Dear Clients and Friends,

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

- **10 Corporate Insolvency Cases**
- **3 Cross-border Insolvency Cases**
- **5 Restructuring Cases**
- **4 Corporate Disputes Cases**
- **4 Bankruptcy Cases**

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

Best regards,

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Corporate Insolvency Cases

1. Flexible application of the *pari passu* principle in distribution of foreign assets which are not freely transferable

*Guangdong International Trust & Investment Corp Hong Kong (Holdings) Ltd* [2018] 5 HKLRD 396

The Guangdong International Trust & Investment Corporation Hong Kong (Holdings) Limited (the “Company”), a company incorporated in Hong Kong, went into creditor’s voluntary liquidation. The remaining assets of the Company to be distributed to creditors were cash in a Mainland bank account of about RMB38.9 million (equivalent to HK$43.8 million) (“Mainland Account Balance”); and cash in Hong Kong of about HK$18 million (“HK Assets”).

The Liquidators faced regulatory issues in distributing all the assets of the Company proportionally among the creditors, as the Mainland Account Balance can only be transferred to other Mainland bank accounts in Renminbi under Mainland laws and regulations. Therefore, creditors with Hong Kong bank accounts only, or creditors who were unwilling to receive dividends in Renminbi, would be unable to join the pool for distribution of the Mainland Account Balance. The Liquidators thus proposed to the Court to distribute the assets of the Company in the following manner (the “Proposed Distribution Mechanism”):

1. to distribute the Mainland Account Balance to creditors who were willing to accept Renminbi dividends and had Mainland bank accounts *pari passu*; and
2. to distribute the HK Assets to all creditors excluding those who had received the Renminbi dividends *pari passu*.

The principle of *pari passu* distribution of the company’s assets is central to the English insolvency regime, which Harris J held is not an inflexible principle of insolvency law. In appropriate cases, the principle of *pari passu* can be overridden: *Re Agrokor* [2017] EWHC 2791 (Ch).

Further, his Lordship considered that liquidation is a merely administrative process of collective execution against the assets of the company for the benefit of all creditors and does not create or diminish rights or obligations for the company or the creditors. Therefore, a liquidator can only handle the company’s assets as he finds them and his powers are qualified by the limitations already attached to the assets of the Company.

Harris J also held that the *pari passu* principle is concerned with substantive *pro rata* division of assets among creditors, and is unconcerned with the precise procedural mechanisms to achieve the substantive result.
In the circumstances, the Court considered that the instant case was appropriate for a departure from the *pari passu* principle, as the Liquidators had no other viable methods to distribute the Mainland Account Balance. Furthermore, the Proposed Distribution Mechanism was conducive to the closure of the lengthy liquidation process and was in the overall best interests of the creditors.
2. Security for costs application dismissed against a company in liquidation because it would stifle a serious and genuine claim

Absolute Living Developments Ltd (in liquidation) v DS7 Ltd [2018] EWHC 1432 (Ch)

Absolute Living Developments Ltd (in liquidation) (the “Claimant”) issued proceedings against the Defendants, alleging that the Defendants had paid money away from the Claimant. The Defendants applied for an order that the Claimant provide security of £500,000 on the basis that the Claimant, being insolvent, would be unable to pay the Defendants’ costs if ordered to do so.

A successful security for costs application requires satisfaction of a two-stage test under the English Civil Procedure Rules, namely (1) there must be reason to believe that the claimant would be unable to pay the defendant’s costs; and (2) it is, in all the circumstances, just that an order for security for costs be made.

The Claimant conceded that the first requirement was met. However, it argued that it would not be just for an order for security for costs to be made, because to do so would stifle a serious and genuine claim.

The English court held that in determining whether an application for security for costs would stifle a serious or genuine claim, the court has to carry out a balancing exercise between the interests of the claimant and the defendant. As the Claimant was in liquidation, the interest of its creditors had to be considered. On the facts, the court was of the view that the balance clearly favoured the liquidator continuing to bring the claims on behalf of the Claimant for the benefit of its creditors. In reaching this decision, the court took into account the following facts:

1. There is no prospect of the Claimant being able to pay for itself any sum by way of security. The liquidator, her solicitor, counsel and other professional parties engaged were all acting on a contingent basis;

2. The liquidator was not prepared to fund any security and it would be entirely unusual and contrary to the public interest and the insolvency regime to require a liquidator to provide security, as it is well established that a liquidator will not be obliged to pay costs by way of a third party costs order unless there is a degree of impropriety or misconduct in bringing of the proceedings;

3. The liquidator had given credible explanation for not approaching the Claimant’s creditors for funding, because they were not wealthy and would be unlikely to be in a position to provide the required funding.
In particular, the Judge observed that it is not for the court to look behind the funding decisions of the liquidator regarding the progression of the claim. They were matters for the liquidator alone. The application for security for costs was thus refused.

It is noteworthy that this decision does not sit well with the Hong Kong case *Wing Hong Construction Ltd (in compulsory liquidation) v Hui Chi Yung and Other* HCA 1423/2015, in which the court considered that it should not infer too readily from the impecuniosity of the claimant that proceedings will be stifled if security for costs is granted. It is necessary for a claimant to do more than simply assert that he is not in a position to provide security. Generally, it will be necessary for him to provide the court with reasonably detailed information as to his resources, and to show not only that he is unable to meet any order for security from his own resources, but also that he is unable to raise the funds from other resources, whether through commercial borrowing, or from other backers.
3. Revival of dissolved company to distribute overlooked assets

Stephen Liu Yiu Keung v Registrar of Companies and another [2018] HKCFI 1220

Hanluck Investments Limited (the “Company”) was ordered to be wound up in March 2000. The liquidators experienced great difficulties in investigating into the affairs of the Company and only a small amount of money was realized. No distribution was made to the Company’s creditors and the Company was dissolved under section 227 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap 32) (“CWUMPO”) in May 2004.

Under section 290 of CWUMPO, the court may, upon an application at any time within 2 years of the date of the dissolution, make an order declaring the dissolution to have been void. In December 2017, one of the former liquidators of the Company applied for, among other things, an order that the dissolution of the Company be declared void and to extend the time for making the application.

According to the applicant, it was brought to his attention in 2016 that the Company had an interest over a piece of land (the “Land”) in the PRC with an estimated value of RMB120,000,000. A potential buyer had indicated interest in purchasing the Company’s interests in the Land. At the time, a total amount of HK$77,000,000 was still owed to the Company’s creditors.

The applicant considered and the Court accepted that despite the uncertainties over the Company’s rights/interests over the Land, the potential realisation of the Land could repay a substantial part of the Company’s outstanding debts or benefit the creditors by providing financing for investigation into the Company’s affairs for recovery of other assets. The fact that the potential buyer indicated interest in purchasing the Land showed that the Land had some marketable value.

In the decision, DHCJ Marlene Ng commented that while the ordinary purpose of an application under section 290 of CWUMPO is “either to enable the liquidator to distribute an overlooked asset or a creditor to make a claim which he has not previously made”, such provision should not be limited to a situation where a liquidator is quite unaware of an asset belonging to a company, and is apt to cover analogous situations where a liquidator is aware of an asset but unaware that that asset has any realisable value. The emergence of potentially recoverable assets that will enable creditors to be repaid may be sufficient reason to extend the 2-year period to make an application and may provide ground for the order sought.

The Judge also noted that the consequence of declaring the dissolution of a company void and reviving the company is that the office of the former liquidators revive and they remain as liquidators of the company. The judge further commented that the court normally expects the
liquidator applicant to be the one who seeks re-appointment upon revival of the company, and if not, the person seeking appointment as liquidator and/or the person who appeared to be interested should join as applicants, so all relevant parties are bound by the order to be made – in other words, any order granted would be effectively carried into effect.
4. **Receiver not entitled to an indemnity of expenses where he took part in proceedings for personal interest against the estate**

*Ho Chor Ming and Others v Hong Kong Chiu Chow Po Hing* [2018] 3 HKLRD 859

Buddhism Association Limited (the “Association”) sought an account of relevant charges and expenditure from its Receiver to challenge the remuneration they received. The Receiver’s opposition to the application was held to be unfounded in principle and authority. At issue was whether, *inter alia*, the Receiver’s costs should be paid out of the Association’s assets.

The court held that although in general a receiver is entitled to an indemnity for expenses properly incurred out of the assets of the estate, including those of defending a legal proceeding as an officer of the court for the benefit of the estate, a receiver who defended a purely personal interest against the estate, as in the case of a trustee, would not be indemnified as to costs: *Seagar v Seagar* [1950] NZLR 376, *Capewell v Revenue and Customs Commissioners* [2007] 1 WLR 386. It was noted that the Receiver’s opposition to the application was against the Association’s interests and did not benefit it, and was intended only to protect the Receiver and his solicitors’ personal interests. The opposition was undertaken not in the performance of, but in resistance to, his duties to account: *Hirani v Rendle* [2003] EWHC 399 (Ch), *Re Cooper* [2006] NI 103.

In all the circumstances, the court considered that costs should follow the event. However, due to the lateness of the Association’s application and that none of the authorities relied on in the decision concerning a receiver’s accounts was cited by counsel or drawn to the Receiver’s attention earlier by the Association, the court ordered that the Receiver do pay only half of the Association’s costs of the application including the costs of the argument on costs (without indemnity from the Association’s assets).
5. BVI Court held that provisional liquidation is available to facilitate a restructuring

*Re Constellation Overseas Limited and others* (BVIHC (Com) 2018/0206 – 2012)

Constellation Overseas Ltd and its BVI subsidiaries (the “Companies”) applied for the appointment of “soft touch” provisional liquidators over each of the applicants before the BVI Court. The Companies were members of a group of companies (the “Group”) headquartered in Brazil. The Group had sought and obtained the protection of a court supervised judicial reorganisation from the Brazilian Courts, which is supported by Chapter 15 proceedings in the United States.

Adderley J considered the jurisdiction of the court exercised under statutory provisions in a number of jurisdictions, including England, the Cayman Islands, Bermuda and Hong Kong, and the principles that have emerged. The Judge found that there is persuasive authority in England for using the Court’s statutory powers flexibly to support restructuring, including a foreign restructuring process. The Judge noted that such practice of the English courts of using provisional liquidations in aid of corporate rescues have been used in the Cayman Islands and Bermuda, citing cases such as *Re Fruit of the Loom Ltd.* [2000] CILR, Note 7b, unreported; *Discover Reinsurance Company v PEG Reinsurance Company Limited* [2006] Bda L.R. 88, and *Re Seadrill Limited & others* [2018] SC (Bda) 30 Com (5 April 2018).

The Judge found that the BVI court has a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect the assets of the Company, and that the jurisdiction includes making such appointments to aid the company’s reorganization including cooperating with cross border reorganizational efforts aimed at achieving that overriding objective. On the facts, the Judge was satisfied that the Companies were unable to pay the debts as they fall due; there was a real prospect of a restructuring being achieved, resulting in a better outcome for creditors than would be the case on a winding up; and the application was supported by a number of the Group’s major creditors. In the circumstances, the BVI Court approved the appointment of the provisional liquidators to each of the applicants.

It is noteworthy in the judgment that Adderley J distinguished the Hong Kong case of *Re Legend International Resorts Limited* [2006] 2 HKLRD 192, where Rogers VP opined that the appointment of provisional liquidators must be for the purposes of winding up “not for the purpose of avoiding the winding-up”, and held that the provisions in the BVI Insolvency Act did not intend that the application for the appointment of a liquidator was necessarily for the purpose of winding up the company. The Judge also noted that the principle established by *Re Legend* has been ameliorated by the recent decision in *Re China Solar Energy Holdings Limited* [2018] HKCFI 555 which held that JPLs may pursue a corporate restructuring provided they have originally been appointed on conventional grounds such as a need to preserve company assets against creditor actions.
6. **Liquidators’ application under the Trustee Ordinance (Cap. 29) to distribute assets held by the company**

*Re the Joint and Several Liquidators of China Point Stock Brokers Ltd* HCMP 297/2018

China Point Stock Brokers Limited (the “**Company**”) is a brokerage firm that went into members' voluntary winding up. The liquidators of the Company considered that the Company held various securities and cash as trustee for its clients but the liquidators were unable to distribute the same and bring the liquidation to an end, either because they were unable to contact the beneficiary, or for some reason the beneficiaries were seemingly uninterested in recovering the assets.

The liquidators thus applied pursuant to sections 56 and 62 of the Trustee Ordinance (Cap 29) to be empowered to sell the securities and then to pay into court the sale proceeds along with the cash that they also held. Citing *Re Drake & Morgan Ltd* (unrep., HMCP 1490/2009, 27 August 2009), Harris J agreed that this is the proper approach and helpfully included to the decision an Appendix of the terms of the order for the future reference of practitioners as follows:

**Appendix**

1. The Applicants are at liberty to sell or otherwise dispose of and/or deal with the HSBC Shares identified in section 1 of the Schedule annexed hereto and HSBC Dividends identified in section 2 of the Schedule annexed hereto, pursuant to Order 85 rule 2 of the Rules of the High Court (Cap 4A);

2. The Applicants do have leave under section 56 of the Trustee Ordinance (Cap 29) to sell or otherwise dispose of and/or deal with the Unclaimed Cash, Unclaimed Securities, Abandoned Assets (consist of Abandoned Cash, Pre-Liquidation Abandoned Stocks, Post-Liquidation Abandoned Stocks) SCC Securities and Delisted Paper Securities as identified in section 3 of the Schedule annexed hereto (“**Remaining Trust Assets**”) as they see fit and the Applicants be discharged from any obligations or claims in respect of the Remaining Trust Assets other than to deal with the proceeds (if any) in accordance with paragraph 4 below;

3. The Applicants be allowed to pool the Unclaimed Cash, the Abandoned Cash, along with the derived income from and the proceeds from the sale of the Unclaimed Securities, Pre-Liquidation Abandoned Stocks, Post-Liquidation Abandoned Stocks, SCC Securities and Delisted Paper Securities (as applicable) and apply to the pooled funds to settle the Applicants’ proper fees, costs and expenses incurred and assessed in (i) administering, collecting and dealing with the Remaining Trust Assets and (ii) making this application and any costs incurred in giving effect to this Order before paying the balance remaining...
into Court under section 62 of the Trustee Ordinance (Cap 29) and Order 92 of the Rules of the High Court (Cap 4A);

4. In the event that any of the Unclaimed Securities, Pre-Liquidation Abandoned Stocks, Post-Liquidation Abandoned Stocks, SCC Securities and Delisted Paper Securities have not been sold after three months from the date of this Order, and are listed securities, the Liquidators be authorized to withdraw the relevant share certificates from the relevant stock exchange and/or custodian (as applicable) and deliver the same to the Registrar of the High Court;

5. Notification of this Order, the rights of the Clients of the Company to apply for payment out or withdrawal of their respective Remaining Trust Assets under Order 92 of the Rules of the High Court (Cap 4A) and any unclaimed cash and securities be dealt with in accordance with Rule 23 of the High Court Suitors Fund Rules (Cap 4B) be given by advertisements in a Chinese-language and an English-language daily newspapers in Hong Kong, within 14 days from the date of this Order;

6. The Applicants do have leave to dispense with the requirements under Order 92, rule 4 of the Rules of the High Court (Cap 4A) upon compliance with paragraph 5 above; and

7. There be liberty to apply generally.
7. **No winding-up petition should be issued for recovery of legal fees before delivery of a bill and, if required by the client, taxation**

*Re Luen Ford Industrial Co Ltd [2018] HKCFI 1772*

The Petitioner, a firm of solicitors, issued a winding up petition against the Company based on an unsatisfied statutory demand for non-payment of a total sum of HK$10,000,000. The alleged debt arose from three dishonoured cheques, which were delivered to the Petitioner to settle legal fees and disbursements. One of the shareholders of the Company, Woo, was a client of the Petitioner. The fees related to work concerning winding-up proceedings/corporate restructuring of the debts of the companies through which Woo operated. Most of the fees consisted of counsel’s charges. Evidence revealed that the Petitioner did not provide any fee estimate to Woo, or send counsel’s fee notes to Woo or ask Woo to agree counsel’s brief fees.

The statutory regime under the Legal Practitioners Ordinance (Cap 159) (the “Ordinance”) prohibits a solicitor from suing for his fees and disbursements until his client had been given the opportunity to have them taxed. The Petitioner argued that the statutory regime did not apply because it was proceeding against the drawer of a cheque, not suing Woo for unpaid fees. The Petitioner also contended that, as permitted by section 64(2) of the Ordinance, it took the cheques as security for its fees and was entitled to enforce it.

Harris J observed that there was compelling evidence of extreme overcharging and a manifest failure by the Petitioner to properly advise Woo and ensure that suitable counsel was instructed and fair fees negotiated. Further, his Lordship considered that it was clearly arguable that the cheques were not security for the purpose of section 64(2) of the Ordinance so that there was a *bona fide* defence to any such claim. A bill of exchange given to a solicitor to settle a liability for costs can only be sued on if a solicitor has complied with the requirements of the Ordinance in respect of suing for recovery of fees and disbursements. Section 66(1) of the Ordinance provides that no action shall be brought to recover any costs due to a solicitor until one month after the bill has been served. Harris J found that no bill had been served to which the cheques could relate. Therefore, to allow enforcement by issuing a petition before delivery of a bill and, if required by the client, taxation, would be inconsistent with section 66(1) of the Ordinance.

Accordingly, the winding-up petition was dismissed. Harris J found that the petition was an abuse of process and that the Petitioner has conducted itself in a manifestly unprofessional manner. The Petitioner was thus ordered to pay the Company’s costs on an indemnity basis.
8. Court has no jurisdiction, even by consent, to make an order for the buy-out of shares in an unfair prejudice petition, until it is satisfied that there has been unfairly prejudicial conduct

*Lai Chi Keung v Wang Zhihua and Another* [2018] HKCFI 867

The three petitions in three conjoined cases were issued pursuant to sections 168A and 177(1)(f) of the previous Companies Ordinance (Cap 32) and first came on for trial in July 2016. On the first day of trial, by consent, an order was made as follows:

“Subject to the terms herein below and on a without admission of liability basis, the 1st Respondent shall purchase the Petitioner’s entire interest in the 2nd Respondent.”

The order then continued to provide that all the other issues, including, *inter alia*, the purchase price, the number of shares involved, the percentages of shareholding, and other ancillary matters, be adjourned for further argument.

At the directions hearing, G Lam J held that the court, in fact, does not have jurisdiction, even by consent, to make an order for the buy-out of shares in such a petition until it is satisfied that there has been unfairly prejudicial conduct: *Hollington on Shareholders’ Rights*, 8th edition, at §§8-01 to 8-08; *Re Bird Precision Bellows Limited* [1986] Ch 658.

It follows, therefore, that even where the parties have agreed that the respondent is to buy out the petitioner, it is usually necessary for the court to come to a determination on the merits of the petition, to the effect that the petition is well-founded, before the court can make an order for buy-out under section 168A. Further, and in any event, a simple, in-principle agreement for a buy-out leaves a myriad of matters to be determined in order to set the parameters and basis of the valuation, so that very often a trial of the allegations in the petition may still be necessary: *Re Astrotech Company Limited* (unrep, HCCW 282/2010).

In the present case, the parties failed to agree upon the terms of the buy-out. It is thus accepted by all that a trial will in any event be necessary to ascertain whether the petitions are well-founded and which of the allegations of misconduct are established, which clearly will have a fundamental impact on the value of the shares to be transferred. However, G Lam J considered it not necessary to have the consent order set aside in the circumstances. Instead, the better course is to have the matter set down for trial as expeditiously as possible, so that the issues that require determination can be resolved sooner rather than later.
9. What happens when a creditor petitions to wind up a company already subject to an unfair prejudice petition?

*Li Fu Hua (also known as Denise Li) v Chen Ching Chih (陳清治) and another* [2018] HKCFI 2786

On 31 August 2018, the Petitioner presented an unfair prejudice petition (the “Petition”) against the 1st respondent and Prosperous Global China Holding Limited (the “Company”) was joined as a nominal party. The Petitioner alleged that she was wrongfully excluded from the management of the Company and the 1st Respondent had repeatedly breached the articles of the Company. Shortly thereafter, on 28 September 2018, a creditor of the Company, Yi Chun Navigation Inc., which was controlled by the 1st Respondent, presented a winding-up petition against the Company (the “Creditor’s Winding-Up Petition”).

The Petition was listed for hearing on 3 October 2018. In view of the pending Creditor’s Winding-Up Petition which the court was told would be uncontested, the court ordered a temporary stay of the Petition. On 10 December 2018, a winding up order was made against the Company on the Creditor’s Winding-Up Petition. The issue was whether the Petition should be stayed, as submitted by the Petitioner, or be struck out or dismissed, as contended by the 1st Respondent. Deputy High Court Judge William Wong SC (the “Judge”) decided that the Petition should be struck out or dismissed.

The Judge considered that there is no reason for the Petition to hang over the 1st Respondent when in reality there is no prospect that the Petition would be heard. The relief as prayed by the Petitioner could never be granted in view of the winding up of the Company. Secondly, with the winding up of the Company, the liquidators should be the one to investigate any wrongdoings against the Company. Therefore, there is no utility in maintaining the Petition.

The Petitioner then applied to withdraw the Petition, which was not opposed by the 1st Respondent, and thus the Judge made an order that the Petition be withdrawn by consent. As to costs, the general rule is that the party who applies to withdraw an action or any proceedings would bear the costs, unless the applicant shows a good reason for departing from that position. To displace the presumption, the applicant will usually need to show a change of circumstances to which he has not himself contributed and is brought by some form of unreasonable conduct on the other party. The Judge decided that the winding up order made on the Creditor’s Winding-Up Petition was not a change of circumstances caused by some form of unreasonable conduct on the part of the 1st Respondent. The Petitioner was thus ordered to pay the costs of the 1st Respondent.
10. *Ad valorem* fees payable on amounts paid over into compulsory liquidation by CVL liquidators

*STX Pan Ocean (Hong Kong) Co. Limited (In Liquidation)* [2018] 4 HKLRD 826

STX Pan Ocean (Hong Kong) Company Limited (the “*Company*”) went into creditors’ voluntary liquidation on 26 August 2013 and liquidators (the “*CVL Liquidators*”) were appointed. A creditor then presented a petition on 14 November 2013 for the compulsory winding up of the Company. More than HK$160 mil had been realised up until the court made a winding up order on 26 September 2014 whereupon the Official Receiver became provisional liquidator and subsequently, the joint and several liquidators (the “*Liquidators*”) were appointed on 24 April 2015. After the winding-up order was made, the CVL Liquidators paid some HK$144 mil out of the realisations into the Companies Liquidation Account. The Liquidators applied for a declaration that *ad valorem* fees amounting to some HK$1.9 mil were not chargeable on the balance of the funds derived during the creditors’ voluntary liquidation up to the date of the winding-up order.

The Companies (Fees and Percentages) Order (Cap 32C) (the “*CFPO*”) provides that *ad valorem* fees are payable to the Official Receiver on compulsory liquidation of a company. The amount of such fees, as provided in section 7(2) and Item I of Table B of Schedule 3 to the CFPO, depends, by reference to a sliding scale, on the “aggregate amount of assets realised and brought to credit by a liquidator”.

G Lam J agreed with the Official Receiver that on the correct interpretation of the statutory scheme, *ad valorem* fees are not charged on realisations by voluntary liquidators during voluntary winding-up. Rather, *ad valorem* fees are only charged on the amounts realised and brought to credit within the compulsory winding up. However, citing the English decision in *Re a Debtor* (No 29 of 1986) [1997] BPIR 183, G Lam J considered that the word “realised” simply means “got in or reduced into cash” and “the amount realised by the trustee” meant “in effect the total of the amounts received by him, in whatever manner, in respect of assets forming part of the bankrupt’s estate.”

The Company’s money was realised and brought to credit when the money was remitted to the Companies Liquidation Account, in the same way as the company’s bank balances or money held by a former officer for the company are “realised” when they are paid over to the liquidator after winding-up. *Ad valorem* fees are not charged on the realisations by the CVL Liquidators as such but on the amount paid over by the CVL Liquidators into the compulsory liquidation, which G Lam J considered to constitute assets realised and brought to credit from the point of view of the compulsory liquidation. G Lam J further added that the amount of fees is irrelevant to the amount of work done by the Official Receiver as a liquidator. The purpose of *ad valorem* fees is not to remunerate the Official Receiver for work done as a
liquidator but is in the nature of a levy to support the services provided by the Official Receiver’s Office generally.
11. Hong Kong court refuses to assist Chapter 11 Trustee on the ground of public policy

*Re China Fishery Group Ltd [2019] HKCFI 174*

An application was made by the Chapter 11 Trustee of CGP Peru Investments Pte Limited (Singapore) (the “Applicant”), a Singaporean subsidiary of China Fishery Group Limited (“CFG”), to the Hong Kong Court for leave to use an earlier Hong Kong Court order and decision in a related proceeding given in chambers (the “Hong Kong Court Decision”) in the New York Chapter 11 proceedings. The Hong Kong Court Decision discharged the appointments of provisional liquidators appointed over CFG (incorporated in the Cayman Islands) and over China Fisheries International Limited (incorporated in Samoa) (“CFI”) (collectively the “Companies”)

In November 2015, HSBC presented winding-up petitions in Hong Kong and Cayman Islands against the Companies. Provisional liquidators were appointed. Subsequently, under the Hong Kong Court Decision, the Companies successfully set aside the appointments. HSBC then appealed. The appeal and the pending petitions were withdrawn upon a deed of undertaking given by the Companies for the appointment of a chief restructuring officer and a proposed sale. Shortly after the petitions were withdrawn, the Companies filed for Chapter 11 in New York, notwithstanding that the Companies had no operation in or connection with the United States.

Harris J noted that the courts of common law jurisdictions do not recognize and assist all foreign proceedings and holders of offices. In determining whether or not a foreign office holder should be recognized and assisted, the court will consider the following two matters:

1. Whether the office holder had been appointed in collective insolvency proceedings;
2. Whether the foreign jurisdiction in which the office holder has been appointed and the company have a relevant connection.

If the answer to these two questions is in the affirmative, one would normally expect the foreign proceedings and the office holder to be recognized.

While Harris J accepted that the Chapter 11 proceedings are collective insolvency proceedings, his Lordship found that there is no relevant connection between the Applicant and the United States. Assistance was also refused on the grounds of public policy as Chapter 11 proceedings had been commenced for the purpose of preventing the enforcement of the undertakings made by the Companies. This was held to be objectionable and an affront to the Hong Kong Court. Public policy considerations weigh heavily in favor of
declining to provide any form of assistance to a process that arises in this way, including allowing the Applicant to make use of the Hong Kong Court Decision.
12. Decision in Hong Kong highlights the importance of advance cross-border planning

*Re CW Advanced Technologies Ltd* [2018] 3 HKLRD 552

CW Advanced Technologies Limited (the “Company”) is a Hong Kong incorporated company and part of a corporate group (the “Group”) that is headquartered and has its principal place of business in Singapore. In June 2018, Bank of China (Hong Kong) Limited (“BOC”), the Company’s largest creditor, served a statutory demand on the Company, demanding immediate repayment of substantial sums. Four companies in the Group (including the holding company and the Company) applied to the Singapore Court for a six-month moratorium under section 211B of the Singapore Companies Act to facilitate a restructuring under Singapore’s new restructuring regime. The Company originally presented its own winding-up petition and applied for the appointment of provisional liquidators in Hong Kong in order to assist the implementation of the Group’s restructuring efforts in Singapore. The Company subsequently withdrew its application. Instead, an application to appoint provisional liquidators was made by BOC.

Allowing BOC’s application, the court found that the threshold requirement for appointing provisional liquidators was satisfied because the Company admitted that it was insolvent and the debt owed to BOC was undisputed. The discretionary requirement that it would be right that a provisional liquidator be appointed was also satisfied because BOC had produced evidence showing the need for independent investigation into the Company’s affairs and the need to preserve assets.

Harris J observed that BOC’s application for provisional liquidation calls for a better understanding of the practice of cross-border restructuring and the importance of advance cross-border planning. In *obiter*, his Lordship indicated that where a moratorium in Singapore was involved in a cross-border context in the future, practitioners should consider whether it was eligible for recognition in Hong Kong, and if so, whether the court might grant assistance by way of appointing provisional liquidators. It was unclear if the moratorium in Singapore was a collective insolvency proceeding for common law recognition purposes; and if so, whether the court could grant assistance by way of appointing provisional liquidators. Further, his Lordship also indicated that careful cross-border planning was needed before insolvency proceedings were commenced, noting that BOC, despite being the largest creditor of the Group, was not consulted before the four Group entities applied for the moratorium in Singapore.

Harris J offered comments that the Company’s restructuring may conceivably be achieved by extending the Company’s PLs powers to do a restructuring, and if schemes of arrangements in Hong Kong are proposed, the schemes would presumable be recognized in Singapore under Singapore’s implementation of the UNCITRAL Model Law on Cross-Border Insolvency.
Further, if necessary, parallel schemes of arrangement may be promoted in the Cayman Islands to mirror the Hong Kong scheme. Harris J also commented that this case highlighted the urgent need to enact a statutory cross-border insolvency regime.
13. English High Court considered the factors relevant for determining a company's COMI for recognizing foreign main proceedings

*Re Videology Ltd* [2018] EWHC 2186 (Ch)

Videology Ltd (the “Company”) is incorporated and has its registered office in England and Wales. It is a wholly-owned subsidiary of Videology Inc. (“Inc.”), a corporation incorporated in Delaware, United States. The Company forms part of a larger corporate group (the “Group”) of which Inc. is the parent company. The Group provides video advertising software which connects television and video viewing to media behavior information. In 2018, falling in financial difficulties, Inc. and certain of its subsidiaries, including the Company, filed voluntary petitions under Chapter 11 in the United States Bankruptcy Court which resulted in immediate protection from individual creditor action under US law. To obtain similar protection in the UK, applications were taken out for recognition of the Chapter 11 proceedings in relation to both Inc. and the Company as foreign main proceedings in the UK.

Article 17(2) of the UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”), which has been incorporated into English law in the Cross-Border Insolvency Regulations 2006 (“CBIR”), provides that a foreign proceeding shall be recognized (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests (“COMI”); or (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of sub-paragraph (e) of article 2 in the foreign State. Article 16(3) of the Model Law further provides that, in the absence of proof to the contrary, the place of the debtor’s registered office is presumed to be its COMI. “Establishment” is defined in Article 2(e) as “any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services.”

In respect of Inc. the judge was satisfied that the COMI of Inc. was in the US, and that the Chapter 11 proceedings in the Delaware Court were foreign main proceedings. An order was made recognizing the Chapter 11 proceedings in relation to Inc. as foreign main proceedings in the UK.

As to the Company, however, the judge was not satisfied that the location of the Company’s COMI was in the US. The Company’s registered office is located in London. This gives rise to the presumption that the Company’s COMI is in England. Citing *Re Eurofood IFSC Ltd* (Case C-341/04) [2006] CH 508, the judge observed that the COMI of companies within a group must be separately assessed. Factors relied upon to rebut the presumption as to the COMI being in the place of the registered office had to be both objective and ascertainable by third parties. The mere fact that a parent company in another Member State controlled the economic choices of a subsidiary was not enough to rebut the presumption. On the facts, the judge found that in addition to being the place of its registered office, the UK is where the Company’s trading premises and staff are located, where its customer and creditor
relationships are established, where it administers its relations with its trade creditors on a
day-to-day basis using those premises and local staff, and where its main assets are located.
All of those factors are visible and immediately ascertainable by third parties, in particular by
the customers and the trade creditors of the Company. The UK is also where representations
were made to the Company’s main finance creditor that its COMI was situated. The judge
considered that though the facts that strategic management decisions are taken for the
Company and some high-level issues have been dealt with on behalf of the Company by the
senior management of Inc. in the US is relevant, those factors did not carry sufficient weight
to displace the other factors. Accordingly, the judge concluded that the COMI of the
Company is in the UK and not in the US. However, the judge considered that the Company’s
connections with the US were sufficient to justify recognition of those proceedings as foreign
non-main proceedings.

Recognition of the Company’s Chapter 11 proceedings as foreign non-main proceedings
does not bring about the same automatic stay on individual actions against the debtor as
would be the case if the proceedings had been recognized as foreign main proceedings.
The judge did, however, grant the Company discretionary relief under the CBIR equivalent to
the moratorium against actions by individual creditors and against the commencement of
collective insolvency proceedings in the UK without court consent, and to allow the sale of its
assets and the distribution of the proceeds to take place in the US.
Restructuring Cases

14. Singapore High Court granted third party releases in schemes of arrangement

*Re Empire Capital Resources Pte Ltd* [2018] SGHC 36

Empire Capital Resources Pte Ltd (“ECR”) was a guarantor of two sets of notes issued by Berau Capital Resources Pte Ltd (“BCR”) (“the 2015 Notes”) and by PT Berau Coal Energy Tbk (“BCE”) (“the 2017 Notes”). All three companies are within a group of companies known as the “Berau Group” which was in financial difficulties.

ECR applied for leave to convene a scheme meeting to consider a proposed scheme of arrangement to restructure the debt owing under the 2015 Notes and the 2017 Notes where the liabilities of ECR, BCR and BCE would be discharged. What was unusual here is that the applicant was the guarantor and not issuer of the notes. Some of the noteholders objected to the application. It was argued that what was proposed was not in fact a compromise between ECR and its creditors. Instead, the proposed scheme improperly released third parties, i.e. BCR and BCE.

Citing *Daewoo Singapore Pte Ltd v CEL Tractors* [2001] 2 SLR (R), in which the Singapore Court of Appeal considered that third party releases were permissible in schemes of arrangement, the learned Judge held that the general approach in Singapore is for the creditors to weigh what is in their interests, and conversely it is for the company to propose an attractive enough proposition for creditors to agree to the proposed releases. Hence, a third party release is not in itself something that is to be guarded against and restricted. What matters is that there must be some connection between the applicant company’s debt and what is sought to be released. Once it is established that there is a sufficient connection between the applicant company’s debt (i.e., ECR’s guarantee for the 2015 Notes and the 2017 Notes) and what is sought to be released (i.e., the debts of BCR and BCE under the 2015 Notes and the 2017 Notes), the Court has the power to order that a scheme meeting be convened. It is up to the creditors to decide if they are satisfied with what is being offered in exchange for the release. Accordingly, the Court granted leave for a scheme meeting to be convened.
15. In a novel privatisation scheme of arrangement, the court explains its jurisdiction over a scheme of arrangement involving just one member, who holds all the issued shares on trust for underlying investors

Re Enice Holding Co Ltd [2018] 4 HKLRD 736

The case concerns an application under sections 673 and 674 of the Companies Ordinance (Cap 622) (the “Ordinance”) by a company incorporated in Hong Kong but listed on the Australian Stock Exchange for the sanction of a scheme of arrangement for its privatization involving a reduction of capital. The company had only one shareholder which held all the issued shares on trust for the underlying investors. The issue before the court was whether it had jurisdiction to sanction a scheme of arrangement between a company and a single shareholder or creditor.

Under section 673(1) of the Ordinance, there may be a scheme between a company and “the creditors or the class of creditors, or the members or the class of members, or both”. As a matter of statutory language, it would seem permissible to have a scheme between a company and a single member or creditor because the statute permits the company to select any class of creditors or members to enter into a statutory contract, and that class of creditors or members may consist of only one person. And generally speaking, the statutory use of a plural noun (“members” and “creditors”) would include the singular. Further, there are English and Australian authorities permitting a scheme between a company and its single member, e.g. Re TSB Nuclear Energy Investment UK Ltd [2014] EWHC 1272 (Ch); Barrick (Lawlers) v Barrick Mining Company (Australia) [2015] FCA 1510 and SGIC Insurance v Insurance Australia (2004) 51 ACSR 470. In Re TSB Nuclear, it was held that the fact that there is only one person in the class of creditor or members does not preclude the holding of a meeting.

Under section 674(1) of the Ordinance, there are two pre-conditions to the court sanctioning a scheme of arrangement, namely the “headcount” test and the “majority-in-value” test. In this case, however, the headcount test is inapplicable because the scheme is a “takeover offer” within the meaning of section 674(2) of the Ordinance: Re Cheung Kong Holdings Ltd [2015] 2 HKLRD 512. Section 674(2) provides that, where a scheme involves a takeover offer, only the majority-in-value test is relevant, subject to the proviso that the votes cast against the scheme do not exceed 10% of the total voting rights attached to all disinterested shares.

The court noted that a trustee is permitted to do split vote to cater for the wishes of different beneficiaries and the value for and against will be calculated accordingly. In the case, the scheme of arrangement was approved by shareholders representing at least 75% of the voting rights of the shareholders present and voting, in person or by proxy, and that the votes
cast against the scheme do not exceed 10% of the total voting rights attached to all disinterested shares in the company. The majority-in-value test was thus satisfied.

Lastly, the court agreed that the scheme of arrangement was such that an intelligent, honest person acting in respect of his interest might reasonably approve. The reduction of capital was duly approved by the requisite special resolution. The scheme treated all shareholders equitably and the reasons for it were properly explained, it was for a discernible purpose and, given its technical nature, the interests of creditors were safeguarded: Re China Light & Power Co Ltd [1998] 1 HKLRD 158, Re Wheelock Properties Ltd [2010] 4 HKLRD 587.

The scheme of arrangement was accordingly sanctioned.
16. Underlying beneficial notes holders may participate directly in the scheme of arrangements as creditors if they have the right to be issued with definitive notes upon conditions being met

*Re Mongolian Mining Corp* [2018] 5 HKLRD 48

Mongolian Mining Corporation (the “Company”), a company incorporated in the Cayman Islands, is registered in Hong Kong as an overseas company and listed in Hong Kong. The Company was in provisional liquidation in the Cayman Islands. It sought sanction of a scheme of arrangement (the “Scheme”) that was part of a larger restructuring exercise involving an inter-conditional Cayman scheme of arrangement. Under the Scheme, the debts owed to the scheme creditors were to be discharged. In return, scheme creditors would obtain new notes and shares in the Company. The effectiveness of the Hong Kong Scheme is conditional on the Cayman scheme being sanctioned by the Cayman court and recognized in the United States under Chapter 15 of the Bankruptcy Code. One of the debts was USD600 million senior secured notes (the “Old Notes”). The Old Notes were held in a global form or global restricted form through the clearing systems. The scheme creditors were the beneficial holders of the Old Notes with the right to be issued with definitive notes upon conditions being met.

In sanctioning the Scheme, the court found that under Part 13 of the Companies Ordinance (Cap 622), a “creditor” is anyone who has a monetary claim against the company which, when payable, would constitute a debt. Contingent claims were included for this purpose. Since the Scheme Creditors are entitled upon satisfaction of certain conditions to be issued with definitive notes in accordance with the terms of the Old Notes, they are contingent creditors for the purpose of scheme jurisdiction: *Re Enice Holding Company Ltd* [2018] HKCFI 1736. The Scheme Creditors are therefore proper parties to the Scheme. Further, the Court found that there was jurisdiction to sanction the Scheme, as there was sufficient connection between the Scheme and Hong Kong for non-exhaustive reasons, such as that (1) the Company was registered as an overseas company in Hong Kong; (2) its principal place of business was in Hong Kong; (3) it was listed here; (4) it had multiple bank accounts in Hong Kong and etc.: *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1. Lastly, the court considered that various criteria for sanction, *inter alia* a scheme needed to be effective in practice, have been met. In this respect, the Company produced satisfactory evidence to demonstrate that it was likely that the US Bankruptcy Court would grant recognition and the ancillary relief necessary to enforce the Cayman scheme: *Re China Light & Power Co Ltd* [1998] 1 HKLRD 158, *Re Cable & Wireless HKT Ltd* [2001] 1 HLRD 7, *Re Wheelock Properties Ltd* [2010] 4 HKLRD 587. Accordingly, the Scheme was sanctioned.
17. Hong Kong court allowed appointment of provisional liquidators with extensive restructuring powers

_Pang Wai Hong v China Taifeng Beddings Holdings Ltd_ [2018] HKCFI 1828

China Taifeng Beddings Holdings Ltd (the “Company”) was formed in the British Virgin Islands and its shares were listed on the Hong Kong Stock Exchange. However, trading in its shares has been suspended since June 2015. Independent professionals were appointed to pursue a restructuring plan and proposals for restructuring have made significant progress. However, on 26 January 2018, the Listing Committee of the Hong Kong Stock Exchange informed the Company that it had decided to proceed to cancel the Company’s listing. The decision was maintained by the Listing Review Committee. The Company has requested to refer the matter to the Listing Appeals Committee.

Upon a winding-up petition presented by a creditor of the Company, the Company made an _ex parte_ application for the appointment of provisional liquidators. The court agreed that there is an imminent need to appoint provisional liquidators, as there is a real likelihood that provisional liquidators will be able to take the matter to the stage where the Listing Appeals Committee will be able to be convinced that the restructuring agreement will be able to be fulfilled and that consequently, it would be premature to delist the Company.

It was submitted by the Company that it is not the usual practice to grant provisional liquidators extensive restructuring powers at the first instance on their initial appointment. Such powers will usually only be granted on a subsequent separate application by the provisional liquidators themselves. However, the learned judge considered that this a case in which the restructuring process has begun long before the application and is ongoing. It would not be commercially sensible to impose a _de facto_ stay on restructuring works upon the appointment of provisional liquidators by declining to give them restructuring powers. Further, this case concerns efforts to save the listing status of a Hong Kong, which has been accepted to be capable of constituting an asset in jeopardy and justifying the appointment of provisional liquidators: _Re China Solar Energy Holdings Ltd (No 2)_ [2018] 2 HKLRD 338. Thus, the grant of restructuring powers is even more desirable if these powers are to be applied by the provisional liquidators to preserve this valuable asset of the Company. Accordingly, an order was made appointing provisional liquidators with restructuring powers.
18. Singapore Court considered the voting rights of creditors holding security over assets owned by third parties in judicial management

Re Swiber Holdings Ltd [2018] SGHC 180

Swiber Holding Ltd and Swiber Offshore Construction Pte Ltd (together the “Companies”) provided corporate guarantees to their bank creditors for facilities extended to their subsidiaries. The facilities were also secured against assets owned by the subsidiaries but not the assets owned by the Companies. The Companies were subsequently placed under judicial management. Judicial management in Singapore is a method of debt restructuring where an independent judicial manager is appointed to manage the affairs, business and property of a company under financial distress. The company is also temporarily shielded from legal proceedings by third parties, giving it the opportunity to rehabilitate.

Regulation 74 (“Reg 74”) of the Singapore Companies Regulations (the “Regulations”) provides that a “secured creditor” may only vote in respect of the unsecured element of its claim unless it surrenders his security, and a “secured creditor” who votes in respect of the whole debt shall be deemed to have surrendered its security. The issue before the court was whether the bank creditors’ vote should be taken to represent the full value of the debt or only so much, if any, as is unsecured even by a third party.

From an analysis of the legislative history, the Singapore High Court formed the view that a creditor with third-party security is not a “secured creditor” for the purpose of Reg 74, regardless of whether the third party is a subsidiary or an associate of the debtor company, and could vote for the full value of its claim against the debtor without deducting the value of the security.

Further, the Singapore Court had to consider the position where the creditor realizes its third-party security after lodging its proof of debt. Would he still be able to vote for the full value of the debt as filed or would he have to account for the amounts recovered through realization of the security? The Court held that in the case of the insolvency of a principal debtor, a creditor is entitled to maintain a claim for the proof filed unless the debt is paid in full. The creditor is not required to reduce its proof of debt to reflect part-payments by a surety unless such a payment extinguishes the surety’s obligations. On the other hand, in the insolvency of a guarantor, a creditor must update its proof of debt after it realizes its third-party security or receives payment from the third party after lodging its proof of debt, in order to reflect the reduced value of the principal debt.
Corporate Disputes Cases

19. A Hong Kong company is not required to give any reasons for the removal of a director

Yeung Bing Kwong Kenneth v Mount Oscar Ltd [2018] HKCFI 2763

Mount Oscar Ltd (the “Company”) is a private company incorporated in Hong Kong. It is beneficially owned by Yeung Chi Shing Estates Limited (“YCSEL”). The Company had four directors, including the Applicant. On 26 January 2018, YCSEL, as the Company’s majority shareholder, requested the board of directors to call an EGM to consider the removal of the Applicant as a director.

Section 463 of the Companies Ordinance (Cap 622) (the “Ordinance”) affords a director who is faced with a proposed resolution to remove him an opportunity to be heard and to make representations at the meeting. The Applicant complained that no reasons had been given for the proposal to remove him despite repeated demands. Hence he had not been given a real, genuine or reasonable opportunity to make meaningful representations at the EGM. The Applicant thus brought proceedings seeking (i) a declaration that the ordinary resolution to remove him as director is invalid, and (ii) an injunction to restrain the Company from implementing the resolution.

It was common ground that nothing in section 463 expressly provides for the giving of reasons to an affected director. The Court held that it is not enough for the Applicant to show that the additional requirement is reasonable or sensible, or that the Legislature, if it had thought about it, would probably have included this requirement in section 463. In order to succeed, the Applicant must show it is clear from the express language of section 463 that the additional requirement must have been included.

On the facts, the Court considered that the Applicant had failed to make out his case. It is entirely conceivable that there will be situations in which a company does not know the reasons why a particular shareholder proposes the resolution to remove a particular director, for instance, because the shareholder has not disclosed and/or refused to disclose the reason to the company. In that situation, the additional requirement of providing reasons to the affected director will put the company in an impossible situation - on the one hand, pursuant to section 567(1) of the Ordinance, the directors have no choice but to call the general meeting requested by the shareholder, while on the other hand, the company, acting by its directors, cannot meet the additional requirement of providing reasons to the affected director prior to or at the meeting. Further, it is clear that under section 566(3)(b) of the Ordinance, a shareholder may but is not obliged to include the text of the proposed resolution in the request. YCSEL, being the shareholder in question, thus has no obligation to provide reasons to the Applicant or to the Company.
20. Whether a shareholder’s failure to serve adequate notice on the company will result in dismissal of his application to commence statutory derivative action?

*Re Pearl Oriental Oil Ltd (東方明珠石油有限公司) [2018] 5 HKLRD 567*

Under section 733(3) of the Companies Ordinance (Cap 622) (the “Ordinance”), a member of a company must serve 14 days’ written notice on the company of his intention to apply for leave to commence a statutory derivative action under section 732, and under section 733(4)(b) the “reasons for that intention”. The Company argued that the application for leave by a shareholder under sections 732(1) and 733 should be dismissed for non-compliance with section 733(1)(c) because the notice served stated only one of the complaints set out in the draft statement of claim.

The court found that the purpose of a notice under section 733(4) is to allow the company concerned to consider what to do with the complaints. The notice must include sufficient details and particulars of each of the complaints. What constitute sufficient details and particulars is a question of fact in each case, the test being whether the directors, as reasonable commercial persons with their knowledge of the company’s affairs, would be in a position when reading the notice to make a proper informed decision on how to respond: *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980, *Chu Kong v Up Profit Ltd* HCMP 305/2016. Thus, the bare assertion of breach of fiduciary duties without reasons was inadequate, since the Company would not be in a position to respond to them. However, under section 733(5) of the Ordinance, the written notice could be dispensed if the court finds it just to do so.

The Company had given no response to the draft statement of claim with particulars of all the complaints that was served 22 days before the hearing. Therefore, the Judge considered that the failure to give full details in the notice was immaterial, as no prejudice would be caused, and it would be a complete waste of time to dismiss the leave application for all complaints save one and start that whole process afresh: *Yu Yuchuan v China Shanshui Investment Co Ltd* HCMP 360/2015.
21. Director's application to inspect documents refused on the ground that the application was made for an improper purpose

_Yung Siu Wa v Raffles Family Office Ltd and Others_ [2018] 5 HKLRD 816

The plaintiff, a director of each of the defendant companies, sought an order for inspection and taking of copies of various documents of the defendants. The other three directors of each of the defendants are Kwan Chi Man (“Kwan”), Mok Wan Chi (“Mok”, the wife of Kwan), and Tam Chun Wing Ray (“Tam”). The plaintiff is also the Chief Investment Officer (CIO) of the 1st defendant. Kwan is the sole owner of another company (“CMK”) which is the registered shareholder of 44% of the issued share capital of the 1st defendant, which in turn wholly owned the 2nd – the 6th defendants.

It is the plaintiff’s case that he recently discovered various misconducts of Kwan and Mok. On 23 October 2018, the plaintiff’s solicitors wrote to the 1st and 2nd defendants alleging misconduct by Kwan and Mok and demanded that they or CMK buy out the plaintiff’s shares in the 1st defendant and, absent a reply, threatened court proceedings. On 25 October 2018, the plaintiff was summarily dismissed as the 1st defendant’s CIO. A general meeting of the 1st defendant to consider the removal of the plaintiff as a director was fixed for 27 November 2018. In addition, notices were also given to the plaintiff that board meetings of the other defendants would be held to consider the convening of general meetings to remove him as a director of each of the defendant companies.

The Court held that if an inspection by the directors was intended for any improper purpose, inspection would be refused. An attempt to achieve an advantage in proceedings, anticipated or existing between various shareholders of the company concerned, if proven, would be an improper purpose: _Oxford Legal Group Ltd v Sibbasbridge Services Plc_ [2008] Bus LR 1244, _Ng Yee Wah v Lam Chun Wah_ [2012] 4 HKLRD 40. The fact that a director seeking inspection is likely or inevitably to be removed soon is not _per se_ a reason to refuse inspection. The question was what inference could be drawn from the likely or inevitable removal regarding the purpose of the inspection in all the circumstances.

The court found that it was a virtual certainty that the plaintiff would be removed as a director of each of the defendants on 27 November 2018 or soon after. The plaintiff must have known that his removal was inevitable, given that Kwan’s camp controlled the defendants, yet he persisted in his application. The clear inference to be drawn on the evidence was that the plaintiff was not making and continuing with the application for inspection for the purpose of enabling him to discharge his duties as a director of the defendants. Rather, the plaintiff’s application was made for an improper purpose, namely to obtain information which might assist him in likely litigation against Kwan and Mok. Accordingly, the inspection was refused.
22. Singapore Court of Appeal set out an analytical framework to provide guidance in cases where an oppression action features both personal and corporate wrongs

*Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33

In 2009, Mr. Ong Siew Kwee (“Ong”) proposed to Mr. Douglas Foo (“Foo”), the founder and chief executive officer of Sakae Holdings Ltd (“Sakae”) that they come together to acquire more than 90% of the units in Bugis Cube, a shopping mall. To further this business idea, Griffin Real Estate Investment Holdings Pte Ltd (the “Company”) was incorporated, which was owned 24.69% by Sakae, 43.35% by Gryphon Real Estate Investment Corporation Pte Ltd (“Gryphon”) of which Ong was a shareholder, and 29.96% by ERC Holdings Pte Ltd another company substantially owned and controlled by Ong. The management of the Company was left to Ong and Gryphon. Foo subsequently discovered that over the years, Ong diverted substantial amounts of money from the Company to entities directly or indirectly related to Ong.

Sakae then commenced action against Ong, his associates and various companies owned and controlled by Ong under section 216 of the Singapore Companies Act, alleging that the diversion and misappropriation was oppressive to Sakae as a minority shareholder of the Company. Ruling in favour of Sakae, the High Court of Singapore found that six of the seven impugned transactions were oppressive to Sakae and, among other things, ordered that the Company be wound up and that Ong and his associates repay the Company certain sums diverted from it under those six transactions.

The defendants appealed. On appeal, they contended, *inter alia*, that Sakae was not entitled to relief under section 216 on the ground that its claims were based not on personal wrongs suffered by Sakae itself, but on wrongs done to the Company. They argued that Sakae should have applied for leave under section 216A of the Companies Act to commence a statutory derivative action instead of seeking a remedy under section 216.

The Singapore Court of Appeal observed that despite some similarities between section 216 and 216A, the two causes of action are intended to have distinct spheres of application. This is to prevent the circumvention of the rule that only the company can sue for loss that it has suffered and the principle barring the recovery of reflective loss.

It was further held that in cases where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court should have regard to the real injury that is complained of and the essential remedy that is sought in ascertaining whether an oppression claim brought under section 216 of the Companies Act is an abuse of process. The analytical framework to be applied is as follows:
(a) **Injury**

(i) What is the real injury that the plaintiff seeks to vindicate?

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) **Remedy**

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

(ii) Is it a remedy that can only be obtained under section 216?

On the facts, the Court of Appeal was satisfied that the real injury which Sakae sought to vindicate was the injury to its investment in the Company and the breach of its legitimate expectations as to how the Company’s affairs would be managed. Further, the essential remedy sought by Sakae was to exit the Company. In the Court’s view, Sakae’s oppression claims pertained to personal wrongs committed against it and were properly pursued by way of an action under section 216.
Bankruptcy Cases

23. Decision of the Singapore court that funding agreements are permissible in the context of individual bankruptcies

Re Fan Kow Hin [2018] SGHC 257

The trustees of the bankruptcy estate of Fan Kow Hin (the “Trustees”) commenced proceedings against various defendants, including the avoidance of transactions at an undervalue and unfair preferences under the relevant provisions of the Singapore Bankruptcy Act (“the Clawback Claims”). The Trustees sought litigation funding for the action and applied to the court for sanction of funding agreements that have the effect of assigning and selling a proportion of the benefits or proceeds of the Clawback Claims.

First, the court held that the proceeds of the Clawback Claims may be assigned by the Trustees as the Bankruptcy Act expressly recognises that fruits of the litigation constitute property of the bankruptcy estate. Secondly, the court held that the proposed assignment does not offend the rule against maintenance or champerty as the assignees have no control over the conduct of proceedings. Further, the assignment is aimed at providing access to justice in the context of an insolvency, in which no other option for litigation funding would be viable.
24. A trustee in bankruptcy has no locus to apply for vesting order of a disclaimed property or its proceeds of sale

*Sleight v The Crown Estate Commissioners* [2018] EWHC 3489 (Ch)

Mr. Sleight (the “Trustee”) was appointed the trustee in bankruptcy of the deceased’s estate, which included around 27 properties. 24 of those properties appeared, however, to be in negative equity. The Trustee thus disclaimed the vast majority of those as “onerous property” pursuant to the English Insolvency Act 1986. Two of the disclaimed properties were subsequently sold by the mortgagees in possession and there was a small surplus from the sale.

The Trustee applied under section 320(2)(a) of the Insolvency Act 1986 for a vesting order as “a person who claims an interest in the disclaimed property”. Section 320(a) is substantially similar to section 59(6) of our Bankruptcy Ordinance (Cap 6), which enables any person who has sufficient interest in the disclaimed property to apply to the court for an order vesting the property in him or delivery of the property to him.

The English court held that the Trustee would only have standing to apply for a vesting order as “a person who claims an interest in the disclaimed property” if he had a proprietary interest in that property: *Hindcastle v Barbara Attenborough Ltd* [1997] AC 70. Given that the Trustee no longer had any proprietary interest in the two properties, the Trustee did not have standing to apply to court for a vesting order in relation to those properties, nor in relation to the surplus arising from their sale by the mortgagees. The Trustee’s application was refused.
25. Trustee in Bankruptcy only required to give limited undertaking as to damages when applying for Mareva Injunction

Patrick Cowley and Another (The Joint and Several Trustees in Bankruptcy of the Property of the Bankrupt) v All Powerful Holding Ltd and Another [2018] HKCFI 1802

The bankrupt, Mr. Jaffe Lau Yu ("Mr. Lau"), was the sole shareholder and director of All Powerful Investment Ltd ("APIL") since its incorporation in 2009. On 19 December 2014, Mr. Lau executed a Deed of Settlement establishing the JL Family Trust ("the JL Trust"), a trust governed by the laws of the BVI. The trustee is All Powerful Group (PTC) Ltd, a BVI company. The JL Trust was the sole shareholder of another BVI company called All Powerful Holdings Limited ("APHL"), which was also incorporated on 19 December 2014. Soon thereafter, on 20 January 2015, Mr. Lau transferred the sole issued share in APIL, held by him, to APHL for the sum of HK$1.00 ("the share transfer").

On 6 January 2017, a bankruptcy petition was presented against Mr. Lau by The Hongkong and Shanghai Banking Corporation ("HSBC"). Mr. Lau was subsequently adjudged bankrupt. The trustees in bankruptcy (the "Trustees") contended that the share transfer was in breach of section 49 of the Bankruptcy Ordinance (Cap 6) as it constituted a transaction at an undervalue and was a disposition of property made with intent to defraud creditors. The Trustees also sought Chabra injunctions against APHL and APIL, who are not parties to the substantive bankruptcy proceedings, but who hold the assets ultimately reflected by the ownership of the single share in APIL. Named after the case of TSB Private Bank International SA v Chabra [1992] 1 WLR 231, a Chabra injunction is a Mareva injunction over the assets of a party to whom the plaintiff has no cause of action and is part of the law of Hong Kong: XY, LLC v Jesse Zhu & Anor [2017] 5 HKC 479 (CA) and China Metal Recycling (Holdings) Ltd v Chun Chi Wai (No 2) [2017] 2 HKLRD 603.

Deputy High Court Judge Saunders held that in considering whether or not to exercise the Chabra jurisdiction, the court should consider the extent to which the cause of action defendant, in this case Mr. Lau, has by way of control or interest in the assets of the non-cause of action defendant, in this case APHL and APIL: Dadourian Group International Inc v Azuri Ltd [2005] EWHC 1768 (Ch). The Judge accepted that there is ample evidence that Mr. Lau was in reality in control of the JL Trust, APHL, and consequently, ultimately APIL. Further, in light of the audited accounts, which demonstrated that in the year of the share transfer, APIL has generated revenue of HK$1.561 billion and a net profit of HK$24 million, the Judge was satisfied that there is a good arguable case that the share transfer was at an undervalue. The Judge also accepted that the creation of APHL and the establishment of the JL Trust are arguably steps that were taken by Mr. Lau to remove assets from his creditors, with the intent to defraud them. The Judge took into account the fact that the share transfer occurred in close proximity to the establishment of APHL and JL Trust of which Mr.
Lau may at any time become a beneficiary. And this is itself sufficient evidence that there is a real risk of dissipation of assets.

With regard to the court’s jurisdiction to make a Mareva injunction against a third party, the Judge held that it can be exercised where there is good reason to suppose that the assets of the third party are in truth the assets of the defendant in the substantive proceedings, in this case Mr. Lau. It is not necessary to establish beneficial ownership in a strict trust law sense, so long as it can be shown that the defendant exercises substantive control over the assets: *Akai Holdings Ltd v Christopher Ho* (unreported, HCMP 1718/2009, 24 September 2009). Having found that Mr. Lau had, in reality, control over JL Trust, APHL and APIL, the Judge held that the Chabra jurisdiction can be invoked.

Lastly, it is well-established that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages, expressed as the price that an applicant must pay for an injunction in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160. However, there are limited exceptions to this rule and the court has jurisdiction to order a limited cross undertaking instead, for example where litigation is being brought by liquidators on behalf of an insolvent company where there are no large creditors who can be expected to indemnity them and where it has proved impossible to obtain insurance against unlimited liability on the cross-undertaking. The Trustees, though unable to obtain insurance against unlimited liability, have been able to obtain an indemnity to the extent of HK$40 million from HSBC. The Judge considered that the HK$40 million was commensurate with the size of APIL’s business, which was estimated to be approximately HK$34.5 million. In *Re DPR Futures Ltd* [1989] 1 WLR 778, the order froze assets of £2.3 million, and the applicants, who were liquidators, were permitted to limit their liability under a cross undertaking at £2 million. The court, having regard to the proportion between the amount sought to be recovered by the liquidators in *DPR Futures*, and the extent of the cross-undertaking, ordered the Trustees to give a cross undertaking limited to the sum of HK$40 million, to be fortified by an indemnity from HSBC.
26. English court held a moral right to fees on non-contractual basis did not vest in trustee in bankruptcy

*Gwinnutt v George and another* [2018] EWHC 2169 (Ch)

Mr. George, before the making of his bankruptcy order, was a practicing barrister. He had been engaged on “express terms that there should be no contract” with his instructing solicitors, such that he was unable to bring proceedings to enforce any promise against the instructing solicitors to pay his fees. At issue was whether any expectation of Mr. George to receive fees arising in respect of work he had carried out on a non-contractual basis before his bankruptcy vests as property in the trustee in bankruptcy.

The English High Court held that a moral right or a right in honour to fees, without any legal entitlement to the same, does not amount to property under the Insolvency Act 1986. Further, an engagement expressly on a non-contractual basis was not the same as engagement pursuant to a contract which was not enforceable in the courts. Contracts might be unenforceable for a number of reasons, but that of itself would not prevent them from being property, and it was a very different thing from a mere moral obligation, which cannot be sold, assigned or factored. The Court concluded that any unpaid fees as at the date of the commencement of Mr. George’s bankruptcy which had arisen under a non-contractual, honorarium engagement did not vest in the trustee in bankruptcy.