September 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:

- 3 Corporate Insolvency Cases
- 3 Cross-border Insolvency Cases
- 1 Restructuring Case
- 5 Corporate Disputes Cases
- 6 Bankruptcy Cases

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

Best regards,

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

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

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Corporate Insolvency Cases

1. Post *Lasmos* – What is the legal effect of an arbitration agreement governing an underlying debt on a winding-up petition?

Re Hongkong Bai Yuan International Business Co., Ltd [2022] HKCFI 960

The Petitioner presented a petition ("**Petition**") on 10 June 2021 seeking a winding up order against the Company on the ground that the Company has failed to comply with a statutory demand in respect of a debt of EUR955,000 ("**Debt**").

The Debt arose out of a sales contract entered into between the Company and the Petitioner ("**Sales Contract**"). The Sales Contract provided that "*all disputes are to be referred to CIETAC for arbitration under Chinese law in English language*" ("**Arbitration Agreement**"). In response, the Company sought to dismiss the Petition on the following grounds:

1. There was a *prima facie* dispute which should be referred to arbitration under the Arbitration Agreement;

2. There were *bona fide* disputes on substantial grounds in relation to the Debt; and

3. The Company had a cross-claim against the Petitioner which exceeded the amount of the Debt.

Prima facie dispute to be referred to arbitration

The Court took the view that when facing a debt covered by an arbitration agreement, it is incumbent upon the debtor to first demonstrate that there is a genuine dispute on the debt which requires determination of a tribunal. The Court sees no point in having the parties resolve their dispute through the contractually agreed forum when no genuine dispute exists. The Court would therefore review the evidence and arguments adduced by the parties to see whether there is a genuine dispute over the debt. If there exists a genuine dispute, the Court would ordinarily dismiss the petition.

Whilst the Court would give considerable weight to the fact that there is an arbitration agreement between the parties and other relevant circumstances, the Court would not follow the approach laid down by Harris J in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("***Lasmos***"), which provided that a petition should generally be dismissed if the company could show that (a) the debt is not admitted; (b) the dispute is covered by an arbitration clause; and (c) the company has taken step to commence arbitration.

Bona fide dispute of the Debt

The Company argued that while it has not paid the Debt to the Petitioner, it "had been prepared to effect payment to the Petitioner" upon determining certain issue with the quality of the cargo. In response, the Court ruled that the Company has failed to demonstrate that there is a *bona fide* dispute in respect of the Debt as the Company has clearly admitted liability to pay the Debt but merely considered itself entitled to suspend payment pending determination of the quality issue. Further, the Company could not identify any provision under the Sales Contract or other documents which entitles it to withhold payment of the Debt.

Cross-claim against the Petitioner

The Company further contended that it had a serious cross-claim against the Petitioner for breach of other contracts to which the amount of losses sustained by the Company exceeded that of the Debt. However, on the facts of this case, the Court took the view that the Company had failed to demonstrate that it had a serious cross-claim against the Petitioner. Further, on the evidence adduced by the Company, it was shown that the loss suffered by the Company was not caused by the alleged breaches of the Petitioner. The Court also noted that even if the Company did in fact have a serious cross-claim against the Petitioner, there was no valid basis for the Company to withhold payment of the Debt pending determination of the cross-claim because: (a) the cross-claim arose from a separate set of contracts independent of those of the subject matter; and (b) there was no contractual provision present in those contracts conferring a right on the Company to retain the Debt as security for its cross-claim.

Accordingly, the Court allowed the Company 14 days from the date of the Order to settle the Debt if it wished to avoid a winding-up order. In the event that the Company fails to do so, the Petitioner may restore the Petition for hearing whereupon a usual winding-up order will be made against the Company.

2. The Cayman Court granted declaratory relief in winding-up proceedings

In the Matter of Polarcus Limited (In Official Liquidation) FSD 31 of 2021 (IKJ)

Joint official liquidators ("**JOLs**") were appointed to the Company on 21 June 2021 by the Grand Court of the the Cayman Islands. The JOLs sought sanction from the Court to enter into a sale and purchase agreement concerning the purchase of shares in foreign connected entities (the "**Transaction**"). The Court granted such sanction pursuant to an order dated 14 December 2021 (the "**Sanction Order**"). Notwithstanding the Sanction Order, the JOLs were subsequently required to demonstrate to a foreign regulator that they had the requisite power to enter into the Transaction on behalf of the Company in liquidation. Accordingly, the JOLs sought a further order from the Court to provide that confirmation.

Justice Kawaley acknowledged the gap arising from the fact that the Companies Winding Up Rules (2018 Revision) (the "**CWR**") did not grant the Court an express power to provide declaratory relief in winding-up proceedings and that the provisions of the Grand Court Rules Order 15, rule 16 (providing the Court's jurisdiction to make binding declarations of right whether or not any consequential relief is or could be claimed) did not apply to winding-up proceedings.

However, Justice Kawaley noted that the Court had in past cases been prepared to use its inherent jurisdiction to fill gaps in the CWR and that the express statutory power to grant declaratory relief (by way of section 11 of the Grand Court Act) was not limited by its own terms. Justice Kawaley also noted the practice of seeking declaratory relief within the guise of sanction applications (directing whether and how liquidators may exercise their powers) and that confirmation as to the powers of official liquidators to facilitate the recognition of such powers abroad are frequently sought by way of letters of request, for which the Court's jurisdiction has never been doubted on an *ex parte* basis nor successfully challenged.

Accordingly, Justice Kawaley considered that the declaration sought fell within the broad ambit of section 11 of the Grand Court Act, was consistent with the Court's power to control the exercise of official liquidators' powers and could also be made pursuant to the inherent jurisdiction of the Court to fill a gap in the CWR and facilitate the implementation of the Sanction Order.

3. How should the Court exercise the discretion to order non-party costs against liquidators?

Wing Hong Construction Ltd (In Liq) v Hui Chi Yung [2022] 2 HKLRD 123

The Plaintiff is a company in liquidation. The Plaintiff's claims (the "**Action**") were brought on its behalf by its Liquidators. The Action was dismissed with costs reserved. The Defendants sought an order for the Liquidators to be (1) joined to the Action for costs purposes only, and (2) made jointly and severally liable with the Plaintiff for the Defendants' costs of the Action. The Liquidators agreed to be joined for costs purposes but opposed the imposition of non-party costs liability on them.

In respect of non-party costs order, it is well-established that:-

(1) The grant of any non-party costs order is exceptional.

(2) The touchstone requirement is ultimately that it is in the interests of justice to award non-party costs.

(3) Whilst the Court has jurisdiction to order non-party costs against liquidators, there is a particular need for caution in dealing with any application for non-party costs against a liquidator given the public policy considerations involved.

Recorder Abraham Chan SC held that impropriety and bad faith are at the least highly important factors in deciding whether to make a non-party costs order against the Liquidators.

Having considered the evidence before the Court, Recorder Abraham Chan SC dismissed the Defendants' application for non-party costs order against the Liquidators for the following reasons:-

(1) The Court should always consider and give substantial weight to the important public interest in ensuring that liquidators are not deterred from discharging their proper role.

(2) The Court may have regard to the overall merits of the failed action objectively viewed, bearing in mind the summary nature of the Order 62 rule 6A procedure for costs orders in favour of or against non-parties and with due caution as to the dangers of hindsight and attempts to re-litigate decided matters.

(3) The merits of the claim were not such that it was improper or otherwise an instance of misconduct on the Liquidators' part to have brought and maintained the Action. Various findings were made on the balance of probabilities, upon an extensive assessment of all the evidence at trial.

(4) The Court may also consider the extent to which the liquidators' conduct was driven by any self-interested desire for gain over the best interests of the creditors or without proper regard to the creditors' interests.

(5) The Liquidators were not driven by their own interests as distinct from and over those of the creditors or otherwise conducted themselves so as to justify costs liability on the basis that they were "real parties".

(6) The Defendants had already sought and obtained security for costs in the sum of HK$2 million and it was open to them to seek additional security. The availability of security for costs is a weighty discretional reason against the grant of non-party costs.

Save for the dismissal of the non-party costs order, Recorder Abraham Chan SC made order that the Liquidators be joined as parties to the Action for costs purposes only, and that the Plaintiff do pay the Defendants' costs including the trial of the Action (including all costs reserved) on a party and party basis. As to the summons for the non-party costs order and hearing thereto, Recorder Abraham Chan SC made no order as to costs.

4. Court confirmed the power and authority of liquidators to act as agent of a foreign solvent company, notwithstanding that common law principles of recognition and assistance do not extend to solvent liquidations

Re the Joint Provisional Liquidators of Seahawk China Dynamic Fund [2022] HKCFI 1994

The Company was incorporated in Cayman Islands and carries out investment activity, which is mainly managed by a Hong Kong company holding the relevant SFC licenses ("**Manager**"). On 10 February 2022, joint provisional liquidators ("**JPLs**") were appointed by the Cayman Court upon a winding-up petition on just and equitable grounds being presented by a contributory of the Company. The Company is solvent.

Since their appointment, the JPLs sought to take control of the Company's assets in Hong Kong but were unable to do so as certain financial institutions holding the Company's cash would only accept the JPLs' instructions after they obtain a Hong Kong recognition order. The JPLs thus took out an application for recognition and assistance.

The Court found two issues should be considered in this application (i) whether the court should provide recognition and assistance to liquidators of a solvent company in the case where the JPLs accept that the process they are conducting is not a collective insolvency process; and (ii) whether this application should be granted as the JPLs accept that the Company's centre of main interests are not in the Cayman Islands.

Regarding the first issue, there are authorities suggesting that the court would not grant insolvency assistance to foreign officeholders if the company is solvent. The common law principles of recognition and assistance that apply to foreign collective insolvencies processes, which are based on the common law principle of modified universalism, have no application to solvent liquidations.

That said, the Court considered that where a liquidator was appointed in the court of the company's place of incorporation and hence entitled to act as agent of the company and exercise the conventional powers of a company's agent, in the event that a party in Hong Kong refuses to accept the liquidator's instructions on behalf of the company, the liquidator could seek an order that that party does what has been requested: *A Co v B* [2014] 4 HKLRD 374 and *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* [2016] HKEC 2377

In the present case, the Court found that the JPLs were in substance asking for a declaration that they are able to act as the agent of the Company in Hong Kong with the consequence

that they are entitled to make certain requests and take certain action on behalf of the Company, rather than an order providing for common law recognition and assistance.

Further the Court held that as the JPLs are only seeking an order confirming that they have particular powers by virtue of their appointment in the company's place of incorporation, the second issue fell away. The insolvency principles are not engaged by the application.

Accordingly, the Court granted an order confirming that the JPLs may exercise the powers specified therein, which they have by virtue of the order appointing them in the Cayman Islands. No order as to costs was made, as the Court found that it should be a matter for the Cayman Court. The order is appended to the decision.

5. Cayman Court emphasised that careful consideration must be given to comity when winding up a Cayman company

In the matter of GTI Holdings Limited FSD 102 of 2020 DDJ

Back in 2020, the Grand Court of the Cayman Islands appointed JPLs to the Company for restructuring purpose. On 9 November 2020, Harris J recognised the JPLs' appointment, thereby allowing the JPLs to exercise certain powers in Hong Kong. The Company later sought an order from Harris J to convene a meeting of its creditors for the purpose of considering and, if thought fit, approving a proposed scheme of arrangement. At a hearing on 20 December 2020, Harris J invited the Company to submit a revised scheme document. After some delay, on 8 November 2021, Harris J directed that a fresh application to convene the scheme meeting be listed for hearing on 29 March 2022.

However, before the hearing could take place, on 22 November 2021, Linda Chan J made a winding up order in respect of the Company, finding, amongst other things, that the scheme was not feasible. As a consequence of the winding up order, the Hong Kong Official Receiver was appointed as provisional liquidator in Hong Kong, while the JPLs remained in place in the Cayman Islands for restructuring.

On 14 January 2022, notwithstanding the Hong Kong winding up order, the JPLs applied to the Cayman Court for a winding up order and sought their appointment as joint official liquidators.

Doyle J emphasised that whilst a winding up in the place of incorporation will normally be recognised and have extra-territorial effect, that is not the case for foreign winding up proceedings. Satisfied that the Company was unable to pay its debts, Doyle J made the winding up order and appointed the JPLs as joint official liquidators of the Company (the "**JOLs**"). The limited effect that the Hong Kong winding up order would have on the Company's subsidiaries outside Hong Kong was, in Doyle J's view, also a good reason for making the winding up order.

In passing, Doyle J also noted that *"Cayman judges have sensibly had comity concerns at the forefront of their minds when determining issues in proceedings before the Grand Court of the Cayman Islands when there are connected proceedings in foreign friendly jurisdictions such as Hong Kong"* and while "*it is … entirely a matter for the Hong Kong Court*", Doyle J expressed his wish that the Hong Kong Court would give the joint official liquidators recognition and assistance.[1]

[1] For completeness, the JOLs subsequently went back to the Hong Kong Court and sought recognition and assistance of the liquidation and their appointment in the Cayman Islands. The application went before Linda

Chan J. Linda Chan J was critical of the conduct of the JOLs, finding that the Cayman Court had been misled. The JOLs were ordered to bear all the costs and were not allowed to recover their remuneration from the Company's assets (see *Re GTI Holdings Ltd* [2022] HKCFI 2598).

6. Recognition of foreign insolvency processes in Hong Kong – a company's centre of main interest as the primary criterion

Provisional Liquidator of Global Brands Group Holding Ltd v Computershare Hong Kong Trustees Ltd [2022] HKCFI 1789

The Company is an investment holding company incorporated in Bermuda. The Company is listed on the Hong Kong Stock Exchange. Due to the ongoing COVID-19 pandemic, the business of the Company and its subsidiaries was seriously challenged. As a result, the Board of the Company decided it was in the Company's interest to commence winding-up proceedings and therefore applied to the Bermuda Court to appoint a provisional liquidator (the "**PL**") with limited powers to help restructure the Company's debts. The restructuring attempts were however unsuccessful and the Bermuda Court made a winding-up order against the Company on 5 November 2021.

The PL had been trying to take possession of the Company's assets in Hong Kong, which included (i) approximately HK$8 million cash balances held by Computershare Hong Kong Trustee Limited ("**Computershare**") arising from the Company group's employee shares schemes; and (ii) some small balances held in the Company's bank account with HSBC. The PL sought an order from the Hong Kong Court for recognition and assistance in order to take control of the relevant assets of the Company in Hong Kong.

In considering whether or not a foreign liquidation should be recognised in Hong Kong, the Court introduced the following approach:-

(1) Whether the foreign proceedings constitute a collective insolvency process; and

(2) Whether the foreign proceedings (subject to limited exceptions below) are conducted in the jurisdiction in which the company's centre of main interests ("**COMI**") is located at the time the application for recognition is made.

The relevant factors for determining a company's COMI include the location where a company conducts its management and operations, has offices, holds its board meetings, has its officers residing, has its bank accounts, maintains its books and records, has conducted or is conducting its restructuring activities, etc.

Further, Harris J noted that if the foreign liquidation is not taking place in the jurisdiction of the company's COMI, recognition and assistance ought to be declined unless the assistance sought is limited in nature, i.e. it falls in one of the following two categories:-

(1) If the liquidator is appointed in the place of incorporation, the application is limited to recognising a liquidator's authority to represent a company and seeking orders

that are an incident of that authority, which might be described as “managerial assistance“; and

(2) If the liquidator is appointed in the place of incorporation and the circumstances do not fall within the first exception above, then recognition and limited and carefully prescribed assistance may be given as a matter of practicality.

On the facts of the case, the Court granted the order for recognition to the PL but the assistance granted is limited to the power to receive and transfer out of Hong Kong the balances held with Computershare and HSBC. The recognition was granted on the basis that the PL was appointed in the Company’s place of incorporation (instead of its COMI which was probably in Hong Kong) and the PL was given powers incidental to his authority - i.e. the PL only requires an order to demonstrate to Computershare and HSBC that as the lawful agent of the Company he is entitled to direct the monies to be transferred to another bank account. This comes within one of the exceptions to the COMI test as mentioned above. Such assistance is also consistent with common law assistance which is justified by established principles of private international law. The order is attached to the Court’s decision.

Restructuring Cases

7. Hong Kong Court commented on whether an offshore scheme recognised in the US seeking to compromise US law governed debts will have the desired effect in Hong Kong

Re Rare Earth Magnesium Technology Group Holdings Ltd [2022] HKCFI 1686

The Company is part of a group whose business involves the development and production of green fertilisers with production bases in China. The group's financial position deteriorated in 2020 due to the COVID-19 pandemic. Soft-touch provisional liquidators ("**PLs**") were appointed to the Company in Bermuda in mid-2020 to assist and facilitate a debt restructuring. The PLs were recognised by the Hong Kong Court shortly thereafter. The Company and the PLs pursued a debt restructuring which led to a scheme of arrangement being put forward in Hong Kong.

The scheme compromised the principal debt of interest-bearing bonds (governed by HK law). The total indebtedness was around HK$852 million which was owed to 10 scheme creditors. Under the terms of the scheme, the creditors were given a choice to choose (i) a term extension option, (ii) a convertible bond swap option, or (iii) a combination of both. Scheme creditors who had already agreed to the terms of the restructuring were given a consent fee in cash amounting to 3% of the principal amount of debt owed by the Company to the scheme creditors.

At the adjourned creditors meeting on 1 March 2022, 79.06% of the creditors voted in favour of the scheme terms (representing 9 out of the 10 scheme creditors). The matter then went before Harris J for sanction by the Court.

In considering whether to sanction the scheme, the Court would apply the following well-established principles:

1. whether the scheme is for a permissible purpose;

2. whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;

3. whether the meeting was duly convened in accordance with the Court's directions;

4. whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;

5. whether the necessary statutory majorities have been obtained;

6. whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and

7. in an international case, whether there is a sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

On the facts, the Court found that the scheme has complied with the above principles and sanctioned the scheme.

What is worth noting is that in passing, Harris J commented on the interplay between the *Gibbs* rule and Chapter 15 recognition. According to the *Gibbs* rule, a debt can only be discharged if compromised in accordance with the law of the jurisdiction which governed the instrument giving rise to the debt. One exception is that the debt can be discharged or compromised under the law of a jurisdiction if the creditor to whom that debt is owed submits to the jurisdiction of that foreign court.

The Court observed that many mainland businesses listed on the Hong Kong Stock Exchange carry US denominated debt and instruments governed by US law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States.

Under Chapter 15 of the Bankruptcy Code, a US bankruptcy court must recognize a foreign proceeding if certain requirements are satisfied. It does not however provide for an independent mechanism to discharge or restructure debt. Therefore, an offshore scheme recognised in the US will not bind a creditor (in Hong Kong) who did not participate in the foreign scheme process. Accordingly, if a company has any creditors who could present a petition to wind up the company in Hong Kong, a parallel Hong Kong scheme of arrangement may be necessary.

The case illustrates that careful planning is necessary when companies seek to compromise debt obligations via a scheme of arrangement to ensure that the compromise is effective in all the relevant jurisdictions.

Corporate Disputes Cases

8. The Court allowed a ListCo's application for extension of time for holding Annual General Meeting and laying financial statements

Re GT Group Holdings Ltd [2022] HKCFI 2054

The Company (together with its subsidiaries, the "**Group**") is a holding company listed on the Main Board of the Stock Exchange. A firm of certified public accountants was engaged by the Company as its auditor for the purpose of producing the annual report for the year ended 31 December 2020. However, the audit procedure was delayed because the auditor of two of the Company's associate companies failed to provide certain audit evidence in time and one of the subsidiaries of the Group was involved in legal proceedings in Mainland China, which further hindered the audit procedure. As a result, the Company failed to announce its annual results for 2020 on the Stock Exchange by 31 March 2021 and the trading of its shares had been suspended since 1 April 2021. The Company applied *ex parte* to the Court for extension of time for holding the Company's Annual General Meeting ("**AGM**") and laying financial statements.

The Court's jurisdiction to grant the extension stems from sections 610(5) and 431(1)(b) of the CO. When exercising the discretion, the Court will usually take into account factors such as whether the shareholders were aware of the financial position of the company in question and thus were not prejudiced by the non-compliance, whether the default was inadvertent, and whether the Court is satisfied that the company will comply with its obligation in the future. Further, the Court's discretion should be exercised for a legitimate purpose.

In the present case, the Court was satisfied that it should exercise the discretion after taking into account the following:

(1) The Company had ensured that its shareholders were fully aware of the financial position of the Company for the year of 2020.

(2) The Company's default was not the result of "indifference" to its statutory obligation. Rather, it was the result of a desire not to present an incomplete and potentially misleading picture to its shareholders.

(3) The Company had produced a timetable showing the steps that would be taken towards convening the AGM and laying the financial statements, and had given an undertaking that the Company would be able to table its audited financial statements and to have its AGM held within the requested time.

The Court granted the time extension sought by the Company.

9. The Court adjourned a just and equitable winding-up petition for the petitioner's legal team to consider afresh the nature of the Petitioner's complaints, noting that a shareholders' agreement was executed, which was inconsistent with the "*quasi-partnership*" claim

Re COBO Asia Ltd [2022] 2 HKLRD 892

This case concerns a winding up petition against the Company on the just and equitable ground (the "**Petition**"). In the Petition, it is pleaded that the Company was formed on the basis of a "*quasi-partnership*". Harris J repeated that the expression *quasi-partnership* is a convenient shorthand way of referring to the circumstances in which equitable considerations are engaged which may justify a winding up order on the just and equitable ground, even if there has been no breach of contract or duty. The relevant issue is whether or not the Company was formed in circumstances which impose on the shareholders obligations, or restrictions on the exercise of their legal rights, other than those that arise by virtue of the Articles of Association, CO, or an express shareholders' agreement. For equitable considerations to be imported into their relationship *qua* shareholders, something more than an existing commercial relationship or assumptions about the integrity of other shareholders needs to be established.

The Court considered that the present Petition was drafted without regard to the explanation by Lord Hoffmann in *O'Neill v Phillips*, i.e. a member of a company 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. In the present case, originally a shareholders' agreement was executed, and this is inconsistent with the shareholders' rights being determined by anything other than the Articles of Association, the shareholders' agreement and CO. The Court concluded that the Petition needs reconsideration. To the extent that a fact or matter is said to have caused a breach of the Articles of Association, the shareholders' agreement or CO this must be stated precisely. The petition should not include, for example, pleadings like "*In breach of that quasi-partnership and fundamental understanding, the 2nd respondent…..*".

The Court adjourned the Petition to give the petitioner more time to consider afresh the nature of its complaints and how, if at all, they support a winding up order or, if on reflection it is considered appropriate to do so, seek relief for unfair prejudice.

10. Leave to commence statutory derivative was refused on the ground that the object of a family company is not necessarily to maximize profit

Wong Wai Chung and Another v Woncorn Investment Ltd [2022] HKCFI 1680

The Applicants, Wong Wai Chung and Wong Wai Tak ("**Wai Chung**" and "**Wai Tak**") sought leave to commence statutory derivative action on behalf of the Company under section 733 of the CO against their siblings, Wong Ying Chi Alta ("**Alta**") and Chiu Wong Fat Chi Ava ("**Ava**") for breach of fiduciary duty as directors of the Company.

The Company was established by the Applicants' mother ("**Mother**") in 1985 to hold her residential property and carparks (the "**Properties**"). At all material times, Wai Chung, Alta and Ava were directors of the Company, while all of the children of Mother (the "**Siblings**") were its shareholders. The residential property was occupied by Mother, Alta and Wai Chung as their residence, while the Company bore most of the expenses incurred by the Properties, including utility expenses and rates for over 34 years. After Mother's demise, the Siblings had multiple shareholders' meetings and board meetings to resolve how the Properties shall be managed. The Applicants voted in favour of the sale of the Properties, and questioned Alta's occupation of the Properties without paying rent or rates. The claims intended to be brought against Alta and Ava (the "**Sisters**") as directors in the name of the Company include:-

1) Conflict of interest - the Sisters had been residing in and using the Properties but still voted in the resolution concerning the proposed sale of the Properties;

2) Failing to act in good faith and in the interest of the Company - the Properties could be rented out or sold with proceeds to be shared among shareholders. The free use of the Properties by the Sisters was contrary to the interest of the Company;

3) Misappropriation and/or wrongful possession of the Company's assets.

Under section 733 of the CO, the following 3 requirements have to be satisfied before leave to commence statutory derivative action on behalf of a company will be granted:-

1) On the face of the application, it appears to be in the interest of the company that leave be granted;

2) There is a serious question to be tried and that the company has not itself brought the proceedings;

3) The applicant has served a written notice on the company in accordance with section 733(3) of the CO.

The thresholds of “serious question to be tried” and “in the interest of the company” are relatively low. The Court’s role is not to resolve conflicts of evidence nor to conduct a trial within a trial. So long as the applicant can prove that it has some prospect to success and some practical benefit is likely to result, the criteria can be satisfied. If a “serious question to be tried” has been demonstrated, it is *prima facie* in the interest of the company that proceedings are pursued.

Conflict of Interest

The Court considered that the Applicants’ claims lack particularisation. Essentially, the Applicants failed to state what duty was said to have been owed to the Company which was in conflict with the Sisters’ interest. The principal activity of the Company was long term property holding without carrying on any business for profit. As such, the Sisters do not have any duty to procure the sale of the Property.

Besides, no conflict of interest will arise if the principal has given his free and fully informed consent to enable the fiduciary to prefer his own interest. In current case, the Company was a family company and the Applicants also admitted that the Company did consent to the Sisters living in or use the Properties. Such a consent can only be effectively withdrawn with a board or shareholders’ resolution.

Failure to Act in Good Faith and Misappropriation of the Company’s Assets

The Court rejected the submission of the Applicants that selling or renting the Properties was in the interest of the Company. As the Company engaged in the activity of long term property holding and was not established to make profit, the sale of the Properties would be contrary to its activity. Based on similar reason, the Court rejected the Applicants’ claim on misappropriation and wrongful possession of the Company’s assets.

In conclusion, the Court ruled that there was no serious question to be tried and it would not be in the interest of the Company to be given leave to commence the proposed derivative action.

11. Court of Appeal refused to strike out a winding-up relief against a solvent and profitable company in a shareholders' dispute, finding the petitioner not being unreasonable in seeking to have the company wound up where there are serious allegations of substantial misappropriation or misapplication of funds

Re Overseas Associates Ltd (僑民有限公司) [2022] 2 HKLRD 790

This is a shareholders' dispute amongst members of the Liu family in respect of the Company that was established by Liu Hao Tsing, deceased ("**Liu Sr**") in Hong Kong in 1965. The Company is an asset/investment holding company holding shares in various subsidiaries and associated companies (together the "**Group**"), and other publicly traded securities. Liu Sr had 6 children, including (1) the Petitioner, his eldest son ("P"); (2) the 4th Respondent ("R4"), his 2nd daughter; (3) the 1st Respondent (R1), his 2nd son; and (4) the 2nd Respondent ("R2"), his 3rd son. The 3rd Respondent ("R3") is not a Liu family member, but a former long-term employee of the Company. The 5th Respondent ("R5") is an educational charitable company founded by Liu Sr in 1986.

Until 21 November 2003, the Company's entire 5,000 issued shares were held by Liu Sr. On 21 November 2003, Liu Sr transferred 1,500 shares in the Company to R5, and continued to hold the balance (3,500) of the shares in the Company.

On or about 2 February 2014, Liu Sr transferred his remaining 3,500 shares in the Company to P (1,400 shares), R1 (1,050 shares) and R2 (1,050 shares).

P complained that R1-3 caused the Company or its subsidiaries to unjustifiably make substantial payments to R1-4 and that P had been excluded from the management of the Group and had been denied or delayed access to documents and records of the Group.

P sought the following orders:

- an order that R1-2 sell their shares to P; or
- an order that R1-2 purchase the shares of P and R5; or
- an order that the Company be wound up

Rs applied to strike out the Petition on the ground, *inter alia*, that the winding up relief was liable to be struck out because the alternative relief of a buy-out was available, and that the Petition against R3 and R4 should be struck out as no relief was sought against them.

At first instance, the Judge struck out the winding up relief and the Petition against R3-4. P appealed.

Striking out winding up relief

To justify the striking out of the winding up relief, an applicant is required to show 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.

Generally speaking, where the winding up relief is sought, particularly in cases where it is put forward as an alternative to some other remedy, the petitioner ought to explain why it is the relief that he prefers or why it is, or may be, the only relief to which he is entitled. The justification normally given for including the winding up relief as an alternative to a buy-out order is that a respondent may not be able to pay the acquisition price or that it may become clear that valuation is not practical.

The Court of Appeal held that in saying that P did not put forward the justification that R1 and R2 might not be able to pay the acquisition price or that it may become clear that valuation is not practical, the Judge appeared to have overlooked the fact that in the Petition, it was expressly pleaded that:-

(1) R1 and R2 do not have the requisite financial resources to purchase P's shares in the Company;

(2) P has a genuine interest and basis in seeking the alternative winding-up relief because, amongst other matters, (a) the various unauthorized or unjustified payments from the Group and other wrongdoings of R1-3 should be properly and fully investigated by an independent liquidator; and (b) the Company is an asset holding company and does not carry on business operations in its own right, and thus a winding-up order would not have any adverse impact on any ongoing business or operations of the companies within the Group or affect their value.

The Court of Appeal found that R1-5 have not filed any evidence to counter the allegation that they do not have the requisite financial resources to purchase P's shares in the Company. Counsel for Rs sought to argue that R1 and R2 can use their shares in the Company to satisfy a potential buy out order.

Whether a respondent shareholder could rely upon his shares in the company to show that he had sufficient financial resources to satisfy a potential buy out order depends on the facts and circumstances. The respondent has to provide proper evidential foundation because the value of private company shares may not be reflected by the net asset value of the company.

In the present case, the Court of Appeal found that R1 and R2 had not laid a sufficient factual foundation for the argument that their shares in the Company can be used to fund the purchase of P's shares.

Further, regardless of the form of buy-out, there is still the question of whether or not valuation of the shares is practical, having regard to the allegations of substantial misappropriation or misapplication of funds belonging to the Group by R1 to R3.

The fact that the Company is a solvent and profitable company and there would be a substantial surplus for its shareholders is a relevant consideration to the question of whether a winding up order should be made, but it is by no means conclusive on this question. In this regard, it is also relevant that the Company is an asset/investment holding company and does not carry on any active business of its own.

The Court of Appeal concluded that it is not plain and obvious that the petition for winding up would fail on the ground that there was an alternative remedy available to P, or that P was acting unreasonably in seeking to have the Company wound up instead of pursuing the buyout remedy.

Striking out of the Petition against R3 and R4

The Court of Appeal held that a person may be a proper or necessary party to a petition even if he is not a shareholder of the company, or no relief is sought against him.

In the Petition, P made serious allegations against R3 for breach of fiduciary duties and R3-4 received misappropriated funds from the Company.

If the Court orders R1-2 to sell their shares to P, the valuation of shares should take into account the amounts improperly paid to or for the benefit of R3-4 by the Company or the Group. The Company can then recover improper payments from R3-4. This is why R3-4 should be bound by Court's findings in the Petition.

12. Can one of the two directors instruct a solicitor on behalf of the company without the consent of the other director?

Rushbrooke UK Ltd v 4 Designs Concept Ltd [2022] EWHC 1110 (Ch)

This is a case before the Business Property Courts in Bristol. The Company carried on business as an architectural consultancy and property developer. Two individuals, Mr. Steventon-Smith and Mr. Bryan, were the directors of the Company and each owned 50% of the shares of the Company, but they fell out and Mr. Bryan stepped back from his day-to-day role. The petitioner provided architectural services in connection with preparing planning applications for the Company. The petitioner had been invoicing the Company for services rendered since 2018, but around £20,000 was outstanding. When no payment was received despite several chasing emails, the petitioner spoke to Mr. Bryan, who apparently stated that the company was likely insolvent. The petitioner issued a statutory demand.

Mr. Steventon-Smith passed the statutory demand to a firm of solicitors, who wrote to the petitioner stating that they had been instructed by Mr. Steventon-Smith "*in his capacity as director*" of the Company. Afterwards, the solicitors issued the instant application, stating that they were instructed by the Company. Mr. Bryan emailed the solicitors, stating that he was co-director of the Company and he wished to dis-instruct them. The issue was whether the application should be struck out on the basis that the solicitors had not been authorised by the Company to act for it.

The judge reasoned that the Company was a limited company which could only act by its officers and organs in accordance with its constitution, which contained articles of association as set out in Table A of the Companies Act 1985 and the Companies (Tables A to F) Regulations 1985. The Company's business was to be managed by its directors, who could make appointments or delegate powers. Here, the Company's directors did not make any appointment or delegation of their powers. While the Company could instruct lawyers to commence proceedings by decision of the directors, there was no evidence of any such agreement. It was clear that Mr. Steventon-Smith alone instructed the lawyers. Although the lawyers occasionally referred to Mr. Steventon-Smith as their client, the application notice unequivocally stated that the Company was their client.

In the past, the Court had held that in some cases, paragraph 72 of Table A might confer authority on a managing director to commence or defend proceedings on behalf of the company, but not where there were only two directors who had fallen out and would not agree to ratify the commencement of proceedings. That was precisely the position in the instant case. Accordingly, it was decided that Mr. Steventon-Smith had no authority to make or give instructions to make the application on the Company's behalf.

Bankruptcy Cases

13. When will a creditor's refusal to enter into a settlement proposal with a debtor be considered unreasonable?

Re Ashit Sud (Debtor) [2022] 2 HKLRD 898

Since June 2020, the Company, the Union Bank of India (the "**Petitioner**") and two other creditors had been engaged in discussions concerning repayment of the outstanding debts owed by the Company, where the Debtor served as the director. The Company raised a one-time settlement proposal (the "**Proposal**"), which was rejected by the Petitioner and other creditors. In particular, the Petitioner informed the Company that it could not consider the Proposal as it lacked an upfront payment which was a mandatory condition of the Petitioner bank's mandatory policy. The Petitioner subsequently served a statutory demand in the sum of US$38 million in July 2021 on the Company and the Debtor respectively (the "**Statutory Demands**"). The debt was not paid and the Petitioner presented a winding up petition against the Company and a bankruptcy petition against the Debtor (the "**Petitions**"). Between the date of the Statutory Demands and filing of the Petitions, the Petitioner appropriated about US$1.9 million out of sale proceeds of a third party security, but more than US$34 million remained outstanding.

The Company and the Debtor sought to dismiss the Petitions on, amongst others, the following grounds:

1. The Petitioner's rejection of the Proposal was unreasonable ("**1st Ground**"); and

2. The amount of debt owed was overstated in the Statutory Demands for the purpose of sections 178(1)(a) and section 9(2) of the BO ("**2nd Ground**").

1st Ground

The Company and the Debtor relied on section 178(1)(a)(ii) and section 6D(3) of the BO and argued that the creditors acted unreasonably in rejecting the Proposal, and in particular the Petitioner was unreasonable in requesting a 10% upfront payment.

The Court clarified that the test for "reasonable satisfaction" under section 178(1)(a)(ii) and section 6D(3) of the BO was the same and it was objective and to be evaluated at the date of the hearing. Citing case authorities, the Court made it clear that the relevant principles and considerations applicable to section 6D(3)(c) of the BO in determining a petitioner's refusal of the debtor's offer as being unreasonable included:-

1. The court has to be satisfied that no reasonable hypothetical creditor in the petitioner's position, and in light of the actual history, would have refused the offer;

2. The position should only be considered as between the petitioner and the debtor without regard to the position of other creditors;

3. The petitioner is entitled to have regard to his own interests and is not required to balance his interests against those of the debtor, nor to show patience or generosity. Acting reasonably is not the same as acting justly, fairly or kindly;

4. The debtor should be full, frank and open with the petitioner in respect of his statements of his position;

5. In considering a debtor's ability to repay the debt, no regard should be given to future contingencies such as profit or income from future contracts if he is permitted to carry on his business; and

6. Future income is only relevant as part of the total circumstances.

Noting that whilst the requirement of an upfront payment could be objectionable, the Court made it clear that coherent in-house policies are legitimate. The Debtor made no disclosure of his financial circumstances. There was also no evidence to show that the Petitioner's in-house policy of requiring an upfront payment was demonstrably incoherent or unacceptable. The suggested approach of comparing the economic outcome of the offer with the return for creditors in liquidation / bankruptcy was wrong. Importantly, the Court made it clear that if the Company was insolvent and unable to pay its debts, it was the creditors who had a real interest in the Company and could decide whether it was in their interest to have the Company wound up. It was not for the Company to assert otherwise. The Court did not agree that the only reasonable choice open to the Petitioner was to accept the Proposal and in rejecting it, the Petitioner was not being unreasonable.

2nd Ground

Instead of contesting that an overstated statutory demand was invalidated entirely, the Court clarified the correct approach to be adopted was for the debtor company to comply with the demand as to the amount which was not genuinely disputed and then contest the remainder. Notably, the Court held that overstating the amount due in the statutory demand did not *ipso facto* invalidate the statutory demand nor render the debtor company any less solvent so long as a debt which exceeded the statutory limit was due and admitted or not genuinely disputed. After the Petitioner appropriated about US$1.9 million towards the Company's debt, a sum in excess of US$34 million remained outstanding and undisputed. Accordingly, the amount due overstated in the Statutory Demand served on the Company was held by the Court to be not affecting the applicability of section 178(1)(a). As a last note, the Court remarked that in any event, a statutory demand was merely a means of proof of insolvency – when a debt which was not substantially disputed remained unpaid, there would be the

inference that the debtor company was unable to pay its debt under section 178(1)(c) of the BO.

Regarding the amount overstated in the Statutory Demand served on the Debtor, the Court found that the amount stated was correct and following the Petitioner's appropriation of US$1.9 million between then and the filing of the bankruptcy petition, the amount owed by the Debtor to the Petitioner was at least US$34 million. Overstating the amount did not cause any injustice to the Debtor who had not made any repayment. Accordingly, the Court held that the Statutory Demand served on the Debtor remained valid.

14. Care should be taken in preparing statutory demands - Court of Appeal considered whether overstatement of debt will entitled the debtor to set aside the statutory demand

Chan WS and Another v CC Bank [2022] 3 HKLRD 520

The Debtors are husband and wife and are the joint and several guarantors of loan facilities taken out by a company of which they were directors and shareholders. After the company defaulted on the loans and a subsequent restructuring agreement, the Creditor issued statutory demands ("**SDs**") against the Debtors on 15 June 2018. There is no dispute that the debt stated in the SDs was overstated, in that the accrued interest was wrongly calculated due to clerical mistake. On 24 July 2018, the Debtors applied to set aside the SDs. On 8 August 2018, the Creditor through its solicitors provided the Debtors with a schedule of the breakdown of outstanding indebtedness that provided the correct debt amount.

At first instance, the Judge considered the principles as stated and applied in *Re Ip Pui Man Nina* [2011] 3 HKLRD 299 that an over-statement of the indebtedness in the statutory demand will not automatically entitle the debtor to have the demand set aside, and that the relevant question is whether injustice would be caused to the debtor by allowing the particular demand to stand. However, the Judge held that this principle only applies when the Court considers whether to make a bankruptcy order at the hearing of the petition in circumstances where the debtor has not applied to set aside the demand, hence the principle is not applicable to the present case. The Judge then decided to set aside the SDs on the grounds that the over-statement was of a significant amount and no attempt had been made by the Creditor to correct it. The Creditor appealed.

On appeal, the Court of Appeal held that the principles enunciated in *Re Ip Pui Man Nina* is equally applicable in applications to set aside a statutory demand and found that the Judge had erred or misdirected herself on the principles governing the exercise of discretion, and that the Judge failed to consider, *amongst other things*, whether there was any evidence that the Debtors could and would have repaid the indebtedness even if it were correctly stated in the SDs, especially in the light of the Creditor's subsequent clarification of the correct amount due. As none of these were taken into account by the Judge, the Court of Appeal considered that there is sufficient and proper ground to interfere and allowed the Creditor's appeal.

Accordingly, the Creditor is authorised to present a bankruptcy petition against each of the Debtors. Nevertheless, the Court of Appeal expressed that this dispute could have been avoided if an application to amend the SDs was taken out by the Creditor, who failed to do so. As such, the Debtors were only ordered to pay 75% of the Creditor's costs of the set aside application.

15. Court refused to strike out a bankruptcy petition where there is a pending petition against the same debtor

Re Pan Sutong [2022] HKCFI 1896

This is an application by the Debtor to strike out a bankruptcy petition (the "**Petition**") presented by the creditor, Xinhua Financial Network Limited ("**XFN**"), on the ground of abuse of process when the Debtor is faced with another pending petition presented by other creditors.

The Debtor was the personal guarantor of a loan extended by XFN to a company owned or controlled by him. Upon the Debtor's default in respect of the loan, XFN served a statutory demand on the Debtor on 12 October 2021. Subsequently, the company, XFN and the Debtor entered into a settlement agreement which effectively stalled XFN from presenting a bankruptcy petition against the Debtor. As a result, other creditors were able to present a bankruptcy petition against the Debtor on 25 November 2021, before XFN issued the Petition on 9 December 2021.

In deciding whether to strike out the Petition, the Court considered that the sole question is whether or not the presentation of the Petition while the Debtor is faced with an earlier petition constitutes an abuse of process.

As a starting point of reference, the Court found that it has statutory power to consolidate multiple petitions under section 101 of the BO. In applying relevant sections of the BO, the Court took the view that there is no impediment to presenting a petition when there is a pending petition against the same debtor: *Re Wong Wai Dai* [2001] 2 HKLRD 465.

Counsel for the Debtor placed heavy reliance on the case of *Re China Greenfresh Group Co Ltd* [2021] HKCFI 36, wherein the Judge held that there should only be one petition against a debtor at any one time. The Court distinguished the present case from *Re China Greenfresh Group* as the latter is a winding-up case and there is no provision for consolidation of multiple winding-up petitions against the same company under the Companies (Winding Up and Miscellaneous Provisions) Ordinance.

In view of the above, the Court concluded that presentation of the Petition *per se* while the Debtor is faced with another petition could not be said to be plainly an abuse of process in the circumstances of the case. The Court also refused to grant a stay of the Petition pending determination of the earlier petition.

16. English Court ordered security for costs against the Russian Trustee-in-bankruptcy for the Bankrupt's costs of and occasioned by the Trustees' application for recognition in England

Kireeva v Bedzhamov [2022] EWHC 1047 (Ch)

The Russian trustee in bankruptcy ("**Trustee**") of the Respondent ("**Bankrupt**") applied for her recognition in the United Kingdom. At first instance, Snowden J recognised the Trustee. On appeal by the Bankrupt, the Court of Appeal directed that the matter be remitted for reconsideration. The Bankrupt applied for security of costs against the Trustee for his costs of and occasioned by the remittal.

It is indisputable that the Trustee is resident out of jurisdiction and not resident in a state bound by the 2005 Hague Convention. The threshold condition for security for costs was therefore met. At issue was whether it is just to make an order having regard to all the circumstances of the case and the quantum.

The Judge reiterated the relevant principle that in order for the court to exercise its discretion, it requires objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned. Such grounds exist where there is a real risk of (i) non-enforcement and/or (ii) additional burdens of enforcement.

The Judge found that the Trustee has no assets in the United Kingdom against which an order for costs could be enforced. There is also a real risk of non-enforcement in Russia, taking into account the risk of ill-treatment to the Bankrupt if he is to return to Russia and the risk of sanctions.

Whilst the Judge acknowledged that it is exceptional to make an order for security for costs against a trustee in bankruptcy, the Judge considered the facts of the present case exceptional. The Judge therefore concluded that an order for security for costs is just in all the circumstances and allowed the Bankrupt's application.

17. A debtor cannot have a second bite of the cherry by raising arguments against the petition which could have been raised in set-aside application

Re Yip Kim Po [2022] 3 HKLRD 356

On 19 December 2019, the Petitioner served a statutory demand on the Debtor. The Debtor applied to set aside the statutory demand, arguing that the cause of action accrued in 2010 and the Petitioner's claim was thus statute-barred (the "**Application**"). The Petitioner submitted that its cause of action only accrued in 2014 and hence the limitation period had not expired when the statutory demand was served on the Debtor. On 22 June 2021, the Application was dismissed.

On 9 August 2021, the Petitioner presented a bankruptcy petition against the Debtor. At the hearing of the Petition, the Debtor contended that the petition was an "action" under section 4(1)(a) of the Limitation Ordinance (Cap.347) (the "**LO**") and, since the Petitioner presented it more than six years after 2014, it was statute-barred and should be dismissed (the "**Limitation Issue**").

The Petitioner argued that the Debtor was precluded from raising the Limitation Issue because he could have, but did not, raise it during the Application (the "**Res Judicata Issue**"). Further, the Petitioner submitted that, upon a proper construction of the LO, time should run from the date of service of the statutory demand, not the date of presentation of the petition, such that the claim was, in any event, brought within time.

Dealing first with the Res Judicata Issue**,** the Court held that it is no longer open to the Debtor to raise the Limitation Issue or, indeed, any argument against the debt at the hearing of the Petition for the following reasons:-

(1) In dismissing the Application, the Judge decided as a necessary step in her reasoning that the Petitioner's claim for the debt was not time-barred at the time of the Application. The Debtor was bound by that determination on the issue.

(2) The Debtor could with reasonable diligence have raised the Limitation Issue as a ground in the Application. His failure to do so gave rise to an issue estoppel against him.

(3) It would be an abuse of process for the Debtor to seek to set aside the statutory demand by raising one ground in the Application, while benefitting from not having to face the Petition and the running of time for limitation purpose, and, when the Application failed, to argue that the claim was time-barred when the Petition was presented.

For the above reasons, the Court held that the Petitioner is entitled to rely on the Debtor's failure to comply with the statutory demand for the purpose of proving his inability to pay debts as required by section 6(2) of the BO. Nevertheless, the Judge went on to consider the Limitation Issue.

On the Limitation Issue, the Court agreed with the Petitioner's Counsel that the word "action" in section 4(1)(a) of the LO is wide enough to cover the service of a statutory demand as part of the two-stage process governing the commencement of bankruptcy proceedings. As the statutory demand was served within 6 years from the date of accrual of the debt on 20 March 2014, the Debtor would also fail on the Limitation Issue.

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

18. English Court held that a bankrupt has standing to appeal against refusal to set aside a statutory demand as such rights are personal to the bankrupt

Addison v London European Securities Ltd [2022] EWHC 1077 (Ch)

By a loan agreement and a guarantee respectively, the Appellant ("**Mr. Addison**") guaranteed repayment of a loan of £275,000 (the **"Loan"**) made by the Respondent ("**LES**") to Lodge Inns (Pendle) Limited (**"Pendle"**).

On 25 April 2019, Pendle and LES entered into a written option agreement for additional security (the **"Option Agreement"**). In outline, the Option Agreement gave LES the right (the **"Option"**) to buy a land (the **"Property"**) from Pendle at an agreed price of £1.4m. By a notice dated 10 February 2020, LES exercised the Option, triggering an obligation to complete the purchase of the Property on 10 March 2020. Completion however never took place.

On 2 March 2020, LES served a statutory demand on Mr. Addison for £374,125, stated to be due pursuant to the terms of the Guarantee, and comprising the Loan of £275,000, interest of £96,375 and an exit fee of £2,750. Mr. Addison sought to set aside the statutory demand but was refused by the District Judge. LES subsequently presented a bankruptcy petition against Mr. Addison and he was adjudged bankrupt on 2 June 2021 (the **"Bankruptcy Order"**). Mr. Addison appealed. One of the issues on appeal is whether Mr. Addison has standing to pursue the appeal given that he was adjudged bankrupt on 2 June 2021.

While relevant case laws do not speak with one voice, the English Court considered that there are cases where the claim or application brought against a bankrupt is sufficiently personal to the bankrupt that he has standing to continue to litigate in respect of them.

Drawing on relevant case laws, the Court made, *inter alia*, the following observations:

(1) A bankrupt who is a defendant will normally not have standing to bring an appeal;

(2) However, there are cases where the bankrupt can appeal an order against him, such as those concerning something personal to the bankrupt;

(3) Some of the factors relied on in the cases to determine whether the matter should be regarded as personal to the bankrupt include:

(a) whether the bankrupt's status is at issue;

(b) what common sense and fairness dictates;

(c) whether it is natural to regard the action as vesting in the trustee in bankruptcy and for the trustee rather than the bankrupt to continue the litigation;

(d) whether the judgment in the litigation is or would be enforceable against the estate of the bankrupt or not;

(e) tied to that, whether there are other routes by which the litigation can or could have been dealt with.

Therefore, the right question to ask is whether the right to apply to set aside the statutory demand and to appeal against the refusal to set aside the statutory demand was something personal to the bankrupt.

The Court considered that given the question of whether a statutory demand can be set aside is intimately tied up with the question of whether a person should be made bankrupt and his status, applying the above legal principles to the present case, Mr. Addison has standing to pursue the appeal against the refusal to set aside the statutory demand.

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