Dear Clients and Friends,

I would like to highlight several cases in this April issue of ONC Corporate Disputes and Insolvency Quarterly. Of particular significance to insolvency practitioners would be the Hong Kong case *Re Lehman Brothers Futures Asia Ltd (in liquidation) HCMP 2264/2016*. In this case, Harris J held that in considering a scheme of arrangement, even a material difference in rights is not necessarily sufficient to require creditors to be divided into separate classes if the circumstances of the case demonstrate that notwithstanding differences in existing rights there is sufficient commonality of interest in the commercial purpose and substance of the proposed compromise that they can deliberate on the scheme as one class. Another significant case is the Supreme Court’s decision in *Akers and others (Respondents) v Samba Financial Group (Appellant) [2017] UKSC 6*, in which the Court held that a common law trust may be created in respect of the shares in question, even though the law of Saudi Arabia, where the shares are sited, does not recognize trusts in any form. Further, the Court held that where an asset is held on trust, the legal title remains capable of transfer to a third party. But the trust rights (of the beneficiary) are not disposed of, they continue to be capable of enforcement unless and until the disposition of the legal title has the effect of overriding the trust rights (such as when it is disposed to bona fide purchaser without notice). In another important English decision, *Green v Wright [2017] EWCA Civ 111*, the Court took the view that a trust in favor of creditors constituted by an IVA survives the completion of the IVA. The “property” subject to the IVA continues to be held on trust. Further, in the ground-breaking decision, *Shih-Hua Investment Co Ltd v Zhang Aidong and Others HCCW 198/2016*, Anthony Chan J held that Hong Kong courts have jurisdiction to grant a mandatory interlocutory injunction for the reconstitution of the board of directors of a company. Last but not least, in the Singapore case of *Chong Chin Fook v Solomon Alliance Management Pte Ltd and others and another matter [2017] SGCA 05*, the Singapore Court of Appeal reversed the decision of the High Court, finding that in an application for leave to control the conduct of an on-going suit on behalf of a company, a demonstration by the applicant that it is probable that the company will not diligently prosecute the action will suffice. The bar would be set at...
too high a level if the complainant has to demonstrate an actual lack of diligent prosecution.

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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April 2017
Corporate Insolvency Cases

1. Intended objection or appeal against tax assessment does not lend to a finding of triable issue for a stay of the winding up application

*Comptroller of Income Tax v BLO and another matter* [2017] SGHC 50

The Defendant failed to pay additional tax for the years of 2011 and 2013. The Comptroller served a statutory demand on the Defendant for the outstanding tax and penalties owed. The statutory demand was not complied with. The Comptroller then presented a winding-up petition against the Defendant on the ground that it was unable to pay its debts. The Defendant sought a stay of the application on the basis that it intended to object or appeal under the Income Tax Act against the tax assessments giving rise to the underlying debt.

The Singapore High Court noted that under section 85(1) of the Income Tax Act, tax assessed is payable “notwithstanding any objection or appeal against the assessment”. Case law has suggested that the existence of an objection or appeal against the Comptroller’s tax assessment does not constitute a basis for a defendant to resist summary judgment: *Comptroller of Income Tax v A Co Ltd* [1965-1967] SLR(R) 322; *Comptroller of Income Tax v Beaver Singapore Pte Ltd* [1979-1980] SLR(R) 75. Similarly, the Court considered that the intended objection or appeal by the Defendant did not lend itself to a finding of a triable issue for a stay of the winding up application.

Moreover, the Court also noted that the Income Tax Act has provided for a statutory process to review tax assessment, and that the statutory process should not be bypassed. The Defendant, however, had not availed itself of the statutory process.

In conclusion, the Court held that there was no substantial or *bona fide* dispute for a stay to be granted. The Court granted the application to wind up the Defendant.
2. Commingling of stocks in a mixed bulk does not extinguish the security interest of the contributors. The mixed stock is to be divided among the contributing lenders rateably in proportion to the value of their respective contributions

_Pars Ram Brothers (Pte) Ltd (in creditors’ voluntary liquidation) v Australian & New Zealand Banking Group Ltd and others_ [2017] SGHC 38

Pars Ram Brothers (Pte) Ltd (“the Company”) was engaged in the spice business and financed its import of pepper stock through trade financing facilities granted by the defendant lenders (“the Lenders”). As security for the facilities, the Company would furnish the shipping documents for the financed stock to the Lenders under a pledge. The Lenders would then release the relevant shipping documents to the Company, and in consideration for this release, the Company would execute a trust receipt on terms that the Company held the financed stock or its proceeds of sale on trust for the Lender. The Company went into liquidation. The stock financed by each Lender was however commingled together and due to outgoing shipments prior to liquidation, the available quantity of stock is insufficient to meet each Lender’s claims in full.

At issue is whether this commingling affected the Lenders’ security interests so as to preclude each Lender from asserting its interest in the proceeds of sale, in priority to the pool of general creditors.

The Singapore High Court found that there are no direct authorities on whether commingling affects security interest or not. However, cases have suggested that the commingling of stocks in a mixed bulk does not extinguish the proprietary interests of the contributors. The equitable solution is for the contributors to hold the mixed bulk as co-owners in proportion to their respective contributions: _Indian Oil Corporation Ltd v Greenstone Shipping SA (The “Yoatianna”)_ [1987] 3 All ER 393; _Glencore International AG and others v Metro Trading International Inc (No 2)_ [2011] 1 Lloyd’s Rep 284. The Court held that there is no principled reason to make a distinction between the ownership and security interests in a mixture. Prior to the mixture of the stocks, the Lenders already possessed a perfected security interest by virtue of the underlying pledge. The failure to segregate the pledged goods did not negate the existence of the Lender’s security. The Judge found that each Lender’s security interest remains intact notwithstanding the mixture of goods. And the just solution is for the mixed stock to be divided among the contributing Lenders rateably in proportion to the value of their respective contributions.
3. The mere fact that the company desires to protect its directors from personal liabilities does not necessarily warrant the inference of the desire to improve the position of the creditor in the event of the company's insolvent liquidation

Osman Mohammed Arab and Wong Kwok Keung, The Joint and Several Liquidators of Kam Toys & Novelty Manufacturing Ltd (In Creditors' Voluntary Liquidation) v Cashbox Credit Services Ltd HCMP 1908/2016

The liquidators applied seeking a declaration that the amount of HK$19,287,000 paid by the Company to the Respondent ("the Payment") constituted an unfair preference contrary to ss. 266 and 266B(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("the Ordinance") and was thus void.

The Company was put into creditors' voluntary winding up pursuant to s.228A of the Ordinance on 6 March 2014. Shortly before the liquidation, the Company obtained a loan of HK$19 million from the Respondent for less than a month. The loan, together with the interest of HK$287,000 (at 36% p.a.), would be repaid in full on 13 January 2014. The loan was fully secured and in addition, the directors of the Company also personally guaranteed the loan. The loan was repaid on 9 January 2014.

To establish unfair preference, the applicant must establish that in deciding to make the Payment the Company was influenced by a desire to "prefer the Respondent".

The liquidators contended that the Payment was made to protect the directors of the Company from being personally liable for the loan under the guarantee. It was submitted that the Company’s desire to protect its directors and its desire to put the Respondent in a better position in a liquidation scenario went hand-in-hand and are indistinguishable.

The Court considered that while the directors of the Company must have appreciated that the Payment would result in improvement of the Respondent’s position in the event of an insolvent liquidation, it is difficult to see how or why the directors would have desired (or positively wished for) that consequence.

The Company was badly insolvent. The directors were probably indifferent as to which of the Company's creditors would be better off in the event of liquidation. Further, there is no evidence of any non-commercial relationship between the Company or its director(s) and the Respondent or its controller(s).

In conclusion, the Court found that there was no evidence to support the inference of desire on the part of the directors to improve the position of the Respondent in the event of the Company's insolvent liquidation. The application was dismissed.
4. Creation of beneficial interest in jurisdiction not recognising trust and its destruction by post winding up disposition – a recent Supreme Court decision sheds light on these questions

*Akers and others (Respondents) v Samba Financial Group (Appellant) [2017] UKSC 6*

Saad Investments Co Ltd (“SICL”) is a company incorporated in Cayman Islands. It went into liquidation in the Cayman Islands on 30 July 2009. Liquidators were appointed. The English Companies Court subsequently recognized the Cayman Islands winding up proceedings as a foreign main insolvency proceedings under the Cross-Border Insolvency Regulations 2006.

Mr Al-Sanea, a Saudi Arabian citizen, was the legal owner of shares in five Saudi Arabian banks, valued at around US$318 million. SICL alleged that Mr Al-Sanea held the Saudi Arabian shares (“Disputed Shares”) on trust for SICL. The trust arose allegedly as a result of six transactions, which are all subject to Cayman Islands law.

Six weeks into the liquidation, Mr Al-Sanea transferred all the Disputed Shares to Samba Financial Group (“Samba”) in order to discharge his personal liabilities towards Samba.

The Liquidators of SICL claimed against Samba for the return of the Disputed Shares under section 127 of the Insolvency Act 1986 (equivalent to section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)), which provides that any disposition of the company’s property made after the commencement of the winding up is void, unless the court otherwise orders.

Samba contended that SICL could not have any equitable proprietary interest in the Disputed Shares, because the law of Saudi Arabia, where the Disputed Shares are sited, does not recognize the institution of trust or a division between legal and equitable interests. Samba further contended that even if SICL had equitable interest in the Disputed Shares, there was no “disposition” within the meaning of section 127.

The UK Supreme Court found that the transfer to Samba did not dispose of any rights belonging to SICL within the meaning of section 127.

The Court considered that a common law trust may be created, come into existence and be enforced in respect of the Disputed Shares, even though Saudi Arabian law does not recognize trusts in any form: *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 (1) Tru LI 35. Thus, in the eyes of English law, a common law trust exists in respect of the Disputed Shares even though Saudi Arabian law does not recognize equitable proprietary interests and may not give effect at all to a common law trust.

Having concluded that SICL had equitable interests in the Disputed Shares, Lord Mance went on to consider whether the transfer of the Disputed Shares constitutes “disposition”
within the meaning of section 127. The definition of “property” is plainly wide enough to embrace both legal and equitable proprietary interests in this context.

However, where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter. Where an asset is held on trust, the legal title remains capable of transfer to a third party, although the disposition may be in breach of trust. But the trust rights are not disposed of, because the trustee simply does not own that title. They continue to be capable of enforcement unless and until the disposition of the legal title has the effect of overriding the protected trust rights.

There is no question of Mr Al-Sanea having transferred SICL’s equitable interest in the Disputed Shares to Samba. He simply transferred his legal ownership of the Disputed Shares to Samba. But since Samba, on the assumed facts, was a bona fide purchaser for value without notice, SICL’s equitable interest in the Disputed Shares was effectively extinguished.

In conclusion, the Supreme Court declared that for the purposes of section 127 of the Insolvency Act 1986, there was no disposition of any rights of SICL in relation to the Disputed Shares by virtue of the transfer to Samba.
5. By request only: foreign liquidators’ rights to receive information from third parties in Hong Kong

*Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* HCMP 3563/2016

In November 2016, four companies incorporated in the British Virgin Islands were wound up by the Eastern Caribbean Supreme Court ("the Supreme Court"). The Liquidators’ investigations have identified a number of parties in Hong Kong which may hold assets and records belonging to the companies that would be useful to the Liquidators in the furtherance of the liquidation. The Liquidators applied to the Supreme Court to issue a letter of request to the Hong Kong Court for recognition of the Liquidators’ appointment on terms that would allow them to advance their investigations.

Harris J reiterated that the Hong Kong court has power to provide assistance and recognition to liquidators of a foreign incorporated company appointed by the court of the company’s place of incorporation if the insolvency laws of the place of incorporation grant similar powers to a liquidator to those available under our own insolvency legislation.

However, the form of order sought by the Liquidators in the present case differs in one respect from the usual orders. Based on the letter of request, one of the paragraphs reads:

> “The Liquidators have and may exercise such powers… for the following purposes: (a) to obtain from third parties such documents and information as concern the Company, including its promotion, formation, business dealings, accounts, assets, liabilities or affairs…”

The Judge was of the view that such wording gives the Liquidators a right to obtain from third parties documents that the Liquidators are not entitled to without an order of the Court under section 221(3) Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("the Ordinance"). Also, the section provides that a liquidator only has the right to obtain documents “relating to the company”, but not documents that concern its promotion, formation, trade, dealings, affairs or property. The Judge thus modified the wording used and granted the order as follows:

> “To request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency”.


6. A Company incorporated in Bermuda with assets in Hong Kong may appoint provisional liquidators in Bermuda for restructuring purposes

In the matter of Z-Obee Holdings Limited and in the matter of the Companies Act 1981 [2017] SC (Bda) 16 Com

Z-Obee Holdings Limited (“the Company”) is a company incorporated in Bermuda and listed on the Hong Kong Stock Exchange. Since 27 June 2014, the Company has been in provisional liquidation, but recently, the Hong Kong joint provisional liquidators (“the JPLs”) have found a potential investor to rescue the Company and hence the JPLs sought to have the Company restructured rather than wound up.

The Company applied to appoint the JPLs as Bermuda JPLs for the explicit purpose of restructuring the Company. If the application was granted, it was anticipated that the present Hong Kong winding-up proceedings would be discontinued and that the Bermuda JPLs would apply to the Supreme Court for the issue of a Letter of Request to the Hong Kong Court for assistance in the form of promoting a parallel scheme of arrangement in Hong Kong, serving as the additional liquidation forum, to the scheme that the JPLs would seek to implement in Bermuda.

The Bermudian Supreme Court noted that it is the Bermudian Court’s established practice to use provisional liquidation in a wide range of circumstances as a mechanism to implement financial or operational restructurings to effect corporate rescue: Re Up Energy Development Group Limited [2016] SC (BDA) 83 Com; Re Titan Petrochemicals Limited [2013] Bda LR 76. Further, the Bermudian Courts have a broad discretion to order adjournment to enable alternatives to a winding-up to be explored: ss 164(1) and 170(3) of the Bermuda Companies Act 1981. In conclusion, the Court granted the Company’s application to appoint JPLs for restructuring purposes.
Restructuring Cases

7. The Chairman of a shareholder scheme meeting may reject votes cast against a scheme of arrangement where the shares have been acquired through an artificial share-splitting exercise designed to vote down the scheme.

_Re Dee Valley Group plc_ [2017] EWHC 184 (Ch)

Dee Valley Group plc ("the Company") applied to the English High Court for sanction of a Scheme between the Company and its members. Shortly before the class meeting directed by the court to vote on the Scheme, a minority employee shareholder of the Company transferred one share each to 434 individual shareholders ("the Individual Shareholders") by way of gift. The Chairman at the class meeting disallowed the votes of the Individual Shareholders. Section 899(1) of the Companies Act 2006 requires a majority in number representing 75% in value of the class of members present and voting at the Court Meeting to approve a scheme before it can be presented to the court for sanction. The result of disallowing the votes of the Individual Shareholders was that a majority in number of the shareholders did approve the Scheme. Had the Chairman allowed these votes, the Scheme would have failed, as it would not have been approved by a simple majority present and voting in the class meeting.

The question that the court has to decide is whether the Chairman was right to disallow the votes of the Individual Shareholders.

The English High Court considered that members voting at a class meeting directed by the court must exercise their power to vote for the purpose of benefiting the class as a whole, and not merely to support those specific interests of individual members if they are different from the interests of the class.

The Court held that the Chairman was justified in disallowing the votes of the Individual Shareholders. Their actions and the timing of those actions demonstrated that the Individual Shareholders could have given no consideration to the interests of the class of members which they had joined. The Individual Shareholders could only have joined with the pre-conceived notion of voting down the Scheme. The Court considered that it was entitled to protect the integrity of the court meeting against manipulative practice such as share splitting, which would undermine "the underlying sprite of the dual requirements prescribed by the legislature as pre-condition for scheme approval": _Re PCCW Ltd_ [2009] 3 HKC 292.
8. Administrators cannot recover costs and expenses incurred in relation to the management and administration of trust property where the costs were incurred otherwise than for the benefit of the beneficiaries of the trust property

*Gillan v HEC Enterprises Ltd (in administration) and Ors* [2016] EWHC 3179 (Ch)

HEC Enterprises Limited and Deep Purple (Overseas) Limited (“the Defendants”) had contracted with the Claimants to provide various services and licences in respect of various copyright works. Disputes arose between the parties, which led to a settlement agreement in 2005 (“the Settlement”). Under the Settlement, a new company (“the Newco”) would be formed, to which various copyrights and other assets were to be transferred. The shares in the Newco were to be held by the Defendants for the benefit of the Claimants (“Trust Property”). In 2015, the Claimants brought proceedings against the Defendants to enforce the Settlement. The Defendants entered into administration in 2016.

Following their appointment, the administrators sought to mediate a settlement. The negotiations were however unfruitful. Moreover, the Administrators refused to lift the statutory moratorium to enable the Claimants to continue the litigation.

The Administrators sought to recover their costs from the Trust Property. The costs comprised of the Administrator’s charges, lawyer’s fees and counsel’s fees incurred in dealing with various aspects of the Trust Property.

As a general rule, an administrator is not entitled to recover his remuneration and expenses in respect of the administration out of assets which the company holds on trust for third parties. However, the Court recognized that an administrator’s functions and powers do extend to doing anything necessary or expedient for the management of the affairs of the company and this may require him to take certain actions in relation to trust property. An administrator may, at the discretion of the court, recover his fees and costs in realizing assets for the benefit of a third party from the relevant trust property: *Re Berkeley Applegate (Investment Consultants) Ltd (No 2)* [1988] 4 BCC 279.

However, in the present case, the Court found that much of the work done by the Administrators was for the benefit of unsecured creditors of the Defendants instead of the trust beneficiaries. Further, the Court was critical of the Administrators refusing to consent to the continuation of the existing litigation and instead taking it upon themselves to resolve the issues. Considerable time and expense have been wasted. As such, the Court held that the Administrators were not entitled to recover their remuneration, costs and expenses out of the Trust Property.
9. Under Cayman Islands law, directors may apply for the appointment of provisional liquidators to pursue restructuring plans, even if such application is not supported by shareholders’ resolution or expressly authorized by the Articles of Association of the company.

_In the matter of CHC Group Ltd_ FSD 5 of 2017

The directors of CHC Group Ltd (“the Company”) applied for the appointment of Joint Provisional Liquidators (“JPLs”) under section 104(3) of the Cayman Islands Companies Law on the ground that the Company intended to pursue a compromise or arrangement with its creditors. The application was however unsupported by shareholders’ resolution nor was it expressly authorized by the Articles of Association of the Company. Moreover, at the same time, there was also an outstanding creditor winding up petition in respect of the same Company.

The Grand Court of Cayman Islands was invited to consider whether the JPLs were validly appointed. The Court noted that directors have no standing to present the winding up petition, unless they are expressly authorized to do so by a resolution of the shareholders or by the company’s articles of association: _In the Matter of China Shanshui Group Limited_ [2015] 2 CILR 255.

However, the Court considered that unlike those situations where a company presents a winding up petition to bring the company to an end, the purpose of the application in the present case is an intention to present a compromise or arrangement to the Company’s creditors, which is a potentially beneficial procedure. Further, there is no conceivable basis for inferring that the application for the appointment of JPLs made on behalf of the Company itself is contrary to law or contrary to good practice. Accordingly, the application is allowed.
10. Even a material difference in rights is not necessarily sufficient to require creditors to be divided into separate classes if the circumstances of the case demonstrate that notwithstanding differences in existing rights there is sufficient commonality of interest in the commercial purpose and substance of the proposed compromise that they can deliberate on a scheme as one class.

*Re Lehman Brothers Futures Asia Ltd (in liquidation)* HCMP 2264/2016

The Joint Liquidators applied for sanction of three schemes of arrangements (“Schemes”) between Lehman Brothers Asia Limited, Lehman Brothers Futures Asia Limited and Lehman Brothers Securities Asia Limited and their unsecured creditors (“Scheme Creditors”).

Under the Schemes, the Scheme Creditors’ rights, i.e. the rights to have their claims determined by the Court under the Hong Kong winding up regime, will be released and replaced by the rights to a predetermined payment. The main object of the Scheme is to avoid protracted litigation and the delays, expenses and uncertainties associated with the litigation.

In determining the constitution of the class, Harris J is of the view that it is necessary to consider not only what is to be replaced and what it is to be replaced with, but also why the compromise embodied in the Scheme is proposed. Consequently, Harris J held that even a material difference in rights is not necessarily sufficient to require creditors to be divided into separate classes if the circumstances of the case demonstrate that notwithstanding differences in existing rights there is sufficient commonality of interest in the commercial purpose and substance of the proposed compromise that they can deliberate on a scheme as one class.

In the present case, Harris J found that the Scheme Creditors of each Company have a common interest in avoiding the expense and delay of litigation. Although inevitably there will be winners and losers as a result of the Scheme, because some Scheme Creditors will end up receiving less than they would have if the matter were left to be determined by the court, it does not seem that this of itself is a reason to require them to vote in separate classes. Each Scheme Creditor is in the same position. They are being asked to give up a right of uncertain value in return for the certainty, cost effectiveness and expedition provided by the Schemes.

Being satisfied that the Schemes have met all the statutory requirements, his Lordship sanctioned the Schemes.
Corporate Disputes Cases

11. In an application for leave to control the conduct of an on-going suit on behalf of a company, a demonstration by an applicant that it is probable that the company will not diligently prosecute the action will suffice

*Chong Chin Fook v Solomon Alliance Management Pte Ltd and others and another matter* [2017] SGCA 05

The Solomon Alliance Management Pte Ltd ("the Company") was founded by the Appellant, the 3rd Respondent, Capellan Pang ("Pang"), Helen Chong ("HC") and Thomas Chin.

Disputes arose over the management of the Company's business. The Appellant suspected that Pang was diverting business from the Company, and had therefore breached certain agreements between himself and the Company. After obtaining a legal opinion from a law firm as to the merits of legal action against Pang, the Appellant, in his capacity as the sole director of the Company, commenced proceedings against Pang on behalf of the Company ("Suit 215"). Pang counterclaimed against the Company and the Appellant for defamation. The Company and the Appellant then issued Third Party Notices to each other seeking indemnification and/or contribution.

The Appellant was later removed as the director of the Company. Pang's niece (who was also married to the lawyer representing Pang in his dispute with the Company), and the 3rd Respondent (who was the Head of Administration of a company in which HC had an interest) were appointed as directors of the Company.

In his capacity as minority shareholder, the Appellant sought leave under section 216A of the Companies Act to control conduct of Suit 215 against Pang on behalf of the Company.

The Singapore High Court refused to grant the Appellant leave to control conduct of Suit 215. It held that as the application was in respect of an action that was on-going, the Appellant had to demonstrate that the Company was not prosecuting the action with diligence. In the High Court Judge's view, the Appellant had failed to demonstrate this. The Appellant appealed to the Court of Appeal.

The Court of Appeal held that the legal criterion to be applied for an application for leave under s.216A to intervene in on-going proceedings is that the complainant has to demonstrate that it was probable that the company would not diligently prosecute the action. The Court of Appeal considered that the bar would be set at too high a level if the complainant had to demonstrate an actual lack of diligent prosecution. However, the probability that the company would not diligently prosecute the action must be a real one as opposed to a mere fanciful or speculative one. In assessing the probability, the court will take
into account the degree of conflict of interest of the present directors where the proceedings are concerned as well as the actual steps taken by the company in the on-going proceedings.

The Court of Appeal was of the opinion that while the Company appeared to be conducting the suit with diligence, the conflicts of interest on the part of its directors were sufficient to demonstrate that it was probable that the Company would not, going forward, prosecute the action diligently.

However, the Court also noted that there might be a different set of conflicts of interest on the part of the Appellant had he been allowed to take control of the conduct of the proceedings on behalf of the Company. In light thereof, the Court of Appeal granted the Appellant conditional leave under section 216A of the Companies Act to control conduct of Suit 215 upon the fulfilment of the following:

(a) the Appellant withdraws the Third Party notice issued to the Company for contribution and/or indemnification for damages arising out of the counterclaim in the proceedings;
(b) The Appellant indemnifies the Company for all costs incurred in the proceedings in the event the Company is unsuccessful;
(c) The Appellant indemnifies the Company for all damages arising out of the counterclaim (if any); and
(d) The Appellant provides security for costs the Company would likely have to pay if it was successful in prosecuting the action.
12. Where it is suggested that an application to commence derivative action has been in some way improperly contested, it will normally be more appropriate to reserve the costs until the trial has been determined when the court is in a better position to make a decision as to who should be responsible for the costs and the basis upon which they should be paid

*Chu Kong v Up Profit Ltd* HCMP 305/2106

The applicant applied pursuant to section 732(1) of the Companies Ordinance (Cap 622) to commence in the Company’s name a statutory derivative action against its sole director Ms Wat Fung Ying. The applicant sought what is a conventional costs order, namely, that the applicant’s costs of and incidental to the application and the derivative action be indemnified by the Company (“Conventional Costs Order”). Harris J granted the applicant leave to commence the derivative action. Subsequently, the applicant sought to have the court order varied to provide that the costs of the application and the intended derivative action be paid by Ms Wat personally on an indemnity basis.

Harris J considered that if a company either takes a neutral position in respect of an application or opposes it on narrow grounds, a Conventional Costs Order will commonly be appropriate. However, his Lordship also considered if an application is opposed either on weak grounds or simply in a way which is unnecessarily contentious and makes what should be a straight-forward application more complex than is necessary, it may be appropriate for the court to make an order that the company, or those in control of it, are liable to pay the applicant’s costs regardless of the outcome of the derivative action. But if that is the case, where it is suggested that the application has been in some way improperly contested, it will normally be more appropriate to reserve the costs until the trial has been determined and the court is in a better position to make a decision as to who should be responsible for the costs and the basis upon which they should be paid.

In conclusion, the Court ordered that the costs of the application for leave and the costs of the intended derivative action be paid out of the assets of the Company. The Court reserved the question of whether Ms Wat should be made personally liable for the costs of either the application or the intended derivative action, and if so on what basis those costs should be assessed.
13. Singapore Court held that in a buy-out scenario, the Buyout Order Date is the appropriate date for determination of the valuation of shares. The onus lies on the party seeking to displace the Buyout Order Date to show that using the Buyout Order Date would result in unfairness.

*Koh Keng Chew and others v Liew Kit Fah and others* [2017] SGHC 52

The plaintiffs commenced an oppression action. The Judge gave an order for the 1st to 6th defendants to purchase the shares of the plaintiffs in the 7th to 16th defendants. But the parties could not agree on the reference date for the valuation of the shares.

The Singapore High Court noted that cases have generally selected the date the action was commenced ("the Filing Date") or the date of the order ("the Buyout Order Date") as the appropriate date for determination of the valuation of shares. The Court was of the view that the Buyout Order Date should be preferred, since this "makes good sense as this is the value that best reflects what the shareholder is selling." Further, although a buyout order is common, it is only one of the possible orders that a court may make in an oppression action. There can be no sale to speak of unless and until the court orders a buyout.

However, using the Buyout Order Date is but a starting point. If it can be shown that the Buyout Order Date would result in unfairness, the court may opt for some other date which would achieve a fairer result. One obvious example is where the majority shareholders have deliberately taken steps to depreciate the value of the company. In such a case, an earlier date than even the Filing Date may be appropriate. The onus lies on the party seeking to displace the Buyout Order Date to show that using the Buyout Order Date would result in unfairness.

The 1st to 6th defendants alleged that an agreement had been reached between the plaintiffs and the 1st to 6th defendants on the reference date, which was, however, rejected by the Court. Instead, the Court found that the 1st to 6th defendants’ offer to buy out the plaintiffs was never accepted by the plaintiffs. Thus, the Court held that the 1st to 6th defendants did not show that using the Buyout Order Date as the reference date would be unfair. The Court concluded that the Buyout Order Date shall be the date for the valuation of the plaintiff’s shares.
14. The Singapore High Court found that the director had breached his fiduciary duties to the company. The fact that the loss suffered by the company had not been crystallized did not detract from there being a breach.

*Nordic International Ltd v Morten Innhaug* [2017] SGHC 1

The plaintiff, Nordic International Limited ("Nordic International"), was incorporated by the defendant, Morten Innhaug ("Morten"), to purchase a fishing trawler to be converted and used as a seismic survey vessel ("Vessel"). At the material time, the shareholders of Nordic International were Morten and Sinwa SS (HK) Co Ltd ("Sinwa"), each holding 50% of the shares in Nordic International.

Shortly before Sinwa became an investor and shareholder in Nordic International, Morten secured a time charter ("Time Charter") chartering the Vessel to BGP Geoexplorer Pte Ltd ("BGP") for a minimum period of three years. BGP in turn contracted to provide seismic survey services to a company named TGS-NOPEC Geophysical Company SA ("TGS").

Due to economic downturn, in August 2008, BGP sought to terminate the Time Charter. Unknown to Sinwa, Morten procured the Time Charter and the seismic services agreement be assigned by BGP to Nordic Geo-Services Ltd ("NGS"), a company substantially owned by Morten. The net effect of the two purported assignments was that BGP was taken out of the equation vis-à-vis TGS but remained liable to Nordic International for the charter hire under a rather convoluted and unconventional arrangement. Following the assignment, Morten, through NGS, stood to make US$15,500 a day. In December 2008, TGS terminated the seismic services agreement.

Sinwa subsequently brought derivative action against Morten alleging that he breached his fiduciary duties to Nordic International. Besides seeking to make Morten account for the profit he has made, Nordic International also seeks to hold Morten liable for the loss of charter hire to Nordic International. Meanwhile, Sinwa commenced another derivative action by way of arbitration on behalf of Nordic International against BGP for loss of the charter hire.

The Singapore High Court held that Morten has clearly breached his fiduciary duties towards Nordic International. The fact that Nordic International may subsequently recover against BGP is strictly irrelevant in determining whether Morten was in breach of his duties. Further, the Court found that there is enough evidence that Morten has earned some profit from the assignment of the Time Charter and the seismic services agreement. The fact that Nordic International could not, or would not, take advantage of the opportunity to earn the additional revenue does not render it any less a breach of his duty not to place himself in a position of conflict. The Court ordered an account of profits.
With regard to the loss occasioned to Nordic International, the Court noted that Nordic International's precise loss could only be determined after the conclusion of the arbitration. Hence, the sensible solution would be to order an assessment of the appropriate amount of compensation in respect of loss of charter hire caused by Morten's breach but to direct that such assessment take place only after the conclusion of the arbitration between Nordic and BGP.
15. Hong Kong courts have jurisdiction to grant a mandatory interlocutory injunction for the reconstitution of the board of directors of a company

Shih-Hua Investment Co Ltd v Zhang Aidong and Others HCCW 198/2016

Shih-Hua ("the Petitioner") and the 2nd Respondent (Motivi), Zhang’s alter ego, are the only shareholders of Everglory Energy Limited ("the Company"), each owning 50% of its shares. The Petitioner, which is the alter ego of Mr Zhong Jie ("Zhong"), and Zhang are the Company’s only directors.

On 20 June 2016, the Petitioner presented a petition seeking a buy-out order, or to wind up the Company on the just and equitable ground in the alternative. Serious allegations were raised over the Respondents’ conduct.

On 20 July 2016, the Petitioner made an application for Provisional Liquidator ("PL") to be appointed, which was however opposed by two creditors of the Company. The opposing creditors informed the Petitioner that the appointment of PL might give rise to an event of default under various Company’s contracts.

The Petitioner, in response, applied to Court to reconstitute the Board of Directors ("the Board") of the Company by replacing the existing 2 directors with 2 suitably qualified independent professionals.

The Court has to consider (a) whether it has the jurisdiction to make such an order on an interim basis; and (b) if there is such jurisdiction, whether in exercise of its discretion the Court should grant the relief in this case.

The Court noted that in the recent case of Komal Patel & Ors v Chris Au & Ors [2015] 6 HKC 389, Mr Justice Zervos granted a mandatory interlocutory injunction for the reconstitution of the board of directors of a company. The Judge considered that the court does have the power to grant interim relief where the justice of the case demands. Drawing from his own experience, the Judge found that reconstituting a board of directors thereby removing the harm to the company by a rogue director is an invaluable and effective interim remedy. However, such power must be exercised sparingly, since the court would be in a difficult position to select those who were appropriate to conduct the commercial affairs of a company: Re Chime Corp Ltd [2003] 2 HKLRD 905.

Being satisfied that the Court has power to grant the interim relief in question, the Court went on to consider whether the discretion should be exercised in favor of the Petitioner. After an evaluation of all the relevant circumstances, the Court came to the view that the shroud of secrecy kept over the Company is indeed alarming and the conduct of the Respondents tend to lend weight to the allegation of the Petitioner that they are doing everything to shield the
Company from any independent investigation. The Court is satisfied that the Petitioner has made out at least a good arguable case on unfair prejudice.

Furthermore, the Court considered that it has not been demonstrated that irremediable prejudice may be suffered by the Respondents if the Reconstitution Application is granted. Moreover, the Court was of the view that damages may be inadequate remedy, because firstly, there is no evidence on the ability on the part of Zhang or Motivi to buy out the Petitioner’s shares in the Company. Secondly, there is evidence of Zhang stripping the assets of the Company. Further, a buy-out order made against Zhang’s wish may be difficult to enforce against him (his roots are apparently in the Mainland) or Motivi, which is a BVI entity. Finally, there is an injustice in having a substantial shareholder of a company helplessly witnessing the asset stripping of his company until the determination of his petition. On the balance of convenience, the Court was in favor of granting the Reconstitution Application.

In conclusion, the Court granted the Reconstitution Applicant and ordered the existing members of the Board be replaced by two independent professionals. Further, the Court ordered Zhang be restrained from exercising any director's power whether acting by himself or his agent or servant or otherwise.
Bankruptcy Cases

16. English High Court indefinitely suspended a non-cooperative bankrupt’s discharge from bankruptcy despite there being a preceding order with a fixed date for discharge

_Harris v Official Receiver_ [2016] EWHC 3433 (Ch)

On 9 August 2013, a bankruptcy order was made against Mr Harris. Under the English Insolvency Act, a bankrupt is automatically discharged from bankruptcy on the first anniversary of being made bankrupt. However, on 4 August 2014, upon the application of the Official Receiver (“OR”) the Medway County Court made an order suspending the discharge of Mr Harris’s bankruptcy until a specified date and time. The order was made with a view to Mr Harris providing further specific assistance to the OR. Mr Harris, however, has not cooperated, and was continuing not to cooperate with the OR. The OR made a further application to the court for an order for indefinite suspension of Mr Harris’s discharge.

Under section 279(3) of the Insolvency Act, the court may make an order suspending discharge until a fixed date or make an indefinite suspension until a specified condition has been satisfied.

The issue is whether the OR or the bankrupt’s trustee can make a further application postponing discharge until a specified condition has been satisfied, if an order has already been made in unconditional terms specifying a fixed period.

The English High Court found that, first of all, section 279 does not expressly provide that only one application under subsection (3) can be made. Further, the Court took the view that there was no good reason to imply a limit on applications, since to do so would make the operation of the section inflexible and it would operate as a disincentive to the making of fixed period orders, which may be beneficial to the bankrupt in that they give him sight of light at the end of the tunnel. In conclusion, the Court held a further suspension was necessary.
17. A trust in favor of creditors constituted by an IVA survives the completion of the IVA

*Green v Wright* [2017] EWCA Civ 111

In August 2007, the Mr Wright ("the debtor") proposed an individual voluntary arrangement ("IVA"), which was approved at a meeting of creditors. Under the IVA, the debtor agreed to give assets belonging to him at the date of the IVA, other than his home and car, to the creditors in consideration for the release of his debts. He complied with his IVA obligations and his Supervisor had issued a certificate of completion under the terms of the IVA. Paragraph 9(2) of the IVA provides that “upon issue of the certificate, the debtor shall be released from all Debts which are subject to the Arrangement.” Shortly after the certificate was issued, the Supervisor received two payments from two banks in settlement of claims for the mis-selling of payment protection insurance policies ("PPI claims") to the debtor. It was common ground that the PPI claims were property to which the IVA applied. However, there was a dispute as to whether the IVA trust continued beyond completion.

The Supervisor applied for directions as to whether the sums paid by the banks were subject to the IVA trust for the benefit of creditors. The county court held that they were not, a decision affirmed by the High Court. The Supervisor appealed to the Court of Appeal.

The Court of Appeal considered that the IVA is directly analogous to a bankruptcy. Under the bankruptcy regime, the bankrupt is released from his debts upon his discharge. However, notwithstanding the discharge, the debts continue to exist for the purposes of proof in the bankruptcy and payment out of the realization proceeds of the assets subject to the bankruptcy. The Court of Appeal held that this is likewise the effect of the provisions of the IVA. The “property” subject to the IVA continues to be held on the trusts and the debts continue to exist. Completion of the IVA simply means that the debtor has fully performed all his obligations under the IVA. It does not mean that the trust comes to an end. In the absence of an express provision in the IVA to this effect, the trust must have continued.