Dear Clients and Friends,

I would like to highlight several cases in this April issue of ONC Corporate Disputes and Insolvency Quarterly. On the insolvency side, in the case of *Osman Mohammed Arab and Another v Chu Chi Ho Ian* HCB 4344/2012, the court held that a trustee in bankruptcy is not bound by judgment recovered against the bankrupt. Instead, he is entitled to go behind to get at the truth. The case of *Bruno Arboit v Koo Siu Ying and Another* HCMP 2749/2012 reminds liquidators trying to enforce private examination order by contempt proceedings that they need to prove the existence of the specific documents (which the respondents allegedly failed to produce) at the time of the disclosure order. Practitioners should also note the case of *Lee Yuk Shing v Dianoor International Ltd (in liquidation)* HCMP 2483/2011, where the overly aggressive liquidators and their legal advisers were criticized by the court, which granted an order for costs on indemnity basis.

In the area of corporate disputes, the Court of Final Appeal was split 3:2 in the case of *Cheng Wai Tao v Poon Ka Man Jason* FACV17/2015. It dealt with the difficult issue of how contractual provisions interact with fiduciary duties. The case of *Hao Xiaoying v Wong Yiu Lam William and Others* CACV 70/2015 is also significant. In that case, the Court of Appeal clarified that, for the purpose of an inspection order, records of a company refer to documents “owned by” or “belong to” the company. Whether or not the company has possession of such documents is irrelevant. The case of *Deutsche Bank AG v Sebastian Holdings Inc and another* [2016] EWCA Civ 23 could be viewed as one rare instance of “piercing the corporate veil”. In that case, the English High Court ordered the sole director and shareholder, who controlled and funded the company’s litigation, to pay costs, as he was the “real party” to the litigation.

As always, your comments and suggestions are most welcome. If we have missed any case which you regard as important, please kindly let us know and we shall endeavour to include them in the future.

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Does the Court have jurisdiction to give leave to amend a winding-up petition to include debts which have accrued only after its presentation?

1. *Re Hin-Pro International Logistics Ltd HCCW 226/2014*

The Petitioner applied for leave to re-amend the winding-up petition. The proposed re-amendments set out the additional debts arising from various Judgments and Orders made after the petition date. The original petition included only one debt pursuant to a Costs Order, which was however subsequently discharged. Therefore, at the hearing, the original debt no longer subsisted. The question before the court is whether the Petitioner should be allowed to substitute the original debt with a number of subsequently arisen debts.

Citing the English decision of *Re Richbell Strategic Holdings Ltd* [1997] 2 BCLC 429 with approval, Ng J held that the court has jurisdiction under the Rules of the High Court to allow an application to amend by introducing post-petition debts in a creditor’s winding up petition. So long as the original debt in a creditor’s petition existed at the date of the petition, the petitioner does not have to establish that the original petition will certainly succeed.

Ng J considered that while the Costs Order was subsequently discharged, it was subsisting and of full legal effect at the time of the Petition. Therefore, it cannot be said that there was no cause of action at the time the Petition was presented. The learned judge concluded that the court has jurisdiction to give leave to re-amend the Petition.

Further, in deciding whether the court should exercise its discretion in favor of the Petition, Ng J found that insistence on fresh petition for each subsequent debt will result in multiplicity of proceedings, unnecessary waste of costs, time and the court’s resources, which is contrary to the underlying objectives of the Rules of the High Court. Moreover, allowing the re-amendments will not cause the Company any substantive prejudice, which cannot be compensated for by an award of costs. Last but not least, the subsequent debts are all based on court orders and judgments. It is trite law that they are *prima facie* evidence that the Company is indebted to the Petitioner.

In conclusion, the court allowed the application to re-amend the winding-up petition.
Hong Kong court could grant stay order in favour of foreign company wound-up at a foreign jurisdiction

2. *Re Joint Official Liquidators of Centaur Litigation SPC (in liquidation) HCMP3389/2015*

The Joint Official Liquidators (“Liquidators”) of three Cayman companies applied for recognition and assistance in the Hong Kong court. The applications were made pursuant to a letter of request issued by the Grand Court of the Cayman Islands.

Harris J first referred to his own decision in *The Joint Official Liquidators of Company A Co [2014] 4 HKLRD 374*, which held that the Hong Kong High Court has the power to recognize foreign liquidators and provide assistance to them in order that they can carry out their functions.

The Liquidators sought, among others, that any person wishing to commence proceedings in Hong Kong against any of the companies to first obtain the court’s leave. Harris J noted that what the Liquidators sought to establish currently exists in the Cayman Islands pursuant to section 97 of the Companies Law, which is in substantially the same terms as section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). Moreover, Harris J considered that making such an order in Hong Kong would assist in the orderly and cost effective liquidation of the Companies.

While Harris J had some concern that creditors in Hong Kong, who were not aware of the order, might incur costs in commencing proceedings only to find that the proceedings were subject to an automatic stay, he nevertheless found it better to grant such an order, because any properly advised and prudent creditor would investigate the current position of the companies and found the restriction on commencing proceedings.

Application was allowed.
A bankruptcy court will not go behind a judgment simply for the debtor to have a second bite of the cherry

3.  *Re Shang Lili* HCB 5329/2014

The Petitioner was the landlord and the Debtor was the tenant. The Petitioner obtained a default judgment against the Debtor for the unpaid rent. When the statutory demand was not complied with, the Petitioner presented a bankruptcy petition against the Debtor. The Debtor opposed.

In order to successfully oppose a petition, a debtor has to show a *bona fide* dispute on substantial grounds, by sufficiently precise evidence which is believable, and must establish that he actually has a defence of substance, not just a fair probability of one: *Re Yuen Mun Wa (a debtor)* [2012] 5 HKLRD 108. Where the underlying debt is based on a judgment, the court hearing the bankruptcy petition will treat the judgment as *prima facie* evidence that the debtor is indebted to the petitioner. In appropriate circumstances, the court may “go behind” the judgment – what is normally required is some “fraud”, “collusion” or “miscarriage of justice” which impinges on the validity of the judgment: *Re Tam Mei Kam* CACV87 of 2012. However, it is not to say that in every case the bankruptcy court should exercise its power of inquiry simply for the debtor to get a second bite of the cherry and conduct parallel proceedings to review a judgment which he has lost or to avoid its execution: *Re Tam Mei Kam* CACV87 of 2012. On the evidence, the court was not satisfied that the Debtor has shown a *bona fide* dispute on the debt on substantial grounds by believable evidence.

Further, the Debtor argued that she had a cross claim against the Petitioner for breach of the tenancy agreement. The court considered that if such set-offs or cross-claim had substance, and exceeded the amount of the debt on which the petition was based, the court would ordinarily dismiss or stay the petition: *Jade Union Investment Limited* HCCW 400/2003. However, the Debtor failed to explain why the malfunction of an air-conditioner amounted to a breach of tenancy agreement. Nor did she explain the quantification of her loss. As such, the court was not satisfied that the alleged cross claim had any substance or that its amount would arguably exceed the debt.

A usual bankruptcy order was made against the Debtor.
Company's liability to indemnify minority shareholders in a derivative action arises immediately after it obtains judgment from the defendant

4. **Waddington Ltd v Chan Chun Hoo Thomas and Other CACV142/2015**

Waddington Limited ("Waddington"), a minority shareholder of Playmates Holdings Limited, brought a multiple derivative action on behalf of Profit Point (the “Company”), against Thomas Chan for breach of fiduciary duty. After a long series of battles, judgment was entered in favor of the Company on 18 December 2013 against Thomas.

On 10 March 2014, it was further ordered that Thomas pay to Waddington the costs of the action on common fund basis. And in respect of that part of Waddington's costs, which will not have been recovered from Thomas, Waddington should be indemnified by the Company: *Wallersteiner v Moir (No.2) [1975] QB 373*. Thomas was also ordered to pay into court the judgment sum with interest, which was more than $44.5 million in total.

On 22 August 2014, Waddington applied for an interim payment in the sum of $30.9 million from the sum in court. The Company opposed and argued that the March Order only entitled Waddington to claim from it any shortfall which it was unable to recover from Thomas and as taxation had not taken place, it was not known how much the shortfall would be.
On 26 November 2014, on the undertaking of Waddington that it would account to the Company any differences following actual payment by Thomas, the court made an order for interim payment to Waddington in the sum of $23 million out of the sum in court. The Company appealed.

The Court of Appeal rejected the Company’s submission that its liability to reimburse Waddington would not crystallize until after Thomas Chan paid costs to Waddington and the shortfall was thereby ascertained. The Company had received the benefit of a substantial judgment in the action that Waddington had brought on its behalf. There would have been no reason to require the shareholder to continue to be out of pocket even after a substantial judgment in favor of the Company had been obtained. It is clear that the Company’s liability to indemnify Waddington was immediate and did not only crystallize when the shortfall is ascertained. Therefore, Waddington was entitled to apply for interim payment of costs it had expended.

The Company’s appeal was dismissed.
Costs will be awarded on indemnity basis against a petitioner who withdraws his petition even if company fails to show grounds for *bona fide* dispute at the time of petition.

5. *Re Sino Pacific Corporation Ltd HCCW257/2015*

The Petitioner presented a winding up petition against the Company on the grounds of insolvency. The Petitioner relied on a statutory demand in respect of a debt alleged to be arising from an Agreement that had been assigned to the Petitioner. The Petitioner subsequently withdrew its petition on the recognition that the Company appeared to have demonstrated a *bona fide* dispute on substantial grounds. The Company sought an indemnity costs order.

Following his own judgment in *Re Lucky Ford Industrial Ltd* [2013] 3 HKLRD 550, Harris J considered that in cases which do not involve the court granting substantial relief, costs should be determined by reference to whether or not the petitioner has obtained substantially what he sought in his petition. If he did, the petitioner will be treated as having been successful. If not, then he is unsuccessful. The court should not be required or need to spend time dealing with speculative arguments about what might or might not have happened if one or other of the parties had dealt with the matter differently. It follows that since the Petitioner voluntarily offered to withdraw the petition, the Petitioner should pay the costs of the proceedings.

Furthermore, Harris J noted that the Agreement expressly prohibits assignment and the Agreement was drafted by the Petitioner’s solicitors. As such, they must have been aware that there was a question over the effectiveness of the assignment and the Company could credibly argue that it had a *bona fide* defence on substantial grounds. Harris J concluded that it was a misuse of the winding up procedure and costs should be paid on indemnity basis.

Lastly, Harris J once again stressed that winding-up procedure is not an alternative to a writ action. It is intended only to be used in straightforward cases, to enable a creditor to put into liquidation a company which there is reason to believe is insolvent, and its insolvency is the reason why it has failed to pay a debt.
A trustee in bankruptcy is not bound by judgment recovered against the bankrupt. He is entitled to go behind to get at the truth

6. **Osman Mohammed Arab and Another v Chu Chi Ian HCB 4344/2012**

This is an application by Sun Willie, Forefront and Dragonite (collectively “Applicants”) for an order to remove the Trustees in Bankruptcy (the “Trustees”) for misconduct. Back in 2012, Forefront presented a bankruptcy petition against Mr. Chu (“Bankrupt”) based on a default judgment. Sun Willie is also a judgment creditor. Bankruptcy order was subsequently granted. The investigation carried out by the Trustees revealed that there were a number of apparently suspicious transactions arising from the relationship of the Bankrupt with the Applicants. As such, the Trustees rejected the proof of debt of the Applicants.

Under s.96(2)(a) of the Bankruptcy Ordinance (Cap 6), if the court is of opinion that a trustee is guilty of misconduct or fails to perform his duties under this Ordinance, the court may remove him from his office and appoint another person in his place. The discretion is wide and the court is not bound by the determinations of the meeting of the creditors, nor is the court bound by the wish or choice of any individual creditor: *Re Wong Wah* [2004] 2 HKLRD 73.

Among other things, it is alleged that the Trustees have displayed real and/or apparent bias in rejecting the Applicants’ proofs of debt. With regard to the approach which should be adopted by a trustee in investigating proofs of debt submitted by creditors, the court agreed with the findings made by Kwan J (as she then was) in *re Global March Limited* HCCW180/1998: “The trustee’s right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt can deprive the trustees of this right. He is entitled to go behind some forms to get at the truth.” As no satisfactory evidence was submitted to the Trustees to prove that it was real debt, the Trustees were entitled to reject the proof of debt.

The application to remove the Trustees was dismissed.
Insolvency practitioners must establish the existence of specific documents before launching contempt proceedings against respondents who fail to produce documents under private examination order

7. Bruno Arboit as Sole Liquidator of Highfit Development Co Ltd v Koo Siu Ying and Another HCMP 2749/2012

Highfit Development Co Ltd ("the Company") was incorporated in Hong Kong in 1991 to develop a real estate project in Shanghai. The defendants were its former directors. The Company went into liquidation in late 2008. The investigation carried out by the Liquidator revealed possible misappropriation of assets of the Company by the defendants.

The Liquidator took out a summons under s.221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and successfully obtained a court order requiring the defendants “to produce all books, correspondence and documents in their custody or power relating to the business and affairs of the Company”. But the defendants produced none of the documents by the deadline, but only some of the Documents post deadline (the “Post-Deadline Documents”). The Liquidator therefore applied for an order of committal of the defendants for contempt of court in breach of the Court Order.

On the facts, the court considered that the defendants have had knowledge and unfettered control of the affairs and finance of the Company. As such, it was plain that the Documents were and are in their power or control. However, Au-Yeung J agreed that the defendants could not be guilty of contempt if there was insufficient evidence that the Documents, which the defendants allegedly failed to produce, were in existence at the time of the Court Order.

The Liquidator relied heavily on the statutory duty of the Company and the defendants to produce and/or keep certain documents, such as audited accounts and minutes of meetings. The court considered that although the documents should have been in existence and should have been in custody or power of the defendants, these are not sufficient, as the defendants were not charged with breach of statutory duty to prepare accounts but contempt. But the defendants were indubitably in contempt in relation to the Post-Deadline Documents.

Further, Au-Yeung J considered that the failure to comply with the Court Order was accompanied by a culpable mind. There had been persistent lack of cooperation with the Liquidator and refusal to provide information or documents sought.

In conclusion, the court was satisfied that this was a wholesale failure to comply with the Court Order. Accordingly, the court found the defendants guilty of contempt.
For the purpose of an inspection order, records of a company refer to documents “owned by” or “belong to” the company, regardless of whether or not the company has possession of such documents.

8. Hao Xiaoying v Wong Yiu Lam William and Others CACV70/2015

The plaintiff, the three defendants and one Mr. Lu were the five shareholders of Green Valley Investment Limited ("the Company") each holding 20% of the shares in the Company. The Company received an agreed Compensation from a Shanghai Company. The plaintiff, as a shareholder of the Company, successfully obtained an order for inspection of documents concerning the transfers and use of the Compensation subsequent to the receipt of the same.

D1, who was the only effective director of the Company, explained that a set-off arrangement was implemented in respect of the Compensation. Since the Company had no bank account in the Mainland, the Compensation was paid into D1’s bank account with 廣發銀行 ("Guang Fat account") in the Mainland. Then he would pay an equivalent amount to the Company’s bank account in Hong Kong using monies he had in Hong Kong. It was argued that the documents relating to the use of funds in his Guang Fat account does not fall within the scope of the order for production and therefore need not be produced.

The plaintiff applied to commence committal proceedings against the defendants. The only issue before the court was whether after the Compensation had been paid into D1’s Guang Fat account, statements generated by Guang Fat in respect of the movement of the Compensation should be considered “records” of the Company. The trial judge found the answer to be affirmative and the defendants guilty of contempt. The defendants appealed.

The Court of Appeal noted that for the inspection of the documents of a subsidiary, the starting point is that the documents of a subsidiary are not documents of its parent company. But if the Company has possession of such documents of its subsidiaries, or the corporation is entitled as a matter of legal right to have possession of such documents, inspection should be given: Wong Kar Gee Mimi v Hung Kin Sang Raymond [2011] 5 HKLRD 241; Leung Chung Pun v Masterwise International Ltd [2014] 1 HKLRD 1129. The Court of Appeal, citing the Australian case of Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2) [2008] WASC 10 with approval, clarified that the right or power of a corporation to obtain a document can only mean that the document is owned by or belong to the corporation. The absence of possession does not disqualify a document from being a record of the corporation. On the other hand, the mere possession by a corporation of a document which is not owned by or belong to it does not by itself make that document a record of that corporation.
In determining whether the documents in question are owned by or belong to the Company, the court considered that a beneficiary is entitled to inspect and make copies of trust documents: *O'Rourke v Darbishire* [1920] AC 581. D1 was the only director responsible for the management of the Company, the set-off arrangement was in effect decided by him alone. Even if he may be allowed to use the Compensation that was deposited into his Guang Fat account for his personal use, the money belonged to the Company because at the end of the day he has to account for the same amount in Hong Kong. This being the case, the court was satisfied that the bank statements of Guang Fat in respect of the movements of the Compensation after it had been deposited into D1’s account must be records which are owned by or belong to the Company. However, D1 had failed to comply with the order for production of documents.

The appeal was accordingly dismissed.
The Court of Final Appeal cannot agree on the extent to which the fiduciary duties of a director are modified by the agreement amongst the shareholders.

9. *Cheng Wai Tao and Others v Poon Ka Man Jason (Suing on behalf of himself and all other shareholders in Smart Wave Limited except the 1st Appellant) and Another* FACV17/2015

Jason, Daisy, Ricky and Shigemitsu Katsuaki were shareholders in a chain of Japanese noodle restaurants in Hong Kong under the name “Ajisen Ramen” (味千拉麵). In 2004, the Ajisen shareholders agreed to develop a chain of sushi restaurants, and Smart Wave Limited was set up to operate the first sushi restaurant under the name of “Itamae” (板長壽司). It was agreed that separate corporate vehicles would be formed to hold the interest of each said chain sushi restaurant business to be established and then they would be allotted shares of and in the said corporate vehicles.

Apart from Ajisen shareholders, Smart Wave also had five minority shareholders, who were suppliers and key staff. Ricky was the sole director. Disputes arose over the allotment of shares in the subsequent Itamae restaurants. At the end of 2005, the Ajisen shareholders entered into the Hero Elegant Agreement, under which, it was agreed that Jason and Daisy would be allotted shares in the Itamae business through their corporate vehicle, Fine Elite. Ricky subsequently went on, on his own, to set up other sushi restaurants, but refused to allot shares to Fine Elite.

By HCA 1269/2008, Fine Elite sought specific performance of the Hero Elegant Agreement against Ricky. Mimmie Chan J found that the Fine Elite had repudiated the Hero Elegant Agreement and the repudiation had been accepted by Ricky such that he was discharged from further performance. Jason then brought a derivative action on behalf of Smart Wave against Ricky, for breach of fiduciary duties owed by Ricky to Smart Wave as its sole director.

When the case finally came before the Court of Final Appeal, the central question was whether, in the events that occurred, the fiduciary duties Ricky owed to Smart Wave were limited or cut down so as to enable Ricky to open further restaurants without breaching those fiduciary duties.

The Court of Final Appeal dismissed the appeal by a 3-2 majority. The majority considered that Ricky, as the sole director of Smart Wave, should not put himself in a position where his own interest and duties to the company conflict. In addition to the further restaurants being in competition with Smart Wave, there was the possibility that a business opportunity was diverted from Smart Wave. Furthermore, Smart Wave, as the first restaurant in what was to
become a chain of restaurants, had an interest in the establishment and operation of the chain as it developed.

The majority accepted that the scope of fiduciary duties could be modified by the unanimous and fully informed consent of the beneficiaries, in this case all the shareholders of Smart Wave. While Daisy and Jason indeed agreed with Ricky that Smart Wave would be the first of a number of corporate vehicles, each operating one restaurant, that agreement was expressly interconnected with an expectation that they would be substantial shareholders in each such vehicle. These two elements were so closely interconnected, that it could not be concluded that they had agreed to the restriction on Smart Wave on its own. Moreover, there was insufficient evidence that the minority shareholders also consented to the arrangement. Absent authorization by all the shareholders of Smart Wave, Ricky was clearly in breach of his fiduciary duties to Smart Wave.

On the contrary, the minority found that it could not be disputed that Ricky had reached an agreement or understanding with the shareholders of Smart Wave that Smart Wave was only entitled to run one Itamae sushi restaurant in a chain of such restaurants. Ricky’s fiduciary duties towards Smart Wave must therefore conform to and be consistent with that reality. Moreover, the breach was compromised by the Hero Elegant Agreement.

Therefore if any shareholder of Smart Wave feels aggrieved by reason of not being allotted shares in a company operating a restaurant further along the chain, redress for such grievance is to be sought in an ordinary action based on an allegation of breach of a contractual obligation owed to the aggrieved shareholder, not in a derivative action based on allegation of a breach of a fiduciary duty owed to Smart Wave.

Also, the minority considered that the overwhelming probability was that the minority shareholders had been allotted shares on the understanding that Smart Wave was to be one company in a chain of separately owned companies.
Liquidators criticized for using creditors’ funds to pursue frivolous defences. Indemnity costs order followed


The action arose out of an auction of the Defendant’s goods, which was described as “rough diamond stones” (the “Stones”). The Stones turned out to be synthetic cubic zirconia. The Plaintiff alleged breach of contract, fraudulent misrepresentation and negligent misrepresentation against the Defendant. The Liquidators of the Defendant, who had conduct of the litigation, denied all the allegations and put the Plaintiff to strict proof of its case. Anthony To J gave judgment in favor of the Plaintiff. The question now is whether costs should be awarded on indemnity basis.

Where the proceedings were scandalous or vexatious, or had been initiated or prosecuted maliciously, or for an ulterior motive, or in an oppressive manner, taxation on indemnity basis is justified: Overseas Trust Bank Ltd v Coopers & Lybrand (a firm) & Others and Peat, Marwick, Mitchell & Co (a firm) & Another [1991] 1 HKLR 177 The principles apply equally to those who defend the proceedings.

In order to resist the Plaintiff’s claim, the Defendant, among other things, put the Plaintiff to strict proof that he was the bidder and purchaser of the Stones, that he paid the purchase price and suffered loss. While the Judge recognized that the Defendant was entitled to put the Plaintiff to strict proof of each and every element of his pleaded case, such liberty is not without limit. The Judge took the view that the challenge of the Plaintiff’s identity and capacity to sue was unnecessary and no reasonable solicitors would have taken on that line of defence in light of the incontrovertible evidence.

The Defendant also challenged the Plaintiff’s evidence that the stones he produced in court were the Stones sold to him at the auction and if they were, the Defendant required the Plaintiff to prove that the Stones were not rough diamond stones. Finding that the Liquidators had knowledge that the Stones were not rough diamond stones before the commencement of the proceedings, Anthony To J was not hesitant to hold that the Defendant’s conduct had well crossed the line of reasonableness and was evident of bad faith and vexatious conduct.

In conclusion, the court criticized the Liquidators for their failure to conduct the litigation appropriately and address their minds to the risk of prejudice to the general body of creditors. The court ordered the Plaintiff’s costs to be taxed on indemnity basis.
Sole director and shareholder who controlled and funded the company’s litigation was ordered to pay costs, as the English court found him to be the “real party” to the litigation.


Sebastian Holdings Inc. ("Sebastian") had maintained accounts with the Deutsche Bank A.G. ("the Bank") for trading in financial products. Due to the closing out of various trading positions, the Bank brought proceedings against Sebastian. The trial judge gave judgment for the Bank and also ordered Sebastian to pay 85% of the Bank’s costs. When Sebastian failed to make the payment, the Bank applied to join Mr. Alexander Vik, the sole shareholder and director of Sebastian, to the proceedings and to obtain an order that he pay the costs of the proceedings personally. The High Court allowed the application. Mr. Vik appealed.

Under section 51 of the Senior Courts Act 1981, the court has full discretion to determine by whom and to what extent the costs are to be paid. Following the Privy Council’s decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, the Court of Appeal held that although costs orders against non-parties are to be regarded as “exceptional”, it is only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such “exceptional” case is whether in all the circumstances it is just to make the order. Generally speaking, the discretion will not be exercised against “pure funders”, i.e. those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that the non-party bears the successful party’s costs, because he himself is “the real party” to the litigation.

The Court of Appeal agreed with the trial judge’s finding that Mr. Vik was closely involved in the litigation. Sebastian was under the entire control of Mr. Vik. He treated Sebastian as his personal trading vehicle to hold and dispose of funds on his behalf as he thought fit. He ran the litigation in England in the sense of making all important decisions when instructing Sebastian’s lawyers and being Sebastian’s only witness. The Court of Appeal was therefore satisfied that Mr. Vik was the real party to the action and there was no injustice in holding him liable to the Bank’s costs.

The English decision is in line with the position adopted in Hong Kong. In the Court of Final Appeal judgment *The Liberty Container* [2007] 10 HCFAR 256, the court ordered the self-interested funder to pay the costs of the proceedings. The principles are also followed and applied in the more recent decision of *Super Speed Ltd v Bank of Baroda* [2015] HKEC 2391.
However, the court, in awarding costs order against non-parties, would be particularly circumspect if the funder is himself a director or liquidator, as they may realistically be regarded as acting in the interests of the shareholders and creditors rather than in his own interests: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39
BVI High Court confirms that the exercise of the court’s discretion to make, adjourn or to dismiss an application for appointment of liquidators is not dependent on the wishes of the majority of creditors

12. *Krios Holdings Pte Limited v Shefford Investments Holding Limited* BVIHC(Com) 0131/2015

Shefford Investments Holding Limited (“Shefford”) was a BVI holding company. Its sole assets were its shares in a Singapore joint venture company. Its parent company entered into a Put Option agreement with the petitioning creditor, Krios Holdings Pte Ltd (“Krios”). Shefford stood as a guarantor. The parent company failed to perform its obligations under the Put Option and owed Krios some US$40 million. Krios subsequently served a statutory demand under the guarantee on Shefford. No payment was made and Krios made an application for appointment of liquidators.

Shefford, however, proposed reorganization in Singapore. Shortly before the hearing, Notices of Opposition were served by Shefford, and a vast majority of unsecured creditors both in number and in value, requesting an adjournment of the application for appointment of liquidators, in order to allow for the restructuring to proceed in Singapore.

Justice Bannister of the BVI High Court made express reference to the judgment of Lord Neuberger in *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633, in which his Lordship held that “the exercise of the court’s discretion will not normally be dependent on mathematical niceties” and “the fact that the majority of creditors in value support the making of a winding-up order is not necessarily decisive on the issue in every case.”

Following *Demaglass*, Bannister J decided that the exercise of the court’s discretion whether to adjourn or dismiss an order appointing liquidators does not necessarily depend on the wishes of the majority of creditors, whether in number or by value. It is simply not “a head counting exercise”. Shefford was clearly insolvent. The court therefore refused an adjournment and made an immediate order for the appointment of liquidators.
US Bankruptcy Court held that in deciding the proper forum for insolvency proceedings, the court should respect the expectations of stakeholders

13. *In re Northshore Mainland Servs.*, Inc. 537 B.R. 192

This decision by the US Bankruptcy Court concerned a group of companies (“the Group”) of which all but one were incorporated under the laws of the Bahamas. The remaining one company was incorporated in Delaware. The primary asset of the Group was a 3.3 million square foot resort complex located in Cable Beach, Nassau, Bahamas (“the Project”). However, due to repeated construction delays, the Project was not complete on schedule. Without any revenue, the Group was in serious financial distress.

The Group therefore applied to the US Bankruptcy Courts for Chapter 11 relief and applied to the Bahamas Supreme Court for recognition, which was however refused. Subsequently, the Bahamas Attorney General presented a petition to the Bahamas Supreme Court seeking orders for the winding up of all the Bahamian Debtor’s business and the appointment of provisional liquidators. Provisional liquidators were appointed. In the meanwhile, two of the group companies filed motions in the US Bankruptcy Court to dismiss their Chapter 11 case.

Judge Carey first referred to §109(b) of Chapter 11 of the US Bankruptcy Code, which provides that any person … has property in the United States may be a debtor. The “property” requirement is satisfied by even a minimal amount: *In re Aerovias Nacionales De Colombia S.A. Avianca* 303 B.R. 1. The judge noted that each Debtor maintained at least one bank account in the United States, hence met the eligibility requirement. However, the Bankruptcy Court has discretion under §305 to dismiss a case, if the interests of creditors and the debtor will be better served by such dismissal.

Judge Carey agreed with the findings made by the Bahamian court that many stakeholders in the Project would expect that insolvency proceedings, if any, would take place in the Bahamas, the location of this major development Project. There is no reason that the parties would not expect that any “main” insolvency proceedings would take place in the United States. In business transactions, the parties seek certainty. Therefore, expectations of various factors, including the expectations as to where ultimately disputes will be resolved, are important, should be respected, and not disrupted unless a greater good is to be accomplished. The judge considered that there was no greater good to be accomplished.

As such, the US Bankruptcy Court dismissed the Chapter 11 cases, except for that of the Delaware corporation.
When court proceedings are already underway, shareholders who seek to take over the conduct of the proceedings must show that there is something wanting in the company’s management of those proceedings, says Singapore High Court

14. **Chong Chin Fook v Solomon Alliance Management Pte and others** [2016] SGHC 24

Solomon Alliance Management Pte Ltd ("the Company") was founded by the Plaintiff, the 2nd Defendant, one Mr. Pang and two others, all of whom were shareholders of the Company. The Plaintiff alleged that Pang had breached his agreement with the Company by diverting business away from the Company. The Plaintiff instructed the Company’s solicitors to commence legal proceedings against Pang ("Suit 215"). As a response, Pang brought a counterclaim against the Company and the Plaintiff alleging defamation.

Subsequently, at an Extraordinary General Meeting, the Plaintiff was removed as a director and the 2nd and 3rd Defendants were appointed as directors of the Company. An independent legal opinion was obtained and it was advised that Suit 215 be withdrawn. The Plaintiff then sought the Court’s leave under s.216A(3) of the Companies Act to allow him to take over the conduct of Suit 215.

An application under s.216A(3) would generally require that the applicant acted in good faith, and that it was *prima facie* in the interests of the company. The High Court of Singapore found that the Plaintiff’s application was not made in good faith. Rather, the Plaintiff was motivated by personal vendetta to get back at Pang. The communications between the Plaintiff and the Company’s solicitors showed a “clouding of judgment that was sufficient to demonstrate a disregard of the interests of the Company”. Further, the Court considered that the threshold for a shareholder of a company to effectively intervene and take over the conduct of on-going legal proceedings should be higher than that for the commencement of an action. In particular, when court proceedings are already underway, the applicant seeking to take over the conduct of proceedings should show that there was something wanting in the company’s management or conduct of those proceedings before he is permitted to take over. However, the Judge found that there was no evidence that the Company was not pursuing the proceedings diligently.

The Plaintiff’s application was thus dismissed.
Singapore Court of Appeal confirms that shareholders are not entitled to commence derivative actions when the company is already in liquidation

15. *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others* [2016] SGCA 17

The Appellant was a minority shareholder in an investment company (the “Company”). It was alleged that the Respondents, who were majority shareholders, had caused the Company to enter into various transactions which were not in the interest of the Company. The Appellant therefore took out its application for court’s leave under s.216A of the Companies Act to commence a statutory derivative action in the Company’s name against the Respondents. But before the application was heard, the Company went into voluntary liquidation and liquidators were appointed.

An application under s.216A(3) would generally require that the applicant acted in good faith, and that it was *prima facie* in the interests of the company. At first instance, the High Court of Singapore dismissed the application. The court found that the application was not made in good faith. Further, it was held that the proposed derivative action was not *prima facie* in the Company’s interests.

On appeal, the Court of Appeal took the view that s.216A had no application when the Company was already in liquidation. The Court of Appeal agreed with the Respondents that the purpose of derivative actions is to provide a remedy for minority shareholders when the directors of a company remain in active management and refuse to enforce its rights. When a company enters into liquidation, the board becomes *functus officio*, and the power to run the company vests with the liquidator. As such, derivative action is not available to minority shareholders as a remedy when the company is already in liquidation.

Accordingly, the appeal was dismissed.

Similarly, in the Hong Kong case of *Ever Joint (Holdings) Ltd v Nice Theme Ltd & Others* [2006] 4 HKLRD 516, Deputy Judge Gill held that if the company is in liquidation, then the appropriate officer to control its litigation is the liquidator. His Lordship said:

“(1) A derivative claim may not be brought where a company is in liquidation. This is because the company is no longer in the control of the alleged wrongdoers, in which event the reason for any exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 disappears. (2) Where a company is in liquidation, it is the liquidator, who has the power to initiate proceedings on behalf of the company. (3) This is the case even if the company was not in liquidation at the time the derivative action was commenced. Once a company goes into liquidation, there is no wrongdoer’s control and the decision whether to continue with the action should best be
left to the judgment of an independent liquidator. (4) Hence, pending any consent by the liquidator or any order by the court for the liquidator to take over or continue with a derivative action, a plaintiff shall have no authority to take any further steps or issue any further applications in the derivative action.”