December 2021

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:

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- 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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In this Quarterly, unless otherwise stated, the following abbreviations are used:-

- Section numbers refer to those in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32, Laws of Hong Kong);
- Rule numbers refer to those in the Companies (Winding Up) Rules (Cap 32H, Laws of Hong Kong);
- "BO" means the Bankruptcy Ordinance (Cap 6, Laws of Hong Kong);
- "CO" means Companies Ordinance (Cap 622, Laws of Hong Kong);
- "the Company" refers to the company which is the subject matter of the disputes or the winding up petition;
- "PL" means provisional liquidators

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Corporate Insolvency Cases

1. Trustees in bankruptcy of a company's creditor given leave to be appointed as provisional liquidators of the company

Re LT Commercial Ltd [2021] HKCFI 2867

The Company had been put into creditors' voluntary liquidation on 6 June 2013. Mr So Man Chun and Mr Jong Yat Kit are the liquidators in the creditors' voluntary liquidation. On 19 July 2021, the Industrial and Commercial Bank of China (Asia) Limited presented a petition seeking a winding up order against the Company and seek to appoint the current liquidators as provisional liquidators of the Company.

The reason the petition, which is not opposed, has been presented was that the most significant assets which the liquidators of the Company need to take control of are located in Beijing. This involves taking control of subsidiaries of the Company whose Mainland management has proved uncooperative. The liquidators have been advised that they are more likely to be able to progress the liquidation in Beijing if they are formally appointed by the Court in a compulsory liquidation process, which will give them the imprimatur of the Hong Kong High Court. For this reason a major creditor has agreed to present the petition.

The Court agreed that the reason for applying to appoint provisional liquidators is largely practical. The only issue is that the current liquidators are the trustee in bankruptcy of Mr Yang Longfei, who is a creditor of the Company. Mr Yang was a previous chairman of the Company. The amount of his debt represents approximately 0.24% of the Company's total debt.

Section 262B(3)(a) provides that except with the leave of the court a creditor of the Company should not be appointed provisional liquidator or liquidator. The Court agreed that by virtue of section 58 of the BO (which provides that the property of a bankrupt vests in the trustees after a bankruptcy order is made) the liquidators are creditors of the Company. It follows that leave of the court is required if the current liquidators in the voluntary liquidation are to be appointed as provisional liquidators.

Given that Mr Yang's debt is very small, the Court took the view that it is unlikely to give rise to a material conflict. It is thus a proper case for the court to give leave for Mr Yang's trustees to be appointed provisional liquidators although technically they are creditors of the Company.

2. Liquidators criticized for allowing excessive claim of a party's costs

Re Quality Denim Ltd [2021] HKCFI 1386

The Company, which was the subject of a shareholders' dispute, was wound up by consent in February 2014. The Company had over HK$2 billion realised assets. In 2016, there was a dispute amongst shareholders about how to realise the value of a subsidiary in the Mainland. The Liquidators issued a summons seeking directions from the Court confirming that the method they proposed should be adopted. On 25 August 2016, the Court granted an order substantially in the form sought by the Liquidators. The Court also ordered that the costs of both the Petitioner and the 1st Respondent be paid out of the assets of the Company. In late 2019, the Petitioner requested the Liquidators to pay its costs in the sum of HK1,853,946. After negotiation, the Liquidators agreed to settle the Petitioner's costs for HK1,483,156.80 (the "**Amount**"). The 1st Respondent objected to the Amount on the basis that the Amount is manifestly excessive.

It is trite law that a liquidators' decision is only to be interfered with if it is reached in bad faith or falls outside the range of decisions that a liquidator, applying the relevant legal principles and giving proper weight to factual matters could reasonably be expected to make.

Having studied the costs schedule submitted by the Liquidators which was provided by the Petitioner, the Court came to the view that the costs claimed by the Petitioner were unprofessional and excessive. In particular, the hours and costs recorded by the Petitioner's solicitors for the preparation of the hearing were entirely unjustified, given that it was an application made by the Liquidators, which was opposed by the 1st Respondent and thus it was not necessary for the Petitioner to take any steps actively to support it. There was therefore no conceivable way in which there could be any justification for the Petitioner recovering anything remotely like that level of time costs and the Liquidators should have appreciated that the fees claimed were manifestly excessive and should be taxed.

In *obiter*, the Court observed that it is now becoming all too common that the court is presented with excessively long affirmations consisting of long-winding expressions of inadmissible opinion, argument and submissions. Liquidators, as officers of the court and themselves professionals, should be alert to poor practices by law firms resulting in the escalation of legal fees.

3. Can liquidators receive bonus for outstanding performance?

Re Lehman Brothers Asia Holdings Ltd (In Liq) [2021] 3 HKLRD 769

This is an application by the sole remaining liquidator of the Company for an order to retain a payment in the sum of US$2.9 million. The payment intended to be made to KPMG is by its nature a bonus agreed by the Company's sole creditor Lehman Brothers Holdings Inc., because of what the creditor considers to be the Liquidators' success in massively reducing various fees that would otherwise have had to be paid to the Hong Kong Government in connection with the liquidation (including ad valorem fees) where the savings totalled HK$989,000,000.

The Official Receiver opposed the application on the following grounds:

1. The bonus is not remuneration and Rule 147 prohibits the payment of any other kind to a liquidator; and

2. Even if the bonus is regarded as an increase in remuneration, the Liquidators failed to justify the payment by reference to the normal principles that govern the payment of liquidators, in particular, the principles in *Mirror Group Newspapers plc v Maxwell & Others* [1998] BCC 324 ("***Maxwell* principles**").

With respect to the first ground, the Court was of the view that the bonus would be remuneration. Further, Rule 147 does not prevent the liquidators returning to court and asking the court to change whatever arrangements that had previously governed their remuneration - it simply states that a liquidator, being a fiduciary, cannot profit from his office unless permitted by statute or an order of the court.

As to the second ground, the Court held that the *Maxwell* principles, which apply in cases where the Court is being asked to assess the remuneration, do not apply to the present case. The present application is based on the creditor's agreement to pay a bonus, not the amount of work carried out by the liquidators. Having reviewed the evidence before it, the Court was also satisfied that the Company's sole creditor held a genuine and reasonable view that the liquidators have successfully carried out their duties and as a result the return to the creditor has been materially higher than it might otherwise have been.

Lastly, given that this was a unique case which would not likely recur, it could not sensibly be said that by approving the application, the Court might appear to condone excessive payments to liquidators, encourage similar applications in the future, or approve overly generous remuneration of liquidators generally.

The Court concluded that the Official Receiver's concerns do not justify the Court declining the application. However, neither did the Court approve the application at the hearing. Rather,

the Court adjourned the summons to a case management conference in order that directions could be made for the filing of further evidence explaining how the bonus is to be distributed and what precisely the creditor had agreed to.

4. Court of Appeal affirmed that the Stock Exchange may suspend the listing of a solvent issuer where the issuer fails to maintain a viable and sustainable business

China Trends Holdings Ltd (中國趨勢控股有限公司) v Stock Exchange of Hong Kong Ltd [2021] 3 HKLRD 554

The Company had been listed on the GEM Board of the Hong Kong Stock Exchange since July 2002. The level of its business operations had been continuously low for several years and it only recorded minimal profit or loss for recent consecutive financial years.

The Exchange's Listing Division, being concerned with a potential breach of the GEM Listing Rule 17.26, invited written submissions from the Company, and having considered the same, decided to suspend trading in the Company's shares pursuant to Rule 9.04 of the GEM Listing Rule.

Rule 17.26 provides that an issuer shall carry out, directly or indirectly, a sufficient level of operations or have tangible assets of sufficient value and/or intangible assets for which a sufficient potential value can be demonstrated to the Exchange to warrant the continued listing of the issuer's securities. In turn, Rule 9.04 provides, *inter alia*, that the Exchange may suspend dealings in an issuer's securities where it considers that the issuer does not carry on a business as required under Rule 17.26.

The decision of the Listing Division was upheld on review by the GEM Listing Committee and the GEM Listing (Review) Committee. The Company then applied for judicial review against the Review Committee's decision. The application was dismissed by the Court of First Instance. The Company appealed to the Court of Appeal. It was argued, *inter alia*, that the Company's business was viable and sustainable for the purpose of Rule 17.26 as it was a solvent company.

The Court of Appeal held, *inter alia*, that there was no justification to read in a "proximity to insolvency" requirement in the application of Rule 17.26 as contended by the Company. Such requirement would lead to the absurd result that notwithstanding the risk to market speculation and manipulation, insider trading and unnecessary volatility, the Exchange would not be entitled to suspend the listing of a dormant issuer or one with negligible business activity so long as it had assets even if those assets had not been, and would not be, meaningfully deployed in the course of business.

Instead, the viability and sustainability of the business of an issuer shall be examined by qualitative assessment as to whether an issuer had a viable and sustainable business which warrants the continued listing of its shares. Whether this threshold had been met was a

matter of professional judgment of the members of the Listing Division, the Listing Committee and the Review Committee.

On the facts, the Court found that the Exchange had acted in accordance with the correct approach and there was no ground for interfering with the decision of the Review Committee.

5. Applying the American Cyanamid test, the English Court refused to grant an injunction to restrain a liquidator from selling properties at an alleged undervalue

Absolute Living Developments Ltd (in liquidation) (acting by its liquidator, Louise Mary Brittain) v DS7 Ltd and others [2021] EWHC 2311 (Ch)

Mr. Charles Cunningham, a litigant in person, brought an application against the Company, and its liquidator, Ms. Louise Mary Brittain, seeking an injunction to restrain the sale of certain properties (the "**Property**") by the liquidator at an alleged undervalue.

The Applicant alleged that the liquidator was proposing to sell the company's interest in a plot of land at an undervalue because a higher price could be achieved if it was instead sold as a development opportunity with two adjacent plots owned by third parties. He claimed that the liquidator was negligent, or dishonest, in pursuing a sale of the land on its own.

Since the Applicant is a litigant in person, the Court decided not to deal with the various preliminary points raised by Counsel for the liquidator, such as the standing of the Applicant. Instead, the Court focused on the substance of the application and whether it satisfied the three-stage test for granting an interim injunction set out in *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1 (05 February 1975), that is (1) whether there is a good arguable case, (2) whether an injunction (as opposed to another remedy) is necessary and (3) what is the balance of convenience (the American Cyanamid Principles).

For the reasons below, the Court concluded that a claim of a transaction at an undervalue as a result of misconduct by the liquidator was hopeless and unarguable on the evidence.

First of all, the Court found that the Company has gone through a sales process and the highest offer came in at £3.211 million for the Property concerned. The Court thus considered that the offers received in relation to the Property very much indicate that the true price for the Property is much closer to what the liquidator says is achievable, rather than the price alleged by the Applicant.

Secondly, the current application is not supported by any creditor of the Company nor by the liquidator of DS7, a company which has a claim to 42% of any sums over and above the sum of £4.5 million received by the Company. If Mr. Cunningham's allegation is right, the creditors of the Company and DS7, acting through its liquidator, would have a very peculiar interest in seeking a higher sale price and in realising the premium that Mr. Cunningham says exists.

More importantly, the Court highlighted that the problem with a "packaged" sale suggested by Mr. Cunningham is that the ownership of the development as a whole is fragmented and is not unitary. Not all of the leasehold interests concerned have been surrendered, rending the development potentially infeasible, uncertain or at least costly.

Lastly, the Court found that the liquidator has been advised by two agents in the sale of the Property. It is likely that they have advised the liquidator to sell on a disaggregated basis. Mr. Cunningham's claim is ambitious as it presupposes a collective form of negligence, or even dishonesty, on the part of all or some of the two liquidators and two sales agents. The Court thus concluded that on the evidence before it, such claim is hopeless and unarguable.

The Court then briefly considered stage two and three of the American Cyanamid Principles, which the application also failed. The application for injunction was accordingly dismissed.

6. Another failed attempt to delay / avoid delisting – the Court refused to grant an injunction pending appeal to prohibit the Exchange from cancelling the Company's listing, finding that the possible impact that delisting might have on the Company's shares was insufficient to constitute a significant factor tilting the balance of convenience in favor of the grant of injunction

Cai Zhenrong (蔡振榮) v Stock Exchange of Hong Kong Ltd [2021] 4 HKLRD 57, [2021] HKCFI 2202

The Company was listed on the Stock Exchange of Hong Kong. It was wound up on the ground of insolvency and was unable to comply within the remedial period with the resumption guidance or conditions set for resumption of trading in its shares. The Listing Committee of the Stock Exchange cancelled the Company's listing pursuant to rule 6.01A of the Listing Rules. he decision was upheld by the Listing Review Committee.

The Applicant is one of the Company's shareholders. He sought leave to apply for judicial review of the Listing Committee's decision. The application was refused by the Court. The Applicant then filed a notice of appeal on several grounds including a systemic challenge to the delisting regime and that the Court had erred in finding that he lacked standing. The Applicant also made an urgent application pursuant to O.59, r.10(9) of the Rules of the High Court (Cap 4A) for an injunction pending appeal to prohibit the Exchange from cancelling the Company's listing, which in effect was an application for a stay of execution of the judgment pending appeal.

On an application for an injunction or stay of execution on a decision pending an intended appeal: (1) the Court will first look to be satisfied that the appellant has shown reasonable grounds of appeal with a real prospect of success, and (2) the Court will then endeavor to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard, so that (3) if not making the order to stay the execution of the relevant order would cause the applicant to suffer irreparable harm, e.g. by making the appeal nugatory; then the Court might interfere (iv) where the balance of convenience pointed in favor of granting of the stay or injunction.

The Court found that none of the grounds of appeal put forward in this case had a reasonable prospect of success. In any event, the balance of convenience tilted against the grant of injunction relief in the particular circumstances of this case for the following reasons:-

(1) Maintenance of the status quo of the continued long-term suspension of trading would cause prejudice. The policy of delisting process was to ensure that listed companies whose shares had been suspended from trading for a lengthy period

should have the listing cancelled. The remedial period had long expired, but the Company was still in no position likely to be able to resume trading even within the coming months.

(2) Mere assertion of irreparable harm was insufficient. The Court found that the Company had said nothing and the Applicant had filed little evidence to set out the nature or extent of the harm he was likely to suffer if an injunction was wrongly withheld and the Company be delisted. The Court held that delisting itself did not necessarily lead to loss. Each case would depend upon its own circumstances.

(3) The possible impact that delisting might have on the Company's shares was insufficient to constitute a significant factor titling the balance of convenience in favor of the grant of injunction. Any investment in shares in a listed company bore the potential that the value of the shares could go down for a variety of reasons.

Accordingly, the Application's request for an injunction pending appeal was dismissed.

7. The Court made a usual winding-up order against the debtor company, finding that the appointment of provisional liquidators over its holding is nothing but an attempt to bolster the application for adjournment of the Petition in Hong Kong

Re Trinity (Management Services) Ltd [2021] HKCFI 2207

The Company is a subsidiary of Trinity Limited ("**Holdings**"), which is incorporated in Bermuda. On 8 December 2020, Standard Chartered presented a petition to wind up the Company on the ground of insolvency relying on failure to satisfy a statutory demand (the "**Petition**"). The debt in question is guaranteed by Holdings. On the same date, Standard Chartered also presented a petition in Bermuda seeking the winding up of Holdings.

Holdings then applied in Bermuda for the appointment of provisional liquidators. On 26 March 2021, the Bermuda court appointed members of RSM as provisional liquidators and adjourned the petition for three months. The Company proposes that the Petition against it also be adjourned in order that what it and Holdings describe as a restructuring can be progressed.

It is not in dispute that a creditor is entitled to a winding up order *ex debito justitae* if a debtor fails to pay an undisputed debt, but that the court has a discretion to adjourn a petition in order to allow a debtor who claims that with time he will be able to pay the creditor the opportunity to do so. To satisfy the Court, a debtor has to put before a petitioner and the court a proposal for repayment, which is both precise and credible.

At the outset, the Judge pointed out that there is a difference between seeking time to pay a debt in full and restructuring a swathe of corporate debt. Holdings is a garment designer, manufacturer and retailer. It proposes to sell one of its best known brands, Cerruti 1881 ("**Cerruti**"), and to pay Standard Chartered, and its other banking creditors, in full. It is not suggested that the debt be restructured at all, neither does it appear that there is any plan to rehabilitate what Holdings' Board recognise is a problematic business model. It would thus appear that Holdings' Board intend to pay off the banks and then continue with the existing business albeit without one of its best known brands. What is proposed, held by the Court, cannot be characterised as a restructuring.

Further, the Court considered that that the appointment of the provisional liquidators was for the sake of bolstering the application for an adjournment. The Judge described the appointment as a misnomer as the management of Holdings has been left in the hands of Holdings' Board. The provisional liquidators' role is nothing more than an independent financial adviser.

Moreover, the Court found that the appointment also seems to have been of limited effect in protecting creditors' interests as the purchase of inventories by a subsidiary of the Company

had led to the resignation of the auditors of Holdings and the provisional liquidators felt constrained to issue a summons in Bermuda to obtain access to the necessary documents to investigate.

Lastly, the Court found that the evidence filed by the Company and Holdings does not demonstrate that on the balance of probabilities the banks will be paid in full within a reasonable period. The offer received to buy Cerruti was also much less than the valuation.

Accordingly, as the Court is not satisfied that it is more likely than not that Standard Chartered's debt will be paid in full at the end of a short adjournment, a usual winding-up order is made against the Company.

8. The Hong Kong Court's first letter of request to a Mainland Court requesting for recognition of and assistance to Hong Kong liquidators under the new "Cooperation Mechanism"

Re Samson Paper Company Limited (In Creditors' Voluntary Liquidation) [2021] HKCFI 2151

The Company is incorporated in Hong Kong and is part of a listed Group. Mr. Lai and Mr. Ho of Deloitte were appointed as provisional liquidators of the listed Group by the Supreme Court of Bermuda on a soft touch basis. On 14 August 2020, the intermediate group subsidiary, which held the voting shares in the Company, resolved to wind up the Company on the grounds of insolvency and appointed Mr. Lai and Mr. Ho as liquidators of the Company ("**Liquidators**"). The Liquidators found it necessary to obtain recognition and assistance to deal with the Company's substantial assets in China, which are principally located in Shenzhen.

On 8 July 2021, the Liquidators issued an *ex parte* originating summons requesting an order that "*A simplified Chinese version of the letter of request in the form annexed hereto to be issued to the Bankruptcy Court of the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and the Liquidators*." This is the first such application made to the High Court of Hong Kong in accordance with the Cooperation Mechanism entered into between the Supreme People's Court and the Secretary for Justice of Hong Kong, which provides for procedures for mutual recognition of insolvency processes and office holders by the High Court of Hong Kong and the Intermediate People's Courts in the three jurisdictions of Shenzhen, Shanghai and Xiamen.

On the evidence, the Court was satisfied that the Company's centre of main interests has been in Hong Kong since its incorporation. The "*Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region*" ("**SPC Opinion**") therefore applies.

Further, the Court considered it appropriate to grant the letter of request sought. The assistance the Liquidators needed relate to conventional asset collection action. In order to carry out this function, the Liquidators have an express statutory power to commence legal proceedings to recover assets and this includes commencing proceedings outside Hong Kong.

In conclusion, the Court ordered that a letter of request in simplified Chinese be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's

liquidation and its liquidators. The letter of request and its English translation are appended to the judgment handed down by Harris J.

9. Increasingly difficult - winding up in Hong Kong a foreign incorporated listed company which holds operating and asset owning subsidiaries in Mainland China through intermediate subsidiaries incorporated in offshore jurisdictions

Re Of Up Energy Development Group Ltd [2021] HKCFI 2595

The Company is incorporated in Bermuda and listed on the Hong Kong Stock Exchange, with asset owning subsidiaries based in the Mainland held by intermediate subsidiaries incorporated in the British Virgin Islands. On 29 March 2016, a petition was issued in Hong Kong to wind up the Company on the grounds of insolvency. On 18 May 2016, another creditor of the Company filed a petition in Bermuda. In October 2016, joint provisional liquidators ("**JPLs**") were appointed by the Bermuda Court over the Company with powers to restructure its debt who were later recognized in Hong Kong. The petition in Hong Kong has been adjourned by consent since that time to allow the JPLs to introduce a scheme of arrangement (the "**Scheme**").

The Scheme was introduced in Bermuda and sanctioned by the Bermuda Court on 1 November 2019. The Scheme involved listing new shares that would be issued to the investor who was to finance the Scheme in return for obtaining control of the Company. However, the Listing Committee of the Exchange decided to delist the Company's shares, and such decision was upheld by the Listing Appeals Committee. The Company then lodged an *ex parte* application for judicial review of this decision, which is pending. But given no successful application in the past, realistically, the Company will be wound up.

The Petitioner then pressed for an immediate winding-up order in Hong Kong.

At the outset, the Court reiterated that as a general rule, a company should be wound up in its place of incorporation. Further, for the purpose of the 2nd core requirement, the Court was of the view that there is no evidence that suggests that the Hong Kong subsidiaries owned by the BVI intermediate subsidiaries could be put into liquidation by a Hong Kong liquidator appointed over the Company. The liquidator would not be able to obtain control of the BVI subsidiaries and through control of the BVI subsidiaries' shareholding take control of the Hong Kong subsidiaries.

Moreover, the Court noted that there are proceedings already on foot in Bermuda and also that it is probably necessary to put the Company into liquidation in Bermuda in order to obtain control of the Group. Accordingly, the Court refused to make an immediate winding-up order but directed that the Petition be adjourned until the second Monday after the handing down of the decision in the judicial review proceedings commenced by the Company.

Lastly, in passing, the Court commented that in general, a winding up petition against a company incorporated in an offshore jurisdiction that owns a subsidiary incorporated in another offshore jurisdiction which in turn owns operating and asset owning companies in the Mainland, should be issued in the company's place of incorporation, unless:-

(1) The intermediate offshore subsidiary's centre of main interest is in Hong Kong and thus recognition in the Mainland is possible under the cooperation arrangement signed on 14 May 2021 by the Secretary for Justice and the Supreme People's Court; or

(2) A liquidator appointed over the holding company can petition to wind up an offshore subsidiary in Hong Kong as a creditor.

10. Winding-up petition against a foreign incorporated listed company ordered to be dismissed for there is no real and discernible benefit of a winding-up order being made in Hong Kong

Yao Weitang v China Creative Global Holdings Ltd [2021] HKCFI 2814

The Company is incorporated in the Cayman Islands and listed on the Main Board of the Hong Kong Stock Exchange. The operating and asset owning subsidiaries of the Company, held through BVI intermediaries are located in the Mainland where the Company carries on the large majority of its business. On 11 December 2020, the Petitioner, an individual who made a loan in the amount of HK$4 million to the Company, sought to wind up the Company on the grounds of insolvency. There is no dispute that the Company is insolvent.

The Company did not adduce any evidence in response until the Petition was first heard on 24 May 2021. The Court considered that it would have made an immediate winding up order if not for the fact that points were taken on behalf of the Company concerning the Court's exercise of its discretionary jurisdiction to wind up a foreign company. The Petition was thus adjourned for substantive arguments.

There is no dispute that the first and third core requirements are satisfied. The controversy concerns the second core requirement which requires a petitioner to demonstrate a real and discernible benefit of a winding-up order being made in Hong Kong.

The Petitioner advanced two matters as constituting a real and discernible benefit. The first concerns the possibility of the Company having sufficient cash in bank in Hong Kong to satisfy the debts. In this regard, the Petitioner relied on the last publicly available interim report of the Company for the period ended 30 June 2019, which shows that there is cash in bank of over RMB500 million. This was rejected by the Court as the report is two years out of date and the Company's principal bankers were at all times located in the Mainland.

The second matter concerns obtaining control of the Mainland subsidiaries. It was argued that the new cooperation arrangement signed on 14 May 2021 would allow liquidators of the BVI intermediate subsidiaries to seek recognition in Xiamen, presumably, as the Group carried on business in Fujian. The Court however noted that the Group divides into two parts. One part has an intermediate holding subsidiary incorporated in Hong Kong, Allens, but that is already in liquidation in Hong Kong on the petition of a different creditor. In the case of the other part of the Group there is no evidence which suggests that the Company would have a basis for seeking a winding up order in Hong Kong because the Petitioner simply does not have access to the Company's relevant financial records, or that the relevant BVI subsidiary's centre of main interest is currently located in Hong Kong. In view thereof, the Court took the view that the suggestion that there is a benefit to be obtained by putting the Company into liquidation because it would begin a process which would result in a BVI

subsidiary being put into liquidation in Hong Kong that would provide a springboard for recognition in the Mainland to be very largely speculative and not sufficient to satisfy the second core requirement.

The Petition was thus dismissed. As to costs, the Court made no order as to costs to reflect the unsatisfactory way in which the Company responded to the Petition.

11. Hong Kong Court, for the first time, granted order for recognition of and assistance to reorganisation proceedings in the Mainland

Re Jiang Wenyu and Others [2021] HKCFI 2897

The Company is the holding company of a substantial business group based in Hainan that developed very serious financial problems in the past few years. On 10 February 2021, the Hainan Province Higher People's Court ordered that a reorganisation commence pursuant to Article 22(i) and Article 24(i) of the Enterprise Bankruptcy Law and Article 18 and Article 19 of the Provisions of the Supreme People's Court which provide for the appointment of an administrator during the course of Enterprise Bankruptcy cases. The order established a liquidation group which was appointed as the Company's administrator ("**Administrator**").

The Administrator applied to the Hainan Province Higher People's Court for a letter of request directed to the Hong Kong High Court seeking recognition of the reorganisation in the Mainland and for powers of assistance to particular representatives of the Administrator in Hong Kong.

It is well established now that the Hong Kong Court will only recognise what, as assessed by Hong Kong legal principles, constitutes a collective insolvency process. Having considered what the PRC reorganisation process involves, the Court reached the view that the Mainland reorganisation concerns all of the Company's creditors and its character is clearly properly characterised as a collective insolvency procedure and, therefore, should be and is capable of being recognised in Hong Kong.

Another issue before the Court arose by virtue of the cooperation agreement between Hong Kong and Mainland signed on 14 May 2021 that provides a procedure for recognition and assistance of insolvency proceedings in Hong Kong and three intermediate People's Courts in the Mainland, being Shenzhen, Shanghai and Xiamen - but the agreement does not extend to Hainan. However, citing *Re CEFC Shanghai International Group Limited* [2020] HKCFI 167, the Court explained again that the principle of reciprocity is not a requirement of common law recognition and assistance in Hong Kong. Therefore, the fact that it may be that the Hainan Province Higher People's Court would not recognise Hong Kong insolvency proceedings and liquidators, is not of itself a bar to the Hong Kong court granting recognition at the request of the Hainan court.

In conclusion, the Court granted the order sought by the Administrator. The order are appended to the judgment handed down by Harris J.

12. The 2nd core requirement may still not be satisfied for winding up a BVI company even if the Court has powers over directors resident in Hong Kong

Re Grand Peace Group Holdings Ltd [2021] HKCFI 2361

The Company was incorporated in Bermuda and listed on the GEM Board of the Stock Exchange of Hong Kong Limited (the "**HKEX**"). On 19 December 2019, a winding-up petition was issued against the Company. The petition has been adjourned on several occasions to allow the Company to restructure its debt. On 30 April 2021, the GEM Listing Committee determined that the Company's shares should be delisted from the HKEX.

On 21 May 2021, one of the Company's creditors (the "**Applicant**"), being dissatisfied with the repeated adjournment of the petition, applied to be substituted as the petitioner and sought an immediate winding up order. On 16 August 2021, the GEM Listing Committee upheld the decision that the Company's shares should be delisted. In view of the delisting decision, restructuring previously envisaged by the Company was no longer feasible. The only issue before the Court at the hearing was to determine jurisdiction.

It is now well established that the 3 core requirements must be satisfied before the Court would exercise its discretion to wind up a foreign incorporated company, namely that: (1) the foreign company has a sufficient connection with Hong Kong; (2) there must be a reasonable possibility that the winding-up order would benefit the petitioner; and (3) the court must be able to exercise jurisdiction over person(s) in the distribution of the company's assets.

In *Re China Huiyuan Juice Group Limited* [2021] 1 HKLRD 255, the court decided that in general, it would be futile for the Hong Kong court to appoint liquidators over a company incorporated in Bermuda in order to take control of its subsidiaries incorporated in the BVI with the ultimate aim of taking control of subsidiaries in the Mainland owned by the BVI companies. The correct course should be to seek to wind up the holding company in its place of incorporation.

In this case, there was no dispute that the 1st and 3rd core requirements were met. The only issue was whether the 2nd core requirement was satisfied. With reference to the decision in *Re Yung Kee Holdings Limited* (2015) 18 HKCFAR 501, the Applicant argued that the 2nd core requirement can be satisfied if the majority of the directors of the Company are in Hong Kong and therefore subjected to the *in personam* jurisdiction of the Hong Kong court. It was argued that the Hong Kong court could make an order to compel directors of the Company to execute documents necessary for liquidators to take control of the BVI subsidiaries.

The Court was of the view that there are 2 main problems with the approach taken by the Applicant. On the one hand, the BVI Registrar of companies will likely refuse to recognize

and effect the necessary changes for liquidators to take control of the BVI subsidiaries if he was alerted to the fact that documents with which he had been presented had only been executed under the compulsion of an order made by a Hong Kong court on the application of a liquidator appointed in Hong Kong because this would be inconsistent with the principle of BVI private international law that only a liquidator appointed by the court of the place of incorporation will be recognised and assisted. Even if the BVI Registrar of companies made the necessary changes, it would still be open to a disgruntled creditor or member to apply to the BVI court for an order to rectify the register.

On the other hand, once a company is in liquidation and the Hong Kong court appoints a liquidator, directors cease to have any power as the liquidator steps in. It would thus be artificial for the court to make an order compelling directors to execute necessary documents at the request of the liquidator.

It would be an exception to the general rule if the centre of the main interest of the BVI subsidiaries were in Hong Kong and what was sought was the appointment of liquidators in Hong Kong with a view to an application being made to one of the Intermediate People's Courts of Shanghai, Shenzhen or Xiamen under the "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region" (the "**Cooperation Mechanism**"). However, the Applicant did not intend to make such application pursuant to the Cooperation Mechanism.

On the facts, the Court found that the Company's only asset in Hong Kong is an unquantified debt of less than HK$80,000 owed by a subsidiary incorporated in Hong Kong. Therefore, neither the Company's assets in Hong Kong nor the value of the Company's listing status that has now been lost is sufficient to satisfy the 2nd core requirement of a reasonable possibility that the winding-up order would benefit the petitioner.

As a result, the substitution application made by the Applicant was dismissed. The winding up petition was further adjourned as requested by the parties until later this year in order that the Company can put forward a proposal for scheme of arrangement.

13. The Court clarified that in a privatisation scheme, offeror concert parties should be allowed to vote at the scheme meeting but their votes should not be counted for the purposes of complying with the Takeovers Code

Cosmos Machinery Enterprises Ltd (大同機械企業有限公司) [2021] 3 HKLRD 637

According to Rule 2.10 of the Code on Takeovers and Mergers and Share Buy-Backs ("**Takeovers Code**"), where any person seeks to use a scheme of arrangement or capital reorganisation to acquire or privatise a company, such scheme can only be implemented if:

(a) The scheme is approved by at least 75% of the votes attaching to the disinterested shares that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares; and

(b) The number of votes cast against the resolution to approve the scheme or the capital reorganisation at such meeting is not more than 10% of the votes attaching to all disinterested shares."

In the present case, at issue is whether the offeror concert parties should be excluded from voting at the scheme meeting as a result of the operation of Rule 2.10 of the Takeovers Code.

There are two schools of thought on the meaning of Rule 2.10, namely: (i) Rule 2.10 prohibited the offeror concert parties from voting (the "**Prohibition View**"); and (ii) Rule 2.10 did not prohibit the offeror concert parties from voting but their vote could not be counted for the purposes of complying with the Takeovers Code (the "**Non-Prohibition View**").

The Court held that the Non-Prohibition View was the correct position, that such a view was more consistent with the natural and ordinary meaning of Rule 2.10 of the Takeovers Code and s.674(2) of the CO. If parties acting in concert with the offeror were part of the scheme, they must be allowed to vote as a matter of scheme law because there must be a meeting of those shareholders subject to the scheme under s.670(2)(b) of the CO.

The proposed scheme in the present case however was not able to proceed as the necessary majority has not been obtained.

14. In deciding whether to discount the votes of a scheme creditor, whose motive is impugned, the Court would ask if the creditor had not had the "special interest" in question, would he have voted differently

Re Century Sun International Ltd [2021] HKCFI 2928

The Company was incorporated in Hong Kong in 2011 and is part of a media group headquartered in the Mainland (the "**Group**"). On 14 July 2020, a winding-up petition was presented against the Company. The Company has been pursuing a debt restructuring in order to return to a solvent going concern. On 23 June 2021, the Court made an order allowing the Company to convene a meeting of its unsecured creditors to consider and approve a proposed scheme of arrangement to restructure the Company's unsecured debt (the "**Scheme**"). A meeting was convened on 29 July 2021, at which the Scheme was approved by the Scheme Creditors representing 76.9% of the unsecured debt. On 20 August 2021, the Company applied for the Court's sanction of the Scheme which was opposed by two Scheme Creditors (the "**Opposing Creditors**").

In deciding whether a scheme should be sanctioned, the Court will take into account the considerations as set out in *Re China Singyes Solar Technologies Holdings Limited* [2021] HKCFI 457, namely (a) whether the scheme is for a permissible purpose; (b) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting; (c) whether the meeting was duly convened in accordance with the Court's directions; (d) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision whether or not to support it; (e) whether the necessary statutory majorities have been obtained; (f) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and (g) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

What is controversial in the present case and which are the objections of the Opposing Creditors are (1) the constitution of the classes, (2) whether the result of the meeting satisfactorily represented the interests of the Scheme Creditors, and (3) the adequacy of the information contained in the Explanatory Statement.

1. Constitution of the Class

When determining the constitution of classes, the Court will look at the similarity of creditors' legal right against a company. Rights that a creditor may have against a third party are not relevant. In the present case, the Opposing Creditors argued that they should have voted in a separate class because they have guarantees from third parties and the Scheme purports

to release those rights. The Court disagreed and held that this is not relevant to the constitution of classes as the rights under the guarantees are not rights against the Company. The Court further held that given the release of liabilities of third parties was intended to facilitate the return of the Group to financial viability, such release was permissible.

2. Whether the approval of the Scheme fairly reflect the interests of Scheme Creditors

The majority of the debt compromised by the Scheme is inter-company debt. Scheme Creditors, who are also subsidiaries of, or associated with the Company account for around 67% of the debt to be compromised by the Scheme. The Opposing Creditors argued that the Group creditors, in approving the Scheme, were motivated by additional reasons. The Court held this is not the test. The test is whether because of their additional interests their views cannot be regarded as fairly representative of the class. To answer this question, the Court will ask whether there is anything that suggests if the creditor whose motive is impugned had not had the "special interest" in question, he would have voted differently. The Opposing Creditors failed to point to anything which suggested that the Group creditors would have voted differently but for their relationship with Company. The Court, therefore, considered that the Group creditors' vote should be counted.

3. Adequacy of the Explanatory Statement

A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests. The duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. Having reviewed the Explanatory Statement, which consisted mainly of formal documents plus a list of directions, the Court found that the Company failed to provide explanation on the missing audited financial statements for two financial years. The Court also considered that the table in the Explanatory Statement containing what purports to be a comparison of a scheme scenario and a liquidation scenario, contained minimal information and the liquidation scenario is not supported by independent verification from an insolvency practitioner or other suitable professionals. As a result, the Court came to the view that the Explanatory Statement fell far short of providing the type of information required. But considering that the Scheme was put forward in good faith, the Court ordered that a further meeting be convened and an adequate explanatory statement be produced.

15. The High Court in Malaysia makes it clear that leave to proceed with legal proceedings against a company under a scheme of arrangement will only be allowed under exceptional circumstances

Re Top Builders Capital Bhd & Ors [2021] 10 MLJ 327

This Malaysian decision concerns an application to proceed with legal proceedings against a company subject to a scheme of arrangement.

In November 2020, Seng Long Construction & Engineering Sdn Bhd ("**Seng Long**") which was a construction and renovation contractor filed a writ action against Ikhmas Jaya Sdn Bhd ("**IJSB**") which was the main contractor in a construction project to recover the alleged debt for services provided. On 10 December 2020, Seng Long filed for a summary judgment application. However, before the summary judgment application was heard, at around the end of December 2020, Top Builders Capital Berhad and two of its subsidiaries, Ikhmas Equipment Sdn Bhd and IJSB filed for an application in the Malaysian High Court for leave to convene the creditors' meeting under a scheme of arrangement and obtained a restraining order on actions against them. Seng Long then applied to intervene in the scheme of arrangement proceedings and sought leave to continue with its writ action against IJSB. The issue before the Malaysian Court was whether leave was to be granted to Seng Long to proceed with the legal proceedings against IJSB despite the restraining order.

In dismissing Seng Long's application for leave to proceed against IJSB, the Malaysian Court held that leave will only be granted in 'exceptional circumstances' and that the circumstance or combination of circumstances must be of sufficient weight to overcome the strong imperative to have the claims dealt with under the machinery of the scheme of arrangement. It was held that since Seng Long's claim was a pure monetary claim and that Seng Long's contention that the summary judgment application had a real prospect of success were not 'special circumstances' to warrant the grant of leave. Seng Long had thus failed to demonstrate that the circumstances in this case warranted its claims to be determined and proceeded with differently from the other general scheme creditors under the machinery of the scheme of arrangement.

16. Applying the irregularity principle, the Court refused the minority shareholder's challenge against an inquorate EGM, finding that the majority shareholder could avail itself of section 570 of the CO

Paul & Shark Asia Pacific Ltd [2021] 2 HKLRD 1235

The Company has three shareholders, namely Dama S.P.A. ("**Dama**") holding 70 of the shares, the Plaintiff holding 15 shares and her sister ("**Lily**") holding the remaining 15 shares. As at the relevant date, Andrea Dini ("**Dini**"), Lily and the Plaintiff are the only directors of the company.

On 1 July 2016, Dama, the Plaintiff and Lily entered into a shareholders' agreement, clause 3.1 of which provided that the number of directors shall be at least two, with one representative from Dama and one representative from the Plaintiff and Lily; that the parties may increase or decrease the number of directors at any time provided that there was unanimous agreement.

On 28 December 2020, Dama sent an email invoking the members' power to request the directors of the Company to call an EGM under section 566 of the CO. The Plaintiff and Lily agreed to the calling of the EGM. But neither of them attended the EGM. Dama then adjourned the EGM to the following week and at the adjourned EGM, it was resolved that the Plaintiff be removed as a director of the Company.

The Plaintiff contended that the EGM was inquorate since the Company's articles required two members. Further, the Plaintiff argued that Dama had wrongly adjourned the EGM to the following week instead of dissolving it under a proper construction of article 36(1) of the Company's articles. As a result, the Plaintiff claimed that the purported resolutions and meetings were null and void, and of no legal effect.

The issues before the Court were (1) whether the EGM convened was held pursuant to the articles of association; and (2) if not, whether Dama could rely on the 'irregularity principle' as a majority shareholder to avail itself of section 570 of the CO.

The Court held that the Plaintiff's construction of article 36(1) of the Company's articles was correct and the Plaintiff's application would succeed but for the application of the irregularity principle.

The essence of the irregularity principle is that, the lawfulness of a decision taken by a meeting of members or board cannot be questioned if the only facts alleged to make it unlawful is a mere informality and irregularity and the intention of the meeting is clear. This is particularly so if there is no evidence that the decision of the meeting would have been

different if the correct procedure had been observed: *Peter Yip v Asian Electronics Limited* [1998] 2 HKC 96 at 102I to 103B.

In the present case, the question comes down to whether an application, if it had been made under section 570 of the CO, would inevitably have been successful. Section 570 of the CO confers power on the Court to order a meeting in difficult circumstances where, for example, the quorum requirements or some other provision of the articles cannot be complied with and nevertheless deems the meeting to have been properly convened, held (constituted) and conducted.

The Plaintiff contended that by virtue of clause 3.1 of the shareholder's agreement, she has a right to participate in the management of the Company. In any event, it was the Plaintiff's case that the Company is a *quasi-partnership*.

In deciding whether a minority shareholder can successfully contest an application for an order under section 570 of the CO on the grounds that a company is in the nature of a *quasi-partnership*, the Court referred to and adopted the approach set out by Harris J in *Re Mandarin Capital Advisory* [2011] 2 HKLRD 1003, which requires that:

(i) The minority shareholder should demonstrate that, assuming that the meeting called could be convened and conducted without the intervention of the court, he would be entitled to an injunction to prevent the applicant tabling a resolution;

(ii) Strong evidence would be required of an unqualified right on the part of the minority shareholder to participate in the management of a company all the time that he remained a shareholder.

To satisfy requirement (ii), the Court ruled that normally a written agreement between shareholders, to which a company is not a party, containing an express prohibition against removal of a director which can be enforced by injunction would be required. Allegations that, if made out at trial, might establish that it was unfairly prejudicial for a minority shareholder to be excluded from management of a company is not sufficient.

Furthermore, the Court found that clause 3.1 of the shareholders' agreement, properly construed, did not confer on the Plaintiff a *"right to participate in the management of the company"*. The clause was in substance a representation clause.

Accordingly, the Court dismissed the Plaintiff's application. In passing, the Court noted that the gist of the Plaintiff's complaint was indeed a matter which she could take up, if so advised, in unfair prejudice proceedings.

17. Overlook of the proper plaintiff rule results in application dismissed

ZPMC Offshore Service Co Ltd v Philip Jeffrey Adkins [2021] HKCFI 2660

The Applicant, the majority shareholder of the Company, issued an originating summons pursuant to sections 728 and 729 of the CO in the proceedings in HCMP 426/2017 (the "**426 Action**"), seeking, amongst other things, a declaration that a board meeting of the Company that took place on 14 February 2017 and the resolution purportedly passed at that meeting to remove Mr. Adkins, the 1st Respondent, as the CEO of the Company were valid.

Also on 24 February 2017, the Applicant applied *ex parte* on notice for an order prohibiting, amongst other things, Mr. Adkins holding himself out as the CEO of the Company and obtained order granted by Louis Chan J ("**Order**"). The Order was continued by Harris J without opposition on 3 March 2017 and 11 April 2018. It appears that Mr. Adkins was aware of the Order but subsequently breached it on more than one occasion. On 24 August 2020, leave was granted to the Applicant to apply for an order of committal and the Applicant issued an originating summons on 31 July 2020 seeking an order for committal ("**Contempt Proceedings**").

Mr. Adkins applied to strike out the 426 Action, discharge the Order, set aside the order for leave to issue the Contempt Proceedings and dismiss the Contempt Proceedings.

Section 729(1) of the CO provides that a member "*whose interests have been, are or would be affected by...*" conduct falling within section 728(1)(a) can seek a final injunction or a declaration. Section 728(1)(a)(iii) of the CO includes "*a breach specified in subsection (4)*". Subsection (4) includes breach of a person's fiduciary duties owed to the company in question both as a director and in any other capacity.

The Court emphasized that the above provisions have to be read and understood against the general proposition of the Rule in *Foss v Harbottle* that the proper plaintiff in proceedings to remedy a wrong to a company is the company itself, because it is in the company that the cause of action is vested. Section 729 is only intended to permit and facilitate a member to remedy a wrong which a company cannot and will not take steps to remedy itself, but not to allow a member to commence an action for a breach of fiduciary duty by a director which a company is quite capable of commencing.

The Company has three shareholders: the Applicant, which holds 51% of the shareholding of the Company, the 2nd Respondent RBF HK Ltd ("**RBF**"), which holds 32.5% and the 3rd Respondent Lihua Logistics Company Limited ("**ZHLG**"), which holds the remaining 16.5%. The Articles provide for the Company to have seven directors of which four are appointed by the Applicant. There were four in February 2017. It is clear from the Articles and the Shareholders Agreement that it was possible for the Applicant to convene a

board meeting to pass any resolution it likes other than in relation to reserved matters, albeit it may, because of the way which the Articles operate, initially have required the initial meeting of the Board to have been adjourned because the quorum requirements required a director representing each member to be present. However, if the initial meeting was inquorate it could be adjourned for 10 days at which if any four directors were present the board meeting would become quorate. Therefore, as the wrongs of which the Applicant complained were clearly done to the Company and the Applicant could cause the Company to take action to remedy them, then on the face of the matter it was unnecessary for the Applicant *qua* member to take action.

Accordingly, the Court considered it appropriate to strike out the 426 Action and discharge the Order. As a result, the Court ordered that the order for leave to issue the Contempt Proceedings be set aside and the Contempt Proceedings be dismissed.

18. The Court made a winding-up order against a solvent, listed foreign company upon a shareholder's unfair prejudice petition, recognizing that given the extent of the misfeasance it will be difficult to quantify the adverse impact of the prejudicial conduct on the value of the Company

Ninotre Investment Ltd v Strong Light Investments Ltd [2021] HKCFI 3095

The Company was incorporated in the Cayman Islands and listed on the GEM Board of the Stock Exchange of Hong Kong. The Petitioners, the 1st Respondent, Strong Light Investments Limited ("**Strong Light**"), and the 2nd Respondent, Flying Mortgage Limited ("**Flying Mortgage**") held 3%, 23.41% and 10.39% of the Company's issued shares respectively.

The Petitioners sought to wind up the Company on just and equitable ground, contending that the Respondents, which are controlled by Wong Kwan Mo and his wife, Lau Lan Ying ("**Wongs**"), had caused the affairs of the Company to be conducted in a manner which is dishonest, unfair and prejudicial to the Respondents.

Flying Mortgage sought to strike out the Petition on the ground that it was brought unreasonably as the Petitioners had not pursued the more appropriate alternative remedies, i.e. a buyout order. The Respondents further contended that it is *prima facie* unreasonable to seek to wind up a solvent listed company because a shareholder can go into the market and sell their shares.

Generally, a winding up of a solvent company is a remedy of last resort. This is particularly so if the order might adversely affect the financial interests of innocent shareholders. Citing his own decisions in *Scanty Investment Company & Anor v Brilliant Functions Ltd & Others* (Unrep., HCCW 190/2018, 26 March 2020), Harris J explained that the Petitioner should be required to seek relief in the place of incorporation unless it can be demonstrated that: (i) the Respondents would be unlikely to be able to finance the purchase of the Petitioner's shares; or (ii) there is some other compelling reason not to require the Petitioner to litigate his complaint in the place of incorporation.

As to the availability of a public market, the Court held that this is a relevant consideration if there is reason to think that it provides a fair and pragmatic resolution of a dispute, but if the share price is depressed because of mismanagement then it is not. Expecting the Petitioners to be satisfied with selling their shares at the present price with no adjustment for the impact on their value for the matters, is both unrealistic and unreasonable.

On the evidence, the Court found that the affairs of the company justifies an independent investigation by provisional liquidators, which is likely to result in valuable claims being pursued to the benefit of the Company and its shareholders. The investigation will not be

pursued unless the Company is wound up. The court also agreed that, given the extent of the misfeasance and loss caused to the Company by the machinations of the Wongs and their nominees and proxies, it would be difficult to quantify the adverse impact of their conduct on the value of the Company and its shares. This pointed to this being one of the rare cases in which the appropriate remedy is to wind up a solvent, listed company.

Accordingly, the Court made a winding-up order against the Company.

Bankruptcy Cases

19. English Court recognised the Russian bankruptcy proceeding under common law

Kireeva and another v Bedzhamov [2021] EWHC 2281 (Ch)

The Respondent is a Russian national, who has been residing in England and Wales since 2017. On 2 July 2018, the Russian Court made a bankruptcy order against the Respondent (the "**Bankruptcy Order**") and appointed the Applicant, a Russian insolvency practitioner as the trustee in bankruptcy of the Respondent.

On 19 February 2021, the Applicant applied to ask the English Court to recognise her appointment and the bankruptcy proceedings in Russia (the "**Recognition Application**") with the aim of taking control of the Respondent's property located in England.

The English Court allowed the Recognition Application, finding that the Respondent had submitted to the Russian jurisdiction when the Respondent's legal adviser in Russia voluntarily appeared on behalf of the Respondent at the hearings of the bankruptcy proceedings before the Moscow City Arbitrazh Court in June 2017 (the "**Russian Hearings**"). At the Russian Hearings, the Respondent's legal adviser submitted that the relevant court should have been the Arbitrazh (Commercial) Court of the Moscow Region instead of the Moscow City Arbitrazh Court. The English Court found that this was merely a challenge to the internal jurisdiction but not the international jurisdiction of the Russian courts to exercise bankruptcy jurisdiction over the Respondent. The English Court also held that the bars to recognition, namely fraud, natural justice and public policy had not been established on the facts.

The Court then considered the effect of recognition on the Respondent's assets in England. The parties accepted that movable property in England vested in the trustee. However, the Court found that there is no authority which supports the proposition that the English courts may make an order at common law to vest immovable property located in England in a foreign trustee or to require a bankrupt to transfer any such property to a foreign trustee. Accordingly, the English Court concluded that it has no power to entrust the immovable property of the Respondent to the Applicant or declare that it has vested in the Applicant or order it to be transferred to the Applicant. In consequence, the Court also declined to grant the trustee any further assistance in relation to the property, such as ordering the bankrupt to provide further information on it.

20. A discharged bankrupt has *locus standi* to defend claims against him arising from personal injuries, for the order of discharge does not release the bankrupt from such debt

Yu Chun Kit v Wong Wing Yau (formerly trading as Viewbond Cargo Service Co) [2021] 3 HKLRD 938

The plaintiff was a casual delivery worker. On 23 January 2014, he was riding and sat in the front seat of a medium goods vehicle driven by the 1st defendant. A car accident occurred and the plaintiff sustained various injuries.

After the accident, on 16 September 2014, the 1st defendant was adjudged bankrupt upon a bankruptcy petition presented by himself. The plaintiff commenced the proceedings on 20 January 2017. Thereafter, upon the consent of the plaintiff and the joint and several trustees in bankruptcy of the 1st defendant's estate ("**Trustees**"), Master M Wong made an order in HCB 5797/2014 granting leave to the plaintiff to carry on these proceedings against the 1st defendant. The Trustees have indicated that they would not contest these proceedings on behalf of the 1st defendant. On 16 September 2018, the 1st defendant was discharged from bankruptcy.

At issue is whether the 1st defendant, being a discharged bankrupt, has *locus standi* to appear at the trial and cross-examine the plaintiff.

The general principle is that a bankrupt has no *locus standi* to appear in proceedings involving claims for debt or damages in which he is a defendant, by reason that the only assets out of which the claim can be satisfied will have vested in his trustee in bankruptcy. The bankrupt is protected by his bankruptcy from the claim which lies only against his estate, and has therefore no recognised interest in defending it: *Heath v Tang* [1993] 1 WLR 1421. However, section 32 of the BO recognises several circumstance in which an order of discharge does not release the debt of the bankrupt. In particular, section 32(6) of the BO provides that discharge does not, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty being damages in respect of personal injuries to any person.

The Court, after considering relevant English authorities, came to the view that since the 1st defendant's liability has not been released by his discharge from his bankruptcy, he remains personally liable to pay any damages as assessed at the trial out of his property acquired after discharge. The 1st defendant thus has sufficient interest, and thus *locus standi*, to appear at the trial and make submission on the quantum of the plaintiff's claim.

21. An exclusive jurisdiction clause does not *per se* prevent a winding up petition from being presented in the appropriate jurisdiction

Re Guy Kwok-Hung Lam [2021] HKCFI 2135

Pursuant to a credit and guaranty agreement (the "**Agreement**") between CP Global Inc. (the "**Borrower**"), Tor Asia Credit Master Fund LP, the lender (the "**Petitioner**"), and Lam Kwok-Hung Guy, the personal guarantor ("**Lam**"), the Petitioner advanced various term loans in the amount of US$29,500,000 (the "**Term Loans**") to the Borrower. The Term Loans were secured by the personal guarantee given by Lam in favour of the Petitioner.

The Borrower did not repay the Term Loans by the deadline. Nor did Lam repay the Term Loans. The Petitioner thus took presented a petition seeking a bankruptcy order against Lam. The Agreement contains an exclusive jurisdiction clause ("**EJC**"), which provides that the parties agreed to submit to the exclusive jurisdiction of the New York court for the purpose of all legal proceedings arising out the Agreement. On 14 April 2021, Lam commenced proceeding in the New York courts against the Petitioner, seeking declaration that there was no event of default and various other reliefs.

Lam advanced in total six grounds to argue that the bankruptcy petition should be dismissed. Amongst the other things, Lam contended that the Petitioner is required to litigate the dispute in the New York court before coming to Hong Kong to invoke the bankruptcy regime (the "**EJC ground**"). Lam placed reliance on the decision in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449, where Harris J held that a winding up petition should generally be dismissed if (1) the company disputed the debt, (2) the contract contained an arbitration clause that covered any dispute relating to the debt, and (3) the company commenced the contractually mandated dispute resolution process and filed an affirmation in accordance with rule 32 of the Companies (Winding Up) Rules (Cap 32H) demonstrating this.

The Court rejected Lam's argument. The Judge, Madam Justice Linda Chan, accepted the Petitioner's submission that there is a fairly settled view in the Commonwealth authorities that an EJC does not *per se* prevent a winding up petition from being presented in an appropriate jurisdiction: see *BST Properties v Reorg Apport Penzugyi RT* [2001] EWCA Civ 1997; *Citigate Dewe Rogerson Limited v Artaban Public Affairs Sprl* [2011] 1 BCLC 625; New South Wales: *Re International Materials & Technologies Pty Ltd* [2014] NSWSC 168; and *De Wet v Vascon Trading Limited* (BVIHCV (Com) 2011/0129, 6 December 2011).

Her Ladyship further explained that the fact that the parties have agreed to an arbitration clause or an EJC is only a factor which would be taken into account by the Court when considering a winding up/bankruptcy petition. An EJC does not *per se* prevent the Companies Court from considering the issue whether the creditor has the *locus* to present a winding up/bankruptcy petition. This is because unless and until the company/debtor is able

to demonstrate to the Court that there is a *bona fide* dispute on substantial ground in respect of the debt, there is no proper basis for the company to contend that there is a dispute which must be litigated in accordance with the contractually agreed forum. Putting it in another way, it would be a pointless exercise to require the creditor to first obtain an award or a judgment from the agreed forum when there is no real dispute on the debt.

On the facts, the Court found that there is no *bona fide* dispute that (1) there was event of default under the Agreement and, therefore, the Petitioner was entitled to enforce the security provided by the various parties, and (2) Lam was liable but failed to repay the Term Loans to the Petitioner on or before 31 December 2019.

Accordingly, the Court made a usual bankruptcy order against Lam.

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