Dear Clients and Friends,

This quarterly newsletter is issued four times a year to update practitioners on important and noteworthy cases in the areas of corporate disputes and insolvency in Hong Kong, the UK and other common law countries. In this issue, we have highlighted:

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Our selection of cases and our analysis of them may not be exhaustive. Your comments and suggestions are always most welcome.

Best regards,

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Corporate Insolvency Cases

1. Creditors permitted to take over the Company’s proceedings from the Liquidators with conditions imposed to ensure that the Company will be sufficiently indemnified

Chen Muhua (also known as Winky Chan) and Another v The Joint and Several Liquidators of Joy Rich Development Ltd HCCW 146/2013

The Applicants are shareholders of Joy Rich Development Limited (“the Company”). The main asset of the Company is a valuable residential property (“Property”), which is subject to a charge. A mortgagee action (“the Mortgagee Action”) was commenced by the holder of the charge against the Company. The liquidators decided not to defend the Mortgagee Action due to the Company’s lack of funds.

The Applicants thus took out a summons under section 200(5) of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap 32) for leave to defend the Mortgagee Action for an on behalf of the Company. Section 200(5) provides that “if any person is aggrieved by any act or decision of the liquidator, that person may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just.” The decision of the Liquidators under complaint is their decision not to defend in the Mortgagee Action.

The Liquidators are agreeable to the Applicants defending the Mortgagee Action so long as an adequate protection is afforded to the estate of the Company.

The court held that to justify leave be granted to carry on the defence in the Mortgagee Action for and on behalf of the Company, the Applicants must establish a serious question to be tried on a solid evidential foundation in their purported defence. Though the court was not entirely without doubt about the validity of the purported defence, it was satisfied that the purported defence has certain evidential foundation and poses a serious question to be tried.

The court further held that the Company could be sufficiently indemnified if the following conditions are imposed on the Applicants:-

(1) the Applicants be solely responsible for their own costs and any adverse costs orders for defending the Mortgagee Action in the name of the Company.

(2) A deed duly executed by the Applicants be provided to the Liquidators within seven days indemnifying the Company against any future costs, charges, expenses in connection with or arising out of the Mortgagee Action.
(3) The Applicants give an indemnity in the deed against any such post-liquidation interest for such period that the court deems just and appropriate.

(4) an amount of HK$500,000 be paid by the Applicants to the Liquidators within seven days thereafter, to be applied to any such costs, charges or expenses if and when incurred. The Liquidators have the liberty to apply to the court for further sums of money to be paid by the Applicants for the same purpose.

(5) the Liquidators be entitled to be informed by the Applicants from time to time as to the progress of the proceedings. More specifically:

   a) the Applicants be obliged to provide copies of all future documents (including but not limited to orders, affirmation and exhibits) in connection with the Mortgagee Action to the Liquidators as and when such documents are filed and/or received.

   b) the Applicants be obliged to inform the Liquidators as soon as practicable any hearing dates in the Mortgagee Action and the outcome of any hearings and interlocutory applications.

   c) The Liquidators and their legal advisers be allowed to attend any hearings in connection with the Mortgagee Action under a watching brief. Such costs should be taxed, if not agreed, in the liquidation to be indemnified by the Applicants.

(6) the Applicants shall not compromise the Mortgagee Action without first obtaining an approval from the court.
2. Auditors failed to strike out a negligence claim for failing to report fraud and material irregularities in the company’s accounting statements

*Days Impex Ltd (in liquidation) and another v Fung, Yu & Co (a firm) and another* HCA 1035/2014

The 1st and 2nd plaintiffs are two private companies incorporated in Hong Kong which are now in liquidation. The 1st defendant was a firm engaged as the auditor of the plaintiffs between 2005 and 2011. The 2nd defendant is the practice successor of the 1st defendant.

The plaintiffs claimed that the defendants had breached their duty owed to the plaintiffs by failing to detect and report the massive import/export fraud which the controlling shareholder and director had caused the plaintiffs to commit. It is said that had the fraud been detected earlier and reported to the relevant authorities, the fraud would not have continued for so long and the plaintiffs’ losses would have been lesser. The defendants sought to strike out the plaintiffs’ claims in its entirety.

The Court rejected the submission that an auditor’s duty is as narrow as to be restricted to the provision of information and advice, but may extend to detecting material irregularities in the company’s accounting statements: *Barings v Coopers & Lybrand* [1997] 1 BCLC 427. In appropriate cases, an auditor’s duty may even extend to reporting any fraud he detected during the course of his work for a client directly to a third party without the knowledge or consent of the management, such as where the auditor suspects that management may be involved in, or is condoning, fraud or other irregularities: *Sasea Finance Ltd v KPMG* [2000] 1 All ER 676. Such responsibilities are also reflected in the *Auditing Guidelines* issued by the Hong Kong Society of Accountants, failure to comply with which without adequate explanation is powerful evidence that the auditor has not acted reasonably. The Court concluded that it is highly arguable that an auditor’s duty is more than just providing information and advice on his client’s financial statements. The Court further noted that it is at least arguable that the interests of the creditors require protection and should be factored into the scope of duty of an auditor when his client company is insolvent or near insolvency.

The defendants further sought to rely on the illegality defence to strike out the plaintiffs’ claims. It was argued that the fraud perpetrated by the controlling shareholder and director was attributed to the plaintiffs and as such the plaintiffs could not sue on the fraud. In relation to this, the defendants cited the English Supreme Court case *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391, which the Court in this case commented as highly controversial. The Court further noted that in the recent English Supreme Court decision in *Patel v Mirza* [2016] 3 WLR 399, the illegality defence has been substantially reformulated, so that it has now moved away from the rule-based approach in *Tinsley v Milligan* [1994] 1 AC 340 to a policy and fact based approach. In view of these recent developments, the Court was not satisfied that the present case is a plain and obvious one for striking out.
3. If a petitioner clearly knows that it is the net debtor of the company, it is *prima facie* an abuse of the process of the court to present a petition

*Discreet Ltd v Wing Bo Building Construction Co., Ltd* HCCW 49/2017

Wing Bo Building Construction Co., Ltd (“the Company”) is a building contractor. On 19 July 2007, it entered into a contract with the petitioner, which is a developer, to build houses at Tsuen Wan. When the work was complete, the Company produced a final account to the petitioner, which set out how much was owed to it.

The petitioner, being dissatisfied with the Company’s assessment of the amount payable for the work it had completed, suggested that an independent quantity surveyor be appointed to assess the final amount. According to the report produced by the independent quantity surveyor subsequently appointed, the amount payable by the petitioner to the Company is $3,689,994.10. The petitioner however failed to make the payment. As a result, the Company commenced legal proceedings against the petitioner. The petitioner applied, and succeeded in its application to stay the proceedings in favor of arbitration. The Company attempted, but failed to set aside the stay. Costs in the sum of $52,630 were ordered against the Company. On 6 February 2017, the petitioner issued a petition to wind up the Company on the grounds of insolvency, relying on a statutory demand that the said sum of $52,630 was due to it. The Company sought to strike out the petition.

Harris J found that there is clearly a cross-claim, which exceeds the debt relied on by the petitioner. His Lordship held that if a petitioner knows that it is a net debtor of the company, as in the present case, it is *prima facie* an abuse of the process of the court to present a petition. This is particularly true if the petitioner has no reason to think that the company is insolvent and it cannot, therefore, be sensibly suggested that the petitioner is asserting a class right with a view to ensuring that the interests of creditors generally are protected by the company being put into liquidation. In the circumstances, Harris J held that it is an abuse of process for the petitioner to issue the petition and ordered the petition to be struck out. The petitioner was also ordered to pay the Company’s costs on an indemnity basis.
4. In deciding whether the requisite “desire” is established in an unfair preference claim, the fact that the subject creditor held personal guarantees from the directors as security is a relevant consideration for the court, but is not conclusive.

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 CACV 67/2017

In the April issue of ONC Corporate Disputes and Insolvency Quarterly 2017, we discussed the Court of First Instance decision in this case. 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 and was thus void. 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 Company owned a property at Black's Link, which was subject to a charge. On 15 November 2013, the Company entered into a provisional sale and purchase agreement to sell the Black's Link property for HK$300 million. A total deposit of HK$30 million was paid by the purchaser to the Company's solicitors as stakeholders. However, the solicitors could only release the Deposit to the Company if the balance of the purchase price (i.e. HK$270 million) was sufficient to discharge the existing mortgage/charge on the property. The total sums due to the mortgagee however exceeded HK$270 million. As such, the Company was not able to get its hands on the HK$30 million deposit.

In early December 2013, the Company approached the Respondent for a bridging loan of HK$19 million for less than a month. The lion part of the loan (i.e. HK$16 million) was used to reduce the total sums due to the mortgagee so as to secure the mortgagee's consent to the release of the HK$30 million deposit. The loan was fully secured and in addition, the directors of the Company also personally guaranteed the loan. The Company repaid a total sum of HK$19,287,000 to the Respondent on 9 January 2014. Shortly after, the Company went into creditors’ voluntary winding up on 6 March 2014.

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.

Anthony Chan J however 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 Judge concluded 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 liquidators appealed and the Respondent cross-appealed on the costs order. The Court of Appeal has recently given its judgment in the matter.

The Court of Appeal held that in the absence of direct evidence on the state of mind of the directors, the court would have to see whether the requisite desire can be inferred by considering evidence of the relevant surrounding circumstances, such as how the company was running its business, how it dealt with funds, whether there was pressure from the subject creditor or other creditors, whether the company derived any benefit from paying the subject creditor, etc. The fact that the subject creditor held personal guarantees of the directors as security is a relevant circumstance, but is not conclusive.

In the present case, the Court of Appeal found that there was no evidence indicating that the directors were aware of the imminent or inevitable insolvent liquidation of the Company. More importantly, the Court found that by using the leveraging power of the $19 million loan, the Company was able to secure the release of the HK$30 million deposit. The advantage to a cash-strapped company of having that sum of cash is obvious. In light of the above, the Court of Appeal agreed with the Judge that the evidence does not point to the Company having a “positive wish” or “desire” to benefit the Respondent in the event of its insolvent liquidation. The liquidators’ appeal was thus dismissed.

In relation to the Respondent’s cross-appeal on costs order, the Court of Appeal considered that the Judge had erred in law in ordering that the costs of the Respondent be paid by the Company not by the liquidators. It was held that liquidators who institute proceedings should pay the costs personally in the first instance if they lose.
Court will not order the delinquent directors to pay compensation to the company, if liquidators cannot prove that the company suffered any unrecovered actionable loss.

The Liquidators of Wing Fai Construction Co Ltd (in liquidation) v Yip Kwong Robert and Others HCCW 735/2002

The liquidator of Wing Fai Construction Co Ltd ("Wing Fai") took out a misfeasance summons pursuant to section 276 of the predecessor Companies Ordinance (Cap 32) against three of its former directors. The Liquidator alleged that between 6 May 1999 and 18 April 2002, the respondents, as directors or de facto directors, caused Wing Fai to enter into a series of transactions which involved (i) “payments-out” by cheques or under letters of credit from the available funds of Wing Fai to two related companies, namely Famous Capital Enterprises Ltd ("Famous Capital") and King Capital Engineering Ltd ("King Capital") purportedly for goods purchased when in fact no such goods were ever sold or delivered to Wing Fai; and (ii) “payments-in” made by those two companies purportedly as repayments. The Liquidator alleged that, in total, the payments-in fell short of the payments-out by $36,151,301.87 and this constituted a fraud on Wing Fai. As such, the respondents were guilty of misfeasance, breach of duty and negligence.

Wing Fai was incorporated in 1980 in Hong Kong and is part of a group of companies ("the Group") headed by China Rich Holdings Limited ("China Rich"), formerly known as Wing Fai International Limited, whose shares were (and still are) listed on the Hong Kong Stock Exchange. The structure of the group of companies is as follows:-
It was common ground that the funds paid to Famous Capital and King Capital through letters of credit or cheques were channeled to other Group companies, while some of the money subsequently found its way back to Wing Fai.

On 23 November 2001, the Board of China Rich resolved that an agreement for the mutual set-off ("Set-Off Agreement") of certain indebtedness among companies in the Group be approved. The implementation of the Set-Off Agreement gives rise to a net debt owed by Fitzroya to Wing Fai of $41,213,162.

On 22 April 2002, Benefit entered into a Sale and Purchase Agreement to sell Wing Fai to a company named Sino Glister International Investments Ltd ("Sino Glister"). Under the Sale and Purchase Agreement, it was provided that Sino Glister would acquire Wing Fai clear of bank debts. Wing Fai's overdrafts with the banks were thus fully settled with money provided by the Group. The net total payment by the Group to settle Wing Fai’s bank indebtedness was $105,766,126. As a result of these payments for Wing Fai, Fitzroya’s net indebtedness to Wing Fai was extinguished. Instead, Wing Fai became indebted to the Group to the tune of $59,924,342.58. The Group waived the amount in excess of $40 million (i.e. $19,924,342.58) so that, as was agreed with Sino Glister, Wing Fai owed $40 million to Benefit. The Group did not lodge any proof of debt other than Benefit’s proof for $40 million. The proof had been disputed by the Liquidator and is no longer maintained.

The Judge observed that the scheme clearly involved deception of the banks and the use of forged documents issued by Wing Fai, which if and when discovered, would obviously jeopardize Wing Fai’s relationships with its bankers, and as a matter of common sense could have possible implications on its business. It was clearly not a scheme to which an ordinary, honest director would have subscribed. Hence, the Court considered that there was plainly a misuse of fiduciary powers and hence a breach of duty on the part of the respondents.

However, the Court noted that section 276 is not a section for punishing a man guilty of misfeasance but for compensating the company in respect of the loss occasioned by his misfeasance. The Judge found that Wing Fai received, but did not give, value for the discharge of its bank debts to the tune of $59,924,342.58, which far exceeds the alleged “shortfall” between the payments-out and the payments-in. Notwithstanding the finding that the respondents breached their fiduciary duties towards the Company, the Judge refused to order the respondents to pay anything, given that Wing Fai did not suffer any unrecovered actionable loss.

The misfeasance summons was accordingly dismissed.
6. A liquidator’s disrespect or disregard to the court’s orders or findings is a valid ground for his removal

Allied Ever Holdings Ltd v Li Shu Chung and Others HCCW 497/2009

Luen Tat Watch Band Manufacturer Limited (“the Company”) was wound up upon the Petitioner’s petition on 6 July 2010. Liquidators were subsequently appointed. The Petitioner now seeks (a) an order to stay the winding-up order against the Company; and (b) an order to remove the Liquidators.

The Court, upon a detailed examination of the documentary evidence, considered that the Company is marginally solvent. Further, the Court was satisfied that the Company’s liability could be adequately covered by undertakings. Accordingly, the winding-up order was stayed permanently.

On the second issue, a liquidator may be removed if he has been shown to have been biased, or to give rise on reasonable grounds to a perception of bias, or to give rise to a real and reasonable loss of confidence in him by the petitioner, creditor or contributories. A liquidator’s disrespect or disregard to the court’s orders or findings may also be a valid ground for his removal.

To J was highly critical of the Liquidators for a series of conduct, including:-

1. entertaining spurious proofs of debts and disrespecting the court’s finding in related proceedings impugning on the validity of such proofs;
2. maintaining false allegation about hidden tax liability of the company to justify their continuation in office;
3. foregoing investigations and claims against one camp of member;
4. positively assisting the same camp of member in another legal action;
5. insistence on continuing with various legal actions against one camp of members; and
6. exaggerating the non-compliance of a party in a s221 production order

The court concluded that their conduct gives rise to a real and reasonable loss of confidence in them, which justifies their removal on grounds of bias or loss of confidence in them.
Cross-border Insolvency Cases

7. English court held that foreign proceedings, which involves a group of companies, can be recognized in the UK, so long as recognition is only sought in relation to an individual debtor

*Re Agrokor [2017] EWHC 2791 (Ch)*

Agrokor DD ("the Company") is the holding company of a group of companies specializing in agriculture, food production and related activities in Croatia. It is said to be the largest privately owned company in that country. In recent times, the Agrokor group has encountered financial difficulties. In order to facilitate the restructuring of the Company and its subsidiaries and affiliates and to preserve their business as going concerns, the Croatian Parliament passed a new law, the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia, on 6 April 2017. On 10 April, the Company and its 50 affiliates were put into extraordinary administration. An application was then made to the English court for recognition of the extraordinary administration proceedings in Croatia as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006. The application however only concerned the Company as the holding company of the Agrokor group. The application was opposed by Sberbank, a Russian bank, which is a creditor of the Company. Sberbank argued, inter alia, that there is no scope to recognize group insolvency proceedings under the Cross-Border Insolvency Regulations 2006.

It was common ground that the proceeding in Croatia is a single group proceeding against the whole Agrokor group of companies. Recognition however was sought only in relation to the Company, not the controlled or affiliated companies.

The English Court held that though it is clear that a group proceeding as such cannot be recognized, there was nothing in the legislation to suggest that it is impossible to recognize a group proceedings as a proceeding in respect of a particular debtor in the UK. Not to be able to do so would leave a significant hole in the range of possible options for international recognition, as such groups are today very common.
8. Failure to make full and frank disclosure in obtaining a recognition order would result in the recognition order being set aside

*Re Dalnyaya Step LLC (In Liquidation) [2017] EWHC 3153 (Ch)*

Hermitage was a Guernsey unit trust investing in Russian capital markets. Dalnyaya Step LLC (“DSL”) was one of the Russian subsidiaries through which Hermitage invested. In August 2006, DSL went into liquidation in Russia. Hermitage alleged that it was the victim of a US$230 million tax fraud carried out with the approval and assistance of Russian authorities. Criminal proceedings were opened in Russia against members of Hermitage and their lawyer, with the lawyer dying in custody. Between June 2010 and February 2013, Russian authorities had made multiple requests to the UK authorities for assistance with the criminal proceedings. They were all rejected on the basis that to do so is likely to prejudice the sovereignty, security, *ordre public*, or other essential interests of the UK. The liquidation was subsequently terminated but re-opened in August 2015. Mr. Nogotkov was appointed as official liquidator of DSL. In 2016, Mr. Nogotkov obtained a Recognition Order in the UK recognizing the Russian liquidation.

Hermitage applied for an order setting aside the Recognition Order on the ground that Mr. Nogotkov had failed, when he applied for the Recognition Order, to make full and frank disclosure to the court. Hermitage contended that Mr. Nogotkov ought to have made the English Court aware of (1) the criminal proceedings in Russia against the members of Hermitage; (2) his intention to make a private examination application against the Hermitage parties; and that (3) Hermitage would be likely to argue that the public policy exception under the Cross-Border Insolvency Regulation was engaged as the UK Home Office had refused repeated requests from Russian authorities for assistance in the criminal proceedings.

When seeking recognition, full and frank disclosure must be made to the court in relation to the consequences for third parties that are not before the court that may flow from the recognition of the foreign proceeding, including from intended future applications enabled by the recognition order: *In re OGX Petróleo e Gás SA [2016] EWHC 25 Ch*. It was held that Mr. Nogotkov’s failure to alert the court to the public policy issues and the political background was inexcusable. Mr. Nogotkov was thus in clear breach of his duty of full and frank disclosure when he applied for and was granted the Recognition Order. The English Court therefore set aside the Recognition Order *ab initio*. 
9. The Grand Court of Cayman Islands granted common law recognition and assistance to Hong Kong liquidators of a Cayman Islands company for the purpose of promoting a scheme of arrangement

*Re China Agrotech Holdings Limited* FSD 157 of 2017 (NSJ)

China Agrotech Holdings Limited ("the Company") was incorporated in the Cayman Islands as an exempted company. The Company was registered as a non-Hong Kong company since November 1999 and was listed on the Main Board of the Hong Kong Stock Exchange since 2002. In 2014, a winding-up petition was presented against the Company in Hong Kong, with winding-up order made on 9 February 2015. Liquidators were appointed.

In order to effect a resumption proposal and reorganization of the Company, the Liquidators sought to introduce a scheme of arrangement between the Company and its creditors in Hong Kong and a parallel scheme in the Cayman Islands. On 19 July 2017, following an application of the Liquidators, Harris J issued a letter of request to the Cayman Court, seeking an order that the Cayman Court treat the Liquidators as if they have been appointed as joint and several liquidators of the Company by the Cayman Court with the specific power to promote a scheme of arrangement in the Cayman Islands.

The Grand Court of Cayman Islands held that it could not make an order which treated the Liquidators in all respects in the same manner as if they had been appointed as provisional liquidators by the Cayman Court. However, the Court held that it did have the power to recognize and assist the Liquidators by permitting them to act on behalf of the Company since the directors had shown no sign of wishing to take any action to either support or oppose the scheme; there was no intention to wind up the Company in the Cayman Islands; for over two years, creditors had submitted proof of debts to the Liquidators in Hong Kong; and the Company had substantial connection with Hong Kong such that its likely center of main interests was in Hong Kong.

In addition, the Judge directed that any proceedings commenced, or in existence, against the Company in the Cayman Court be assigned to him so that he can ensure that those proceedings are stayed or adjourned pending the completion of the scheme.
Restructuring Cases

10. Singapore High Court held that an applicant must adduce some evidence of reasonable attempts at trying to secure financing on a normal basis, before the court will grant rescue financing a super-priority

*Re Attilan Group Ltd [2017] SGHC 283*

Earlier this year, the Singapore Parliament passed the Singapore’s Companies (Amendment) Bill to amend the Singapore Companies Act. The Bill introduced significant amendments relating to the enhancement of Singapore’s debt restructuring framework. One of the features is rescue financing provisions, under which the Court will be empowered to order that rescue financing be given super-priority. That means priority over all other debts or to be secured by a security interest that has priority over pre-existing security interests, provided that the pre-existing interests are adequately protected. *Re Attilan Group Ltd* is the first case where an application of such nature has been made.

Attilan Group Limited ("Attilan") is a company listed on the main board of the Singapore Exchange. In 2016, Attilan entered into a subscription agreement with Advance Opportunities Fund ("the Subscriber") for the latter to subscribe, over several tranches, to unsecured equity-linked redeemable structured convertible notes issued by Attilan.

Attilan subsequently went into financial difficulties. The Subscriber refused to subscribe further under the subscription agreement. In light of its financial difficulties, Attilan sought to implement a scheme of arrangement. The scheme provided for subsequent sums disbursed by the Subscriber under the subscription agreement to be treated as “rescue financing” with super-priority in the event of Attilan’s winding up.

The Court held that rescue financing could be in the form of a financing by an existing creditor or it can even be premised on a prior obligation. However, if the existing creditor is already bound to inject funds, then the provision of funds pursuant to that pre-existing obligation is not financing that should be accorded the super priority under the new rescue financing provisions. The Court noted that an event of default under the subscription agreement has arisen, thereby giving the Subscriber right to terminate the subscription agreement forthwith. The Subscriber is therefore not obliged to make further payments to Attilan. Any extension of funds to Attilan arising from the Subscriber's continuation of the subscription agreement would be additional funding for Attilan. Accordingly, notwithstanding the fact that the Subscriber is extending funds to Attilan based on a prior agreement, this funding from the Subscriber constitutes “rescue financing” within the statutory meaning.

The Court went on to consider whether the extension of funds by the Subscriber should be accorded with super priority. The Court recognized that giving super priority disrupts the
expected order of priority of the various creditors of the company. The grant of super priority should thus not ordinarily be resorted to and the courts would be slow to do so unless it is strictly necessary. Generally, it is only where there is some evidence that the company cannot otherwise get financing that it would be fair and reasonable to reorder the priorities of winding up, giving the rescue financier the ability to get ahead in the queue for assets. For this reason, the applicant should adduce some evidence of reasonable attempts at trying to secure financing on a normal basis, i.e. without any super priority, to move the court to exercise its discretion. The Court found that there is insufficient evidence of any efforts, let alone reasonable efforts, being expended by Attilan to secure financing without any super priority. Neither has Attilan shown that it was in objectively such abysmal financial health that no financial aid could have been reasonably received without any offer of super priority.

In conclusion, the Court declined to grant super priority status to the extension of funds from the Subscriber.
11. **English Court sanctions scheme of arrangement for a Luxembourg-incorporated company, whose COMI had been shifted to the UK and where there had been a change of the governing law and jurisdiction clauses in its debt obligations from New York to England**

*Algeco Scotsman PIK SA [2017] EWHC 2236 (Ch)*

Algeco Scotsman PIK SA ("the Company") is incorporated in Luxembourg. Thus it is presumed that its center of main interest ("COMI") is in the Luxembourg. The Company experienced some financial difficulties. In order to resolve those difficulties, the Company proposed a scheme of arrangement to restructure around $699 million of its junior debt obligations under a so-called PIK Loan Agreement.

A convening order was granted, pursuant to which a single scheme meeting was held. At the scheme meeting, the scheme was passed by hefty majorities. The Company applied seeking sanction of the court for the scheme of arrangement. In order for the court to exercise its jurisdiction to sanction a scheme of arrangement in relation to a foreign company, there must be a sufficient connection with England to warrant the intervention of the English court in the way proposed: *Drax Holdings Ltd [2004] 1 WLR 1049*.

The Court noted that the PIK Loan Agreement was governed by New York law with a jurisdiction clause stipulating the New York courts. In preparation for making the scheme application, the governing law has been changed from New York to England. Similarly, the non-exclusive jurisdiction clause in favor of the New York courts had been changed to the non-exclusive jurisdiction of the English courts. The Company had also taken extensive steps to move its COMI to the UK a month before the hearing of its application to convene meetings of creditors to vote on the scheme.

The Court was satisfied that the Company had a sufficient connection with England and Wales. The Court found that the COMI of a company, even if shifted prior to the presentation of the scheme and for the intended purpose of facilitating that scheme will also, of itself, create a sufficient connection with England. The further basis for establishing a sufficient connection is the change of governing law and the jurisdiction clause. But the Court also noted that these changes of the governing law and jurisdiction clauses and of COMI have been arranged with the purpose of opening the gateway by the English Court's jurisdiction and wherever there is such a change with such an intended purpose, the court will be careful to scrutinize whether the change of law or jurisdiction or the resort more generally to the English court is appropriate.

In *Re LDK Solar Co Ltd [2015] 1 HKLRD 458*, the Hong Kong court sanctioned a scheme of arrangement involving a company incorporated in the Cayman Islands, finding that there was sufficient connection with Hong Kong. One important consideration for the court in exercising
its discretion was that some of the debts were governed by Hong Kong law and a debt can only be discharged under the law governing the debt. If the restructuring is not sanctioned in Hong Kong, there is a risk that the creditors might be able to enforce the debts in Hong Kong and thus jeopardize the restructuring of the company.

As to whether the shift of COMI to Hong Kong itself creates a sufficient connection, the same issue is yet to come before the Hong Kong court. However, given the liberal attitude of the Hong Kong court towards cross-border insolvency, it is likely that the Hong Kong courts will follow UK’s lead in this regard.
12. Foreign liquidators whose appointment is properly recognized by the Hong Kong court have power to act as the agent of the company to introduce scheme/compromise and seek sanction from Hong Kong courts

Re Z-Obee Holdings Ltd HCMP 1563/2017

Z-Obee Holdings Ltd ("the Company") is a company incorporated in Bermuda and listed on the Hong Kong Stock Exchange. The Company was registered as an overseas company in Hong Kong. Since 27 June 2014, the Company has been in provisional liquidation. In early 2017, the joint and several provisional liquidators ("the Hong Kong JPLs") found a potential investor to rescue the Company. Given the limitations of Hong Kong’s legislative framework and restrictions on the use of provisional liquidators in Hong Kong to restructure companies in financial distress, the Company took steps to invoke the jurisdiction of Bermuda court, where provisional liquidation may, in a wide range of circumstances, be used to facilitate a restructuring. By the order of the Supreme Court of Bermuda dated 17 February 2017, the Hong Kong JPLs were appointed as the joint and several liquidators of the Company in Bermuda ("the Bermuda JPLs") and are authorized to, inter alia, undertake the restructuring. By the orders of the Hong Kong court dated 27 March 2017 and 29 March 2017, the court discharged the Hong Kong JPLs and granted their recognition as the Bermuda JPLs appointed by the court in Bermuda.

On 16 October 2017, pursuant to the leave of the court, a scheme meeting of the unsecured creditors of the Company was held for the purpose of voting on a scheme of arrangement compromising their debts. All scheme creditors voted in favor of the scheme. On 23 October 2017, a petition was issued seeking the court’s sanction of the scheme. The petition was issued by the Company and also by the Bermuda JPLs. The issue before the court is who is the proper person to present the petition.

Under section 673(3) of the Companies Ordinance (Cap 622), an application for the purpose of sanctioning a compromise can be made by a company or its creditors affected by the compromise. Harris J held that the Hong Kong court has recognized the appointment of the Bermuda JPLs and the powers that have been granted to them to act as the agent of the Company to introduce a scheme compromising the debt. As such, the Company has properly issued the petition and section 673(3) is satisfied.

The Judge is satisfied that the necessary statutory majority was obtained at the scheme meeting, that the class was fairly represented by those attending the meeting, that the arrangement is such as an intelligent and honest creditor might reasonably approve and also that there is sufficient connection between Hong Kong and the scheme to justify the Hong Kong court exercising jurisdiction. The scheme was accordingly sanctioned.
Corporate Disputes Cases

13. **Singapore Court of Appeal ruled that any modification of a director’s fiduciary duties requires clear and explicit language**

_Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal_ [2017] SGCA 68

Two doctors, Dr. Goh PK and Dr. Kelvin Goh, co-owned and operated two clinics, one of which is the Orchard Clinic. The Orchard Clinic was owned by Centre for Laser and Aesthetic Medicine Pte Ltd ("CLAM"), which in turn was owned in equal shares by the doctors’ wives: Dr. Kelvin Goh’s wife, Ms. Jacqueline Goh, and Dr. Goh PK’s wife, Mdm. Wong. Ms. Jacqueline Goh and Mdm. Wong are registered directors of CLAM, while Dr. Kelvin Goh and Dr. Goh PK are _de facto_ directors of CLAM. In 2013, a dispute arose between the two doctors. Thereafter, the doctors and their wives entered into a settlement agreement ("the Agreement") on 14 February 2014 following a successful mediation.

The Agreement is essentially an exit arrangement whereby the two doctors were to procure the sale of the two clinics at a minimum price of $6 million by 31 December 2016. Clause 7 of the Agreement provided that in the interim, the parties “shall duly continue with and fulfil their responsibilities, arrangements and operations of the [Clinics]”. On the other hand, clause 10 of the Agreement also provided that the parties “shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from [the Companies]”.

Subsequently, Dr. Goh PK set up GPK Clinic, two units away from the Orchard Clinic, which commenced operations on 19 May 2014. GPK Clinic was owned by Dr. Goh PK and Mdm. Wong through GPK Clinic (Orchard) Pte Ltd ("GPKPL"). Dr. Goh PK diverted patients from the Orchard Clinic to GPK Clinic and also used confidential information from the Orchard Clinic to divert its patients to GPK Clinic. In response, Dr. Kelvin Goh caused CLAM to commence action against Dr. Goh PK and Mdm. Wong, alleging, _inter alia_, that Dr. Goh PK breached his fiduciary duties by diverting Orchard Clinic patients to GPK Clinic.

Ordinarily, any diversion of CLAM’s business to GPKPL would necessarily constitute a breach of Dr. Goh PK and Mdm. Wong’s duties to CLAM. The pivotal inquiry here is whether the terms of the Agreement permitted the parties to “harm” CLAM notwithstanding their fiduciary duties to CLAM.

The Singapore Court of Appeal took the view that it is clear that the underlying purpose of the Agreement is to facilitate the exit arrangement of the two doctors via the sale of the Companies as a going concern. The corollary to this purpose would oblige the parties to...
preserve the value of the Companies in the interim. Otherwise, if the parties were free to extract or destroy the value of the Companies in the meantime, the object of selling the Companies at the minimum price of $6 million would be in serious jeopardy.

Further, the Court noted that the first sentence of clause 10 merely permitted the parties “to set up any other business or clinics in any location in Singapore”. Nowhere in Clause 10 did it expressly state in positive language that the parties were entitled to divert any patient from CLAM. To read such entitlement into Clause 10 would change the defendants’ duties to CLAM and effectively permit them to willfully harm CLAM. Such a construction, the Court held, will require very clear and explicit language in the Agreement. The proviso in clause 10 does not come close to achieving that outcome.

Accordingly, the Court found that clause 10 did not permit Dr. Goh PK to actively divert patients from the Orchard Clinic to GPK Clinic. In relation to Mdm. Wong, the Court found that she knew that Dr. Goh PK was diverting patients from CLAM, but she did not stop him. Neither did she report this information to CLAM. Mdm. Wong’s inaction was a breach of her fiduciary duties to CLAM and she could not rely on Dr. Goh PK’s belief that he was entitled to divert patients to justify her own inaction.
14. The very purpose of section 740 of the Companies Ordinance is to enable a member to obtain company documents so that he may then make an informed decision as to whether to take legal or other actions to safeguard his interests as a member

*Fung Chuen v Sandmartin International Holdings Ltd* HCMP 1044/2017

The plaintiff is a shareholder of the defendant Company, holding not less than 2.5% in value of the voting rights of all the members having a right to vote at general meetings. Pursuant to section 740 of the Companies Ordinance, the plaintiff seeks inspection of 2 categories of documents of the Company relating to certain loans and investments overseas.

The plaintiff alleged that the Company’s dealings in those transactions are extremely dubious and warrant investigation. The Company opposed the application. In particular, the Company alleged that the application for inspection of the documents is a fishing expedition by the plaintiff in search for evidence to substantiate his allegations in a winding up petition also brought by the plaintiff.

The Court observed that the very purpose of section 740 of the Companies Ordinance is to enable a member to obtain company documents so that he may then make an informed decision as to whether to take legal or other actions to safeguard his interests as a member: *Wong Kar Gee Mimi v Hung King Sang Raymond & Anor* [2011] 5 HKC 361.

In fact, the plaintiff is not confined to obtaining information for the purpose of the winding-up petition. The plaintiff is entitled to take whatever lawful steps he likes to protect his interests as a shareholder, including reporting any suspected transactions to the relevant authorities using the documents revealed during inspection. Further, as long as the plaintiff’s primary purpose for inspection is a proper one, it is irrelevant that an inspection may be of benefit to him for some other purposes.

The Court was satisfied that the plaintiff had made out a reasonable case for investigating the transactions and had acted out of a genuine and legitimate concern to protect his interests as a shareholder of the company.
15. Court permitted inspection of documents by shareholders subject to a condition that documents obtained are not to be provided to third parties until final judgment is given in other proceedings

*Huinong Delta Investments Ltd and Others v CCCC Financial Ltd and Others* HCMP 3194/2016

The 1st to 3rd plaintiffs ("Minority Shareholders") are shareholders holding an aggregate of 27% shareholding in CCCC Financial Ltd ("the Company"). The Minority Shareholders sought an order to inspect seven categories of documents, including board and shareholders’ resolutions, books, accounts and vouchers of the Company, as well as transaction documents allegedly relating to a disposition of the company’s shareholding in a company called Lightning Triumph. Apart from this action, the Minority Shareholders also issued a derivative action, namely HCA 2814/2016 ("Derivative Action") against the 2nd and 3rd defendants, who are directors of the Company, as well as an asset recovery action, namely HCA 2813/2016 ("Asset Recovery Action").

Under section 740 of the Companies Ordinance, on an application by members representing at least 2.5% of the voting rights of all the members having a right to vote at the company’s general meetings at the date of application, the court may make an order authorizing a person to inspect a record or document if it is satisfied that (a) the application is made in good faith; and (b) inspection is for a proper purpose.

The Minority Shareholders claimed that there is *prima facie* evidence to show that a wrong has been done to the Company. Therefore, they wish to inspect documents to carry out relevant investigations. The Company opposed the application and suggested that the documents requested would be used to injure the Company in a material way or that the inspection would be detrimental to the interests of the Company.

The Court considered that the Minority Shareholders were acting in good faith and that the inspection was for a proper purpose. However, to allay the concerns of the defendants, the Court permitted inspection of the requested documents, except those that were not in the possession, custody or control of the Company, subject to a condition that documents obtained are not provided to third parties, save for professional advisers, until final judgment is given in the Derivative Action and the Asset Recovery Action.
16. Members of a non-profit making company incorporated by guarantee may also commence derivative action to remedy wrongs done to the company which would not otherwise be corrected

*Lam Kim Chung v Soka Gakkai International of Hong Kong Ltd* HCMP 1002/2017

Soka Gakkai International of Hong Kong Ltd (香港國際創價學會有限公司) (“the Company”) was set up for exclusively charitable purposes, principally the promotion of the Buddhist faith. It is limited by guarantee and pursuant to the Company’s Memorandum of Association, its income and property cannot be distributed by way of dividend or capital to its members. The Applicant was at all material times registered as a member of the Company.

The Applicant issued an Originating Summons seeking leave to bring proceedings against various persons in connection with the affairs of the Company. On 25 May 2017, the Company took out a summons seeking the determination of the issue regarding the Applicant’s standing before the full hearing of the Originating Summons. In gist, the Company disputed the standing of the Applicant to bring proceedings on behalf of the Company, due to the fact that the Company is a charitable company incorporated by guarantee whose members have no right to any of its surplus assets upon its dissolution and the affairs of the Company is subject to supervision by the court at the instance of the Secretary for Justice.

There is no direct authority on whether a common law derivative action can properly be commenced by a member of a non-profit making company incorporated by guarantee. Harris J considered however that there is no reason why a member of a company incorporated by guarantee cannot commence a derivative action to remedy wrongs done to the company which would not otherwise be corrected. Further, Harris J held that the fact that the Secretary for Justice could intervene if he considers it appropriate does not however follow that a member does not have an interest in the administration of the company arising from his membership which is distinct from the general public’s interest in the proper administration of charities generally. In fact, he does and such interest is sufficient for the purpose of a common law derivative action.
17. **Court provides guidance on how to commence and carry on proceedings before letters of administration or probate can be obtained**

_Tsang (deceased) and Kloeden v Banca Ltd_ [2017] 5 HKLRD 562

Tsang, the sole shareholder and director of four companies (individually “the Company” and collectively “the Companies”), died intestate. The deceased’s husband, Mr. Kloeden, is yet to obtain the Letters of Administration in respect of his late wife’s estate. However, it is necessary for a new director of the Companies to be appointed promptly, since the Companies were all playing a role in an active business. Mr. Kloeden thus took out an application under section 570 of the Companies Ordinance (Cap 622) seeking orders for the convening of EGMs of each Company and authorizing the new director to operate each Company’s bank accounts and make payments in the normal course of the Company’s business. At issue was how to commence and conduct proceedings while letters of administration or probate were being sought.

Where after a person had died, it was necessary that proceedings be commenced before either letters of administration or probate was obtained, Order 15 rule 6A(3) of the Rules of the High Court (Cap 4A) should be followed. For an application of this sort, the originating summons should be headed with two applicants: the deceased and the person making the application on behalf of the deceased and any other person interested in the estate. An order was then necessary appointing Mr. Kloeden to represent Tsang’s estate in the proceedings and to seek a substantive order. However, where there is no positive opposition, it is permissible to deal with the procedural stage together with the substantive application and for an order to be made granting Mr. Kloeden leave to make the application on behalf of the deceased’s estate, and then for the court to grant in the same order the substantive relief which is sought.

Under section 570(2)(b) of the Companies Ordinance, the court may order a general meeting of the company to be called, held and conducted in any manner the court thinks fit, upon the application by a member of the company who would be entitled to vote at the meeting. Although Mr. Kloeden is yet to be a member of the Companies, Harris J was satisfied that section 570(2)(b) is satisfied, as it is probable that Mr. Kloeden will become a member of the Companies. Accordingly, the Court made the following orders: authorizing Mr. Kloeden to make the substantive applications and for an EGM to be convened for each of the Company; dispensing with notice of the EGMs and that Mr. Kloeden’s attendance at the EGM could constitute a quorum; and at the EGMs, a resolution be put to the Companies for the appointment of Mr. Kloeden or such other person(s) as he considered appropriate as an additional director of each of the Companies.
18. The fact that the shareholders may not have had any basis for an expectation that the company would take up a new line of business is not the same as acquiescing or agreeing to a restriction of the scope of business.

*Zhang Heng v Kingstone International Wealth Management Ltd and Others* CACV 56/2017

The plaintiff, Madam Zhang Heng (“Zhang”) came to know the 4th defendant, Madam Shum Shan Mui (“Shum”) in the course of her work, as both of them work in the financial field. They then developed a close personal relationship. In 2012, Zhang and Shum agreed to set up a joint venture business in Hong Kong, which resulted in the incorporation of the 1st defendant, Kingstone International Wealth Management Limited (“the Company”). The shares of the Company were held by Zhang (47.5%), Shum (47.5%) and VP Ltd (a corporate vehicle of one Mr. Pang) (5%). Shum is the sole director of the Company. In March 2013, the Company obtained an insurance broker licence which entitled it to sell insurance products to its clients.

Unknown to Zhang, in 2014, Shum incorporated Kingstone International Advisors Limited (“Kingstone Advisors”) in Hong Kong. The shares in Kingstone Advisors were held by Shum (60%) and one Poon Kwok Tung Alex (“Poon”) (40%). In August 2015, Kingstone Advisors obtained 3 licences (Licences) to carry on Type 1, 4 and 9 regulated activities. Poon joined the Company in around February 2015 as an associate director. The relationship between Zhang and Shum broke down in around July 2015.

Zhang sought leave to bring a derivative action in the name of the Company against Shum and Poon, contending that Shum and Poon wrongfully caused Kingstone Advisors to apply for and obtain the Licences and to carry on a new line of business in securities, in breach of the “no conflict rule” which applied to Shum and Poon as fiduciaries of the Company. At first instance, Anthony Chan J refused to grant leave. Zhang appealed.

At first instance, Anthony Chan J held that Zhang has not made out a serious issue to be tried because he found that the business conducted by Kingstone Advisors under the Licences was never part of the scope of business of the Company as agreed between Zhang and Shum. Hence, there was no breach of the “no conflict rule”.

The Court of Appeal held that the judge erroneously approached the case on the narrow basis whether the business undertaken by Kingstone Advisors fell within the original scope of business of the Company as agreed between Zhang and Shum. By doing so, the Judge in effect was treating the agreement on the original scope of business as an agreement to restrict the scope of business of Kingstone Wealth without any possibility of expansion. The fact that other directors or shareholders may not have had any basis for an expectation that
the company would take up a new line of business is not the same as acquiescing or agreeing to a restriction of the scope of business: *Pook Ka Man Jason v Cheung Wai Tao* (2016) 19 HKCFAR 144

In fact, the Court of Appeal noted that there is plenty of evidence pointing the other way. For example, Zhang had, on behalf of the Company, explored with a fund manager, the possibility of co-operation on setting up a private equity fund. This demonstrated that the Company could have gone into the business of financial products. The Court of Appeal concluded that there is plainly a serious issue to be tried that there was a "real sensible possibility of conflict" of Shum and Poon in causing Kingstone Advisors to apply for an obtain the Licences and carry on a business thereunder.

The Court of Appeal further held that the ability of the Company to bear the costs of the litigation is not directly relevant to whether or not it is in its interests to grant leave, because the court may grant leave to Zhang to bring a derivative action on behalf of the Company upon terms that Zhang is to bear costs in bringing such proceedings in the first instance, and if the proceedings prove successful she may then be granted an indemnity.
19. Where the principal relief sought is a buy-out, the petitioner must satisfy the court that there is sufficient risk to the economic value to the company to justify appointment of interim receiver – this case should be moved to corporate disputes

*Marrakesh Investments Ltd v Tangiers Holdings Ltd and Another* HCCW 352/2016

Jessop & Baird (Hong Kong) Limited ("the Company") is owned equally by the petitioner and the 1st respondent. They in turn are owned or controlled by Mr. Robert Ng and Mr. James Jessop respectively. The relationship between Mr. Jessop and Mr. Ng began to deteriorate since around April 2016. On 31 August 2016, the petitioner presented a petition seeking as its principal relief a buy-out order. Despite being presented as a winding-up petition, it did not seek a winding-up order. Consequently this was converted into Miscellaneous Proceedings at the end of September, but on 3 October 2016, the petitioner issued a further petition seeking a winding-up order. On 11 October 2016, the petitioner issued a summons seeking the appointment of an interim receiver over the property of the Company.

Harris J pointed out that the appointment of receivers over an ongoing business has considerable and generally adverse effect. First, it is expensive and depletes the assets of the company. Secondly, it is generally damaging to companies, whose business involves manufacturing and sale of items, as opposed to a more static business such as letting commercial or residential property. Given that a receivership is a serious infringement of rights, there must be ‘solid evidence’ showing risk of dissipation. The standard of proof of the real risk of dissipation is relatively high: *Wong Luen Hang and Tsui Kwok So v Chan Yuk Lung and others* (HCA 1265/2015, unreported, 11 March 2016).

Thirdly, his Lordship was of the view that in cases where clearly the principal relief sought is a buy-out, it will generally be desirable commercially that the business is operated by the person likely to take control of it if they are ordered to purchase the petitioner’s shares. If a petitioner, who seeks a buy-out order, wishes to appoint a receiver, he has to demonstrate that there is sufficient risk to the economic value of the company to justify such an intrusive order. The court will balance the evidence of the risk of dissipation of assets or general damage to economic value against the disadvantages of appointing receivers.

In the present case, Harris J was of the view that there is not sufficient risk to assets to justify appointing receivers. In particular, the Court found that the present hearing of the summons has been fixed at the 1st respondent's instigation, which is inconsistent with a genuine concern on the petitioner’s part that it is necessary to appoint a receiver. In view of these findings, Harris J dismissed the application to appoint the receiver and ordered the petitioner to pay the 1st respondent's costs forthwith.
Bankruptcy Cases

20. Court of Appeal directed that in the future, the court will process the dismissal of an appeal on paper where the trustee in bankruptcy of the appellant decides not to adopt the appeal

*Lo Sui Lin v Chan Hung Fook and Others* CACV 156/2017

The plaintiff appealed the Court of First Instance judgment dated 14 June 2017. The Notice of Appeal was served and the appeal was set down on 20 July 2017. However, in the meantime, a bankruptcy order was made against the plaintiff. The Official Receiver, acting as the provisional trustee in bankruptcy, decided not to adopt the appeal, due to the inability of the Plaintiff to provide indemnity on costs. Subsequently, the joint and several trustees in bankruptcy (“Trustees”) confirmed that they had no objection to have the appeal discontinued forthwith. The Court of Appeal therefore directed the appeal be listed for hearing to consider if it should be dismissed. At the hearing, the Trustees confirmed that they would not proceed with the appeal and had no objection to the dismissal of the appeal. The Court of Appeal therefore dismissed the appeal and ordered costs against the plaintiff.

Importantly, the Court of Appeal directed that in the future, in order to save costs and avoid unnecessary hearings, the court will process the dismissal of an appeal in similar situation on the papers unless any party involved requests an oral hearing after the Registrar for Civil Appeals gives a direction for intended dismissal to the parties.
21. Trustees failed to set aside transfer of assets between a couple as the Court found the transfer to be set-off of genuine loans and the intention to create legal relations was evident

_Osman Mohammed Arab and Another v Ng Shui Ching, Irene and Another_ HCA 311/2014

A bankruptcy petition was presented against Mr. Ng Shiu Kwan (“Mr. Ng”) on 9 May 2013, and a bankruptcy order was made on 10 July 2013. His trustees-in-bankruptcy (“the Trustees”) applied for an order to set aside the transfer of 55% shares of a company called Gain Whole from Mr. Ng to the 1st defendant, Mrs. Ng. The transfer took place just 7 months before the petition for bankruptcy. The Trustees alleged that the transfer of the shares was at an undervalue, constituted an unfair preference of creditors and was with intent to defraud creditors. Mr. and Mrs. Ng however claimed that during the period from June 2004 to October 2007, Mrs. Ng advanced numerous personal loans to Mr. Ng for his general investment and business ventures. The transfer of the shares was to set off the loans by Mrs. Ng.

On the evidence, the Court found that Mr. Ng was indeed in need of money for his own business, mortgage repayments, investment and general use at the material time. Further, the Court found that Mr. Ng and Mrs. Ng did maintain separate finance and the loans advanced to Mr. Ng were real loans which Mr. Ng had to repay.

Mr. Ng’s financial position improved in 2009 after selling 2 properties. However, he decided to keep the cash for his business but transfer the shares in Gain Whole to Mrs. Ng to set off his debts. A Declaration of Trust was executed on 1 November 2009, the effect of which was that the beneficial interest in the shares passed to Mrs. Ng on 1 November 2009. However, no transfer was implemented. Mrs. Ng produced 2 handwritten notes to Mr. Ng in 2010 pressing him to effect transfer of the shares. Read objectively, her tone was that of a creditor. An Instrument of Transfer and Bought and Sole Notes was eventually executed on 8 October 2012, whereby transferring the shares at the face value of HK$1.00 per share to Mrs. Ng.

The Court rejected the Trustees’ suggestion that these arrangements are domestic arrangement, but found that the intention to create legal relations between the couple was plainly evident.

In relation to the allegation that the transfer constitutes transfer at an undervalue, the Court found that the value of the shares is substantially the same as the total amount of the loans advanced by Mrs. Ng to Mr. Ng. Accordingly, there was no transfer at an undervalue.
Further, the Court considered that there was no unfair preference as Mrs. Ng was the only creditor of Mr. Ng at the time the Declaration of Trust was executed and Mr. Ng was solvent at the time of the Declaration of Trust.

Lastly, the Court found that there was no intent to defraud creditors to trigger section 60 of the Conveyancing and Property Ordinance (Cap 219), since there were plainly no creditors except Mrs. Ng when the Declaration of Trust was entered into.

In conclusion, the Court held that the transfer of the shares was supported by consideration and did not violate any of sections 49, 50, 51 of the Bankruptcy Ordinance (Cap 6) or section 60 of the Conveyancing and Property Ordinance (Cap 219).