Limitation Periods for Recovery Actions in Insolvency

Ludwig Ng
Senior Partner, ONC Lawyers
Scope of Talk

- Basic Principles of Limitation Periods
- Principles relating to common law recovery actions
  - Negligence
  - Breach of Fiduciary Duty / Dishonest Assistance
- Principles relating to statutory recovery actions
  - Unfair Preference
  - Fraudulent Conveyance
  - Fraudulent Trading
  - Post-petition disposal
  - Others
- Concluding remarks
Basic principles

1. Statute based – Limitation Ordinance, Cap 347
   • Lengths for various causes of action are prescribed by statute: 2 years for marine/aviation related claims, 3 years for personal injuries, 6 years for contract and tort, 12 years for ‘specialty’, 12 years for land…
   • Once passed, court has very limited power to override (s.30, only applies to personal injuries cases)

2. Secondary limitations
   • Time extended by a number of factors: disability, part payment, acknowledgement, fraud, concealment, trust etc.

3. Time starts to run upon “accrual of cause of action”
   • i.e., when the essential facts constituting the cause of action have occurred
The most commonly used provision:-

Section 4(1)(a) provides that:-

The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say-

(a) actions founded on simple contract or on tort;
What’s meant by ‘accrual of cause of action’?

- “Cause of action” means ‘simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person’. Per Ma J in *Wing Siu Co Ltd v Goldquest International Ltd* (No 1) [2002] 4 HKC 408, at 414.
Date of Accrual:

- **Contract:** the day the contract was broken
- **Tort:** the day damage was suffered
- **Yeung Pui Ying Anna v Day & Chan CACV 67/2010**
  - Guarantee signed by P on (negligent) advice of D in 1994
  - P sued by lender in 1998
  - Judgment against P entered by lender in 2007
  - P sued D in 2008
- **When did time start to run?**
Case Study

- *The New China Hong Kong Group Ltd v Ernst & Young* HCCL 41/2004
  (facts presented below are simplified version)

  - L investigated and fought a number of s.221 CWUMPO summonses with EY
  - Actions commenced against EY in 2004 and AW in 2005 (the case was heard in 2008)
  - EY was auditors for whole period, also financial adviser. AW was lead partner.
  - AW was director up to 1993, then financial adviser on the executive committee.
  - Claims against EY – iro 94, 95 audited accounts, EY gave unqualified opinions (in 95 and 96) and failed to give warning of over-exposure to 7 debtors.

When did cause of action accrue?
s.221 CWUMPO

(1) The court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company.
When did cause of action accrue?

L: when the NCHK went into liquidation.

EY: when the audited reports were issued.

Answer: ?
When did time start to run for contract claim? for tort claim?

What’s the loss caused by the negligent audit?

- The full amount of the loans?

- No, it’s just the chance to salvage what’s left of the bad loans (by realising securities and enforcing the loan).

- Hence, cause of action accrued shortly after the issuance of the audited reports when management was supposed to take necessary action if the audited reports had not been negligently prepared and had given the necessary warnings.
Hence, primary limitation of 6 years has passed.

What about secondary limitations under s.31 and s.26 LO?
s.31, LO

(1) This section applies to any action for damages for negligence, other than one to which section 27 applies, where the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both-

(a) the knowledge required for bringing an action for damages in respect of the relevant damage; and

(b) a right to bring such an action, ....

(4) That period is either-

(a) 6 years from the date on which the cause of action accrued; or

(b) 3 years from the date of knowledge, if that period expires later than the period mentioned in paragraph (a).
(5) In subsection (1) "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge-

(a) of such facts about the damage in respect of which damages are claimed as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment;

(b) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;

(c) of the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action against the defendant.
(6) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (1).

(7) For the purposes of this section or section 33 a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek,

but a person shall not be taken by virtue of this subsection or section 33 to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.
s.31, LO

Key issues:-

- only applies to negligence, not contract

- “the knowledge required for bringing an action for damages in respect of the relevant damage” – what does it mean?

- whose knowledge?

- A few months before the NCHK case, these issues have been authoritatively answered in *Kensland Realty Ltd*.
- Kensland sold a property to purchaser to be completed on 2 September 1997.
- On the completion date (2 September 1997), it (through TTC) only gave instructions on split cheques to purchaser’s solicitors in less than 2 hours.
- Purchaser was 6 minutes late to deliver cheques (1:06 pm).
- Kensland, on advice on its legal adviser, TTC, treated this as repudiation, forfeited the deposit and refused to complete.
- Purchaser immediately sued Kensland on 3 September 1997.
Kensland Realty Ltd v. Tai, Tang Chong (cont’d)

- Kensland won against purchaser at First Instance (5/4/2000) but lost in CA (23/1/2001) and lost again in CFA (10/12/2001)
- Kensland sued TTC in 2004.
- When would it be deemed to have “the knowledge required” to bring an action against TTC for negligent advice?
• Answer: 3 September 1997!

Why? Because of s.31(5) and (7) LO

• What is required is the knowledge of “damage”, NOT legal knowledge of “liability” or “cause of action”.
The New China Hong Kong Group Ltd v Ernst & Young (the “NCHK case”)

• The Court summarised the principles in Kensland as follows:-

  (1) The knowledge which sets time running under s. 31 LO consists both of the plaintiff’s actual knowledge and knowledge which is imputed to him (para. 68);

  (2) S. 31 is concerned the plaintiff’s knowledge relating to the damage incurred and not with the defendant’s liability. The section has nothing to do with whether the plaintiff knew that the defendant’s conduct amounted in law to negligence or that he had a good claim against the defendant (paras. 73, 74);
The NCHK case (cont’d)

(3) S. 31(5)(a) LO establishes a low threshold. The knowledge required to set time running is likely to be satisfied where a plaintiff becomes aware of *some* actual damage, provided that it is not so trivial as to be not worth bothering about (para. 79);

(4) S. 31 LO does not require the plaintiff to have detailed knowledge of all the acts and omissions set out in the particulars of his pleadings as constituting negligence. What matters is the plaintiff’s knowledge of what lies at the core of the pleaded case. The requisite knowledge is not of the acts or omissions as pleaded but knowledge of the facts constituting “the essence of the complaint of negligence” distilled from such pleading (paras. 103, 105);
The NCHK case (cont’d)

(5) Knowledge of the “essence” of the act or omission is gained “the moment at which the plaintiff knows enough to make it reasonable for him to begin to investigate whether or not he has a case against the defendant”: Hoffmann LJ in Broadley v. Guy Clapham & Co. (para. 107);

(6) The plaintiff must be shown to have actual or imputed knowledge of all the facts which are essential to the complaint which is eventually formulated as his negligence claim (para. 108).
s.31, LO (cont’d)

- Hence, it could be seen that the threshold is rather low. Further, the burden is on the plaintiff to prove that he did not have such knowledge.

- In the NCHK case, the plaintiff argued that it was only after the s.221 CWUMPO proceedings, which took a few years to conclude, and after full analysis of the transcripts, that the full extent of EY and AW’s breaches of duty have become clear.

- However, the court found that whilst the s.221 CWUMPO transcripts may provide further evidence to support the claims, the essence of the claims was known long before that.
Known by whom?

- Note that the plaintiff in the NCHK case is the company acting through the liquidators, **NOT the liquidators**.
- Hence, it’s the knowledge of the company that counts, **NOT the liquidators’**.
- What’s meant by the knowledge of the company?
- Rules of attribution: knowledge of the defendants and those (within the company) who conspire with him doesn’t count
- Knowledge of directors who are in a position to act would count.
The NCHK case (cont’d)

• The court held that the essential facts in this case are that:-
  • NCHK’s business was conducted in a reckless manner and that the defendants failed to give the necessary warning and signed unqualified opinions of its audited accounts.
  • It was found that the finance director and some other directors were aware of these facts well before the winding up of NCHK in 1999. It was not pleaded and no evidence was presented that they were in any way connected with the alleged negligent acts of EY and AW.
  • Hence, NCHK and the liquidators, when they took over, were fixed with the knowledge of the essential facts through these directors.

• What if those directors were overpowered by other directors, including TTT, not to take appropriate actions?

• See Weavering Capital (UK) Ltd V Peterson [2012] EWHC 1480
Weavering Capital (UK) Ltd. v. Peterson [2012] EWHC 1480

Fraud, breach of fiduciary duty
Negligence

Liquidators

WCUK (in liq)
Manager and Adviser of Macro

D2 Director
D9 Director
D10 Senior employee

D1
Couple
D1
Control (father and brother nominees)

WCF

CE/MD
Advice and Manage

OTC transactions

$ Investors

Macro (in liq)
Public fund
Swaps
FRAs

Manager

Adviser of
Macro
**Weavering Capital (UK) Ltd. v. Peterson [2012] EWHC 1480**

- D2, D9, D10 found liable for negligence
- As director/senior employee, they owed independent duty to company to get to know its business and prevent fraud from happening.
- Being over-powered by D1, merely following D1’s instructions or blindly trusting D1’s explanations … are not viable defences.

- Appeal dismissed [2013] EWCA Civ71
Concealment under s.26 LO

- Can the liquidators then argue that there was deliberate concealment under s.26 LO?
- L argued that EY and AW were uncooperative in providing information, and fought a number of s.221 summonses requiring them to produce documents (in which they all lost), thus substantially lengthening the investigation process.
s. 26 LO provides:

“(1) Subject to subsection (4), where in the case of any action for which a period of limitation is prescribed by this Ordinance, either –
   (a) …
   (b) Any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant;
   (c) …
   the period of limitation shall not begin to run until the plaintiff has discovered the ….. concealment or could with reasonable diligence have discovered it.

(2)…

(3) For the purpose of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.
The court in the NCHK case held:-

‘In this connection, it should also be borne in mind Lord Browne Wilkinson’s statement in Sheldon that “facts relevant to the plaintiff’s right of action” do not include facts which improve the plaintiff’s prospect of success. The liquidators’ complaint as to concealment of details of E&Y’s audit work; destruction of the audit working papers; or the obstruction or opposition to the section 221 proceedings, are therefore clearly irrelevant for the present purpose. They are not essential matters or “relevant facts” for the purpose of section 26(1)(b).’ (para 137)
What’s meant by “deliberate concealment”?  

• “The defendant must have considered whether to inform the plaintiff of the fact and decided not to. The fact which he decides not to disclose must either be one which it is his duty to disclose, or at least be one which he would ordinarily have disclosed in the normal course of his relationship with the plaintiff. …

• It remains necessary for the plaintiff to prove that there was a deliberate and conscious decision to conceal or withhold the relevant information. If a solicitor genuinely believed that his advice was right and did not inform the client of any problem, he was not deliberately concealing.”

--- Lee Tsan Sum v David Wong [2010] 5 HKC 363
Lee Tsan Sum v David Wong [2010] 5 HKC 363

- P engaged D (a solicitors firm) to purchase a “Ding House”.

- D approved title even though no “certificate of exemption” had been issued for the House.

- D was subsequently told by Lands Registry that “certificate of exemption” was required. D wrote back to argue with Lands Registry.

- Court found that D genuinely believed in his position. He even gave seminars to that effect. (The seminar notes were submitted as evidence!)

  no deliberate concealment!
Claim for breach of fiduciary duty

- In the NCHK case, AW was accused of breach of fiduciary duty.
  - What’s fiduciary duty?
  - What’s the limitation period (if any) applicable to breach of fiduciary duty?

Note: the term ‘fiduciary duty’ is not used in the LO. Instead, concepts of ‘equitable relief’, ‘trust’, ‘trust property’ and ‘beneficiary’ are used.
What’s fiduciary duty?

Per Lord Millett in *Bristol and West Building Society v Mothew [1998] Ch 1*

“… this branch of law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one’s terms. The expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that **not every breach of duty by a fiduciary is a breach of fiduciary duty.** I would endorse the observations of Southin J. in *Giradev v Crease & Co.* (1978) 11 B.C.L.R. (2d) 361, 362:

‘The word “fiduciary” is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth…That a lawyer can commit a breach of the special duty [of a fiduciary]…by entering into a contract with the client without full disclosure…and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.’”
Hence:

- Not all breaches by fiduciaries (such as company directors) are breaches of fiduciary duties.

- Anyone who is entrusted with property other than for his own benefit could become a fiduciary – a messenger given money to pay a company’s bill.
Two relevant sections: s.4(7) and s.20 LO

s.4(7):-

(7) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding enactment contained in the Limitation Act 1980 (1980 c. 58 U.K.) is applied in the English Courts.
s.4(7) LO causes great complications by its wording and by importing practice of the English Courts.

- However, properly understood, s.4(7) LO has limited applications.

- Equity follows the law. Where an equitable proceeding not expressly subject to a statutory period of limitation is analogous to a legal remedy subject to such period, equity will apply the period by analogy: *Knox v Gye* (1872) LR 5 HL 656

- Hence, suing director for equitable compensation will be deemed as analogous to suing for contract damages and subject to 6 years limitation

- s.4(7) LO applies to purely equitable reliefs such as: injunction, specific performance, setting aside transaction for undue influence, account (based on fiduciary relationship), rectification…

- But these would be subject to the equitable defence of laches and estoppel.
s.20(1) LO

(1) No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action-

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Ordinance, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
s.20 LO

- Only applies to true ‘trustee’ who are fiduciaries: see *Peconic Industrial Development Ltd v Lau Kwok Fai Danny* FACV 17/2008

- People who dishonestly assisted in breach of trust but are non-fiduciaries – the solicitor in the *Peconic* case – are not ‘trustee’ within the meaning of s.20. The term “constructive trustee” is only applied to them as a form of remedy. They are not true trustees.

- Directors who breached fiduciary duty but not in respect of company property are not caught by s.20(1) LO (because it’s not a breach of trust).

- For these people, s. 4(7) and 4(1)(a) LO applies (to claims for equitable compensation) – 6 years.
$151m
Mai Po Landowners

$515m
Asiagreat

Sub-sale of the properties at overvalue with secret profits for Chio

Danny Lau
Handling the acquisition transactions

Elsie Chan

Elsie Chan’s mother

Leung

$...
Secret profits channeled back to Chio

Chio
(director of Peconic)
Hence, the claims against AW would be subject to s.20(2) LO

- Note the recent English CA case *Central Bank of Nigeria v Williams* [2012] EWCA Civ 415 disagreed with *Peconic*.

- But in HK, *Peconic* is likely to be followed.

P.S. English Supreme Court overruled the CA in *Central Bank of Nigeria* on 19 February 2014. *Peconic* confirmed.
General principles of Limitation as applied to Statutory Insolvency Recovery Actions

Relevant provisions:

s. 4 LO:
(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say-

(d) actions to recover any sum recoverable by virtue of any Ordinance or imperial enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

(3) An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Ordinance.
What is a “specialty”?  

- Two meanings:-
  - contract under seal (Alliance Bank of Simla v Carey (1880) 5 CPD 429).
So, how to reconcile s.4(1)(d) and 4(3) LO and what are the limitation periods to the various statutory recovery actions?

- *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144, set out the following principles:—

- (1) An application under [s.50, BO / s.266, CO] to set aside a transaction is an action on specialty within [Limitation Ordinance, s4(3)], and so it should *prima facie* be subject to a 12-year limitation period.

- (2) However, there may be some cases that are taken *outside* the scope of section 4(3) by the combined operation of s4(1)(d) and 4(3). In such cases the limitation period will be reduced from 12 years to 6. This will be so if the *substance, or essential nature, of the application* is ‘to recover a sum recoverable by virtue of’ those sections. An action might fall into this category if the transaction to be set aside was a *simple payment of money*. Alternatively, an action might fall into this category if the only substantive relief available to the applicant is an order for the payment of money.

- (3) In cases where there is doubt as to whether the 6-year or 12-year limitation period is applicable, the court should *look to see* what is the substance, or essential nature, of the relief that is truly sought by the applicant. In undertaking this examination, the court would not be limited to just the words of the pleadings and could look at the substance behind the pleading.
Unfair preference

- Unfair Preference (s.50 BO)
  - Essential Requirements
    - A creditor (or guarantor) was put in a better position (than other creditors) by the transaction (s.50(3)(a) BO)
    - The transaction was influenced by the debtor's “desire to prefer” the recipient (s.50(4) BO)
  - Relevant time
    - 6 months for non-associates
    - 2 years for associates
  - Must the debtor be insolvent at transaction time?
    - Yes
  - Remarks
    - The “desire to prefer” is presumed in the case of associate.
    - Serious gaps appear when concept of “associates” in BO applied to corporate debtor by s.266B CO. (spouse of director, holding company/majority shareholder)
Applying the Priory Garage Principles, the limitations for the following actions are:-

Unfair Preference (s.50 BO, s.266 CO) can be effected by simply paying one creditor in preference to others or providing additional security/transferring ppty to one creditor:-

- For setting aside property transactions:
  - 12 years *(Re Faith Dee Limited HCCW 237/2005 (Judgment on 5/2/2013)).*

- For recovery of money:
  - 6 years.
  - Time to run upon appointment of liquidator/trustee in bankruptcy as action can only be taken by trustee/liquidator.
Transaction to defraud creditors (s.60, Conveyancing and Property Ordinance)

- The material part of S.60 of CPO provides as follows:-

  “(1) ..., every disposition of property made... with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced....

  (3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors.”
Same Directors/Shareholders

Girvan Ltd.

Deferred Share Scheme

Tradepower Hong Kong

Facts:-

Summary Judgment obtained in Jan 1999 with damages to be assessed.

Deferred Share Scheme effected in Sep 1999

Tradepower (Holdings) wound-up in Apr 2000

Elimor
Tradepower (Holdings) Ltd (In Liquidation) v Tradepower (Hong Kong) Ltd and others

- The liquidators brought claim against the Girvan and the former directors under s.60 of the Conveyancing and Property Ordinance (Cap.219) and for breach of fiduciary duties.
Tradepower (Holdings) Ltd (In Liquidation) v Tradepower (Hong Kong) Ltd and others

- Trial judge dismissed claim. CA reversed the trial judge’s decision. The directors appealed. The CFA affirmed the CA decision.

- The CFA stated the principle as follows:
  “Where it is objectively shown that a disposition of property unsupported by consideration is made by a disponor when insolvent (or who thereby renders himself insolvent) with the result that his creditors (including his future creditors) are clearly subjected at least to a significant risk of being unable to recover their debts in full, such facts ought in virtually every case to be sufficient to justify the inference of an intent to defraud creditors on the disponor’s part.” Para 88, per Ribeiro PJ
Transaction to defraud creditors – limitation period

• 12 years for property transactions.

• 6 years for recovery of money.

Time start to run?
• For liquidators/trustee – when appointed.

• For creditors – when they become ‘victim’. Hill v Spread Trustee Co Ltd. [2006] BCC 646. They may be able to take advantage of s.26(3) LO (concealment by way of breach of duty) to extend time as the debtor is “in breach of duty” (Giles v Rhind [2008] 3 ALL ER 697)
Post-petition disposition (s.182, CWUMPO)

- “In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.”

- Only applies where winding up is by the Court.

- Wide interpretation of ‘disposition’ and ‘property’. (Chevalier (HK) Ltd v Right Time Construction Co Ltd [1990] 1 HKC 35)

- Commencement of winding up = date of petition (except where there was a prior resolution to the same effect – see s.184 CWUMPO).
Post-petition disposition

- 12 years for property transactions.
- 6 years for recovery of money.

Time start to run?

- When liquidator appointed? When transaction made?
- No direct authority. Most likely when liquidators appointed following *Hill v Spread*
Fraudulent trading (s.275, CWUMPO)

- S. 275 CWUMPO:
  
  “(1) If in the course of the winding up...the court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may...declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible...for all or any of the debts or other liabilities of the company as the court may direct.

- Hence, it’s likely to be 6 years as the only remedy is to recover money. Re Farmizer (Products) Ltd [1997] B.C.C. 655, Re Overnight Ltd (In Liquidation) [2009] EWHC 601

Time start to run?

- For liquidators/trustee – when appointed.

- For creditors – when they become ‘victim’. They may be able to take advantage of s.26 (3) (concealment) to extend time as the debtor is “in breach of duty” (Giles v Rhind [2008] 3 ALL ER 697)
s.49, BO – Transactions at Undervalue

6 or 12 years depending on whether for money recovery or setting aside transactions.

(1) Subject to this section and sections 51 and 51A, where a debtor is adjudged bankrupt and he has at a relevant time (defined in section 51) entered into a transaction with any person at an undervalue, the trustee may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that debtor had not entered into that transaction.

(3) For the purposes of this section and sections 51 and 51A, a debtor enters into a transaction with a person at an undervalue if-

(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;

(b) he enters into a transaction with that person in consideration of marriage; or

(c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the debtor.
Setting aside floating charge – s.267 CWUMPO

12 years for setting aside floating charge

Where a company is being wound up, a charge which, when created, was a floating charge on the undertaking or property of the company and which was also created within 12 months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate specified in the charge or at the rate 12 per cent per annum whichever is the less.
Concluding remarks:-

• All actions have a limitation period – except misappropriation of assets by trustee/director (s.20(1) LO).

• Limitation periods are tremendously important and must be observed as the court has no power to override – and judges tend to take a restrictive approach.

• Do not wait until full facts and evidence have been ascertained. Time can start to run long before that.

• Knowledge of company =/= knowledge of liquidators.

• For common law recovery actions, time can start to run much earlier than appointment of liquidators. Liquidators must review all books and records and interview directors/staff ASAP.
Thank you!
14-15th Floor, The Bank of East Asia Building
10 Des Voeux Road Central, Hong Kong
Tel: (852) 2810 1212
Fax: (852) 2804 6311
Email: ludwig.ng@onc.hk
Website: www.onc.hk
solutions • not complications