June 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:

- 13 Corporate Insolvency Cases
- 5 Cross-border Insolvency Cases
- 2 Restructuring Cases
- 5 Corporate Disputes Cases
- 1 Bankruptcy Case

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. The presumption of a desire to prefer merely reverses the burden of proof, but does not alter the standard of proof

Tsui Mei Yuk Janice v Panorama Corp Ltd [2022] HKCFI 260

This case concerns an application for a declaration that a transfer of HK$3,022,679.56 made by HMV Marketing Limited ("**HMV**") to the 1st defendant ("**Panorama**") (the "**Transfer**") was unfair preference under the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWUMPO**") and thus is void and the directors of the defendant were guilty of misfeasance and breached their fiduciary duty.

The Plaintiffs of this case were the Joint and Several Liquidators ("**Ls**") of HMV, a company engaged in selling entertainment products in Hong Kong. HMV was an indirect wholly-owned subsidiary of a company listed on The Stock Exchange of Hong Kong Limited ("**ListCo**"). Panorama was a supplier of VCDs and DVDs products and had been one of the key suppliers to HMV for a long time. On 9 January 2017, the ListCo, through a subsidiary, entered into an agreement with the owner of Panorama ("**Mr. Fung**"), pursuant to which Mr. Fung agreed to sell his 70% stake in Panorama to ListCo. The original long-stop date was 28 February 2017, which was subsequently extended for a lengthy period of time.

During this period, HMV continued its business with Panorama. The usual grace period for HMV to settle Panorama's invoices was around one to two months. Part of Panorama's invoice to HMV for April 2018 and all the invoices for May to November 2018 were not settled. The invoices showed a general increasing trend, peaking in October 2018 when the amount was around HK$940,000. On 1 November 2018, the ListCo and Mr. Fu completed their transaction and Panorama thus became an indirect 70% subsidiary of ListCo. Mr. Fung and his team, however, remained in management. On 19 November 2018, Mr. Shiu ("**Mr. Shiu**") and Mr. Sun ("**Mr. Sun**") as directors of HMV caused/approved the Transfer. On 18 December 2018, ListCo decided that HMV should, and HMV resolved to, enter into voluntary liquidation.

The Ls claimed that since Panorama was "a person connected with" HMV and the Transfer did have the objective effect of preferring Panorama over other creditors, section 266(5) would thus apply. Ls further argued that the objective facts show HMV must have desired or been influenced by a desire to prefer Panorama.

It was not in dispute that the Transfer took place at the relevant time, when HMV was insolvent, and Panorama was a person connected with HMV. The only issue between the parties is whether the defendants have overcome the presumption and showed that the

company acting through Mr Shiu and Mr Sun was not influenced by any desire to prefer Panorama.

It is the Defendants' case that Transfer was not made under the desire to prefer Panorama for the following reasons:

(i) HMV and Panorama, whilst fellow subsidiaries of ListCo from 1 November 2018, maintained separate businesses and did not act in a concerted manner. In fact, Panorama's business was different from HMV's and Panorama had its own management team.

(ii) Due to a downturn in its business in around July 2018, a number of HMV's suppliers stopped doing business with it. HMV had to look to Panorama as a supplier who was still willing to do business with HMV to supply more stock and to show its inventory. This explained the increase of sale from Panorama to HMV during that period. Under the circumstance, Panorama "proposed" to HMV for HMV to settle the then outstanding invoices before Panorama deliver further supply and shortly after the settlement, Panorama delivered HK$1,249,272 worth of stock to HMV.

(iii) Minus the Transfer, the amount claimed by Panorama in the Proof of Debt is HK$1,167,995.71. It means that by its delivery of stock, Panorama continued to expose itself to the risk that HMV may not be able to pay.

(iv) During the period from April to November 2018, HMV paid suppliers on normal commercial terms in excess of HK$30 million and paid rent, building management fees, and rates of at least another HK$20 million. The Transfer only accounted for 6% of the total sum paid by the HMV during such period.

The Court, having considered the above reasons provided by the Defendants, declined to grant Ls' application. Further, the Court held that the Ls failed to establish that Mr. Shiu and Mr. Sun procured the Transfer knowing "*such Transfer can prejudice the position of the general and/or unsecured creditors*" or "*there is clearly incentive and/or desire … to commit the wrongdoings of unfair preference*" or they failed to preserve assets and acted without honest belief. The Ls' application was thus dismissed.

As for costs, the Court made no order, mainly because the Defendant did not give a substantive reply to HMV's pre-action letter and their defence was only fully revealed in the affirmations in opposition.

2. The English Court invokes the loss of substratum ground to wind up a public company

Re Klimvest plc [2022] EWHC 596 (Ch)

The Company sold its business and assets in January 2019, following which its sole significant asset was cash reserves of approximately £8 million. Following the asset sale, Klimt Invest SA (the "**1st Respondent**"), being the largest shareholder of the Company, sought for the Company to utilize its proceeds to make new investments rather than distribute the proceeds of sale to the shareholders under a liquidation.

Mr Eric Duneau (the "**Petitioner**") sought an order that the Company be wound up under section 122(1)(g) of the Insolvency Act 1986, contending that it was just and equitable to wind up the Company as the purpose or substratum of the Company had come to an end. The 1st Respondent opposed the petition, contending, *inter alia*, that the purpose, or substratum of the Company had not come to end on the basis that prior to the sale of its assets, the Company had in essence become an investment holding company, and its purpose could still be achieved through such investment.

In *Cotman v Brougham* [1918] AC 514, Lord Parker explained that the question of whether or not a company can be would up for failure of substratum is a question of equity between a company and its shareholders. It was held that the Court would essentially consider the following factors in determining whether the loss of substratum ground was made out:

1. The first step is to identify the Company's main or paramount object or purpose.

2. To succeed on the loss of substratum ground, it must be at least practically impossible for the Company to pursue its main object or event or create a like business to pursue the main object.

3. Even if it were technically possible to pursue the Company's main object, one should still consider whether the Company still intends to pursue that purpose or has abandoned it.

4. Where the Court is satisfied that the subject matter of a business for which a company was formed has substantially ceased to exist, such that even if the large majority of shareholders wished to continue to carry on the company, the Court would still make a winding up order: *Re Eastern Telegraph Co., Ltd.* [1947] 2 All ER 104.

On the facts, the Court concluded that rather than becoming an investment vehicle holding shares in its subsidiaries, the Company's main or paramount object or purpose had not fundamentally changed, with a significant part thereof still being based upon the original cloning technology, and the other significant part thereof having at least some connection

therewith, and being a complimentary development of the Company's business, as operated through subsidiary companies that it controlled.

Having identified the Company's main or paramount object or purpose, the Court went on to hold that the loss of substratum ground was made out for the following reasons:

1. It had become impossible, or at least practically impossible for the Company to pursue its paramount object or purpose, given the sale of the Company's assets and the particular nature of the business of the Company.

2. Even if it could, the sale of the Company's assets and the proposal to invest in promising technology companies were a very different venture. There was a "clear abandonment" of the pre-existing object or purpose of the Company.

3. By turning the Company into a private investment vehicle, the Company proposed to embark upon a course of conduct fundamentally outside or different from what could fairly be regarded as having been within the general intention or common understanding of its members, such that it would be unjust and inequitable to require them, against their will, to continue to invest in the quite different and speculative venture that is proposed, and therefore just and equitable that the Company be wound up.

3. Removal of liquidators: Who has the *locus standi*?

Shearman & Sterling (a firm) and others v Asia-Pac Infrastructure Development Limited (in creditor's voluntary liquidation) and others [2022] HKCFI 218

The 1st Defendant (the "**Company**") is a company in creditors' voluntary liquidation. The 2nd and 3rd Defendants ("**Tang**" and "**Hou**" respectively) are the liquidators of the Company. The Company is one of the plaintiffs in HCA 806/2006 ("**806 Action**") whilst the Plaintiffs (the "**Shearman Parties**") are the defendants.

Upon applications of the Shearman Parties, the Company was on 6 December 2011 and 19 November 2014 ordered to provide security in the total sum of HK$4.4 million for the Shearman Parties' costs in the 806 Action up to and including exchange of witness statements and expert evidence. The Company has made the payment-in as ordered.

On 10 April 2017, the Shearman Parties applied to uplift the funds paid in by the Company to satisfy their costs of HK$2.4 million, but subsequently withdrew their application on 10 November 2017. The reason why the Shearman Parties did not continue with their application was that they could not be certain that the plaintiffs in 806 Action would then "top up" the amount paid into Court to cover the payment out. It was further said that the costs Shearman Parties had spent up to 27 June 2018 on the 806 Action far exceeded the amount of payment-in.

By way of originating summons dated 18 December 2017, the Shearman Parties sought for replacement of Tang and Hou as liquidators of the Company (the "**Removal Application**") pursuant to section 252 of the Companies (Winding up and Miscellaneous Provisions) Ordinance, Cap 32 ("**Cap 32**") and the Court's inherent jurisdiction.

The Shearman Parties submitted that their standing in bringing the Removal Application lies in their status as (1) creditors of the Company; and/or (2) defendants in the 806 Action. The Company argued that neither of these gives the Shearman Parties sufficient interest in the relief sought under the Removal Application.

Under section 252, the Court may, "*on cause shown*", remove a liquidator and appoint another in its place. While this section does not contain any limitation on who may make an application to remove a liquidator, the Court does not agree that it should be taken to mean that there is no limitation on the categories of persons who may apply thereunder.

According to *Fletcher, The Law of Insolvency* (5th ed, 2017), "*standing to apply for removal of a liquidator is restricted to persons who have 'a legitimate interest in the relief sought'. Even though the Act itself does not expressly limit the category of person who may make the*

application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor".

Citing the above and having also carefully considered a line of authorities, the Court held that the Shearman Parties' capacity as the 806 Action defendants does not give them the required *locus*. It would be insufficient for the Shearman Parties to show that they have an interest in making the application or that they may be affected by the outcome of the liquidation. The mere fact that they are the defendants in the 806 Action was not sufficient.

Further, the Court also found that the Shearman Parties lacked *standi* in the capacity as the Company's creditors. The Court clarified that a creditor has standing to apply to remove a liquidator not by virtue of the "creditor" label, but by virtue of the circumstances where such creditor will be affected by the liquidation that in turn justifies its interest in the choice of liquidator(s). In the present case, the Court noted that the money owed by the Company had already been secured by security for costs paid by the Company in the 806 Action. As such, the Shearman Parties' position were akin to that of a secured creditor and would be largely unaffected by the liquidation process. Any costs that might have been spent in excess had not yet become payable. Accordingly, they lacked sufficient interest in the relief sought and thus, the *locus* in making the Removal Application.

Despite the findings that the Shearman Parties lacked sufficient interest in the relief sought, the Court went on to consider the merits of the substantive grounds but concluded that it would also have dismissed the Removal Application on merits.

4. Application to re-open assessment of liquidators' costs dismissed for substantial delay

Re Nimble Holdings Co Ltd Formerly Known as The Grande Holdings Ltd [2022] 1 HKLRD 1317

In May 2011, a winding-up Petition was presented against the Company. PLs were subsequently appointed, who successfully restructured the Company. After the restructuring was completed, the PLs were released and discharged in May 2016.

The PL's costs are divided into two parts. Those that relate to the Restructuring and those that relate to the PLs' activities that do not relate to the restructuring. The costs were subsequently assessed by Taxing Master. Six years after the assessment, the Company sought to re-open the assessment.

The starting pointing of the cost assessment is the Maxwell Principle laid down in *Mirror Group Newspapers* ***Plc v Maxwell & Others*** [1998] BCC 324, which states that a provisional liquidator's remuneration is governed by the court's inherent jurisdiction. As such, the assessment of costs is to be undertaken by the Court on an ex parte basis without involvement of the creditor. It is for the office-holder who wishes to be remunerated to justify his claim by giving full particulars and explaining the nature of each main task undertaken. They shall keep proper record to discharge their duty to account. Whether the claim is justifiable depends on whether a reasonably prudent man, faced with the same circumstances, would lay out or hazard his own money in doing what the office-holder has done. On the other hand, under the Procedure Guide for the Taxation/Determination of bills of Provisional Liquidators, provisional liquidators are not required to submit to taxation master information and documents which complied strictly with Maxwell principles. A provisional liquidator thus cannot be criticized for failing to follow the Maxwell Principles.

The court has a discretionary jurisdiction to reopen an assessment (***Re Hong Kong Chiu Chow Po Hing Buddhism Association Limited*** [2018] 3 HKLRD 270. A reassessment will normally be allowed if it is sought within a reasonable period, unless the case has genuinely unusual features which render it prejudicial to the office holders to permit it and the prejudice outweighs the right of the payer.

In the present case, the Company has waited much longer than 6 months before making the application for a reassessment. The Court held that whether to allow the application depends on (1) whether the Company has demonstrated that there was new information which propel it to consider reassessment; (2) the subsequent work undertaken by the Liquidators explained the Company's change of mind, which should be justified from the perspective of the Company.

The Company raised several reasons to justify the delay, including that the invoice number did not match the time cost table, there was an overcharge for foreign travel and there were excessive internal meetings. The Court ruled that these were not substantive reasons which justified such a delay in application for reopening taxation. The PLs would also suffer substantial prejudice from the reopening of assessment as they might not be able to recall each and every entry. Further, a large proportion of the employees of the PLs were no longer employed. The lapse of time also causes grave difficulty in retrieving relevant documents and emails. As such, the prejudice to the PLs significantly outweighs any benefit to the Company.

In view of the above grounds, the Court dismissed the application for reassessment of the Liquidators' costs.

5. An innocent mistaken belief on security might negate desire to prefer, says the English High Court

Re De Weyer Ltd [2022] EWHC 395 (Ch)

The Company commenced creditors' voluntary liquidation on 21 March 2017. Shortly before that, on 9 February 2017, the Respondents, who were the two directors cum creditors of the Company, procured the Company to transfer away a sum of £315,750 to a company called De Weyer Design Limited ("**Design**"), of which the Respondents were also directors / shareholders. On the following date, i.e. 10 February 2017, the sums were further transferred away to the personal accounts of the Respondents in discharge of the loans advanced by them to the Company. The Liquidators of the Company contended that the payments constitute preference within the meaning of section 239 of the Insolvency Act 1986 and sought a restorative order against the Respondents.

The English Court held that although the payment from the Company to the Respondents were split into two stages, they formed a "single coordinated scheme or composite transaction", which was effected in order to discharge the debts owed to the Respondents. In making the payment to Design, the Company did something that had the necessary effect of improving the Respondents' position upon liquidation.

The English Court then went on to consider whether the Company was influenced by a desire to prefer when making the payments to Design. As one of the Respondents, Mr. Gallagher, was the Company's sole director at the time of the payment, whether or not the Company was influenced by the necessary desire depends on whether Mr. Gallagher himself had the state of mind. As he was a person connected to the Company at the time of the payment, the desire requirement is presumed to have been satisfied. The burden is on the Respondents to rebut the same.

Mr. Gallagher argued that, in causing the Company to repay the money, he had truly believed that there was valid security for the debt. The Court held that an incorrect, but sincerely held, belief that a particular creditor held registered security and would be paid first on an insolvent liquidation would exclude the presence of any desire to prefer.

However, based on the contemporaneous documentation, the Court considered that Mr. Gallagher did not hold any true belief that the Respondents were secured creditors of the Company. Had they believed that they were secured, they would not have routed the payment via Design. It suggests that Mr. Gallagher had an intention to disguise the payments to some degree. The Court granted a restorative order against the Respondents.

6. Winding-Up order ordered to be rescinded as it was obtained on an irregular basis

Progetto Jewellery Co Ltd [2022] HKCFI 364

This is an application to rescind the winding up order made against the Company ("**WU Order**") which was brought by the sole director and a shareholder of the Company ("**Applicant**").

The Company was incorporated in Hong Kong in 2009 and carried on jewelry business. It has three shareholders including the Applicant and the Petitioner. In 2014 after the Petitioner resigned from the position of the Company's director, she was sued by the Company for breach of her fiduciary duties owed to the Company, and was subsequently ordered to pay damages to the Company in the amount of around HK$13 million (the "**Judgment Debt**").

The Petitioner did not pay any of the Judgment Debt. On the contrary, in July 2020, she demanded the Company to repay a loan in the sum HK$300,000 (the "**Debt**"), by a statutory demand ("**SD**"). Subsequently, the Petitioner presented a winding-up petition against the Company based on the Company's failure to comply with the SD, and served the same on the Company by leaving at the door of the Company's registered address in August 2020. Later in April 2021, the Petitioner was allowed to amend the Petition, but she only served the Amended Petition by ordinary post to all the shareholders and directors of the Company. The Company did not attend the hearing of the Amended Petition on 11 August 2021 whereupon the Master made the WU Order. On 17 August 2021, the Applicant took out the present application to rescind the WU Order. At the hearing on 1 September 2021, Harris J directed the WU Order not to be sealed and perfected pending the determination of the rescission summons.

In general, where the rescission application is to secure the dismissal of the winding up petition, so that the company is free to resume trading, then the following 3 requirements will ordinarily and invariably have to be satisfied:-

1. The petitioning debt and the debts owed to other supporting creditors have been paid in full or provided for;

2. The Court is satisfied as to the solvency of the company; and

3. The Official Receiver does not consider that the affairs of the company require investigation and her costs are paid.

However, where the winding-up order was misconceived, such as being obtained on an irregular basis, the court may rescind the winding-up order without requiring the applicant to satisfy the above three conditions.

The first ground of the rescission application was that the Company was not liable to pay the Petitioner as the Debt was set-off by the Judgment Debt, and hence the WU Order would not have been made had the Petitioner informed the Master about the Judgment Debt. To this end, the Court held that the Petitioner was not a creditor of the Company and the SD was defective. Firstly, the Court viewed that a creditor who owes a debt to the company has no real interest in the company as he is entitled to rely on his right of set-off in withholding payment up to the amount of the debt he owed to the company. Further, the SD was held to be defective as the Petitioner was aware that the Judgment Debt had not been paid when she issued the SD and the Company was entitled to set-off the Judgment Debt against the Debt as of right. In any event, the Petitioner had in effect obtained full payment or the benefit of a full security in respect of the Debt by withholding payment of the Judgment Debt to the Company.

The second ground relied by the Applicant was that neither the Petition nor the Amended Petition was served on the Company. Pursuant to Rule 25, a winding-up petition and any amended petition must be served by leaving the same at the registered office of the company. In the present case, despite the Master granting a retrospective leave for the Petitioner to serve on the directors and shareholders, there was no order to dispense with the requirement to serve by leaving the Amended Petition at the Company's registered address. Hence, the Court held that the Amended Petition had not been served as required by Rule 25, and as a result the WU Order was not obtained by the Petitioner regularly.

In view of the above, the Court held that the above-listed three conditions for rescission of a winding up order need not be satisfied, and in any event such conditions are satisfied in the circumstances. Finally, the Court ordered the WU Order be rescinded and the Amended Petition be dismissed.

7. In dismissing an application to rescind a winding up order which was obtained regularly, the Court held that the appropriate avenue is to apply for a permanent stay pursuant to section 209 of the Winding-Up Rules

First Ocean Financial Holdings Co Ltd [2022] HKCFI 331

On 17 September 2021, the Petitioner, First Capital Holding (HK) Co. Ltd, presented a winding-up petition against the Company on the ground that it had failed to comply with a statutory demand served on it on 26 August 2021 ("**SD**"). It is not in dispute that the SD and the petition was duly served on the Company. However, the Company did not file any evidence to oppose the petition or instruct any solicitors to appear at the hearing of the petition. As the winding-up petition was unopposed, the Master made a winding-up order against the Company at the hearing on 24 November 2021 (the "**WU Order**") and the WU Order was perfected and sealed on 7 December 2021. In other words, the WU Order was obtained by the Petitioner regularly.

Shortly after the WU Order was perfected, the Company's sole shareholder (the "**Applicant**") took out a Summons seeking to rescind the WU Order on the ground that the Company intended to oppose the petition at the hearing but failed to do so due to inadvertent mistake under Order 35 rule 2 of the Rules of the High Court (Cap 4A) ("**RHC**") and rule 210. The Applicant argued that the hearing for the petition held on 24 November 2021 was a "trial", and, as the Company did not appear at the "trial", the Court has jurisdiction to set aside the WU Order under Order 35 rule 2 of the RHC and rule 210.

The Court took the view that Order 35 rule 2 of RHC does not apply to winding-up proceedings for the following reasons:-

(a) Order 1 rule 2(2) of the RHC clearly states that the RHC shall not have effect in relation to winding up proceedings. Besides, section 209 gives the power to the Court to make an order to stay the winding-up proceedings permanently and it is the usual way for a party to apply for an order to stop the proceedings once a winding up order has been entered. No reason has been given as to why the Applicant should not avail itself of section 209;

(b) Winding up proceedings is a class remedy available to all creditors. The practice of the Companies Court is to hear such petition summarily, without any oral examination or discovery. In either case, there is no "trial" on the petition which requires the Court to determine the *lis* between the parties. There is thus no basis for the Applicant to contend that Order 35 rule 2 of RHC applies; and

(c) It is clear from Order 35, rule 1 that the entire Order 35 only applies to the trial of an "action". It is well established that a winding-up petition is not an "action".

The Court further held that even if Order 35 rule 2 of RHC applies to the petition, the application would still be dismissed by the Court for the following reasons:-

(a) Order 35 rule 2 provides that an application to set aside an order must be made within 7 days after the trial. However, in the present case, the delay in taking out the application was substantial and the reason for such delay was not satisfactory; and

(b) Company has failed to demonstrate by credible evidence that there is any *bona fide* defence to the debt.

The application to rescind the WU Order was thus dismissed.

8. English High Court held that a change of position defence to post-petition disposition will only succeed if there are special circumstances which made the transaction in question one that was in the interests of the general body of creditors

Re Changtel Solutions UK Ltd [2022] EWHC 694 (Ch)

The applicant Company and its liquidators sought to recover payments made out of the company's bank account between the presentation of a winding-up petition and the making of a winding-up order. The Company was ordered to be wound up in January 2015 on a petition presented in June 2013. After presentation of the petition, the Company's bank account was debited with five payments to the respondent, totalling £47,000. The payments were advance payments for the provision of security guards at the Company's premises for a period of approximately seven months up to December 2013. In January 2021 the applicants applied to recover the payments on the basis that they were void under section 127 of the Insolvency Act 1986 (equivalent to section 182 of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap 32)). The respondent argued, *inter alia*, that since the winding-up petition had not been advertised, it had accepted payment from the company in exchange for providing security services and therefore changed its position to its detriment believing that payment was valid.

The English High Court held that the circumstances in which a change of position defence to a section 127 application can succeed are constrained in the same way and for the same reasons as the exercise of the court's discretion to validate dispositions under section 127. The governing principles for validation are set out in *Express Electrical Distributors Ltd v Beavis and others [2016] EWCA Civ 765*, namely that there must be special circumstances which made the transaction in question one that was in the interests of the general body of creditors.

The Court found that the respondent had not established a change of position which rendered it unjust to require it to repay the sums sought by the liquidators. It was not sufficient for the respondent to show that it had acted in good faith, without notice of the petition, in the ordinary course of business and had given valuable consideration for the payment. If such factors amounted to a defence in the present case, it would apply in practically every case in which section 127 operates, rendering the section ineffective.

9. Provisional liquidator appointed by OR is not a person employed by the OR and therefore is not entitled to receive his/her remuneration under the 1st Rank

Easy Champ Corp Ltd [2022] HKCFI 769

The applicants were appointed provisional liquidators of the Company on 8 July 2020 by the Official Receiver ("**OR**") under section 194(1A). They were subsequently appointed the liquidators of the Company on 28 July 2021.

By Summons dated 5 October 2021, the liquidators applied pursuant to section 200(3) for directions as to:-

(1) Whether the provisional liquidator appointed by the OR ("**S194(1A) PL**") is a person properly employed by the OR under rule 179, and the payment of the fees, costs, and charges properly incurred by such provisional liquidator shall have the priority over the taxed costs of the petition including the taxed costs of any person appearing on the petition whose costs are allowed by the court but excluding the interest on such costs" and "the remuneration of any liquidator, other than the [OR], appointed in the winding up by the court or under the Ordinance"

(2) Whether under rule 153, after payment(s) of the fees, costs and charge of the OR, the fees, costs, and charges properly incurred by the S194(1A) PL shall be discharged from the assets of the Company, and have priority over the taxed costs of the petition and the remuneration of any liquidator, other than the OR, appointed in the winding up by the court.

The Liquidators argue that:

(1) a S194(1A) PL is appointed in the OR's place and, therefore, should be afforded the same order of priority under rule 179(1) as the OR acting as provisional liquidator. The legislative intent of section 194(1A) was to give the OR authority to appoint directly a suitable person as provisional liquidator" in the OR's place.

(2) a S194(1A) PL, like the provisional liquidator appointed under the previous "Panel B" scheme, is an agent of the OR, or "a person properly employed by [the OR]" for the purpose of rule 179(1) and, therefore, is entitled to receive their remuneration under the 1st Rank.

The Court took the view that the definition of "liquidator" under the s.2 of CWUMPO applies to the CWUR. Thus, the reference to "liquidator" under the 8th Rank includes the 3 types of provisional liquidator.

The Court disagreed with the Liquidators' suggestion that the position of a S194(1A) PL is the same as that of the OR acting as provisional liquidator. Upon his appointment, a S194(1A) PL becomes provisional liquidator, and the OR ceases to be involved qua provisional liquidator of that company. The OR thus does not have the alleged power to authorise the costs, charges and expenses of the S194(1A) PL. It is thus misconceived for the Liquidators to suggest that the remuneration of a S194(1A) PL may be regarded as "the costs, charges and expenses authorized by the [OR]" under the 1st Rank.

The Court also found the Liquidators' 2nd argument without merit for the following reasons:-

(1) The Panel T scheme introduced a tender process whereby a contract is made between the Government (as represented by the OR) and the firm successful in the tender. The appointment takers are not parties to such contract.

(2) Clause 24 of the Conditions of Contract between Sammy Lau CPA and the Government provides that "*nothing in the Contract shall create a contract of employment, a relationship of agency or partnership*…"

(3) Thus, the s194(1A) PLs are neither agents of nor persons employed by the OR for the purpose of rule 179(1).

The liquidators' application was thus dismissed. Further, the Court ordered that the liquidators are not entitled to recover their remuneration and costs incurred in preparing the application out of the assets of the Company.

10. The Court allowed application for validation order on the condition that the details of all payments and dispositions made by the Company shall be provided to the Petitioner

Univision Engineering Ltd [2022] HKCFI 702

A winding up petition against the Company was made on 28 December 2021 on the basis that the Company is unable to pay a debt of HK$5,955,760 arising from a series of invoices in respect of the supply of services and goods by the Petitioner. The Petition is opposed by the Company on the basis that there are *bona fide* disputes over the invoices.

The Company then applied for a validation order in respect of various payments made or intended to be made by the Company. The application is made on the basis that the Company is solvent and has continued to carry on its business despite the presentation of the Petition. The Company also has outstanding contracts to complete.

Based on the evidence put forward by the Company, it is not in dispute that:-

1. The Company's 2021 audited accounts and interim results show that the Company had been trading profitably albeit its profits were dwindling;

2. The Company was able to raise new bank loans of around HK$24 million to support its trading activities which resulted in a modest profit;

3. The Company still has outstanding contracts to complete, including *inter alia* a substantial contract with MTRC. It also has contractual obligations to its sub-contractors, suppliers and service providers; and

4. the Company has at least trade receivables of HK$10,506,573.14 which are already due and payable by MTRC;

The Court is thus satisfied that the carrying on of the Company's business is likely to be beneficial to the Company and its creditors, by generating net cash or net assets, by reducing the risk of the Company defaulting on its existing contracts and incurring further liabilities and hence by reducing any deficiency that might otherwise exist in the event of the winding up of the Company.

Accordingly, the Court granted the validation order sought to enable the Company to continue its business, subject to an appropriate safeguard that the Company do: (i) provide to the Petitioner's solicitors, until further order of the Court, a schedule on the 21st day of every calendar month, giving details of all payments or dispositions made by the Company pursuant to the Court's validation of the same in the preceding period, stating in respect of each such payment its date, amount, payee (name and address) and purpose, and listing out

any and all supporting documents to justify each payment; and (ii) permit the Petitioner to inspect, on 7 days' notice, any and all such supporting documents.

11. Winding-up petition dismissed after the Court found triable issue over the petitioner's unlicensed money lender status which may render the loan unenforceable

Wealthy Land Investments Group Ltd v Florescent Holdings Ltd [2022] HKCFI 649

Wealthy Land Investments Group Ltd (the "**Petitioner**") seeks to wind up the Company based on the Company's failure to comply with a statutory demand.

The Petitioner agreed to grant the Company a $250 million loan ("**Loan**") pursuant to a loan agreement. As security, the Company pledged its shares in Huazhang Technology Holding Limited ("**Listco**") to the Petitioner. The Petitioner, the Company and Kaiser Financing Company Limited ("**Kaiser**") subsequently entered into a supplemental agreement under which the Loan would be provided as to $200 million by the Petitioner and as to the remaining $50 million by Kaiser as the 2nd lender and the Petitioner and Kaiser would enjoy rights as lenders and pledgees in proportion to the funds advanced by them respectively.

The Petitioner, the Company and Kaiser further entered into a supplemental agreement to, among others, extend the term of the loan by 6 months, provided for interest to be paid to the Petitioner at the rate of 24% per annum, and revised the default interest rate to 48% per annum.

The Company argued that the Petitioner is an unlicensed moneylender such that the loan agreement and the security arrangement are *prima facie* unenforceable under Section 23 of the Money Lenders Ordinance (Cap 163) ("**MLO**").

The issues before the Court are:-

(1) Whether the Petitioner is an unlicensed moneylender within §2 of the MLO;

(2) Whether the exemptions under sections 2(b)(ii) and 5 of Part 2, Schedule 1 of the MLO (the "**Part 2 exemptions**") apply; and

(3) Whether the court should exercise its jurisdiction under section 327.

The Court disagreed with the Petitioner that a single loan was generally insufficient to cause a lender to be treated as a money lender within section 2 of the MLO. Even one transaction might be sufficient. On the facts, the Court held that the Company had made out an arguable case that the Petitioner was a money lender.

The exemption under section 5 of Part 2 of Schedule 1 of the MLO was for "*A loan made by a company or a firm or individual whose ordinary business does not primarily or mainly involve the lending of money, in the ordinary course of that business*." The Court found that

the Petitioner had failed to show this is applicable. The submission that granting the Loan was akin to the Petitioner's ordinary business of holding investments in listed shares is misconceived. It is fundamentally different in nature to granting a loan secured by listed shares, which generate different returns.

The Petitioner also argued that the security created by the two pledges was a floating charge. As such it would be exempted under section 2(b)(ii) of Part 2 of Schedule 1 to the MLO. The Court found that the Company as chargor had no autonomy over the assets charged at the time the pledges were created. Thus, it means that the security created is not a floating charge. Thus, the floating charge exemption is not applicable.

It follows that the Company has demonstrated that it has a bona fide dispute on substantial grounds that the loan agreement and the agreements supplemental to it were unenforceable under section 23 of the MLO.

The Petition was thus dismissed.

12. Liquidators cannot ask the Court for advice on matters of commercial judgment, or ask the court to resolve a difference of opinion in a section 255 application

Joint and Several Liquidators of Hong Kong Universal Jewellery Ltd v Fu Hap Enterprises Ltd [2022] HKCFI 1062

The Company is in members' voluntary liquidation. It has four members. Each of them holds 25% shareholding in the Company and had a representative on the board. The members hold different views on the best way of dividing the Company's assets. On 9 June 2020, the Liquidators of the Company took out an application pursuant to *section 255* with a view to obtaining the court's assistance in deciding how the differences should be resolved. In the application, the Liquidators did not propose any specific course, but simply asked the Court to give directions on the manner in which the Company's assets should be distributed.

Section 255(1) provides that the liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

The way the application was framed was found to be wholly misconceived. The Judge referred to his rulings in *Re A Company (Liquidators: Cowley and Lui)* [2020] 3 HKLRD 96 and explained again that a liquidator cannot use section 255 to seek the endorsement of the court to a proposed course of action simply because he is uncertain about its appropriateness. The principles can be summarized as follows:

(1) The liquidator is to conduct a liquidation exercising their own professional expertise and judgment;

(2) It is clear from case authorities that a liquidator cannot properly seek a direction which involves asking the court to approve what is largely a matter of commercial judgment since judges are generally not well placed to make judgments about what is in somebody else's best commercial interests;

(3) The court will not interfere with a liquidator's decisions unless it can be demonstrated that the liquidator has not acted in good faith, made an error of law or principle or the decision is perverse in the sense of falling outside the range of decisions a liquidator having proper regard to the relevant principles might make;

(4) A decision which comes within a liquidator's broad discretion, particularly if the decision is commercial in character, not only does not require the approval of the court, but also generally will not be amenable to a direction approving it;

(5) A direction must require something other than a general endorsement of a proposed course of action; and

(6) Normally, a direction will require the formulation of a precise issue. The issue will commonly be legal, of significance, and must call for the exercise of some legal judgment.

Applying the above principles, the Court refused to grant the Liquidators' application and made the following observations:-

(1) A liquidator must when seeking a direction pursuant to *section 255* formulate a proposed decision or question, which the court is asked to approve or determine. It is not permissible or appropriate to simply ask for unspecified directions;

(2) If what is sought, is the court's endorsement of a proposed course of action the court will approve it unless it is demonstrated that it has not been made *bona fide* or that it is one that no reasonable liquidator should make after proper consideration of the relevant facts and matters;

(3) An application of the present sort is not an opportunity for the different contributories to argue for an alternative course of action. They should only actively participate (as opposed to stating that they agree or are neutral) if they are objecting and that should only be done if there are grounds to challenge the liquidators' *bona fides* or the rationality of the decision. *Section 255* applications are not an opportunity for a contributory or creditor to lobby the court for a different decision.

(4) The Liquidators cannot ask for advice, particularly on what is a commercial matter, or ask the court to resolve a difference of opinion between the liquidator and contributories.

13. When a grant of security to cover existing indebtedness may amount to a transaction at an undervalue?

Rothstar Group Ltd v Leow Quek Shiong and other appeals [2022] SGCA 25

Mr. Ng Say Pek was the sole shareholder and director of a company, Pictorial Development Pte Ltd ("**Pictorial**"). Mr. Ng was also a shareholder and director of another company, Agritrade International (Pte) Ltd ("**AIPL**"). APIL entered into an agreement for a loan to be provided by Rothstar Group Limited ("**Rothstar**"). To secure AIPL's obligation, Mr. Ng and Poctorial granted a legal mortgage over a property owned by Mr. Ng and Pictorial to Rothstar. APIL eventually failed to repay the loan. Further, Mr. Ng was declared bankrupt and Pictorial was wound up in 2020. The trustees in bankruptcy of Mr. Ng and the Liquidator of Pictorial applied to set aside the legal mortgage on the ground that it was, *inter alia*, a transaction at an undervalue.

The Singapore Court of Appeal need to consider whether the grant of security for existing debt may amount to transaction at an undervalue. According to *Re MC Bacon Ltd* [1990] BCLC 324, where an insolvent party grants security for its indebtedness, the grant of security will not amount to an undervalued transaction. This is because the grant of security for the insolvent party's own indebtedness does not deplete or diminish the insolvent party's assets. However, the Court rejected Rothstar's argument that the principle should equally apply where the insolvent party grants security for a third party's indebtedness. On the contrary, the grant of security would reduce the net assets of the insolvent party as it would impose a new liability which the insolvent party did not previously have.

The Court held that the comparison of value between the consideration provided and the consideration received should be governed by the following principles:

(1) The comparison of value between the consideration provided and the consideration received must be undertaken from the perspective of the grantor. Even though the consideration need not be directly received by the grantor, the value of that consideration is relevant only in so far as it accrues to the grantor. Further, the grantor's mere perception of the value will not suffice.

(2) The value of the consideration has to be assessed "in money or money's worth", thus requiring the value of the consideration to be quantifiable in monetary terms.

On the facts, the Singapore Court of Appeal found that the legal mortgage was a transaction at an undervalue:

(1) Mr. Ng and Pictorial provided consideration of significant value when entering into the legal mortgage. However, there was no value received by Mr. Ng and Pictorial in money or money's worth.

(2) Mr. Ng and Pictorial were insolvent at the time of, or become insolvent as a result of, granting the legal mortgage.

In conclusion, the Singapore Court of Appeal found the legal mortgage constituted transaction at an undervalue.

Cross-border Insolvency Cases

14. Court of Final Appeal upheld that pressure on a debtor to pay an undisputed debt is a proper benefit of allowing a winding-up petition against an overseas company to proceed

Shandong Chenming paper Holdings Limited v ARJOWIGGINS HKK 2 Limited [2022] HKCFA 11

Shandong Chenming Paper Holdings Limited ("**Chenming**") is a company incorporated in the PRC and it has a dual listing in Shenzhen and Hong Kong. Chenming and Arjowiggins HKK 2 Ltd ("**Arjowiggins**") established a joint venture in the Mainland under an agreement entered into in October 2005. Disputes arose, and in October 2012, Arjowiggins commenced arbitration against Chenming for breach of the joint venture agreement. In November 2015, the arbitral tribunal ordered Chenming to pay damages in the sum of RMB167,860,000 to Arjowiggins.

Chenming applied to set aside the arbitral award which application failed. The Court ordered Chenming to pay Arjowiggins' costs on indemnity basis for the application to set aside. On 18 October 2016, Arjowiggins served a statutory demand on Chenming for contractual damages, legal fees, costs and interest, and fees payable to the arbitral tribunal. Chenming did not pay any of the amounts so demanded.

On 7 November 2016, Chenming applied *ex parte* and obtained an interim injunction to prevent Arjowiggins from presenting a winding up petition against. On 11 November 2016, Chenming amended the originating summons seeking a further declaration that since it is an unregistered foreign company, Arjowiggins would not be able to satisfy the 3 core requirements for the Hong Kong Court to exercise jurisdiction to wind up Chenming under section 327(3).

At first instance, Chenming accepted that the 1st and 3rd core requirement were met so the issue was on the 2nd requirement, i.e. whether there was reasonable possibility that the winding up order would benefit those applying for it. Harris J accepted that the value of Chenming's listing status in Hong Kong was not capable of providing a material benefit to Arjowiggins or other creditors of the company. Nevertheless, his Lordship considered that Arjowiggins would still benefit from a winding up order, in that Arjowiggins would be able to derive benefits from the leverage created by the prospect of a winding-up order or the appointment of a liquidator. Given the "immediate and severe" consequences of a winding-up order, it would exert considerable pressure on Chenming's management to satisfy its debt to Arjowiggins. Such leverage may constitute a benefit indirectly and thereby satisfy the 2nd requirement under the three core requirements. The Court of Appeal upheld Harris J's decision. Chenming further appealed to the Court of Final Appeal.

Chenming argued, amongst other things, that the 2nd core requirement has always insisted that the benefit referred to has to be a benefit resulting from the *making* of the winding-up order and that there is no justification for departing from this understanding.

The Court of Final Appeal disagreed and held that:-

(1) There is no doctrinal justification for confining the relevant benefit narrowly to the distribution of assets by the liquidator in the winding up of the company;

(2) It is sufficient that the benefit would be enjoyed solely by the petitioner;

(3) There is also no doctrinal justification requiring the relevant benefit to come from the assets of the company;

(4) There are cases where even though there was nothing for the liquidator to administer the courts did not find any difficulty in holding that the second requirement was satisfied so long as some useful purpose serving the legitimate interest of the petitioner can be identified;

(5) The benefit need not be monetary or tangible in nature; and

(6) The fact that a similar result could be achieved by other means does not preclude a particular benefit from being relied upon for the purposes of fulfilling the second requirement.

Commercial pressure is found to be a legitimate benefit under the 2nd requirement. In the present context, the leverage stems from the adverse consequences on Chenming's listing status in the Stock Exchange of Hong Kong. Any potential impact in terms of possible sanctions by the Listing Division is as much effective before as after the making of a winding-up order. Viewed in that light, the benefit derived from such leverage is incidental to the possibility of the making of a winding-up order.

In conclusion, the appeal was dismissed.

15. The mere fact that a foreign company is wound up by the court of the place of incorporation does not obviate the need for a winding-up order against the company in other jurisdictions where the company has assets

Re Up Energy Development Group Ltd [2022] HKCFI 1329

The Company, which was incorporated in Bermuda, is a registered non-Hong Kong company listed on the HKEx, with asset owning subsidiaries based in the Mainland held by intermediate subsidiaries incorporated in the British Virgin Islands. It conducted most of its financing activities in Hong Kong and had no business activity in Bermuda. In 2016, it became insolvent. A creditor in Hong Kong (the "**Hong Kong Petitioner**") presented a winding-up petition against the Company in Hong Kong. Around the same time, a winding-up petition was also presented against the Company in Bermuda. Consequently, the Bermuda Court appointed 3 provisional liquidators over the Company. In 2017, Harris J approved the recognition of the appointment of the PLs in Bermuda.

The Hong Kong Petitioner then pressed for a winding up order in Hong Kong. At the hearing on 31 August 2021, Harris J held that for the purpose of the 2nd core requirement, there was no evidence suggesting 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. Harris J thus refused to make an immediate winding-up order but directed that the Petition be adjourned pending the outcome of the judicial review process initiated by the Company in respect of the Listing Committee's decision to delist the Company's shares.

In March 2022, the Bermuda Court made a winding up order against the Company and the Hong Kong Petitioner pressed again for a winding up order in Hong Kong. The PLs opposed on the following grounds:-

1. **Primacy ground** – that the Hong Kong Court should give primacy to the Bermuda Court;

2. **Second Core Requirement Ground** – that Harris J already made a finding that the 2nd core requirement was not satisfied**;**

3. **Recognition ground** – affairs of the Company in Hong Kong could be sufficiently dealt with by way of recognition and assistance granted by the Hong Kong Court; and

4. **Ancillary Winding-up Ground** – that an ancillary order would lead to additional time and costs and add to the burden of the estate

Primacy Ground

Linda Chan J considered that forbidding a creditor to seek a winding-up order outside of the home jurisdiction of the company goes against the statutory right given to the creditor under s.327(3). So long as the 3 core requirements can be met, there is no separate or additional requirement for the domestic court to decline a winding up order against a foreign company because it has been or will be wound up in the place of incorporation. As such, the fact that the Company had been wound up in Bermuda was no hurdle to the Petitioner's petition.

Second Core Requirement Ground

Linda Chan J considered that the PLs misunderstood the judgment of Harris J, who unequivocally stated that he was prepared to make a winding-up order in Hong Kong if there was no opposition. Linda Chan J also sided with the Hong Kong Petitioner that the 2nd core requirement was not a high threshold to discharge as the Hong Kong Petitioner only needs to demonstrate a real possibility of benefit. As the Company had assets in Hong Kong, there is a reasonable prospect that the Petitioner will derive a sufficient benefit from the making of a winding up order against the Company.

Recognition Ground

The PLs argued that the affairs of the Company in Hong Kong can be sufficiently dealt with by way of recognition and assistance granted by the Hong Kong Court in the context of cross-border insolvency. The Court however did not agree and held that in the absence of a winding up order made against the Company, the court does not have power under the common law to confer any powers on the Bermuda liquidators or make any provisions under the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWUMPO**") available to the Company. The substantive provisions under the CWUMPO could only be made available to the Bermuda liquidators by a winding up order from the Hong Kong Court.

Ancillary Winding-up Ground

The PLs contended that an ancillary winding-up order would encourage the parties to take a "race to the court" approach and lead to substantial costs and expenses. The Court disagreed and clarified that the mere fact that a foreign company is wound up by the court of the place of incorporation does not obviate the need for a winding up order against the company in other jurisdictions. A winding up order against the Company would be in the interests of the creditors as it would avoid the need for the Bermuda Liquidators to make successive applications to the court for recognition and powers under common law, even assuming the court has power to do so (which her Ladyship indicated that in her view there is not). In conclusion, an immediate winding-up order was made against the Company.

16. Hong Kong Court issued the second letter of request to Shenzhen Court pursuant to the Cooperation Mechanism

Re Zhaoheng Hydropower (Hong Kong) Ltd [2022] HKCFI 248

This case concerns the second application for a letter of request to be issued by the Hong Kong Court to the Shenzhen Intermediate People's Court (the "**Shenzhen Court**") pursuant the "Cooperation Mechanism" that was entered into on 14 May 2021 by the Supreme People's Court (the "**SPC**") and Hong Kong's Secretary for Justice.

The Company was incorporated in Hong Kong and is part of a corporate group (the "**Group**") headed by a company incorporated in British Virgin Islands (the "**Parent**"). The Group has been engaged in the generation and supply of hydropower in the Mainland. The Parent is a 91.07% shareholder of an intermediate company incorporated in the Cayman Islands (the "**Intermediate Parent**"), which in turn wholly owns the Company. The Company is the 99.94% shareholder of a Shenzhen Company (the "**Mainland Holding Company**"), which holds the Group's operating subsidiaries in the Mainland.

On 19 January 2021, a winding up petition was presented against the Company and on 17 May 2021, the Court ordered that the Company be wound up on the ground that it was unable to pay its debts and liquidators (the "**Liquidators**") were subsequently appointed.

The Liquidators require recognition and assistance in the Mainland in order to take possession and deal with the Company's substantial assets in Shenzhen, including:

(a) Shareholding interest in the Mainland Holding Company and other subsidiaries;

(b) A motor vehicle;

(c) Funds credited to the Company's bank account held with the Shenzhen Branch of various banks; and

(d) Accounts receivable totaling RMB439 million due from companies in the Mainland.

The Liquidators were further informed that the accounting records of the Company are currently kept in Shenzhen, the Company and/or its subsidiaries is or was involved in legal proceedings in various courts in the Mainland and the 25.11% of the shareholding interest held by the Company in the Mainland Holding Company was frozen by the Shenzhen Intermediate People's Court.

In light of the above, the Court is satisfied that it is desirable and necessary for the Liquidators' appointment be recognised by the Shenzhen Intermediate People's Court and for that court to provide assistance to carry out the Liquidators' function. Further, on the basis of the evidence before the Court, the Court considered that the Company's centre of main interests has been in Hong Kong since its incorporation as it has always been run out of Hong Kong and Article 4 of the SPC Opinion is thus satisfied.

Accordingly, the Court ordered that a letter of request in simplified Chinese be issued to the Shenzhen Court requesting that the Shenzhen Court make an order recognising the Liquidators and providing assistance to them. The letter of request is appended to the judgment.

17. First application for a letter of request under the Cooperative Mechanism where the entity is not incorporated in Hong Kong

Re Ozner Water International Holding Limited (In Liquidation) [2022] HKCFI 363

The Liquidators of the Company applied for a letter of request to be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation pursuant to the Cooperation Mechanism entered into between the Supreme People's Court and the Secretary of Justice in 2021.

What distinguishes the Company's application from previous applications pursuant to the Cooperation Mechanism is that the Company was incorporated in the Cayman Islands rather than in Hong Kong. The Company has been registered in Hong Kong under Part 16 of the CO as a registered non-Hong Kong company with its principal place of business in Hong Kong. The Company holds its principal operating subsidiaries in Mainland. The Group's business is in three principal areas, namely water purification, air sanitization and supply chain services.

The Court held that granting the letter of request is consistent with the established principles for the following reasons:-

(1) The assets the Liquidators seek to control via the Mainland recognition are assets in the Mainland.

(2) The Company is in insolvent compulsory liquidation with its principal Mainland assets being in Shenzhen.

(3) The Company's centre of main interests has been in Hong Kong because the Company has always been run out of Hong Kong.

(4) The assistance the Liquidators need in the Mainland concerns classic asset collection efforts.

(5) The Liquidators have statutory power to commence proceedings outside Hong Kong to perform their functions.

Although the Company was not incorporated in Hong Kong, the Judge was satisfied that the Company's centre of main interests is located in Hong Kong and thus the case falls within the scope of the Cooperation Mechanism.

18. First letter of request from Hong Kong Court to Shanghai Court for recognition and assistance of Hong Kong liquidators

Re Hong Kong Fresh Water International Group Ltd [2022] HKCFI 924

The Liquidators of the Company applied for a letter of request to be issued to the No.3 Intermediate People's Court ("**Shanghai Court**") pursuant to the Cooperation Mechanism, which provides a procedure for mutual recognition of insolvency processes and office holders by the High Court of Hong Kong and the Intermediate People's Courts in three jurisdictions: Shenzhen, Shanghai and Xiamen. This is the first application under the Cooperation Mechanism for a letter of request to be issued to the Shanghai Court.

The Company is part of a corporate group ("**Group**") headed by its parent company ("**Parent**"). The Company's main assets in the PRC are its shareholding in its various wholly-owned subsidiaries incorporated in Shanghai ("**Shanghai Subsidiaries**").

The Court agreed that the Liquidators have a duty to collect in the Company's assets. The assistance that the Liquidators need in the Mainland 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.

The Court is satisfied that the Liquidators need to obtain recognition and assistance in the Mainland in order to take possession of and deal with the Company's substantial assets in the Mainland, in particular the Shanghai Subsidiaries.

It is also clear that there is a need for the Liquidators to take control the Shanghai Subsidiaries because the Liquidators' investigations show that the management of the Shanghai Subsidiaries have apparently diverted the Shanghai Subsidiaries' business and continued to use the association with the Parent as a listed entity, while they have ignored the Liquidators' request for information. Thus, it is desirable that the Liquidators' appointment be recognised and assisted in Shanghai.

The Court is also satisfied that the Company's centre of main interests ("**COMI**") was in Hong Kong, although it is not incorporated in Hong Kong, as its affairs have been managed since at least March 2021 in Hong Kong by the Liquidators and this alone is enough to satisfy the COMI test as the Cooperation Mechanism only requires the COMI to have been in Hong Kong for six months prior to the application being made.

19. Singapore High Court considers whether lock-up agreements should alter the classification of scheme creditors

Re Brightoil Petroleum (S'pore) Pte Ltd [2022] SGHC 35

This Singapore case discussed whether and how creditors who enter into lock-up agreements (i.e. where the creditor undertakes to vote in favour of a scheme in exchange for certain benefits) should be placed in a separate class from the other creditors for the purpose of voting on a scheme of arrangement under section 71 of the Insolvency, Restructuring and Dissolution Act 2018 (the "**IRDA**").

Brightoil Petroleum (S'pore) Pte Ltd ("**BPS**"), was part of a group of companies that had faced financial difficulties since 2019. BPS had proposed a scheme to restructure its unsecured debts, under which the potential recovery for Scheme Creditors (12%) was 60 times more than recovery in a liquidation scenario (0.2%).

A single class of creditors was used for the voting process. Having obtained 10 out of 11 of the Scheme Creditors' votes in favour of the scheme, BPS then sought the Court's sanction under s71 of IRDA.

Crucially, three of the Scheme Creditors had entered into lock-up agreements to undertake to vote in favour of the scheme in exchange for 1% of the respective Scheme Creditor's admitted debt against BPS. Further, one of the three locked-up Scheme Creditors had entered into a modified lock-up agreement wherein Brightoil Petroleum (Holdings) Limited ("**BOHL**") (of which BPS was an indirect subsidiary) would make a separate payment to the said Scheme Creditor in part satisfaction of guarantee obligations owed by BOHL to it. The lock-up agreement was proposed to all Scheme Creditors.

The Court allowed the application and sanctioned the scheme, holding that the classification of Scheme Creditors was valid. The Court also observed that generally lock-up agreements will not fracture a class when voting on a scheme.

The Court explained the three considerations relevant to determining whether creditors who enter into lock-up agreements should be classed separately in voting on a scheme:

(1) **Relative size of benefit conferred**: The question is whether the benefit conferred on locked-up creditors is so sizeable that it would have a significant influence on the decision of a reasonable creditor when voting for the proposed scheme.

(2) **Equal opportunity to enter the lock-up agreement**: The lock-up agreement must have been made available to all scheme creditors within the relevant class, and on the same terms.

(3) ***Bona fides***: The lock-up agreement must be used *bona fide* (e.g. no misleading of creditors).

Applying these principles, the Court found that there was no need to place the locked-up Scheme Creditors in a separate class from the other Scheme Creditors because:

(1) The consent fee of 1.0% of the Scheme Creditor's admitted debt was not significant compared to the potential recovery of 12.0% under the Scheme, and a 0.2% recovery in liquidation.

(2) All the Scheme Creditors were given the opportunity to enter into the lock-up agreements on substantially the same terms. In respect of the Scheme Creditor which entered into the modified lock-up agreement, the Scheme Creditor's rights against BOHL was independent from its rights against BPS.

(3) The Court also considered that the lock-up agreements were offered as a *bona fide* attempt to introduce certainty into the restructuring process, and BPS had informed the Scheme Creditors of the plan to seek sanction of the scheme under s71 of the IRDA. Further, the expected recovery under the Scheme, as described in the lock-up agreements was not far from the eventual recovery estimated by BPS.

20. Malaysia High Court handed down decision in the Top Builders Capital case, setting out important points for conducting scheme meeting and the sanction of a scheme of arrangement

Re Top Builders Capital Bhd & Ors [2022] MLJU 1

Top Builders Capital Berhad, Ikhmas Jaya Sdn. Bhd. and Ikhmas Equipment Sdn. Bhd. (collectively, the "**Applicants**") were in the process of undertaking a scheme of arrangement ("**SOA**") pursuant to section 366 of the Companies Act 2016. In December 2020, the Applicants obtained a court order for permission to hold scheme meetings of its creditors. The Applicants sought sanction for the SOA (the "**Sanction Application**") but a few creditors opposed (the "**Opposing Scheme Creditors**") on the following grounds:-

(1) Classification of creditors

A scheme creditor, Seng Long Construction & Engineering Sdn. Bhd. ("**Seng Long**") contended that the Applicants should not list all their related company creditors (the "**Related Company Creditors**") as unsecured scheme creditors as they had voluntarily agreed to waive their entitlements under the SOA.

The Court disagreed with Seng Long's arguments and held that the Court would consider the similarities or dissimilarities of legal rights but not their personal or commercial interests. As the waiver did not change the legal rights of the Related Company Creditors, the Court ruled that the legal rights of the Related Company Creditors and the unsecured scheme creditors were similar and thus could be classed together.

(2) Threshold test for disclosures in the explanatory scheme

Another scheme creditor, Star Effort Sdn Bhd ("**Star Effort**") argued the explanatory statement for the SOA contained inadequate disclosure.

The Court held that the contents of the explanatory statement should generally be clear, complete, and not misleading. It is accepted that in complex cases, there is a need to be selective with the facts, confining them to those that are necessarily useful for the creditors to arrive at a commercial judgement on those schemes. On this basis, the Court held that the explanatory statement was sufficient.

(3) Validity of virtual Meetings

Star Effort also contended that since the scheme meetings were conducted virtually, there was therefore a lack of fluency in the exchange. In addition, there was also no facility for participants to engage with one another during the meeting by way of 'breakout rooms'.

The Court upheld the validity of the virtual meeting proceedings especially taking into account the unprecedented COVID-19 environment. The Court was satisfied that the scheme creditors were already fully aware of the details and effect of the SOA and that there were no critical questions that were deliberately ignored. In addition, the disadvantages were not such that there was no effective deliberation amongst the participants.

(4) Extension of time for submission of proofs of debt

Seng Long objected to the chairman of the SOA's (the "**Scheme Chairman**") decision to extend the deadline of the PODs submission. The Court rejected this argument and held that the Scheme Chairman had acted in good faith by trying to ensure that the relevant scheme creditors with legitimate claims would not be substantially prejudiced.

(5) Inspection of other scheme creditors' proofs of debt

Some of the scheme creditors raised the issue of the failure to allow inspection of the PODs of the other scheme creditors. The Court held that a scheme creditor is entitled to access only if he is able to produce *prima facie* evidence of impropriety in the admission or rejection of the PODs. In this case, the scheme creditors did not produce any such *prima facie* evidence.

(6) Discounting of scheme creditors' votes

A few of the Opposing Scheme Creditors alleged that some of the Related Party Creditors' scheme debts should be discounted to zero. That discounting would result in only 62% in value of creditors having voted in favour of the SOA – failing the statutory majority. The Court, again, rejected this argument, and held that the discounting of the votes of wholly-owned subsidiary creditors is not a universal approach by all the courts. The issue of whether to discount or to disregard the votes is a matter of discretion for the Court based on the particular facts of the case.

21. When will a beneficiary's claim for an account be time-barred?

Trinity Concept Ltd (In Liq) v Wong Kung Sang (黃共生) [2022] 1 HKLRD 1388

Trinity Concept Ltd (the "**Plaintiff**"), a company in liquidation, brought an action against the defendants, who were two former directors of the Plaintiff (the "**Defendants**"). The Plaintiff claimed that the Defendants had breached their fiduciary duties by making a total of 139 payments to third parties without giving a proper explanation (the "**Suspicious Transactions**"). The Plaintiff sought an account, an order for delivery up of assets or payment of monies found due upon the taking of account, and alternatively equitable compensation. The Defendants contended that the Suspicious Transactions took place more than six years before the issue of the writ and therefore the present action was brought out of time and should be dismissed under section 4(2) of LO.

First of all, the Court held that the directors of a company are to be treated as trustees of the company's assets that are under their control. As such, they owe fiduciary duty to the company.

Further, when it comes to determining whether statutory limitation period applies to a claim for an account, the Court will consider the nature of each claim, whereby the primary obligation of a trustee is to exercise power on behalf of and act in the best interests of the beneficiary. In order to secure a proper execution of trust, the beneficiary shall be entitled to require the trustee to restore to the trust estate any deficiency which may appear when the account is taken. It is important to note that the beneficiary's right to an account is an entitlement. The beneficiary does not need to prove that there has been a breach of trust in order to obtain an order for account. When considering whether to grant an order for account, the burden is on the trustee to justify his actions.

The Court held that a beneficiary's claim for an account without any allegation of breach of trust and without seeking further orders upon the taking of account was not subject to any limitation period. However, the trustee may be able to rely on the six-year limitation period in respect of a breach of trust, subject to two exceptions under section 20(1) of the LO, such as fraud. While the claim for an account remained not subject to any limitation period, the fact that the claim for further orders was subject to the six-year limitation period would likely weigh heavily on whether the court would exercise its discretion to order an account.

Further, the Court clarified that where a trustee applied to strike out a beneficiary's claim for an account and further orders for alleged breach of trust on the ground that the claim was time-barred, the court should first review the pleading to determine whether there was an arguable case giving rise to a duty to account. If so, the claim for account should *prima facie*

not be struck out, and the court should then consider whether the trustee was able to demonstrate at the interlocutory stage that the claim for further orders would be time-barred. If so, then it would appear that there was good ground to strike out the claim. If the beneficiary did not have sufficient information of the trust to identify any wrongdoing, the claim should generally be allowed to proceed to trial. The trustee might raise the defence of limitation at a later stage.

In the present case, the Defendants' striking out application was dismissed because the Plaintiff did not have sufficient information to assess whether the payments were properly made. The Court was unable to conclude at the pleading stage whether there had been any breach of trust, the nature of such breach if any, and whether the Plaintiff's claim for further orders was bound to be time-barred.

22. The Court of Final Appeal held that the Respondent can rely on misconduct of the Petitioner which he or she was not subjectively aware at the time to negate a finding of unfairly prejudicial conduct on the part of the Respondent

Kwok Hon Ming Dennis v Poon Sui Cheong Albert [2022] HKCFA 2

The Petitioner was a minority shareholder of three companies (the "**Companies**") established for developing plots of land on Lantau Island. The Petitioner was appointed manager of the Companies entitled to receive a bonus "on perpetual basis for future cash receipt" when the sale has reached the original investment pursuant to the shareholders' agreement (the "**SHA**"). Nevertheless, the Petitioner was later removed as manager because of his decision to accept sale offer without consulting all the shareholders. He diverted the sale receipt to his own account and re-deposited the same to the Companies' account upon other shareholders' enquiries. After the removal, he required the Respondents as majority shareholders to purchase his shares in the Companies on the grounds that they had conducted the Companies' affairs in a manner unfairly prejudicial to his interest as a member and in breach of the SHA.

In the Court of First Instance, the Judge ruled that the SHA had entrenched the Petitioner's position as manager precluding any power of removal and as such granted the buy-out relief. The decision was reversed by the Court of Appeal ("**CA**"). The CA held that it was implied in the SHA that the Petitioner could be removed for misconduct. The Respondents were therefore entitled to remove the Petitioner for his wrongful diversion of funds from the Companies to his personal account, even though that the Respondents were not aware of such misconduct at the time of the removal. The Petitioner sought leave from the Court of Final Appeal ("**CFA**") to appeal against CA's decision.

CFA held that the CA was wrong on the issue of implied terms. The SHA never postulated an express term excluding any power to terminate. No term shall hence be necessarily implied by law in the present case.

CFA then went on to consider the unfair prejudicial conduct complained of. In the present case, the Respondents rely on the misconduct of the Petitioner, namely misappropriating the funds of the Companies to his personal account. However, such misconduct was unknown to the Respondents at the time of the Petitioner's removal. The issue is thus whether such misconduct can be relied on to avoid a finding of unfair prejudice.

Endorsing ***O'Neill v Phillips*** [1999] 1 WLR 1092, CFA reiterated the general rule that a member will not ordinarily be entitled to complain of unfairness unless "there has been some breach of the terms on which he agreed that the affairs of the company should be conducted". The Petitioner's case rested entirely on his allegation that he was removed as manager in

breach of the SHA which underpinned their corporate relationship. As the Court ruled that there was no exclusion of termination in the SHA, his removal as manager does not involve any breach and his allegation could not stand.

Further, CFA held that while the Respondents were not aware of the Petitioner's misconduct at the time of removal, nothing in section 168A(1) of the (old) Companies Ordinance (Cap. 32) suggests that the persons concerned must be subjectively aware of the factors bearing on the existence or otherwise of unfair prejudice. Moreover, the Respondents' unawareness of the Petitioner's misconduct was the result of his concealment and failure to respond to questions on the whereabouts of the funds. Applying the objective standard of fairness, the ground of unfair prejudice was not accepted by the Court.

The Petitioner's application for leave was thus dismissed.

23. It is not a proper purpose for a shareholder, who is a director, to use section 740 of the CO

Morning Ray Investment Co Ltd v Jinhui International Enterprise Ltd [2022] HKCFI 926

The Plaintiff, Morning Ray Investment Co. Ltd ("**Morning Ray**"), is a 30% shareholder of the Company. By an application made pursuant to section 740 of the CO, Morning Ray sought disclosure of 14 categories of documents concerning the financial affairs of the Company. It is Morning Ray's case that it is concerned at the way the Company has dealt with its sole asset, namely, what was originally its 61.5% shareholding in Guangdong Create Century Intelligent Equipment Group Corporation Limited. It is Morning Ray's case that the Company has sold the shares and dealt with proceeds of sale and dividends improperly and for the benefit of the other two shareholders in the Company. What is worth noting is that Morning Ray has had a representative director on the Board at all material times.

Under section 740 of the CO, the court has a discretionary power to order inspection of a company's records or documents if it is satisfied that the application is made in good faith and for a proper purpose. Proper purpose will commonly be satisfied by demonstrating that the shareholder's reason for seeking inspection concerns the shareholder's economic interest in the company. The issue before the Court is whether an application could be for a proper purpose if a shareholder already had access as a director or whether the existence of the director's right goes to the exercise of the discretion.

The Court held that it is not a proper purpose for a shareholder, who is also a director, to use *section 740* for the following reasons:

(1) It is a director's duty to monitor the performance of a company;

(2) *Section 740* exists to enable a shareholder to do so if the shareholder believes that the directors are failing to do so;

(3) If the shareholder is a director the course consistent with the structure of responsibility established by the CO and generally accepted principles of corporate governance is for the shareholder-director to take action;

(4) Allowing the shareholder to seek to do what the director can do would come close to endorsing a failure by a director to carry out the director's duties imposed by *section 465* of the *Ordinance*; and

(5) An application by a director for an order facilitating access to a company's books is far more straightforward than an application under *section 740*. Economy and proportionality point in favour of requiring the application to be made by a director rather than under *section 740* where this is possible.

In the present case, the Court noted that there was no explanation as to why Jian (Morning Ray's representative in the Board) could not exercise his powers as a director. Morning Ray's application is held to be not made for a proper purpose. The application is therefore dismissed.

24. Recent case sheds light on the high standard required for proving willful breaches of directors' duties

Chinaculture.com Ltd v Lam Ting Ball Paul [2022] HKCFI 1114

The 4th Defendant, CNT Group Limited, is incorporated in Bermuda and has been listed on the Main Board of the Hong Kong Stock Exchange ("**HKEX**") since 1991 (the "**Company**"). The 1st to 3rd Defendants were at the material times executive directors of the Company. On 10 July 2017 the Company spun-off its paint business ("**Spin-Off**"), China Paint Holdings Ltd, into a new listed vehicle CPM Group Limited ("**CPM**"). This included the transfer of a Shajing production plant in Shajing, Shenzhen ("**Shajing Land**"). The inclusion of the Shajing Land at book value rather than market value in the Spin-Off that has given rise to the present statutory derivative action commenced by the Plaintiff, Chinaculture.Com Limited ("**CC**"). CC is a subsidiary of Alan Chuang's China Investment Ltd, which is also listed on the HKEX, and at the commencement of the trial owned 19.16% of the Company. It is controlled by Mr. Alan Chuang ("**Mr Chuang**").

It is CC's case that the Board of the Company developed a business plan which involved moving the Shajing production plant to Xinfeng and this should have made the Shajing Land available for redevelopment. Contrary to such plan, the Shajing production plant in fact continued in operation and the Shajing Land was included in the Spin-Off and the price at which the initial public share offering took place did not reflect the value of the Shajing Land. The Company held 75% of the issued shares of CPM, but the value of its interest was less than it would have been if either the Shajing Land had been retained or the value of the Shajing Land had been properly reflected in the value of CPM's shares at their initial public offering.

CC argued that as a consequence of the aforesaid matters, the Defendants were willfully negligent or in default of their duties to the Company or caused the Spin-Off to be implemented for an improper purpose and that as a consequence the Company suffered loss. CC accepted that to succeed, it has to establish wilful breach of duty i.e. the person knows what he is doing and intends to do what he is doing. In other words, the person in question must know that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty to be guilty of wilful negligence.

The court found that in gist, CC's case at trial is an invitation for the court to conduct an inquiry into the way in which the Spin-Off was conducted and to assess the conduct of the Defendants with the benefit of hindsight and by standards that are more demanding than those that emerge from CC's own evidence as being generally acceptable to the Company's Board.

It is not sufficient for CC to demonstrate that the Defendants have been negligent but it is necessary to show mistakes and inadequacies which are so serious that they support the inference that the Defendants had a reckless disregard for their duties as directors. The reason for that is that Clause 167(1) of the Company's bye-laws contain the following indemnity given by the Company in favour of its directors and other officers:

"The Directors, Secretary and other officers and every Auditor of the Company for the time being of the Company and the liquidator or trustees (if any) for the time being acting in relation to any of the affairs of the Company and everyone of them, and everyone of their heirs, executives, and administrators, shall be indemnified and secured harmless out of the assets and profits of the Company from and against all actions, costs, charges, losses, damages and expenses which they or any of them, their or any of their heirs, executives, or administrators, shall or may incur or sustain by or by reason of any act done, concurred in or omitted in or about the execution of their duty, or supposed duty, in their respective offices or trusts; and none of them shall be answerable for the acts, receipts, neglects or defaults of the other or others of them or for joining in any receipts for the sake of conformity, or for any bankers or other persons with whom any monies or effects belonging to the Company shall or may be lodged or deposited for safe custody, or for insufficiency or deficiency of any security upon which any monies of or belonging to the Company shall be placed out on or invested, or for any other loss, misfortune or damage which may happen in the execution of their respective offices or trusts, or in relation thereto; **PROVIDED THAT this indemnity should not extend to any matter in respect of any wilful negligence, wilful default, fraud or dishonesty which may attach to any of the said persons**."

Bearing such requirement in mind, , the court proceeded to examine witness statements and made, inter alia, the following observations on available facts:

(1) If the Defendants had approached a corporate finance adviser of the experience of the financial experts who gave evidence at trial, they may well have been advised that a lease back arrangement would be complicated and, quite possibly unsuccessful. In those circumstances they could properly have decided to include the Shajing Land in the Spin-Off. Nonetheless, the Defendants' failure to explore the possibility of a leaseback of the Shajing Land provides little support for an inference of reckless disregard for their duties as directors;

(2) According to Mr Chong's evidence, the reason why the Defendants did not explicitly told the Board that the agreed plan to relocate production plant to Xinfeng had been abandoned was that such plan was self-evident from the structure of the Spin-Off. The court opined that assessed in a fast moving commercial context this is credible explanation. The court also noted that there is no suggestion that other directors were confused about what was intended; and

(3) The Defendants proceeded on the basis that the Shajing Land was necessary for production and had to be included in the assets spun-off. They were also under the understanding that an application to rezone the Shajing Land to residential was unlikely to be successful.

To conclude, the court found that the evidence falls far short of establishing facts which support an inference of improper purpose in the sense of a conscious decision to structure the Spin-Off in such a way as to discourage a takeover attempt. After all, the court is not undertaking an inquiry into the shortcomings of the Defendants' management of the affairs of the Company, but an assessment of whether or not their conduct of the Spin-Off was in material respects sufficiently wanting as to constitute breach of duty. As such, while the court accepted that the Defendants' management of the Spin-Off and reporting to the Board was slipshod, that does not mean that the Defendants breached their duties. The action was thus dismissed.

25. In what circumstances will the Court strike out a winding-up relief when an alternative remedy is available?

Liu Tieh Ching Brandon v Liu Ju Ching [2022] HKCA 512

The Petitioner is a minority shareholder of the Company and one of the children of its deceased founder. The Petitioner issued the Petition seeking an order for distribution in specie, or alternatively a buy-out order, or alternatively a winding-up order of the Company. The Petitioner alleged that the other Respondents have misappropriated and misapplied the assets of the Company. The 1st to 4th Respondents applied to strike out the winding up relief on the ground that an alternative remedy is available. At first instance, the Judge allowed the striking out application and the Petitioner appealed.

To strike out a winding up relief, it must be shown that it is plain and obvious that the petition for winding up would fail on the ground that there is an alternative remedy available to the petitioner and the petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing the alternative remedy. The Petitioner pleaded that the 1st and 2nd Respondents do not have the requisite financial resources to purchase the Petitioner's shares in the Company.

The Court of Appeal held that whether a respondent shareholder can rely on his shares in the subject company to show that he has sufficient financial resources to satisfy a potential buy-out order depends on the facts of the case. It is incumbent on the respondent shareholder to lay a proper evidential foundation, because the value of a block of shares in a private company (particularly a minority shareholding) may not be reflected by the net-asset value of the company. It is not necessarily self-evident that his shares in the company can be utilised to raise funds, and shares in a private company may not be readily realisable, or accepted as security for raising funds. The 1st and 2nd Respondents have not laid a sufficient factual foundation for the argument that their 42% shares in the Company could be utilised to fund the purchase of the Petitioner's shares.

The Court also noted the question of whether or not valuation of the shares is practical given the substantial allegations of misappropriation or misapplication of funds. It is not inconceivable that the Judge may come to the conclusion after trial that valuation would not be practical and it would be more appropriate and straightforward to make a winding up order of the Company.

The Petitioner's appeal was thus allowed.

Bankruptcy Cases

26. The Court made non-commencement order against the Bankrupt for failing to attend interview with the Trustees

Re Lu Yongliang [2022] HKCFI 1251

After a bankruptcy order was made against the Bankrupt, the Trustees in bankruptcy invited him to attend an interview with the Trustees. Despite the Trustees explaining that this would be necessary (a letter dated 25 October 2021) a specific request to the Bankrupt's solicitors (a letter dated 15 November 2021) and an express request by the Official Receiver by a letter dated 30 September 2021, the Bankrupt did not respond.

The Trustees thus applied to the Court for a non-commencement order. The Bankrupt opposed the application through counsel. The Court found that the Bankrupt was clearly trying to avoid cooperating and the Court accordingly made the normal non-commencement order.

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