March 2022

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:

- 9 Corporate Insolvency Cases
- 2 Cross-border Insolvency Cases
- 1 Restructuring Case
- 1 Corporate Disputes Case
- 6 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. Winding Up order made against a foreign incorporated listed company despites its restructuring attempts

Re GTI Holdings Ltd [2021] HKCFI 3647

The Company was incorporated in the Cayman Islands and listed on the Main Board of the HKEX. The Petitioner sought to wind up the Company on the ground that the Company failed to satisfy a statutory demand served upon it on 21 January 2020. On 26 May 2020, the Company presented a winding up petition ("**Petition**") against itself and applied for the appointment of PLs for restructuring purpose with the Grand Court of the Cayman Islands. Subsequently, on 28 May 2020, the Cayman Court appointed PLs over the Company.

The PLs made an *ex parte* application to the Hong Kong Court (under HCMP 1556/2020) to seek recognition of their appointment. By an order made on 9 November 2020, the PL's appointment was recognized and they were allowed to exercise certain powers in Hong Kong for, among other things, the purposes of putting forward and implementing a restructuring proposal.

The Petition first came to be heard before Harris J on 13 July 2020, and was adjourned to 27 August 2020. The Petition was further adjourned to 16 November 2020, 1 February 2021, 22 March 2021, 19 July 2021 and finally to 22 November 2021 ("**Adjourned Hearing**") pursuant to the various consent summonses filed by the Company and the Petitioner. The adjournments were sought without the consent of the creditors ("**Supporting Creditors**") who had given notices to appear in and support the Petition.

By another consent summons dated 11 November 2021, the Company and Petitioner proposed to further adjourn the Petition and to vacate the Adjourned Hearing. No explanation however was given to the Court as to why the Petition should be further adjourned. Nor did the parties seek the consent of the Supporting Creditors. The Court refused to grant an order in terms of the consent summons.

The Court recognized that as the starting point, an unpaid creditor whose debt is not in dispute is entitled as of right to seek an immediate winding up order against the Company. The burden is on the Company to satisfy the court that there is a proper basis to further adjourn the Petition.

In assessing the feasibility or otherwise of the proposed restructuring, the Court will have to take into account the views of the unsecured creditors as they have the right to decide whether the proposed restructuring is one which they are prepared to accept. It is not for the

Company or the PLs to decide if it is in the interests of the creditors to accept the proposed restructuring: *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177.

On the evidence, the Court found that the proposed scheme is not feasible for the following reasons:

(1) One of the creditors relied on by the Company is a secured creditor. As the secured creditor is entitled to realise the security and applies the sale proceeds to repay the debt owed by the Company, it is wrong for the Company to include its claim as part of the 48% creditors who are willing to consider the proposed scheme;

(2) There is no evidence to show that the proposed scheme has the support of 75% in value of the claims of the unsecured creditors;

(3) It is clear from the evidence that the SEHK has not indicated that it will approve the listing of the new shares proposed to be issued upon implementation of the scheme, and requires the consideration of the latest audited financial statements of the Company. Without any audited financial statements, it is difficult to see how the Company can satisfy SEHK's requirements; and

(4) More importantly, it is clear that despite the appointment of the PLs for about 18 months, the financial position of the Company and its subsidiaries have not improved and the Company remained unable to comply with the basic obligation of publishing its audited financial statements. It is therefore undesirable that the Company remain in operation as a going concern in view of the substantial loss recorded in its unaudited financial statements.

Further, the Court is satisfied that the 3 core requirements are satisfied for the Court to exercise its discretion to make a winding up order against the Company. The Court accordingly made an immediate winding-up order against the Company.

2. What is a creditor's entitlement to vote at a creditors' meeting where the company has a cross-claim against the creditor?

Re Hsin Chong Construction Co Ltd (No 4) [2021] 5 HKLRD 489, [2021] HKCFI 3451

Upon the Company being wound up by the Court, its PLs convened a creditors' meeting, at which a creditor, West Kowloon Cultural District Authority ("**WKCD**"), submitted a proof of debt for the purposes of voting in the sum of $1,860,447,061.33. The PLs admitted the proof at $1 on the basis that WKCD's proof of debt was subject to an unascertained cross-claim by the Company, which rendered WKCD's claim unliquidated, by the operation of insolvency set-off under section 35 of the BO and rules 125 and 128. Rule 125 prevents the Chairman of a creditors' meeting from admitting claims for voting purposes if its value is unliquidated or unascertained, whereas rule 128 confers a power to admit or reject a proof of debt for the purpose of voting.

The outcome of the creditors' meeting was that the PLs were appointed as liquidators and a committee of inspection was formed, whose members did not include WKCD. WKCD, which had voted against the PLs' appointment and had wished to be appointed to the committee, applied for, *inter alia*, a declaration that it was entitled to vote at all creditors' meetings in respect of the full amount of its proof of debt.

The Court of First Instance dismissed WKCD's application on the grounds that:

(1) The application turned on whether WKCD's claim, or any part of it, constituted a liquidated amount. If it did, WKCD would have been entitled to vote in respect of that amount at the creditors' meeting. If not, the PLs would have been correct in only admitting it, as per current practice under rule 125, for the nominal amount of $1.

(2) The proper position was that a creditor could vote in respect of the net liquidated amount due, if any, at the commencement of the liquidation. Where a debtor company asserted a genuine cross-claim that was not ascertained yet, the creditor's claim could not properly be admitted for voting purposes.

(3) There was no suggestion by WKCD that the Company's cross-claim was not genuine or that it could be ascertained. As such, the PLs were correct to admit WKCD's proof for $1.

In terms of the standard of proof when adjudicating a proof for voting purposes, the Chairman of a creditors' meeting must determine whether or not on the balance of probabilities a claim or cross-claim for a liquidated amount was established. If it is not, the proof should not be admitted for voting, or should be valued at $1.

Accordingly, WKCD's application was dismissed.

3. Court of Appeal provided guidelines on liquidators' application for direction under s.200(3) of Cap 32

Re Hsin Chong Construction Co Ltd (Provisional Liquidators: Application for Directions) [2021] 5 HKLRD 212, [2021] HKCA 1581

CUHK entered into a contract engaging the Company to construct student hostels (the Main Contract). The Company in turn engaged R2 - 7 as nominated sub-contractors (NSCs). Works under the Main Contract were substantially completed in 2012. The architect issued two final certificates to the Company in 2020, stating that $5,025,227.26 and $3,073,210.06 were due from CUHK (the Final Sum). The Final Sum consisted of, *inter alia*, retention monies and non-retention monies payable to the NSCs. A winding-up petition was presented against the Company in August 2018 and PLs were appointed.

In February 2020, CUHK paid the Final Sum to the Company. The PLs applied for directions, under section 200(3) and the inherent jurisdiction of the Court, as to whether they should make any distributions to the NSCs out of funds received from CUHK because of the existence of 3 legal questions:

1. Whether a set-off mechanism negates a trust in respect of the Retention monies (the '**Set-Off Question'**);

2. Whether the Retention monies have been sufficiently segregated such that a trust has been created (the '**Segregation Question'**); and

3. Whether the Non-Retention monies form part of the estate of the Company or can be distributed to the NSCs pursuant to the provisions on direct payment (the '**Direct Payment Question**').

The trial judge at first instance rejected the application on the grounds that, among others, the PLs cannot ask the court to make a commercial decision for them or seek directions on matters which fall within the liquidators' discretion where the intention is to absolve the liquidators of their responsibility when faced with a difficult commercial decision, and that an application under section 200(3) should not be lightly made.

The PLs renewed the application before the Court of Appeal which granted leave and proceeded to deal with the substantive appeal.

The Court of Appeal held that the starting point is that the PLs as officers of the Court have a duty to administer the assets of the Company in the interests of all stakeholders. It would be impractical and unnecessary to impose a prior requirement for them to seek leave before applying for directions from the Court that appointed them. The relevant term requiring prior sanction of the Court in the order appointing the PLs only covered actions commenced by

the PLs "in the name of and on behalf of [the Company]" and not those commenced in the name of the liquidator as here. Further, the Court of Appeal held that while the judge was correct to say that liquidators should not ask the Court to make a commercial decision for them in an application under section 200(3), they had a duty to seek directions if there was a difficulty in the course of administration. The issue would commonly be legal and of significance and must call for the exercise of some legal judgment. If the Court took the view that an application was legitimate, it should provide some advice or direction so that the liquidators as its officers were not left floundering.

The Set Off Question

The Court of Appeal held that CUHK is entitled to hold the retention monies due to the NSCs. The Main Contract General Conditions and the Nominated Sub-Contractor General Conditions provide that the Retention and the Sub-Contract Retention shall be held upon trust by the employer for the Contractor and for any NSCs respectively.

In *Re Tout and Finch Ltd* [1954] 1 All ER 127, the English Court considered the effect of clauses that (i) creates a trust by way of an equitable assignment of assets described as the contractor's interest in the retention money; and (ii) provides that the contractor shall be entitled to make certain deductions or set-offs from any sums, including any retention money, which he may be liable to pay to the sub-contractor. The English Court held that the latter clause is a normal and sensible provision against what the company (i.e. the main contractor) may owe to the applicants (i.e. the sub-contractor) as trustee, and the company may set off moneys which may be owing by the applicants to the company. On the other hand, in the case of *Yew Sang Hong Ltd v. Hong Kong Housing Authority* [2008] 3 HKC 290, a contrary view was adopted by the court, i.e. a right of set off relating to third party indebtedness is contrary to the existence of a trust.

In view of the conflicting authorities, the Court of Appeal considered that there is a genuine legal question as to whether a set off provision is incompatible with existence of a trust. As such, this is a matter that the PLs in the proper exercise of their duty, may justifiably seek the court's guidance and directions.

The Segregation Question

The Court was referred to the case of *Lehman Brothers International (Europe) (in administration) v. CRC Credit Fund Ltd* [2012] Bus LR 667, where the court held that both segregation of money into a separate bank account and a declaration of trust are necessary to create a trust. The mere segregation of money is not sufficient to establish a proprietary interest. In the case of *MacJordan Construction Ltd v. Brookmount Erostin Ltd* [1994] CLC 581, which was decided in the context of a building contract, the Court held that for a trust to arise, the separate trust fund must be fully constituted prior to insolvency.

The PLs argued that the first instance judge failed to appreciate that segregation of trust assets is arguably an independent requirement that has to be satisfied to constitute a trust in order to ensure certainty of the subject matter.

The Court of Appeal however recognized that there are authorities to the effect that so long as the entitlement to trust assets can be clearly identified, setting aside trust monies in a separate fund is not strictly required.

In light of the different approaches adopted by different cases, the Court of Appeal emphasised that context is everything in a case. It acknowledged that CUHK adopted a stringent project accounting system that retention money can be easily ascertained, and that the PLs received the exact amounts of final accounts payable to the Company and all the NSCs. Thus, there is no question of any NSCs' money mixed with the Company's money.

The Court concluded that this is a matter that the PLs in the proper exercise of their duty, may justifiably seek the court's guidance and directions.

The Direct Payment Question

This question concerns the Non-Retention monies. The PLs are of the view that the Company's creditors should share *pari passu* in the available assets of the company in liquidation, in proportion to the debts due to each creditor. On the other hand, the 4th respondent is of the view that the *pari passu* principle only operates after the winding up order has been made and the NSCs' entitlement both in respect of the Retention monies and Non-Retention monies had arisen before the liquidation.

The Court of Appeal agreed with the PLs. If the Company was eventually wound up, the commencement date of winding up would be the date of the petition. Prior to that date, there was no indication that CUHK was prepared to make the payments direct to the NSCs. The issue of direct payment only arose after the date of liquidation. On this basis, the view of the PLs is correct. Since there is a dispute on the entitlement, the Court of Appeal held, the PLs have properly raised this question for the Court's determination, and the court's answer to the Direct Payment Question is no.

In conclusion, the appeal is allowed. The three questions are found to be genuine legal questions which justify the PLs seeking directions from the court. The Retention Monies are ordered to be released to the respective NSCs. As for the Non-Retention Monies, they form part of the estate of the Company and shall be distributed to the Company's creditors.

4. Hsin Chong Saga continued to the CFA: in applying Section 182, it is important to identify the property being disposed of

Re Hsin Chong Construction Co., Ltd. [2021] HKCFA 14

The Company and Build King Construction Limited ("**Build King**") entered into a joint venture agreement (the "**JV Agreement**") in November 2013 to form and operate a joint venture (the "**JV**"). The JV was subsequently awarded a government contract for a major project in June 2016 with the Company taking a 65% interest and Build King the remaining 35%.

The Company found itself in financial difficulties commencing in 2017/2018. On 27 August 2018, a winding up petition was issued against the Company, which led to the Company's bank account being frozen.

As a result of the Company's insolvency, Build King, on 13 December 2018, invoked its right under Clause 17 of the JV Agreement to exclude the Company from the JV. The Company was then banned from taking part in the management of the JV and Build King took over the benefits of the Company in the JV. However, pursuant to Clause 17 of the JV Agreement, the Company was entitled to receive the amount equal to the sum that it provided in the working capital and the proportionate share of any profits earned by the JV calculated up to the date that the Company was excluded (the "**Residual Rights**").

Following the exclusion, the Company and Build King entered into a supplemental agreement on 17 December 2018 (the "**Supplemental Agreement**"), whereby Build King agreed to acquire, amongst other things, the Company's Residual Rights under the JV Agreement for a sum of HK$53.6 million, to be paid in two instalments. The Supplemental Agreement also specified that the sum would be paid to the bank account of Cogent Spring Limited ("**Cogent Spring**"), a wholly owned subsidiary of the Company as the Company's bank accounts were frozen. Build King subsequently transferred HK$20 million to Cogent Spring's account, representing the first instalment pursuant to the Supplemental Agreement. Those funds were then dissipated in making various payroll and MPF payments owed by the Company as well as legal costs and miscellaneous expenses involving other entities in the Group.

Build King applied for a retrospective validation order confirming that the Supplemental Agreement should not be avoided by section 182, which provides that *"In a winding up by the court, any disposition of the property of the company, including things in action … made after the commencement of the winding up, shall, unless the court otherwise orders, be void."*

At first instance, the trail Judge held in favour of Build King, finding that its payment was made to the Company to discharge its obligations as purchaser under the Supplemental Agreement and for that reason, not a disposition of the Company's property, and that any

subsequent misapplication of the funds was internal to the Company or its directors. The rulings were upheld by the CA. The Company (now in liquidation) appealed to the CFA.

The CFA unanimously allowed the Company's appeal. In reaching this decision, the CFA stressed that it is important to precisely identify the Company's property and the disposition in question. The Company's Residual Rights under the JV Agreement constituted the property concerned. By the Supplemental Agreement, those rights were converted into a contractual chose in action consisting of a right to payment of that consideration which was the Company's property. When Build King made its payment to Cogent Spring's bank account, a disposition of the chose in action took place. Section 182 therefore kicked in and rendered the Supplemental Agreement and the payment made thereunder void unless otherwise ordered by the Court. It mattered not that the transfer or dissipation was wrapped in contractual clothing. Further, the value of the first instalment never accrued to the Company but went entirely to Cogent Spring to be dissipated in favour of various third parties. As a result, the interests of the Company's unsecured creditors were prejudiced. Accordingly, the CFA set aside the validation orders and declared that the Supplemental Agreement and dispositions made accordingly were void under section 182. The effect of the rulings would be that the Company could revert to a claim against Build King for the value of its Residual Rights under the JV Agreement as determined on a final account.

5. Seeking an injunction to restrain the winding-up of a foreign company in Hong Kong? The burden is high

Silver Starlight Limited v China CITIC Bank Corporation Limited, Tianjin Branch & Others [2021] HKCA 1248

The plaintiff, Silver Starlight Limited, is a BVI incorporated company, which is wholly owned by Mr Pan Sutong, a Hong Kong resident. The plaintiff has acquired 35.59% of the shares in a Hong Kong company, Goldin Properties Holdings Ltd ("**Goldin Holdings**"), from the public shareholders during the privatisation exercise (the "**Privatisation**"). Goldin Holdings holds a very substantial property development project in Tianjin. In May 2017, to finance the payment in the Privatisation, the plaintiff borrowed HK$8 billion from the 1st and 2nd defendants and HK$4 billion from the 3rd defendant. Since November 2019, the plaintiff has been in default of payment of interest for both loans, and on 10 December 2019, it was notified that the loan of HK$8 billion was immediately due and payable. On 11 January 2021, the defendants' solicitors issued a statutory demand to the plaintiff for the HK$8 billion loan.

On 22 February 2021, the plaintiff issued its application by originating summons for an injunction to restrain the three defendants from presenting a winding-up petition based on their statutory demand in respect of the HK$8 billion loan. It advanced two main grounds in support of the application:

1. that the jurisdictional requirements for winding up a foreign company are not satisfied, and

2. that there was a *bona fide* dispute of the debt on substantial grounds.

On 3 June 2021, Deputy Judge M K Liu decided both points against the plaintiff and dismissed the originating summons. The plaintiff appealed, contending that the judge was erroneous on both issues. The defendants filed a respondents' notice of additional grounds for upholding the Judgment. Urgent directions were given for the hearing of the appeal, with an interim order preventing the presentation of a petition pending the determination of the appeal.

The principles governing whether the court will exercise its statutory power to wind up a foreign company pursuant to section 327 are well established. Generally, there are three core requirements:

1. there had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;

2. there must be a reasonable possibility that the winding-up order would benefit those applying for it; and

3. the court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

The applicable principles for the grant of an injunction to prevent the presentation of a winding-up petition are based on the court's inherent jurisdiction to prevent abuse of process rather than the ***American Cyanamid*** principles for an ordinary interlocutory injunction. The right to petition for winding up in appropriate circumstances is a statutory right. If the court would restrict a would-be petitioner, there must be clear and persuasive grounds. It is ordinarily not an abuse to invoke the winding up remedy against a foreign company where it is arguable that the three core requirements can be satisfied. Therefore, when seeking an injunction on the jurisdictional ground, the applicant bears the burden to show that the petition is bound to fail for not meeting the core requirements.

For the first requirement, the Court rejected the plaintiff's contention that its connection with Hong Kong is insufficient. Specifically:

1. the plaintiff contended that the judge erred in holding that the mere presence of assets in Hong Kong will suffice. The Court disagreed, confirming that the presence of significant assets in Hong Kong which may be made available for distribution in the liquidation can usually establish a sufficient connection with Hong Kong. In the present case, the plaintiff undertook its principal significant commercial activity in Hong Kong, i.e. borrowing funds to acquire shares in the Privatisation;

2. the plaintiff further submitted that the location of its sole owner is irrelevant. The Court held that the location of the plaintiff's central management and control is still relevant even though this factor may be of greater weight in the case of a shareholder's petition than a creditor's petition.

3. the plaintiff also argued that although the corporate chain includes companies incorporated or registered in Hong Kong, this is of little substance in showing a connection. The Court disagreed, stating that whether a sufficient connection exists is a question of degree. The Court will approach the judge's decision as a conclusion akin to the exercise of discretion.

The plaintiff's challenge in relation to the first core requirement thus failed.

For the second requirement, the plaintiff contended that the liquidator would not derive any direct benefit from its underlying assets which are located in Mainland China because a liquidator appointed by a Hong Kong court may not be recognised in other jurisdictions including the Mainland. The Court rejected such arguments and held that the plaintiff failed to demonstrate that there was no reasonable possibility that a winding up order would benefit the defendants. The plaintiff holds freely transferable shares in Goldin Holdings, whose net

assets are about HK$22.5 billion. Although the minority shareholding cannot result in a management control, it is sufficient to preclude any special resolution in general meetings. The Court distinguished the present case from cases where the asset in question was only shares in a BVI company. The plaintiff's challenge in relation to the second core requirement thus also failed.

Lastly, the Court also affirmed the judge's conclusion that the plaintiff failed to show a *bona fide* dispute of the debt on substantial grounds. Accordingly, the Court dismissed the appeal.

6. The Scope of a bank's *Quincecare* duty to protect an insolvent customer from its own fraudulent controller: Does it extend to protect the customer's creditors?

Stanford International Bank Ltd (in liquidation) v HSBC Bank PLC [2021] EWCA Civ 535

Stanford International Bank Limited ("**SIB**"), which collapsed into liquidation in 2009, held multiple accounts with HSBC between 2003 to 2009 ("**Accounts**"). SIB had debts in excess of US$5 billion arising from its being used as the vehicle for one of the largest Ponzi schemes in history. The liquidators of SIB ("**Liquidators**") made two claims against HSBC as follows:

1. SIB claimed that HSBC has breached the implied contractual and/or tortious duty owed towards SIB such that HSBC should refrain from executing transfer orders when HSBC had reasonable grounds for believing that the orders are attempts to misappropriate the funds of SIB (*Quincecare* duty) (the "**Loss Claim**"); and

2. SIB also claimed that they are entitled to an account or equitable compensation in respect of HSBC's alleged dishonest and/or reckless assistance in breaches of trust and fiduciary duty undertaken by Robert Allen Stanford, SIB's Chairman and perpetrator of the Ponzi scheme (the "**Dishonest Assistance Claim**").

For the Loss Claim, SIB alleged that approximately £118.5 million was paid out of SIB's Accounts during the period when HSBC ought to have frozen the Accounts. SIB argued that SIB's state of insolvency made the cash crucial to SIB and it would have had (at least) £80 million more cash as at 17 February 2009 if HSBC had putatively performed its duty. It would then have been able to pay its creditors more once insolvency process began. For the Dishonest Assistance Claim, SIB submitted that the test of dishonesty or recklessness for large corporations, like HSBC, is or should be different to that applicable to individuals. Also, the allegation of dishonest assistance should not be struck out merely because SIB is not able to identify directors, officers or employees in HSBC who had the relevant state of knowledge.

At first instance, HSBC applied to Mr Justice Nugee ("**Judge**") to strike out the Loss Claim and the Dishonest Assistance Claim. The Judge refused to strike out the Loss Claim but struck out the Dishonest Assistance Claim. In relation to the Loss Claim, the Judge distinguished between a solvent trading company and an insolvent trading company. The Judge held that if the company is solvent, paying out money to discharge liabilities would result in both a reduction in assets and a corresponding benefit to the company by reducing its indebtedness. However, when the company is insolvent, the payment reduces the company's assets but is not offset by a corresponding benefit as the company does not have enough to pay its liabilities. Both parties appealed.

Loss Claim

The English Court of Appeal explained that the *Quincecare* duty was "narrow and well-defined" to protect a banker's customer from losing funds held in a bank account with that banker who was put on inquiry and such *Quincecare* duty was owed to the customer but not to the customer's creditors even when the customer was on the verge of being insolvent.

The Court is of the view that the Judge has erred in distinguishing a solvent trading company from an insolvent trading company. As long as the company is trading (before the insolvency proceedings begin), while payments made to creditors bring about a reduction in its assets, they also bring a corresponding benefit of a reduction in its liabilities, however small the reduction in liabilities may be.

Dishonest Assistance Claim

The English Court of Appeal followed the two-stage test for dishonesty as laid down in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. Firstly, the court should ascertain the defendant's actual state of knowledge and belief as to the facts. Secondly, whether the defendant's conduct was honest or dishonest according to the standards of ordinary decent people. For imputation of blind-eye knowledge, the Court referred to the decision in *Manifest Shipping & Co Ltd v. Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 and held that two conditions must be satisfied, (i) the existence of a suspicion that certain facts may exist, and (ii) a conscious decision to refrain from taking any step to confirm their existence.

The Court of Appeal agrees with the Judge's ruling on three bases. Firstly, SIB has failed to allege that any specific employee of HSBC was dishonest or suspected the Ponzi fraud and made a conscious decision to refrain from asking questions. Secondly, the SIB's allegation relied on gross negligence which would allow blind eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion rather than a targeted and specific one. Thirdly, if dishonesty and blind eye knowledge is to be alleged against corporations, it has to be evidenced by the dishonesty of one or more natural persons. The subjective dishonesty must originate from the dishonesty of a person within the corporation or the blind-eye knowledge of such a person.

In the end, the Court of Appeal held that the judge was wrong to refuse to strike out the Loss Claim as there was no reduction in SIB's net asset position and the Judge was right to strike out the Dishonest Assistance Claim. Subsequent to the CA Judgment, SIB further appealed to the Supreme Court regarding the Loss Claim issue. The appeal was heard on 19 January 2022 with judgement reserved. It remains to be seen how *Quincecare* duty can be applied as a ground for liquidators to recover funds paid out to creditors.

7. The mere assertion that something may be revealed by the liquidator's investigation; and the pressure and leverage of the prospect of winding up are not sufficient to satisfy the 2nd core requirement

Excellent Asia (BVI) Ltd v Mas Media Group Ltd [2021] HKCFI 3605

In March 2020, the Petitioner presented a petition to wind up the Respondent company, which is incorporated in the Cayman Islands, on the ground of insolvency.

Failing to state in the Petition how the three core requirements are satisfied, the Petitioner subsequently took out a summons seeking to introduce a re-amendment to assert matters that are capable of satisfying the three core requirements.

Yet, Harris J found that the Petitioner still failed to assert in the proposed re-amendment that there is a creditor other than the Petitioner subject to the jurisdiction of the court and hence the third core requirement is not satisfied.

Further, in relation to the second requirement, Harris J emphasized the necessity to assert some concrete benefit. The relevant assertions in the re-amendment that the Petitioner sought to make in attempt to satisfy the second core requirement are as follows:

(1) A liquidator appointed by the Hong Kong Court can carry out investigations of the Companies activities, its assets and liabilities and take asset recovery actions in Hong Kong.

(2) There is a reasonable prospect that the leverage and pressure created by the making of a winding up order, and the appointment of a liquidator to investigate the Companies activities, assets, liabilities and to take steps to recover assets, may cause the Company to pay the debt due to the Petitioner.

Harris J held that putting pressure on a company to pay will not generally be sufficient in the case of a private company, as the company must be assumed to be insolvent for the purpose of an insolvent winding up. It is neither sufficient to merely assert that something may be revealed by the liquidator's investigation.

Accordingly, the Court dismissed the Petitioner's Summons to re-amend the Petition.

8. The English Court considered whether litigation stay on proceedings applies to regulatory action taken against a company in liquidation

The Financial Conduct Authority v Carillion Plc [2021] EWHC 2871 (Ch)

The Respondent company was put into compulsory liquidation on 15 January 2018 and the Official Receiver was appointed as the liquidator.

Section 130(2) of the UK Insolvency Act (which is in the same wordings as section 186 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)) provides that:

> *When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.*

On 18 September 2020, pursuant to its powers in the Financial Services and Markets Act ("**FCMA**"), the Financial Conduct Authority ("**FCA**") issued a warning notice and published a brief statement summarizing the action that the FCA proposed to take against the Respondent and others. The statement made clear that a public censure rather than a financial penalty was proposed against the Respondent.

The Official Receiver's case is that the regulatory action taken by the FCA amounts to "*action or proceeding*" that requires the permission of the insolvency court under section 130(2) of the Insolvency Act. The FCA's case is that section 130(2) is limited to court actions and proceedings or materially similar actions and proceedings and does not include regulatory action taken by the FCA.

At first instance, the judge held that the proposed regulatory action by the FCA amounts to a proceedings and hence permission from the court was required but went on to grant the permission. The FCA appealed on the purely legal issue as to the interpretation and scope of section 130(2).

On appeal, it was held that the scope of the word "*proceeding*" is limited to "*legal proceedings or quasi-legal proceedings such as arbitration*." Non-court proceedings will only be within section 130(2) if they are similar to court proceedings having regard to the statutory purposes of section 130(2). The first instance judge's construction of section 130(2) was held to be overbroad and incorrect.

It was further held that the FCA's regulatory action under sections 91 and/or 123 of the FSMA does not fall within the correct definition of "*proceeding*" and hence does not require permission from the court. Therefore, the appeal was allowed.

However, the judge declined to widen out his decision to other regulatory actions that the FCA may take under the FSMA. As such, whether leave is required for other regulatory actions against a company in liquidation remains uncertain.

9. Singaporean Court of Appeal affirms that members' consent is required to put a company into voluntary liquidation

Superpark Oy v Superpark Asia Group Pte Ltd and others [2021] SGCA 8

The appellant, Superpark Oy, is the majority shareholder of the 1st respondent, Super Park Asia Group Pte Ltd ("**SPAG**"). The other shareholders of SPAG are Treasure Step Global Limited ("**Treasure**"), and Vintex Oy. Kumarasinhe is a director and shareholder of Treasure. The then directors of SPAG (the "**Directors"**) were Juha Tapani Tanskanen, who is the appellant's representative on the board of directors of SPAG, Kumarasinhe, and one Goh Ke Ching. The relationship between the appellant and Kumarasinhe became sour sometime in or around the latter half of 2019.

On 17 June 2020, Kumarasinhe tabled a board resolution at a meeting over Zoom to put SPAG into provisional liquidation. On the same day, the Directors lodged the requisite statutory declaration under s 291 of the Companies Act (Cap 40) ("**CA**"). The 2nd and 3rd respondents were appointed as PLs. The 2nd and 3rd respondents then proceeded to ascertain the financial situation of the company, concluding that it was balance sheet insolvent.

On 2 July 2020, the appellant gave the 2nd and 3rd respondents notice of an EGM. One of the resolutions passed was "That the company not be voluntarily wound up and that the present provisional liquidation be terminated with immediate effect."

On 8 July 2020, the 2nd and 3rd respondents commenced HC/OS 656/2020 ("**OS 656**") to seek a declaration that the EGM resolution of 2 July 2020 purporting to terminate the voluntary winding up of SPAG and remove the 2nd and 3rd respondents was invalid. At the same time, they also filed SUM 2700/2020 ("**SUM 2700**") seeking, *inter alia*, an injunction restraining the appellant from taking any action inconsistent with SPAG being in provisional liquidation.

On 13 July 2020, the appellant commenced HC/OS 671/2020 ("**OS 671**") for, *inter alia*, a declaration that the provisional liquidation and any voluntary winding up of SPAG would be terminated at an EGM of SPAG to be held on 16 July 2020. At the same time, the appellant also filed SUM 2791/2020 ("**SUM 2791**") seeking an order, *inter alia*, restraining the 2nd and 3rd respondents from taking any further steps in the provisional liquidation of the 1st respondent until 16 July 2020 or further order.

On 16 July 2020, an EGM and a Creditors' Meeting were held. The 2nd and 3rd respondents had failed to win the relevant support of the members of the company, but had received the support of the majority of the creditors of the company.

On 29 July 2020, the Judge at first instance made the following order in respect of SUM 2791 and SUM 2859 ("**the Judge's Order**"):

> "The 2nd and 3rd Respondents are allowed to continue with their efforts to dispose of the assets of the company and those of the subsidiaries on the understanding that there will be no advertisement. Any sale negotiations will be done by private treaty. The [appellant] has until Wed 5/8/20 to either put the company into judicial management or find other means to restructure or rehabilitate the company. Failing any concrete action by the [appellant], the court will allow the liquidation process of the company to continue to its conclusion."

The Judge however declined to make a clear finding on the 2nd and 3rd respondents' status and whether or not they were liquidators. The appellant appealed.

On appeal, the Singapore Court of Appeal had to decide on three questions of law:

1. In the event that a voluntary winding up is commenced pursuant to s 291(6)(*a*) of the CA, when and how can it be terminated?

2. Does s 291(6)(*a*) of the CA mean that a voluntary winding up commences upon the directors passing a resolution to appoint provisional liquidators under s 291(1) of the CA, regardless of whether the members' resolution for voluntary winding up is passed pursuant to s 290 of the CA?

3. Can the creditors of a company voluntarily wind-up a company and/or appoint liquidators in a voluntary winding-up, if the members have not passed any resolutions to that effect pursuant to s 290(b) of the CA?

The Court first considered Question 3 and answered it in the negative, for the following three reasons:-

1. The plain and unambiguous wording of s 290 of the CA provides that there are **only two circumstances** in which a company may be wound up voluntarily. If s 290(1)(*a*) of the CA is not satisfied, the *only* other avenue of carrying out a *voluntary* winding up is through s 290(1)(*b*) and the passing of the relevant special resolution;

2. Both s 290(1)(*a*) and (*b*) of the CA are founded on the **consent of the company's *members*** to the company being wound up. Absent such consent and/or voluntariness, it would be "an inexplicable misnomer to describe a winding up which lacked the consent and voluntariness of its members as a "***voluntary***" winding up". Further, allowing a company to be "voluntarily" wound up by its creditors in the absence of a resolution by its members to that effect would undermine the real and substantial distinctions between voluntary and compulsory winding up;

3. To decide that the appointment of provisional liquidators and a determination by the provisional liquidators that the company was insolvent could, without more, cause a company to be in liquidation would render s 290(1)(b) of the CA effectively otiose in the context of creditors' voluntary winding up.

As Question 3 has been answered in the negative, it follows that a voluntary winding up *cannot* be said to commence upon the directors passing a resolution appointing provisional liquidators if the members' special resolution for winding up is not passed and that no issue of termination arose.

In conclusion, the Singapore Court of Appeal ordered, amongst other things, that the company is not and never has been in liquidation and that the 2nd and 3rd respondents should not be allowed to continue to dispose of the assets of the company.

10. Hong Kong Court refused to stay proceedings commenced by creditors in Hong Kong despite recognition of Mainland insolvency proceedings

Nuoxi Capital Ltd (In Liquidation in the British Virgin Islands) v Peking University Founder Group Co Ltd [2021] HKCFI 3817

The Peking University Founder Group Company Limited (the "**Company**", together with its subsidiaries the "**Group**") is a holding company incorporated in the Mainland. Two members of the Group, Nuoxi Capital Limited and Kunzhi Limited (together, the "**Issuers**") issued bonds and the bonds were guaranteed by their respective parent companies, Hong Kong JHC Co Limited and Founder Information (Hong Kong) Limited (together, the "**Guarantors**"). The bonds were also backed by Keepwell Deeds entered into between the Company, the Issuers and the Guarantors. The Keepwell Deeds are governed by English law and contain Hong Kong exclusive jurisdiction clauses. The Issuers and Guarantors defaulted on the bonds and were wound up in their own respective jurisdictions.

On 19 February 2020, the Beijing No.1 Intermediate People's Court ("**Beijing Court**") put the Company into reorganisation pursuant to the PRC Enterprise Bankruptcy Law and Administrator was appointed. The Issuers and Guarantors lodged claims to the Administrator on the basis that the Company had breached the Keepwell Deeds but the claims were later rejected. They then issued proceedings against the Company in the HK Court ("**HK Actions**"). The Issuers and Guarantors applied for an expedited trial of the HK Actions and a declaration of their rights as a matter of English law. In response, the Company, followed by the Administrator, applied to stay the HK Actions as the Issuers and Guarantors had submitted proofs of debt in the Company's reorganisation in the Beijing Court and requested the HK Court to recognise and assist the Company's reorganisation in the PRC.

The main issue is whether a stay of the actions should be granted so that the disputes between the Issuers, Guarantors and the Administrator can be resolved in the reorganisation proceedings taking place before the Beijing Court.

Generally, the HK Court would enforce an exclusive jurisdiction clause and would not deprive a party of a right to have the claims determined before an agreed court unless a compelling reason is demonstrated. In this case, the HK Court was unable to find any compelling reason to deprive the Issuers and Guarantors of this right and hence refused to stay the HK Actions.

In line with the well-established English position that a liquidation stay has no extra-territorial effect, the HK Court considered that submission of a claim in foreign insolvency proceedings would not create an absolute bar to a creditor seeking adjudication of the claim in another jurisdiction. A creditor, however, cannot use proceedings outside the foreign insolvency

jurisdiction to achieve a result which is inconsistent with that mandated by the foreign insolvency regime, that is, to try and obtain more than he would obtain if he proves in the insolvency proceedings.

The HK Court found that the Issuers and Guarantors were merely seeking for declaratory relief under the Keepwell Deeds by invoking a purely adjudicatory jurisdiction as opposed to trying to gain advantage over other creditors outside the reorganisation in the Mainland. There is a distinction between proceedings for adjudicating disputes and establishing contractual rights, and proceedings for determining how much a creditor is entitled to prove for in a reorganisation. It was further observed by the HK Court that foreign courts can coordinate with each other where contractual jurisdiction was exercised before one court, with insolvency jurisdiction exercised before another. For these reasons, the HK Court held that the reorganisation in Beijing does not bar the Issuers and Guarantors from commencing the HK Actions.

Further, the HK Court recognised that the disputes raised in the HK Actions relate to the construction of the Keepwell Deeds in which extensive and complicated questions of English law are central to the determination of the claims. As the Hong Kong common law of contract is generally the same as that of English law, a decision made by the HK Court on a contractual dispute under English law would be of value to the Beijing Court and the HK Court therefore expected that weight would be given by the Beijing Court to such a judgment.

11. The Shenzhen Intermediate People's Court granted recognition and assistance to the liquidators in *Samson Paper*

有關森信洋紙有限公司（2021）粵 03 認港破 1 號

In the December issue of ONC Corporate Disputes and Insolvency Quarterly 2021, we reported the decision in *Re Samson Paper Company Limited (In Creditors' Voluntary Liquidation)* [2021] HKCFI 2151, wherein the Hong Kong Court issued its first letter of request to a Mainland Court requesting for recognition of and assistance to Hong Kong liquidators under the new "Cooperation Mechanism".

On 15 December 2021, the Shenzhen Intermediate People's Court issued its decision in (2021) *粵 03 认港破 1 号 (2021) Yue 03 Ren Gang Po No. 1*, finding that it had jurisdiction to deal with the application given that the Company has its principal asset in the Mainland, consisting of a shareholding in a wholly owned subsidiary incorporated in Shenzhen. Further, the Company's "centre of main interests" is in Hong Kong given that it was incorporated and had conducted business for over 40 years in Hong Kong.

The Shenzhen Intermediate People's Court accordingly recognized the creditors' voluntary winding up of the Company in Hong Kong and the appointment of Lai Kar Yan and Ho Kwok Leung Glen of Deloitte as liquidators of the Company.

The liquidators are allowed to perform the following duties in the Mainland: (1) take over the Company's assets, seals, books, documents and other materials; (2) make decisions as to the Company's internal management affairs; (3) make decisions as to the daily expenses and other necessary expenses of the Company; and (4) manage and dispose of the Company's assets. For other matters that will cause material impact on the rights of the Company's creditors, the liquidators must seek prior approval of the People's Court.

12. Amendment to a scheme by the company on behalf of all scheme creditors allowed as the revised arrangement does not prejudice scheme creditors

Re Samson Paper Holdings Ltd [2021] 5 HKLRD 286

The Company convened a meeting of unsecured creditors for considering and approving a proposed scheme ("**Scheme**") of arrangement restructuring the Company's unsecured debt. The statutory majority required by section 674 of the CO was obtained and the Company issued a petition seeking the court's sanction of the Scheme.

The Company has been listed on the Main Board of the HKEx and the Company (together with its subsidiaries, "**Group**") are both balance sheet insolvent. The trading of the Company's shares has been halted since 2 July 2020. To rescue the Company's listing status and achieve restructuring of the Group's liabilities, the Company, the Joint and Provisional Liquidators and investors entered into a restructuring agreement. If the proposed restructuring is successfully implemented, the Group including the Company will continue as a going concern, there will be a resumption of the trading in the Company's shares, and all outstanding debts owed by the Company will be compromised under the Scheme.

The Court accepted that the Scheme is for a discernible and permissible purpose and was satisfied that the requirements for sanctioning the Scheme were met: *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467.

It is however noteworthy that if the Company fails to comply with the HKEX's requirements by the end of this year then the Company may be put in the first stage of delisting. In *Re Burwill Holding Limited* [2021] HKCFI 1318, the Court held that if a company's status has developed to the point where its listing status has been cancelled and it has entered into the review process it will not be appropriate for the court generally to sanction a scheme until the review process has been completed. The Court however found the present case distinguishable from *Burwill*. Here, since the Company has not yet entered the delisting phase, the Court held that it can properly sanction the scheme.

In addition, the HKEx also raised, *inter alia,* a query over a certain aspect of the Scheme which may result in the free-float requirement not being met. An amendment to the Scheme was proposed to address that concern. The Scheme had a conventional provision for amendment of the terms of the Scheme at the sanction hearing. At the sanction hearing, it is proposed that the Scheme be amended in such a way so that the free-float requirement can be met.

As the revised arrangement does not prejudice Scheme Creditors and has the same result as that originally contemplated by the Scheme, the Court considered that there is no reason not to permit the necessary amendment.

The Scheme was accordingly approved with the necessary amendment.

13. Parting of way between shareholders - Is fighting an unfair prejudice petition to the end the only option?

Chan Seung Bun v Wong King Fai Joe and Another [2021] HKCFI 3572

The Company was co-founded by the petitioner Mr. Chan Seung Bun (the "**Petitioner**") and the late 1st Respondent ("**R1**"), now represented by the joint executrices of the estate (the "**Executrices**") in 2013. It was not in dispute that the Company was a quasi-partnership established based on mutual trust and confidence between the Petitioner and R1. The Company had been profitable since its establishment.

Dispute arose between the Petitioner and R1 in 2018. The Petitioner offered to sell his shares to R1 for HK$35 million in March 2018, and R1 counter-offered HK$20 million for the shares. No further step was taken by the parties to come to an agreement on the price of the shares. In August 2018, the Petitioner presented a winding-up petition against the Company, which was subsequently amended that the Petitioner sought, as an alternative relief, a buy-out order. A single expert (the "**Expert**") was appointed by the Court in 2019 to assess the value of the Company.

Options available other than petitioning for winding up

Upon the demise of R1 in January 2021, the Petitioner became the sole shareholder of the Company and he subsequently issued a Summons to seek winding up of the Company. The Executrices however opposed the winding up. The Court in earlier hearings observed that the winding-up of the Company may not be the best solution to settle the matter as it may destroy the value of the Company, which is neither beneficial to the Petitioner nor the R1. The Court further suggested that other than fighting the petition to the end, there are other obvious options available to the Petitioner and the Executrices:

(1) Make an open offer to the other party to buy or sell the shares at a price based on the price range suggested by the Expert.

(2) Make an open offer to the other party to buy or sell the shares at the price to be determined by the Expert on the basis that the Company is a going concern.

(3) Engage a mediator to resolve the difference on the price of the shares.

(4) Put the company into voluntary liquidation, so that the liquidator can proceed to sell the Company to either shareholder or a third part at a reasonable market price.

The Petitioner eventually agreed to sell the shares to R1 at the price to be determined by the Expert.

The Court however, did not make any buy out order against any party, because such order cannot be made in the absence of the necessary finding that the affairs of the company have been conducted in a manner unfairly prejudicial to the petitioner in circumstances where the respondent only indicated an "in-principle agreement for a buy-out", and leaves a myriad of matters to be determined in order to set the parameters and basis of the valuation: *Re China People (Hong Kong) Limited & ors* [2018] HKCFI 867. However, the Court considered that, *Re China People* properly understood, it does not mean that the parties cannot come to an agreement on the terms and the basis of the valuation of the shares, even if the latter requires determination of the Court upon considering the valuation reports of the expert and the submissions of the parties.

Indeed, the Court encourages such agreement to be made between the parties in circumstances where it is clear that the mutual trust and confidence between the parties or the substratum upon which the company was formed has ceased to exist, and there should be a parting of way between the shareholders.

The Court then went on to consider the parties' submission on the valuation report made by the Expert and held that the fair value of the Company as at the date of the judgment is HK$37,315,473 and that the Petitioner's shares in the Company is worth of HK$18,657,737.

Bankruptcy Cases

14. Bankruptcy Order annulled for the Petitioner's failure to satisfy the "business gateway" requirement

Re Wang Huimin [2021] HKCFI 3472

The Bankrupt, Madam Wang, is a Chinese citizen and holds a PRC resident identity card. She has been residing in Shanghai since she was born. The Petitioner is Madam Wang's younger brother.

Madam Wang established a small restaurant, Shanghai City Huangpu Xiao Nan Guo Restaurant (上海市黃浦區小南國飯店), in Shanghai in 1987. The business prospered and expanded into a chain of restaurants operating under the name of "Xiao Nan Guo" in the PRC and in Hong Kong. The Shanghai business was managed and operated by Shanghai Xiao Nan Guo Restaurant Co, Ltd while the Hong Kong business was managed and operated by Xiao Nan Guo Holdings Limited. The holding company TANSH Global Food Group Co Ltd ("**TANSH Global**") was listed on The Stock Exchange of Hong Kong Limited (stock code: 3666) on 4 July 2012.

In or around 2016, the Petitioner and Madam Wang entered into a Share Transfer Agreement ("**STA**") under which the Petitioner agreed to transfer, amongst other things, his 12.5% interest in Shanghai Hongqiao Xiao Nan Guo Restaurants Management Co, Ltd (上海虹橋小南國餐飲管理有限公司) ("**Shanghai Hongqiao**"), which held the non-restaurant business, to Madam Wang for a consideration of RMB 60,000,000.

The cheque subsequently issued by Madam Wang pursuant to the STA was dishonored. The Petitioner then issued a statutory demand to Madam Wang, which was not complied with. The Petitioner then presented a bankruptcy petition against Madam Wang on the basis of non-compliance with the statutory demand. On 3 February 2021, the Bankruptcy Order was made against Madam Wang in her absence.

Madam Wang applies for annulment of the Bankruptcy Order on the basis that the requirement under section 4(1)(c)(ii) of the BO (which confers the court jurisdiction to make a bankruptcy order when a debtor has carried on business in Hong Kong at any time in the period of 3 years ending with the date of the presentation of the bankruptcy petition ("**Relevant Time**")) was not satisfied.

The Petitioner relies on the following activities of Madam Wang as supporting the contention that she was carrying on business in Hong Kong during the Relevant Period:

(1) Owning trademarks and granting licences in Hong Kong.

(2) Buying out the Petitioner's business interest through the STA.

(3) Investments through Extensive Power (the corporate vehicle incorporated for the purpose of holding and managing Madam Wang's interest in the TANSH Global shares).

It is well-established that the condition under section 4(1)(c)(ii) BO is not satisfied by showing merely that a person is running his company's business even though he is the sole beneficial shareholder and in complete control. A person is not regarded as carrying on business in Hong Kong simply because he is organising or managing or takes charge of the business of a company in this jurisdiction, whether as a director or otherwise. There must be some evidence of activities on the part of the debtor over and above those attributable to the company to show that the debtor has carried on business of his own: *Re Chen Mei Huan, ex p Venetian Macau Ltd* [2020] 1 HKLRD 409. On the other hand, the doctrine of the separate legal personality of a company does not preclude a finding, on the totality of the evidence, that such a person is also conducting a business of his own, separate and distinct from his company's business: *Re Kok Hiu Pan, ex p Wing Lung Bank Ltd* [2002] 3 HKLRD 20.

On the evidence, the Court did not agree that Madam Wang was carrying on business at the Relevant Time:

Owning trademarks and granting licences in Hong Kong

The Petitioner argued that Madam Wang owned various trademarks during the Relevant Period for use in Hong Kong and granted a licence to Tansh Global for use of some of her trademarks in Hong Kong. However, no explanation was given as to what business that Madam Wang was said to be carrying on personally by (i) owning those trademarks, (ii) renewing the registration of some of them; and (iii) continuing to abide by the terms of a licensing agreement. There was also no evidence suggesting that Madam Wong was running a restaurant business independent of that carried on by Tansh Global or that she had received any fees other than a nominal one of RMB 1.00 per annum. The Court was therefore of the view that Madam Wang was merely devoting her resources to support the business of Tansh Global in which she was financially interested, and this does not count as the carrying on of Madam Wong's own personal business.

Buying out the Petitioner's business interest through the STA

The expression "carrying on" of a business implies a repetition of acts and, ordinarily, done for the purpose of making a gain or profit. The Court agreed with Madam Wang that the Share Transfer was a one-off business transaction as opposed to a repetition of acts, primarily with a view to a clean break between Madam Wang and the Petitioner of the "Xiao Nan Guo" business in Hong Kong and the Mainland, rather than with a view to potential profit.

Investments through Extensive Power

The Petitioner also submitted that, Madam Wang, through the operation of Extensive Power, purchased and disposed of a substantial number of Tansh Global shares. These transactions were carried out by Extensive Power as Madam Wang's agent and constituted the carrying on of a business by Madam Wang in Hong Kong.

The Court disagreed with the Petitioner finding, amongst other things, that the purpose of incorporating Extensive Power was that it would be used to facilitate the setting up of a family trust and that Extensive Power's business activities were carried out as the trustees of the Wang Trust rather than as the agent of Madam Wang.

On the totality of the evidence, the court was not satisfied that Madam Wang had carried on business in Hong Kong during the Relevant Period. As such, the court had no jurisdiction to grant the Bankruptcy Order against Madam Wang. The annulment application was allowed.

15. Application by persons who had been made the subject of an order for private examination dismissed for lack of legitimate interest in the trustee's removal

Lee Siu Fung Siegfried [2021] 5 HKLRD 627

In January 2001, a bankruptcy petition was presented against Mr. Lee Siu Fung Siegfried in respect of a HK$322 million debt arising out of a guarantee given by him. In or around September 2016, the trustees in bankruptcy obtained an order for the private examination of Mr. Lee and the Applicants, who are the younger brother and son of Mr. Lee.

On 27 March 2017, the Applicants took out a summons for the removal of the trustees for misconduct. In connection with the removal application, the Applicants also took out two applications for discovery, one for specific discovery against the trustees, and the other for non-party discovery against a Messrs. Ip, the trustees in bankruptcy of a Mr. Ho in another bankruptcy action (the "**Ip action**"). The Applicants sought discovery of various documents related to the funding arrangement of Mr. Lee's bankruptcy, alleging that these documents can show that the trustees diverted funds recovered from the Ip action and accepted monies from Mr. Ho, an undischarged bankrupt for use in the administration of Mr. Lee's bankruptcy. The Judge dismissed the applications for discovery on the grounds that the Applicants had no legitimate interest in the trustees' removal, and thus have no *locus* to apply for such removal. It follows that the Applicants had no basis to apply for the discovery sought. The Applicants appealed.

The Applicants contended that (i) they were the subject to a private examination conducted by the Trustees and therefore had a legitimate interest in protecting themselves from the risk of unfair treatment in the private examination by the trustees who were, allegedly, unfit to hold office; (ii) the Judge was wrong to have held that the Applicants were "strangers" to the estate because, they, while not creditors, were participants in the bankruptcy process as subjects of the trustees' exercise of the coercive powers conferred on them; (iii) the Judge erred by regarding their interests as opposed to the estate's, particularly when the bankrupt himself had also made an application to remove the trustees on similar grounds.

The Court of Appeal, not persuaded by the submissions made on behalf of the Applicants, held the following:-

(1) The question of legitimate interest must be answered by reference to the nature of the relief or remedy sought. Alleged concerns that the Trustees might conduct the Applicants' private examinations in an unfair or oppressive manner simply do not justify their applying for the Trustees' removal, particularly after an order for examination had already been made;

(2) To the extent that there might have been any basis for concern that the trustees would be unfair to the Applicants at their private examination, the proper occasion for ventilating those concerns was the hearing of the application for private examination. That application had been heard and decided, the Judge having made a case management decision, which had not been appealed against, to go ahead notwithstanding the Applicants' attempt to stay or postpone it;

(3) It was inappropriate for a person who had been made the subject of an order for private examination, which order had not been appealed, to launch a collateral attack on the order by applying for the removal of the trustees. Such an attack was an abuse of process. Moreover, it sought a remedy which went beyond what was required to address the alleged grievance. That was because the removal of the trustees would affect not only the conduct of the private examination, but would also have serious ramifications for all other aspects of the administration of Mr. Lee's estate, with regard to which the Applicants could have no complaint and in respect of which they plainly had no legitimate interest to interfere;

(4) The Applicants will have the opportunity to object to the unfair manner in the course of the examination, which will be presided over by a Registrar or a Judge;

(5) That removal of the Trustees would eliminate any possibility of an improper exercise of power by them against the Applicants was insufficient to confer on the Applicants' standing to seek such removal; and

(6) As the targets of the examination, the Applicants' interests were at odds with those of the estate.

For the above reasons, the Court of Appeal dismissed the appeal.

16. Court of Appeal: the court, assisted by the OR, exercises supervisory jurisdiction over the entire bankruptcy process, including refusing to approve an appointment of trustee

Re Chan John Loong Fai [2021] HKCA 1834

Mr. Tang, an insolvency practitioner, was found guilty of contempt for breaching a production order in another set of bankruptcy proceedings and fined HK$200,000 (HCB 3819/2011). In a subsequent decision in another matter (see [2018] 1 HKLRD 553), a judge also criticized Mr. Tang for having in the past demonstrated unnecessarily confrontational behaviour. Since then, the OR decided not to put Mr. Tang forward in future for appointment as a liquidator for new cases under the Panel A Scheme. For bankruptcy cases, the OR decided that she would, upon learning of nominations of Mr. Tang as trustee, inform the creditors of Mr. Tang's conviction for contempt. If the creditors nonetheless decided to persist with their nomination of Mr. Tang as a trustee, the OR would proceed to seek a direction from the court under rule 158 as to whether Mr Tang is a fit person to be appointed.

In these bankruptcy proceedings, the petitioner nominated Mr Tang for appointment as one of the joint and several trustees of the Bankrupt's property. Despite the OR sending letters to the creditors informing them of Mr Tang's conviction for contempt, on 18 May 2018 the creditors resolved by a majority to nominate Mr Tang as one of the trustees. The OR then took out the Summons on 25 May 2018 seeking directions pursuant to rule 158 as the OR doubted whether Mr Tang is a "fit person" whom the creditors can validly appoint as trustee.

The Judge at first instance dismissed the OR's application. The OR appealed and advanced three grounds of appeal. The first relates to the Jurisdiction Question, i.e. whether the Court has jurisdiction to grant the directions sought. The second and third grounds relate to the Fitness Question, i.e. whether Mr. Tang is a proper and fit person.

On the Jurisdiction Question, the Court of Appeal held that the courts have supervisory jurisdiction to consider and determine whether a person is fit to be appointed as trustee. Trustees are officers of the court and are subject to its inherent jurisdiction. In the absence of clear words or an expressed legislative intent to that effect, it could not be lightly concluded that the Court had no such jurisdiction. Although the formal requirement of certification by the Court of an appointment had been removed, it is clear from the legislative materials that the amendment was made purely to streamline the bankruptcy procedure by removing unnecessary or unnecessarily cumbersome procedural steps. The Court's power to refuse to approve an appointment was however retained. There was no reason why the Court should be particularly restrained in interfering with the decision of the creditors' meeting where such interference was called for, or that the Court's supervisory jurisdiction should be reserved only for exceptional cases.

As to the Fitness Question, the Court accepted that Mr. Tang would be a fit person to be appointed as trustee in bankruptcy upon his acknowledgment of problems with his past conduct, and providing assurances regarding his future attitude, by way of undertakings to the court.

In conclusion, the OR's appeal was partly allowed.

17. In setting aside a number of money transfers as transaction at an undervalue, the Court draws adverse inferences against the Defendants from their failure to call the Bankrupt as a witness

Ho Man Kit And Another v Lo Siu Chu Judy And Another [2022] HKCFI 133

The Plaintiffs in this case were the joint and several trustees of Li Bao Tian ("**B**"), who was adjudged bankrupt on 7 December 2016. The 1st and the 2nd Defendants (collectively, "**Defendants**") are mother and son. B was in an intimate relationship with the 1st Defendant, albeit whilst legally married to another woman and is the father of the 2nd Defendant.

In between July 2013 and 12 January 2016, B made a number of transfers to the 1st Defendant, totaling HK$4,121,000 ("**Direct Transfer**"). On 12 May 2014, the Defendants entered into two sale and purchase agreements to acquire two properties ("**Properties**"), at the consideration of HK$9,500,000 and HK$2,000,000 respectively (the "**Acquisitions**"). Despite that the Properties were registered under the Defendants' name and that the mortgage for the first property was entered into between the 1st Defendants and the bank, all fees and expenses, including the deposit, the balance of the purchase price, stamp duties, real estate agent's commission, legal fees, monthly instalments on mortgage (up to at least January 2016) and all other expenses for the acquisitions of Properties were all paid by B ("**Indirect Transfer**", with the Direct Transfer, collectively "**Money Transfers**").

The Plaintiffs claimed that the Money Transfers and the Properties were gifts from B to the Defendants. They should be reversed or voided under section 49 of the BO or section 60 of the Conveyancing and Property Ordinance (Cap. 219) (the "**CPO**"). It was Defendants' case that the 1st Defendant had substantial income from her own business activities in the Mainland. It was also said that the funds transferred and the payment made by B to the 1st Defendant were to settle the corresponding funds transferred by the 1st Defendant to B in the Mainland ("**Arrangement**").

After reviewing the evidence submitted by the Plaintiffs and the Defendants, the Court was of the view that the Arrangement claimed by the 1st Defendant was a complete fabrication with no supporting evidence and hence, the Money Transfer as well as the Acquisitions were all funded by B and were gifted by him to the Defendants. In particular, the Court drew adverse inferences against the Defendants from their failure to call B as a witness.

Section 49 of the BO gives the court the power to, in effect, reverse a transaction by a debtor at an undervalue where the debtor is later adjudged bankrupt. Section 49(3) states that a gift or a transaction where the debtor receives no consideration is a transaction at an undervalue.

On the evidence, the Court found that the running up debts of B as revealed in B's Statement of Affairs clearly demonstrated B's insolvency at least since 22 July 2013, i.e., the time of the

first of the Money Transfer and hence, section 49 of the BO should apply to the Money Transfers and the Acquisitions. The Court further considered that section 60 of the CPO is also applicable to the Money Transfer and the Acquisitions as the Money Transfers and the Acquisitions were done with the intention to defraud creditors.

To conclude, the Court ordered D1 to repay the sum of the Money Transfer up to and in March 2014 to the Plaintiffs as Joint and Several Trustees of B and that the Properties shall be transferred to the Plaintiffs for B's bankruptcy estate.

18. Trustees held to have no right to compel the Bankrupt to pay any part of his/her income earned during the bankruptcy to the estate absent an income payments order

Re Ho Suet Hung [2021] HKCFI 3836

A bankruptcy order was made against the Bankrupt on 16 October 2018. Upon the consent of the Official Receiver, being the provisional trustee, the Bankrupt opened a bank account at Standard Chartered Bank ("**SCB Account**") to receive her monthly salary. The Trustees were subsequently appointed whereupon the OR ceased to be provisional trustee.

On 27 December 2019, the Trustees' representative interviewed the Bankrupt and was told that the monthly salary of the Bankrupt and of her husband was $24,700 and $30,000 respectively. The Trustees took the view that each of the Bankrupt and her husband should bear 50% of the family expenses and, on this basis, assessed the Bankrupt's monthly living expenses at $19,352 ("**Assessment**"). In their letter dated 27 December 2019 addressed to the Bankrupt ("**Assessment Letter**"), the Trustees set out the breakdown of the Assessment and the reasons therefor in a table. Based on her monthly income, the Trustees requested the Bankrupt to make a monthly contribution of $5,728 to her estate (the "**Specified Amount**"), which shall be paid into the account opened by the Trustees at SCB (the "**Estate's Account**"). The Bankrupt did not comply.

On 27 October 2020, the Trustees instructed SCB to freeze the SCB Account. This prompted the Bankrupt to take out the present application to appeal against the Trustees' decision pursuant to section 82 of the BO. The Bankrupt also applied to reverse and replace the Trustees' assessment of her monthly living expenses and to uplift the freeze on the SCB Account by the Trustees.

Regarding the Trustees' decision on assessment of the Bankrupt's monthly living expenses, it is well established that the Court would only interfere with the trustee's act or decision if it is shown by the Bankrupt that such act or decision was perverse or clearly wrong, or was utterly unreasonable and absurd such that no reasonable trustees would so act. Taking into account the supporting documents, the Court held that the Trustees' assessment was reasonable and not perverse or clearly wrong.

However, the Court questioned the source of the Trustees' power to require the Bankrupt to pay the Specified Amount into the Estate's Account and to freeze the SCB Account following her refusal to do so.

The Court held that the Trustees had no right to compel the Bankrupt to pay any part of her income earned during the bankruptcy to the Trustees, because the Trustees had never applied for an income payments order pursuant to section 43E of the BO. Under the said

section, a bankrupt's income will form part of the estate only if the court makes an income payments order requiring a bankrupt to pay the amount specified in the order to the trustees. The Court concluded there was no proper basis for the Trustees to require the Bankrupt to make contribution to her estate or subsequently to freeze the SCB Account where she failed to do so. That said, the Court expressed no view as to whether in general the trustees has the power to freeze the bankrupt's bank account, but considered it an issue that requires further consideration.

19. The new judicial approach when dealing with self-petitions in the future – To prevent abuse of process

Re So Tsz Man [2021] HKCFI 3732

This case concerns the self-petitions presented by four debtors for their own bankruptcy (the "**Four Petitions**"). The Four Petitions (i.e. *Re So Tsz Man* (HCB 7033/2020), *Re Lee Wing* (HCB 7299/2020), *Re Tam Wai Yiu* (HCB 7569/2020) and *Re Qiu Wenjun* (HCB 3930/2021) shared a substantial similar fact pattern:

(1) The Four Petitions were all presented on the ground that the debtors were unable to pay their debts;

(2) Numerous hearings had been scheduled before a Master. However, despite that the Court had issued warning letters informing the debtors that failure to attend the next hearing would result in the dismissal of the petition, the debtors had failed to attend some to all of these hearings;

(3) All the debtors had filed several affirmations to the Court, alleging that they had been discussing debt restructuring proposals with their creditors and asked for an adjournment of the petition;

(4) Each of the debtors explained, when asked by the Court, that they did not want a bankruptcy order to be issued against them and their creditors had not pressed them to make any repayment after the presentation of the petition.

The Court emphasised that a self-petition is a serious matter and the debtor is required to comply with the procedural requirement, which are designed to ensure that a debtor presents a petition to seek a bankruptcy order only if they (i) are unable to pay a debt and (ii) genuinely wish to seek a bankruptcy order.

Section 5(3) of the BO provides that the Court has a general power to dismiss or a stay a petition "*if it appears to it appropriate to do so on the grounds that there has been a contravention of rules or for any other reason*".

In the present case, the Court was of the view that it was clear that the debtors did not intend to seek genuinely a bankruptcy order from the Court. Instead, they used self-petitions as "*the means to suspend their obligations to make repayment of the debts and to negotiate with the creditors on the terms of repayment*". The Court thus held that it was an abuse of process for the debtors to present self-petitions and dismissed the Four Petitions accordingly.

Lastly, the Court added, to prevent further abuse of process, save in exceptional circumstances, the approach of the Court in dealing with self-petitions in the future will be as follows:-

(1) If a debtor does not attend the scheduled hearing before a Master, the Master will adjourn the petition to the Bankruptcy Judge for dismissal for want of prosecution.

(2) The Court will not allow an adjournment of the petition simply on the ground that the debtor needs more time to negotiate with the creditors.

(3) At the hearing before the Bankruptcy Judge, if the debtor does not attend the hearing, the petition will be dismissed for want of prosecution and/or abuse of process.

(4) If the debtor attends the hearing before the Bankruptcy Judge and informs the Court that he does not wish to seek a bankruptcy order, the petition will be dismissed for abuse of process.

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