ONC Lawyers
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ONC Corporate Disputes and Insolvency Quarterly

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 jurisdictions. In this issue, we have highlighted:

- 10 Corporate Insolvency Cases
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- 2 Corporate Disputes Cases
- 3 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. Adjournment of petition refused where no unsecured creditor supported the outline restructuring proposal

Re Chase On Development Ltd [2020] HKCFI 629

Standard Chartered Bank ("**SCB**") issued a petition to wind up the Company on the grounds of insolvency. The petitioning debt was in the excess of HK$$15,000,000 and was not disputed. The Company is a subsidiary of Sun Cheong Creative Development Holdings Limited ("**Listco**") which is listed on the Main Board of the Stock Exchange of Hong Kong and is a guarantor of the Company's debt. Listco is currently attempting to negotiate a restructuring of its debt with its creditors. The Company sought a five-week adjournment of the petition to allow Listco to progress the restructuring.

In case where the company is clearly insolvent and the petitioning debt is not in dispute, the Court will take into account the views of the unsecured creditors when considering whether to adjourn the petition. If the creditors are of different views the Court will normally take into account all the circumstances including the following:

a) A qualitative assessment of the number of creditors for and against a winding-up order. It is not just a matter of counting the number of creditors in favour and those against or the proportion of the value of the debt they hold.

b) The reasons proffered by the supporting and opposing creditors.

c) The feasibility of the proposed restructuring.

The Judge found that the Company was not able to produce a single letter from an unsecured creditor indicating support to the outline restructuring proposal that so far has been presented to the various classes of unsecured creditors. Neither has the Company been able to produce a letter from a single unsecured creditor supporting an adjournment of the petition. In the premises, the Court made the normal winding-up order.

2. Implied term can defeat a winding-up petition to dispute an "indisputable" debt

Re Golden Oasis Health Limited [2020] HKCFI 364

In the September 2019 issue of our newsletter, we discussed the ruling of the Court of First Instance in *Re Golden Oasis Health Limited* [2019] HKCFI 2173, where Anthony Chan J refused to stay a winding-up petition to arbitration pursuant to an arbitration clause in the relevant shareholders' agreement. Harris J proceeded to hear the petition and decided to dismiss the petition notwithstanding that it was undisputed that the debtor company did owe the debt in issue: *Re Golden Oasis Health Limited* [2020] HKCFI 364.

Gold Swing Enterprises Limited ("**GSE**") and New Health Elite International Limited ("**NHE**") are shareholders of the debtor company Golden Oasis Health Limited (the "**Company**"). They respectively hold 20% and 61% of the Company's shares. The Company's sole asset and business is its majority shareholding in Mega Fitness (Shanghai) Investments Limited ("**Mega Fitness**"), which operates a chain of sports and fitness clubs in Mainland China.

In August 2018, GSE brought a petition to wind up the Company on the ground of insolvency relying on a debt arising from a shareholder's loan due from the Company to GSE. There was no dispute that the Company owed a sum of HK$5,899,844 to GSE (the "**Debt**"). The Debt was currently due and had been expressly acknowledged by the Company in writing.

Nonetheless, the petition was opposed by NHE. Relying on the shareholders' agreement between *inter alia* GSE and NHE dated 30 March 2016 (the "**Shareholders' Agreement**"), NHE argued that it was the common understanding among the shareholders of the Company that the Debt, being a shareholder's loan to the Company, shall be injected into Mega Fitness as capital contribution which GSE was not entitled to pursue repayment in the absence of approval of all other shareholders of the Company.

Notwithstanding the written acknowledgement from the Company that the Debt was due and uncontested, Harris J accepted the defence of implied term advanced by NHE. It was NHE's case that the Shareholders' Agreement contained an implied term that none of the shareholders shall perform any act, such as requiring repayment of shareholder loans in the nature of working capital, which would bring an end to the circumstances or state that allow the Company to continue to hold Mega Fitness. Importantly, NHE relied upon the following clauses of the Shareholders' Agreement:

- Clause 4.3(k) prohibits issue of a winding-up petition by a shareholder without the consent of all shareholders.

- Clause 5.1 provides that *"[t]he Shareholders agree that the Company shall continue its holding of 55 shares in Mega Fitness which will carry on the business of managing and operating a chain of sports and healthcare clubhouses in the PRC."*

- Clause 4.3(j) prohibits any change in the nature or type of the business of the Company without the consent of all shareholders.

GSE's demand for repayment of the Debt (which, according to the NHE, was to be injected into Mega Fitness as capital contribution) would effectively prevent the Company from continuing to hold Mega Fitness and hence the shareholders from performing the Shareholders' Agreement. In light of the above (particularly clause 4.3(k)), Harris J accepted that NHE had a *bona fide* defence on substantial grounds that it was an implied term of the Shareholders' Agreement that GSE was not entitled to unilaterally call for repayment of the Debt, and in particular, was not entitled to issue a winding-up petition against the Company.

Harris J further held that even though the Company was not a party to the Shareholders' Agreement, it was *bona fide* arguable that the aforementioned implied term was for the Company's benefit and therefore it was entitled to enforce the term by virtue of section 4(1) of the Contracts (Rights of Third Parties) Ordinance (Cap. 623), which inter alia provides that a third party may enforce a term of a contract if the term purports to confer a benefit on it.

The petition was accordingly dismissed and GSE was ordered to pay costs.

3. Court sanction not required for litigation funding agreements in liquidation cases

Re Patrick Cowley and Lui Yee Man, Joint and Several Liquidators of the Company [2020] HKCFI 922

The joint and several liquidators of a company in voluntary liquidation applied to the Court for a direction pursuant to s.255 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (the "**Ordinance**") for an order that it is appropriate for the liquidators to enter into a litigation funding agreement and that the litigation funding agreement be approved (the "**Application**").

The principal issues of the Application were:

1. whether it is necessary for the liquidators to obtain the Court's approval before entering into the litigation funding agreement (the "**1st Issue**"); and

2. if it is not necessary, in what circumstances can liquidators seek the Court's direction as to whether or not they may enter into a litigation funding agreement (the "**2nd Issue**").

Harris J first referred to his decision in *Re Cyberworks Audio Video Technology Limited* [2010] 2 HKLRD 1137 that concerned a funding agreement that was structured for the sale of a chose in action in return for a right to participate in the proceeds of successful litigation to enforce the chose in action, where his Lordship held that it is not necessary for a liquidator in either a voluntary liquidation or a winding-up by the Court to obtain the Court's sanction of the litigation funding agreement.

However, Harris J noted that not all litigation funding agreements involve an assignment of the relevant chose in action. In *Re Company A to Re Company G* (Unrep., HCCW 384/2006 & others, 8 October 2015), the Court approved a funding agreement between a commercial funder and seven companies, which provided for the funder to finance the prospective litigation in return for a share of the proceeds if the litigation were to prove successful.

Paragraph 1 of Part 2 of Schedule 25 of the Ordinance (which deals with liquidators' powers) provides that a liquidator may "bring or defend any action or other legal proceedings in the name and on behalf of the company". Paragraph 9 of Part 3 of Schedule 25 provides that a liquidator may "do all things as may be necessary for winding-up the affairs of the company and distributing its assets". Harris J held that it is obvious from the statutory wording that pursuing litigation to recover monies or other property owed to a company is covered by Paragraph 1 of Part 2 and the taking of steps necessary to facilitate the litigation comes within Paragraph 9 of Part 3. Funding litigation comes within Paragraph 9.

Under s.251 of the Ordinance, a liquidator of company in voluntary liquidator may without sanction from the Court, exercise any of the powers to be found in Parts 2 and 3 of Schedule 25. Consequently, Harris J held that the liquidators of the Company do not require the Court's sanction to cause the Company to enter into a litigation funding agreement.

In a winding-up by the Court, a liquidator may exercise any of the powers specified in Part 1 or 2 of Schedule 25 (including commencing legal action in the name of the company) only with the sanction of the Court or the committee of inspection. However, once such sanction is obtained, the liquidator may then exercise the powers in Part 3 of Schedule 25 without further obtaining sanction of either the committee of inspection or the Court: see s.199(2) and (3) of the Ordinance. It follows that the Court's sanction of a litigation funding agreement is not required in the case of a winding-up by the Court.

Harris J went on to discuss the circumstances in which a liquidator can properly seek the direction of the Court in respect of a proposed litigation funding agreement. In the case of voluntary liquidations, the right to seek the Court's directions in relation to a liquidation is provided for in s.255(1) and (2) of the Ordinance and in the case of a winding-up by the Court, the relevant provisions are s.200(3) and (4) of the Ordinance.

Harris J emphasized that a liquidator cannot just ask the Court to sanction any decision he is contemplating because the liquidator is uncertain about its appropriateness. A liquidator should conduct a liquidation exercising his own professional expertise and judgment. Liquidators are given broad discretion. A decision which comes within this broad discretion, particularly where the decision is commercial in nature, generally is not a matter for the Court's approval or direction.

Further, Harris J held that a direction sought must be formulated precisely such that it must require something other than a general endorsement of a proposed cause of action and call for at least the exercise of some legal judgment. For example, in the case of a litigation funding agreement, directions from the Court may be required where the liquidators had any concerns about any particular provision in the funding agreement or the lawfulness of the arrangement.

4. Winding up family companies owned by a couple may constitute an abuse of process where the petitioner wife was seeking ancillary relief in parallel divorce proceedings

Ng, Christina v Capella Capital Ltd and Another [2020] 2 HKLRD 274

The Petitioner Wife and the Respondent Husband are going through divorce proceedings. Meanwhile, the Petitioner Wife presented winding-up petitions in respect of their two family companies, Capella Capital Ltd ("**Capella**") and Friedmann Pacific Asset Management Limited ("**Friedmann**"), seeking primarily a buy-out order. Both companies are solvent and profitable. Capella and Friedmann, and the Respondent Husband applied to strike out the petitions, or alternatively a stay. It was argued, among other things, that it was an abuse of process for the Petitioner Wife to present the petitions when she was seeking ancillary relief in divorce proceedings.

After judgment was reserved, the Petitioner Wife consented to the dismissal of the petitions.

The Court held that the petitions would have been struck out if the Petitioner Wife had not consented to their dismissal. In considering whether taking out the Petitions constitutes an abuse of process, the key question is whether there is any utility in maintaining the petitions and this includes whether there are issues which can only be resolved in the Companies Court and whether there is any relief which could only be granted by the Companies Court.

In the circumstances of the case, the Judge was not persuaded that there is any relief which the Petitioner Wife can only obtain in the Companies Court that she cannot obtain in the Family Court. The Family Court is well equipped to deal with the issue of trust and misappropriation in the calculation of matrimonial assets and it is sensible for one court to determine all the issues. There was thus no utility in maintaining the petitions. If the Petitioner Wife were to succeed in obtaining relief in the divorce proceedings, there would be no useful purpose in the petitions. And if she were to fail to establish her allegations of wrongdoing against the Respondent Husband, the petitions would also be doomed to failure. In any event, the Judge held that if the petitions were not to be struck out, they ought to have been stayed to avoid companies proceedings parallel to divorce proceedings, which would inevitably lead to substantial waste of costs, expenses and judicial resources.

5. Receivers of Shares failed in application to reconstitute an uncooperative board

Emperor Securities Ltd v SMI Investment (HK) Ltd and Others [2020] HKCFI 881

In the April issue of ONC Corporate Disputes and Insolvency Quarterly 2020, we discussed the decision in *Emperor Securities Ltd v SMI Investment (HK) Ltd and Others* [2020] HKCFI 129, where the Court appointed Receivers over SMI Investment (HK) Limited's 63.01% shareholding (the "**Subject Shares**") in SMI Culture & Travel Group Holdings Limited ("**SMI Culture**"), which were pledged to Emperor Securities Limited as the security of a term loan and a margin facility.

The Receivers however experienced many difficulties in dealing with SMI Culture's board of directors ("**the Board**"). The Board has essentially ignored all the letters sent by the Receivers and disregarded the fact that they have been appointed over the Subject Shares. The Board also failed to provide the information and documents requested by the Receivers. Furthermore, the Receivers have also experienced difficulty in locating and taking control of the Subject Shares. In view thereof, the Receivers applied for, among other things, that the Board be reconstituted.

Citing *Acropolis Limited suing on behalf of itself and all other shareholders in AESO Holding Limited v Chan Siu Chung & Others* [2018] HKCA 184 with approval, the Court held that it should only make an order which has the effect of determining the composition of a board of directors in very special circumstances, and may only interfere in the management of a company if it is absolutely essential do to so.

Having considered the evidence carefully, the Court came to the view that the present level of obstruction through failure to provide information and general non-cooperation does not amount to "very special circumstances" or that it is, in consequences, "absolutely essential" to reconstitute the composition of the Board. In coming to this view, the Court took into account the fact that there was no current and immediate threat to the value of the Subject Shares which now makes it absolutely essential to replace the entire Board of SMI Culture. Further, the Court also gave regard to the fact that this is a public company which has far greater transparency than a private company, which has INEDs and would be closely scrutinized by the regulatory authorities if there were any attempt to "run down" the company: see *H v H (Public Company: Imposed Director)* [2011] 1 HKLRD 1048.

In conclusion, the Court dismissed the Receivers' application to reconstitute the Board, but granted general leave to apply if the Receivers decide to consider less intrusive remedies to confront the difficulties that they are currently facing with the Board.

6. Application to adjourn petition based on very general terms of restructuring taking place in the Mainland refused

Re SMI Holdings Group Ltd (formerly known as SMI Corporation Limited) [2020] HKCFI 824

On the 11 April 2019, HSBC issued a winding-up petition against SMI Holdings Group Ltd (the "**Company**"). In August 2019, Television Broadcasts Limited ("**TVB**") substituted HSBC as the petitioner. The debt relied on by TVB is not disputed.

The Company is incorporated in Bermuda and listed on the main board of the Hong Kong Stock Exchange. The Judge was satisfied that there is sufficient connection between the Company and Hong Kong to justify the Court exercising the power to wind up the Company.

The Company is a holding company holding indirect interests in a substantial group of cinemas and theatres and associated businesses in the Mainland. It is attempting to restructure the debt of the businesses in the Mainland. The Company filed limited evidence about it and its subsidiaries, and its financial position. No information was provided as to what the group's financial position currently is. There are no audited financial statements available for 2018 and 2019. Neither did the Company provide anything resembling comprehensive management accounts.

Referring to his own decision in *Re Chase On Development Limited* [2020] HKCFI 629, Harris J re-emphasized that an important consideration when the court is faced with an application by an insolvent company to adjourn a petition based on an undisputed debt is the views of creditors, their reasons for supporting or opposing the petition and the feasibility of the proposed restructuring. This will require evidence to be put before the court that allows the court to make an informed decision whether or not to grant an adjournment of the petition to allow a company to restructure debt. The evidence will need to be all the more compelling if a company is unable to find a creditor to oppose an immediate winding-up.

The Judge noted that, like many distressed Mainland listed companies, the Company has proceeded on the basis that it can attempt to restructure in the Mainland the group's business and debt without involving the listed company. The Judge was critical of such approach and pointed out that it is unrealistic and unhelpful for Mainland business groups that have chosen to list in Hong Kong to treat the holding company and its listed status purely as a tool of financial convenience, which facilitates access to capital when it is required, and not recognise that the listed company and the supervisory powers of the Hong Kong Companies Court need to be engaged properly if it becomes necessary to restructure group debt. Proceeding on the basis that it is sufficient just to tell in very general terms the Court and Hong Kong creditors that constructive things are taking place in the Mainland and assume that a petition will be adjourned is misconceived.

In conclusion, the Judge ordered the Company to be wound up.

7. Decision of the Singapore Court of Appeal applying the prima facie standard in winding up proceedings where a disputed debt is subject to an arbitration agreement

AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA

AnAn Group (Singapore) Pte Ltd ("**AnAn**") and VTB Bank (Public Joint Stock Company) ("**VTB**") entered into a global master repurchase agreement (the "**Agreement**") over global depository receipts ("**GDR**") of shares in a company known as EN+ Group PLC ("**EN+**"). In substance, it was a loan from VTB to AnAn with EN+ GDR as collateral for the loan. The Agreement required AnAn to maintain sufficient collateral and provided that any dispute arising out of or in connection with it shall be referred to arbitration.

As AnAn later failed to top up a cash margin to meet a shortfall in collateral, VTB issued a statutory demand for the sum of US$170 million and commenced winding-up proceedings against AnAn. AnAn disputed the claim. A winding-up order was made against AnAn. AnAn appealed to the Singapore Court of Appeal.

At issue is which standard of review, that is, *prima facie* standard or triable issue standard, should be applied where a dispute subject to an arbitration agreement arises in relation to a debt forming winding-up proceedings?

The Singapore Court of Appeal held that, when a court is faced with either a disputed debt or a cross-claim that is subject to an arbitration agreement, the *prima facie* standard should apply, such that the winding-up proceedings will be stayed or dismissed so long as (i) there is a valid arbitration agreement between the parties; and (ii) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process.

If the triable issue standard was applied, it would require a thorough examination of the evidence and merits of the company's defence by the court. This would defeat the parties' agreement that such disputes are to be determined by an arbitrator. It would also present greater uncertainty and cause parties to expend significant costs in proving the merits of their case before the court and the arbitral tribunal. Moreover, if the higher triable issue standard were applied for winding-up proceedings, it would encourage the abuse of the winding-up jurisdiction of the court, as the claimant would utilize the draconian threat of liquidation to pressurize the alleged debtor into payment.

However, the Singapore Court of Appeal emphasized that it would be prepared to only stay the petition if the creditor is able to demonstrate legitimate concerns about the solvency of the company as a going concern, and that no triable issues are raise by the debtor.

In the present case, the Singapore Court of Appeal held that it was clear that there was a *prima facie* dispute that was governed by an arbitration agreement and there was no abuse of process on AnAn's part. Considering that no evidence had been tendered to show that there were legitimate concerns relating to the solvency of AnAn, the Court allowed AnAn's appeal and dismissed the winding-up application against AnAn.

8. Creditor's interests held as the key consideration in an application to stay a winding-up order pending appeal

Safe Castle Limited v China Silver Asset Management (Hong Kong) Limited [2020] HKCFI 1028

At the petition of Safe Castle Limited (the "**Petitioner**"), a winding-up order was made against China Silver Asset Management (Hong Kong) Limited (the "**Company**") on 11 March 2020. The sole shareholder of the Company as a contributory (the "**Contributory**") applied for a stay of the winding-up order pending determination of the Company's appeal of the winding-up. The Contributory resolved to provide financial support to the Company to pay its debts when they fall due and also adduced the Company's audited financial statement for the year ending 31 December 2018 that showed that the Company is solvent. However, the said audited financial statement does not cover the Company's liability owed to the Petitioner, and the Contributory failed to show the Company's ability to pay the debt claimed by the Petitioner, though the same was disputed by the Company.

The Court considered that the core question at issue is whether or not creditors' interests will be harmed by a stay of a winding-up order. In order for a stay to be exceptionally granted, in addition to the considerations in general litigations, such as the prospect of success of the appeal, the applicant for a stay must adduce evidence which shows that it is able to pay its debts as they fall due. Once the court has found that a company should be wound up on the grounds of insolvency, the interests of creditors generally are engaged and it follows that the court should have regard to their interests.

Applying the principles discussed above, the Court found that the creditors' interests would be harmed if a stay is granted. Further, the Company failed to show a *bona fide* defence to the debt claimed by the Petitioner. Consequently, the Court dismissed the Contributory's application for a stay of the winding-up order pending appeal with costs to the Petitioner.

9. The UK Supreme Court restated the "No Reflective Loss Rule" – the significance of the decision to civil claims and insolvency law

Sevilleja v Marex Financial Ltd [2020] UKSC 31

Marex Financial Ltd ("**Marex**") sued and obtained judgment for more than US$5.5 million against two companies owned and controlled by Mr Sevilleja (the "**Companies**"). Mr Sevilleja allegedly transferred the Companies' assets to his personal account and placed the Companies into insolvent voluntary liquidation. Marex claimed against Mr Sevilleja and sought damages for (1) inducing or procuring the violation of Marex's rights under the judgment against the Companies, and (2) intentionally causing Marex to suffer loss by unlawful means.

Mr Sevilleja contended that Marex's claim against him should be barred by the rule against reflective loss ("**No Reflective Loss Rule**") because Marex, as a creditor of the Companies, was claiming for reflective loss which was suffered by the Companies (whose assets were depleted by Mr Sevilleja) and ought to be recovered by the Companies only.

The No Reflective Loss Rule originated from the principle that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself (*Foss v Harbottle* (1843) 2 Hare 461).

In *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, the Court of Appeal adopted the principle in *Foss v Harbottle* and held that where a company suffered loss from the wrongs committed by a wrongdoer, and that loss resulted in a fall in the value of the shares of the company, a shareholder could not claim against the wrongdoer for the diminution in the market value of the shares. The shareholder did not suffer any personal loss. His only loss was through the company, in the diminution in the value of the net assets of the company, and was merely a reflection of the loss suffered by the company, which can be made good once the company recovered its loss from the wrongdoer.

Prudential was approved in the subsequent House of Lords decision *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, where Lord Millett (mistakenly) considered the rationale behind the No Reflective Loss Rule to be the avoidance of double recovery and paved the way for the expansion of the No Reflective Loss Rule beyond its narrow ambit in *Prudential*.

Lord Millet's expositions of the No Reflective Loss Rule were interpreted subsequently (including by the Court of Appeal in the present case) as expanding to prevent other stakeholders (in the present case, Marex was in the capacity of a creditor only, and not a shareholder) from recovering loss where the company had a claim for the same wrongdoing. The Court of Appeal in the present case held that Marex's claim was barred by the No Reflective Loss Rule even though Marex sued as a creditor and not a shareholder.

In the present case, the seven Supreme Court judges unanimously allowed Marex's appeal on the basis that the No Reflective Loss Rule did not apply to Marex's claim.

All judges recognised the rigidity of the No Reflective Loss Rule but were divided 4:3 as to its fate – the majority (led by Lord Reed) acknowledged the No Reflective Loss Rule should be restated and confined to the original ambit in ***Prudential*** whereas the minority (led by Lord Sales) opined the Rule should be abolished in its entirety.

Lord Reed, delivering the judgment on behalf of the majority, reconfigured the Rule by dividing claims into two kinds:

1. the first kind being claims that are brought by shareholder in respect of loss which he has suffered in the capacity as shareholder, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer; and

2. the second kind being claims that are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within the description of the first kind of claims, but where the company has a right of action in respect of substantially the same loss.

In the first kind, Lord Reed held that the No Reflective Loss Rule should stand to uphold company autonomy. Shareholders should not be empowered to bring proceedings separately in respect of company's loss.

In the second kind, to which this appeal belonged, the concern for company autonomy that underpinned ***Foss v Harbottle*** does not arise. While the risk of double recovery must be curbed, it does not mean such risk must be curbed to the prejudice of a creditor. Such risk may be properly avoided by other means without giving priority to company's claim as a matter of law. However, Lord Reed did not decide on whether double recovery did exist (and if so, the court's response to it) if Marex were to pursue its claim.

The decision of the Supreme Court is to be welcomed. Getting an empty judgment, as the claimant Marex did in this case, is an all too common frustration for claimants in civil cases. After this decision, claimants in a similar position as Marex could sue the controllers of the corporate defendants whose assets they stripped away. In the past, claimants like Marex would need to wind up the corporate defendants, appoint liquidators over them, in the hope that the liquidators could recover the company's assets from its former controllers. This is a very tedious, expensive and uncertain process. The Supreme Court decision would enable justice to be done in a more expeditious and less costly manner.

10. Shareholders and directors have no standing to apply for injunction to restrain presentation of a winding-up petition against the company

Shorts Gardens LLB v London Borough of Camden Council [2020] EWHC 1001 (Ch)

The applicant applied to restrain presentation of winding-up petitions against Saint Benedict's Land Trust Limited ("**SBLT**") and Shorts Gardens LLB, two entities owned by her. The applicant is also said to be a director of SBLT. The petitions relate to unpaid liability orders and unpaid costs orders from earlier litigation.

The English Court considered, amongst other things, whether the applicant has any standing to make such application.

The Court found that the legal right being invaded in the case of a disputed winding-up petition is the right of a company not to be subjected to the winding-up process other than at the instigation of an undisputed creditor. But this is the company's right, not the right of a director or shareholder. Directors are not personally entitled to any benefit by reason of holding office, and the making of a winding-up order does not deprive shareholders of their shares. As a consequence, the Court refused the application for an injunction by the applicant on grounds of lack of standing and abuse of process.

11. Hong Kong Court continues to recognise and assist Mainland liquidators

Re The Liquidator of Shenzhen Everich Supply Chain Co, Ltd [2020] HKCFI 965

Shenzhen Everich Supply Chain Co, Ltd (深圳市年富供应链有限公司) (the "**Company**") is incorporated in the Mainland. On 19 December 2019, the Shenzhen Intermediate People's Court of Guangdong Province (廣東省深圳市中級人民法院) ("**Shenzhen Court**") ordered that the Company be wound up. Shenzhen Zhengyuan Liquidation Co, Ltd (深圳市正源清算事务有限公司) was appointed as the liquidator of the Company (the "**Liquidator**").

Pursuant to a letter of request issued by the Bankruptcy Court of the Shenzhen Court, the Liquidator applied for recognition of the winding-up of the Company in the Mainland and the Liquidator's appointment and status.

The relevant principles have been discussed comprehensively in the decision in *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676. In gist, the following criteria must be satisfied before recognition and assistance will be granted:-

a. the foreign insolvency proceedings are collective insolvency proceedings: *Re Joint Provisional Liquidators of China Lumena New Materials Corp* [2018] HKCFI 276*;* and

b. the foreign insolvency proceedings are opened in the company's country of incorporation: *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] 1 HKLRD 1120*.*

Provided the above criteria are satisfied, the Court may recognise insolvency proceedings opened in a civil law jurisdiction: *Re Takamatsu* [2019] HKCFI 802.

On the facts, Harris J was satisfied that that the winding-up in the Mainland is a collective insolvency proceeding in the Company's place of incorporation and that the Liquidator has been appointed by the Shenzhen Court to wind up the Company. The Judge, accordingly, ordered that the winding-up and the Liquidator be recognised.

The order was appended to the decision in order that practitioners and Mainland judges could see the powers of assistance that in standard cases the Hong Kong court is willing to order, which in turn would hopefully encourage letters of request to be framed in a way which reflect the form of order that the Hong Kong court commonly grants as this assists in dealing with such applications.

12. Hong Kong Court continues to recognise "soft-touch" provisional liquidators of offshore company

Re the Joint and Several Provisional Liquidators of China Oil Gangran Energy Group Holdings Limited (in provisional liquidation in the Cayman Islands) [2020] HKCFI 825

China Oil Gangran Energy Group Holdings Limited (the "**Company**") is incorporated in the Cayman Islands and listed on the Hong Kong Stock Exchange. Soft-touch provisional liquidators were appointed by the court in the Cayman Islands. The Cayman provisional liquidators obtained a letter of request from the Cayman court seeking recognition of their appointment in Hong Kong and providing assistance to them to facilitate the provisional liquidators progressing a restructuring.

It is now settled that the Hong Kong Court may recognize foreign soft-touch provisional liquidation in Hong Kong even though such use of provisional liquidation in Hong Kong is restricted as a consequence of the decision in *Re Legend International Resorts* [2006] 2 HKLRD 192: see *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165, *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [2019] HKCFI 805, *Re Joint Provisional Liquidators of Moody Technology Holdings Ltd* [2020] HKCFI 416.

The Court granted the application for recognition. For the practitioner's ease of reference in the future, the order made was appended to the decision, which departs from the standard order form in that it provides powers that focus on restructuring rather than the more general powers to be found in the standard form that provided by the Companies Court to guide applicants set out in *Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* (Unrep, HCMP 3560/2016, 27 January 2017); *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [2019] HKCFI 805; *Re CEFC Shanghai International Group Limited* [2020] 1 HKLRD 676.

13. Court withheld assistance to foreign liquidators pending order to be made by the courts of the place of liquidation

Re The Joint & Several Liquidators of Rennie Produce (Aust) Pty Ltd v Cheung Fong Chau Alan and Others [2020] HKCFI 1500

Rennie Produce (Aust) Pty (the "**Company**") was incorporated in Australia and is being liquidated there with liquidators appointed on 9 August 2010. Pursuant to a Deed of Settlement dated 3 October 2012 (the "**Deed**"), the Company and another company belonging to the same group also in liquidation by the same liquidators settled a dispute between the companies and a number of individuals and corporate entities (the "**Rennie Parties**"). As a result of the Deed, assets held offshore by or for the benefit of the Rennie Parties are now the property of the Company, although those assets could not be said to clearly belong to the Company as at the date of the commencement of the liquidation.

The liquidators of the Company applied for production of documents and examination of Mr. Alan Cheung, Ms. Fung Hung Chun and Ms. Rebecca Chong (the "**Respondents**") in Hong Kong. Effectively, the examination of the Respondents and documents sought from them were largely for identifying whether the Rennie Parties maintained or kept offshore assets. This is quite different from the more typical case.

The Respondents opposed the application, contending that the liquidators had not produced expert evidence to demonstrate that the Australian Courts would have made an order like the order being sought from the Hong Kong Court.

According to the twin requirements the Privy Council's decision in *Singularis Holdings Ltd v. PricewaterhouseCoopers* [2015] AC 1675, the power sought to be exercised by the foreign liquidator in Hong Kong must be available to them both as a matter of Hong Kong law and the law of their home jurisdiction.

In the present case, while the Court was of the view that the Australian Courts would have the statutory jurisdiction to make the order now sought in Hong Kong, it was not entirely clear whether it would exercise that jurisdiction in the sense that it would be the "settled practice" of the Courts there to make an order such as the one sought. Given all the circumstances, the Court considered it more appropriate for the Hong Kong Courts being the Courts rendering assistance to wait for the courts of the place of liquidation to make an order. In conclusion, the Court adjourned the present application *sine die* with liberty to restore.

14. Bermuda Court discharged an *ex-parte* order recognising the appointment of a foreign liquidator upon finding that the order was obtained for an illegitimate purpose

Stephen John Hunt v Transworld Payment Solutions U.K. Limited (in liquidation) [2020] SC (Bda) 14 Com

Transworld Payment Solutions U.K. Limited (the "**Company**") is one of a number of Transworld companies which are ultimately owned by Mr. John Deuss, who was also the President and CEO of First Curaçao International Bank ("**FCIB**").

Pursuant to a compulsory winding-up order made in the High Court of England and Wales on 22 September 2014, the Company was put into liquidation. Mr. John Hunt, a partner of Griffins was appointed as the liquidator of the Company.

Upon the *ex-parte* application of Mr. Hunt, the Supreme Court of Bermuda granted an order recognising his appointment as the liquidator of the Company and made corresponding orders granting him assistance in that capacity. Another Transworld company, namely Transworld Payment Solutions Limited, a company incorporated in Bermuda, applied for an order discharging the *ex parte* order on the grounds that: (1) the Company did not have any assets in the jurisdiction of the Bermuda Court and (2) the purpose of the recognition application by Mr. Hunt was to obtain documents and information for use in litigation that Mr. Hunt had already determined to bring in England. Since there was no evidence that the Company has any assets in Bermuda, the Court agreed that the sole purpose of recognition was to further investigate the claims against FCIB, involved in an 'MTIC' (Missing Trade Intra-Community) fraud, that Mr. Hunt already intended to bring. Indeed, Mr. Hunt had already settled draft pleadings to that effect.

Referring to the Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, the Supreme Court of Bermuda held that recognition is permissible where there are assets within the jurisdiction in order to clothe the liquidator with the authority to deal with such assets. The common law power to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form are however not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept limitations. On this ground alone, the Court discharged the *ex-parte* order, as the order was obtained for an illegitimate purpose.

15. Hong Kong Court sanctioned a scheme of arrangement to compromise English and New York law-governed debts

Re China Singyes Solar Technologies Holdings Ltd [2020] HKCFI 467

China Singyes Solar Technologies Holdings Limited (the "**Company**") was incorporated in Bermuda and registered in Hong Kong as a non-Hong Kong company. It has been listed in Hong Kong. The Company is a holding company of a number of subsidiaries (together the "**Group**"). Since June 2018, the Group's financial condition deteriorated seriously.

The Company sought sanction for a scheme of arrangement (the "**Scheme**") under section 673 of the Companies Ordinance (Cap 622) to compromise convertible bonds governed by English law and notes governed by New York law.

In addition to well-established principles whether to sanction a scheme as stated in recent cases of *Re Mongolian Mining Corp* [2018] HKCFI 2035 and *Re Da Yu Financial Holdings* [2019] HKCFI 1730], for an international case, the Court would consider, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

Harris J concluded that the Scheme would be substantially effective in England and the US even though there was no application to the English and US courts for recognition of the Scheme. This was because 100% of the holders of the convertible bonds voted in favour of the Scheme and thus coming within an exception to the *Gibbs* rule, namely submission to the scheme jurisdiction. In such situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding: *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802.

As to the notes governed by US law, Harris J found that more than 99% of the holders of the notes had acceded to the restructuring and voted in favour of the Scheme. The remaining creditors had not come forward and there was no reason to believe that any of them would try to enforce their pre-scheme claims in the US. The risk of adverse enforcement by a dissenting creditor in the US would be *de minimis*. Therefore there was no need to seek recognition of the Scheme under Chapter 15 of the US Bankruptcy Code.

In conclusion, the Court sanctioned the Scheme.

Corporate Disputes Cases

16. In what circumstances other than after trial can the court properly enter a judgment for relief in an unfair prejudice petition?

Re Gain Semiconductor Ltd [2020] HKCFI 596

The case concerns an unfair prejudice petition. At issue is in what circumstances other than after trial can the court properly enter a judgment, which determines that a party is entitled to relief pursuant to section 725 of the Companies Ordinance (Cap 622) (the "**Ordinance**").

Shortly after the trial commenced, the Court was informed by the parties that they were close to settling their differences subject to the court being satisfied that it could make an order in the terms they envisaged agreeing. The 1st to 3rd Respondents, who were to be the subject of the intended order, took the position that they did not wish to oppose the Petitioners' allegations that they had conducted the affairs of the Company in a manner unfairly prejudicial to Petitioners, although they were not prepared to concede them.

In *Lai Chi Keung v Wang Zhihua* [2019] HKCFI 1101, it was held that the court does not have the jurisdiction to make a buy-out order "until it is satisfied that there has been unfairly prejudicial conduct". The Judge agreed that the court cannot simply endorse a consent summons for an order granting relief pursuant to section 725(1)(a) of the Ordinance. However, the Judge considered that it would only be possible for the court to make an order if evidence had been put before the court in order that it can reach the necessary decision that the company's affairs have been conducted in a manner unfairly prejudicial to its members. In practice, the Judge expected it also to be necessary for the respondents to take at least a neutral position in respect of the allegations against them as the Respondents were prepared to do in the present case.

In the present case, the trial had already been commenced, witness statements filed and counsel had opened the case. The Judge thus concluded that it was possible to reach the conclusion that the Court had power to make an order without requiring a full trial. In obiter, the Judge acknowledged that this is not a technique that is likely to be available early in the proceedings. The Judge commented that what the parties could do is to agree to an *ad hoc* arbitration in which an arbitrator decides the valuation that would otherwise be conducted by the Court.

17. The Singapore Court of Appeal Reassessed the Test for Equitable Compensation in Breaches of Fiduciary Duties

Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals [2020] SGCA 35

The Plaintiffs, Winsta Holding Pte Ltd ("**Winsta Holding**") and M Development Ltd (a majority shareholder of Winsta Holdings), brought claims against the Defendants, who were directors of Winsta Holding for, *inter alia*, breaches of fiduciary duty. The Plaintiffs claimed that the Defendants had breached the no-conflict rule and no-profit rule. The allegations concerned, among other things, diversions of business opportunities from the Plaintiffs, and interested party transactions entered into by the Defendants. The Plaintiffs therefore sought equitable compensation for their losses.

The Singapore High Court found that the Defendants were in breach of their fiduciary duties. However, on the issue of causation, the High Court held that the Plaintiffs failed to satisfy the "but for" test to show that their loss was causally linked to the Defendants' breach of their fiduciary duties. The Plaintiffs were found to have suffered only two of the pleaded losses relating to the diversion of business opportunity by the Defendants.

On appeal, the Singapore Court of Appeal reassessed the principles of causation applicable to claims of equitable compensation for non-custodial breaches of fiduciary duties, i.e. those not involving any damage to or loss of property in the custody of the fiduciary.

The Court of Appeal determined the proper approach to be as follows:-

(a) In a claim for a non-custodial breach of the duty of no-conflict or no-profit or the duty to act in good faith, the principal must first establish that the fiduciary breached the duty and establish the loss sustained.

(b) This raises a rebuttable presumption that the fiduciary's breach caused the loss. The legal burden is then on the fiduciary to rebut the presumption, to prove that the principal would have suffered the loss in spite of the breach.

(c) Where the fiduciary is unable to prove this, the court will award equitable compensation to the principal, with the upper limit to be assessed by reference to the position the principal would have been in had there been no breach.

In the present case, the Court of Appeal awarded equitable compensation to the Plaintiffs on two further categories of losses relating to diversion of business as the Defendants were unable to prove that Winsta Holding would have suffered the losses even if they had not diverted the opportunities.

Bankruptcy Cases

18. Petitioner held not being unreasonable in refusing the debtors' settlement offers

Re Dan Yin Ping (鄧燕萍) and Re Ng On Kwok (吳安國) [2020] HKCFI 621

Bankruptcy petitions ("**Petitions**") were presented against Dan Yin Ping ("**Dan**") and Ng On Kwok ("**Ng**") (collectively, the "**Debtors**") based on, among others, their non-compliance with a statutory demand for a judgment debt which arose out of a summary judgment ("**Judgment Debt**").

The Debtors did not dispute the Judgment Debt but opposed the Petitions on the ground that they had made three offers to secure or compound for, *inter alia*, the Judgment Debt and those offers had been unreasonably refused by the Petitioner. At issue is whether the offers made by the Debtors meet the requirements of section 6D(3) of the Bankruptcy Ordinance (Cap. 6) ("**BO**") such that the Court should dismiss the part of Petitions concerning the Judgment Debt.

The Court held that the object of section 6D(3) of BO is to empower the Court to dismiss a petition where the debtor has made a reasonable settlement offer which the creditor has unreasonably refused to accept.

In determining whether an offer has been unreasonably refused, the Court would judge the reasonableness of the refusal at the date of hearing and the test is whether a reasonable creditor, in the position of this petitioning creditor, and in light of the actual history as disclosed to the Court, would have accepted or refused the offer: *Cheung Wah v China State Bank Ltd* [1999] 4 HKC 185. Relevant considerations include (i) whether a debtor's offer for payment is for a sum which is considerably less than the sum claimed, (ii) the length of the period over which the sum offered is to be paid, (iii) the willingness or otherwise of a petitioner to take the risk in accepting payment over a long period of time, and (iv) the past repayment history of the debtor.

On the facts, the Court considered the three offers in detail and held that the Petitioners had not been unreasonable in refusing the offers as the sum due and payable by the Debtors far exceeds the Debtors' offer, the proposed time-frame for payment is too long and the Debtors have a history of default and the Petitioner may lose a substantial amount of legal costs by accepting the offers.

In conclusion, the Court did not accept the Debtors' only defence under section 6D(3) of BO and made bankruptcy orders against Dan and Ng.

19. Solicitor for the Bankrupt ordered to disclose all means of contacting the Bankrupt and a copy of the client ledger

Re Han Catherine (Bankrupt) [2020] 2 HKLRD 767

The trustees in bankruptcy of the bankrupt applied for an order pursuant to section 29 of the Bankruptcy Ordinance (Cap 6) that the solicitor for the bankrupt make an affidavit disclosing (1) full particulars of all means of contacting the bankrupt; (2) full particulars of her current last known address; (3) a copy of the solicitor's client ledger in respect of the bankrupt.

The trustees explained on affirmation that they and the Official Receiver were unable to contact the bankrupt. The solicitor indicated that he takes a neutral stance and will abide by the order of the court on the trustees' application. However, in his earlier letters to the trustees, he had stated that the information sought was confidential or privileged, and also protected by the Personal Data (Privacy) Ordinance (Cap 486) ("**PDPO**").

The Court granted the order sought and held that the bankrupt's whereabouts and contact details were clearly information that the trustees reasonably required for the performance of their functions and there is reason to believe that the solicitor was in possession of the information sought. While the contact details of the bankrupt may be confidential, it is trite that a mere duty of confidentiality may be overridden by a court order for disclosure.

Secondly, the Court held while the protection of legal professional privilege went further than confidentiality, no privilege had *prima facie* arisen, as there was no basis to think that the contact details had been provided to the solicitor in confidence for the purposes of obtaining legal advice. The mere provision of such details by the client was, without more, a formality: *R (Miller Gardner Solicitors) v Crown Court at Minshull Street, Manchester* [2002] EWHC 3077 (QB).

Furthermore, while data protection principle 3 in the PDPO provided that personal data shall not without consent be used for a new purpose, s.60B of the PDPO stated that personal data was exempted from this principle if the use of the data was required or authorised by any court order in Hong Kong or required in connection with any legal proceedings in Hong Kong.

Lastly, it was held that the trustees were entitled to a copy of the client ledger as the bankrupt's property vested in them upon their appointment pursuant to section 58(2) of the Bankruptcy Ordinance (Cap 6).

20. English Court satisfied that a payment constituted unfair preference but refused to grant restitutionary relief given payee's change of position

Bucknall and another v Wilson [2020] EWHC 1200 (Ch)

On 22 March 2017, Mr. Fowlds was adjudged bankrupt as a result of a judgment debt owed to his son. The investigation of the trustees in bankruptcy revealed that on 4 September 2014, within two months of the judgment and with permission to appeal having been refused, Mr. Fowlds made a payment to Ms. Wilson, his stepdaughter. The payment represented 48% of the debt due to her. In addition, all of Mr. Fowlds' creditors were paid in full with the exception of his son.

The trustees in bankruptcy issued an unfair preference claim against Ms. Wilson and sought repayment with interest and costs. Section 340(2) of the Insolvency Act 1986 (equivalent to section 50(2) of the Hong Kong Bankruptcy Ordinance (Cap 6)) provides the English Court with power to make a restitutionary order for the benefit of the bankrupt's estate.

The Court held that the payment was a preference because Mr. Fowlds was insolvent at the relevant time and there is a presumption that Mr. Fowlds when deciding to make the payment was influenced by a desire to prefer Ms. Wilson. In any event, the evidence showed that it was clear that Mr. Fowlds intended to pay all of his creditors with the exception of his son, and accordingly that he positively desired to prefer Ms. Wilson. All the elements required under section 340 of the Insolvency Act 1986 to bring successful claim were thus present.

However, the Court refused to grant relief in respect of the preference, finding that this is a case out of the wide scope of the norm. In reaching this conclusion, the Court took into account the following factors:-

1. The debt arose from a commercial relationship and represented a fair amount for the work carried out. The payment was not influenced by Ms. Wilson being an "associate".

2. Ms. Wilson played no part in the making of the preference other than receiving the payment. She acted in good faith.

3. The preference payment is no longer available to her. The payment had been used to repay her father who in turn had used the money to pay his wife's medical bills. The Court considered that it would not be appropriate to make an order against a recipient who has changed position on the basis of the receipt in good faith, i.e. without knowledge of the possibility of preference, in a way that would make it unfair to require repayment of the money.

4. She would suffer wholly disproportionate consequences. She would be unable to provide restoration without sale of her family home. The proceeds of sale available to her would be insufficient to purchase another house in the same area. That, in turn, would have had a detrimental effect on her business and on her children (14 and 16 years old) who would have had to move school. This would be extremely damaging to her and her children.

The English Court concluded that these factors taken together moved the case well beyond the norm. Justice and fairness required no order to be made.

There is no case law in Hong Kong expressly addressing the same issue. In his book "Principles of Corporate Insolvency Law", Professor Goode has noted two threshold objections to allowing change of position or any other restitutionary defence to an unfair preference claim. The first is that the sections are concerned not with the resolution of claims between private parties but with the protection of creditors in a winding up, and they have the specific policy of protecting the value of the company's assets. The second is that where legislation contains detailed remedial provisions, it is not open to the court to invoke common law rules either to confine the discretion given to the court by the statutory provision or to bypass restrictions on remedial relief imposed by those provisions. It remains to be seen to what extent the Hong Kong courts will follow Professor Goode's more restrictive approach to judicial discretion in statutory insolvency recovery cases.

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