HCMP 2271/2019
[2020] HKCFI 416

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2271 OF 2019

IN THE MATTER OF MOODY TECHNOLOGY HOLDINGS LIMITED (滿地科技股份有限公司) (IN PROVISIONAL LIQUIDATION FOR RESTRUCTURING PURPOSES)

and

IN THE MATTER OF THE COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE (CAP.32) AND THE INHERENT JURISDICTION OF THE COURT

THE JOINT PROVISIONAL LIQUIDATORS OF MOODY TECHNOLOGY HOLDINGS LIMITED (滿地科技股份有限公司) (IN PROVISIONAL LIQUIDATION FOR RESTRUCTURING PURPOSES) — Applicants

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Before: Deputy High Court Judge William Wong SC in Chambers

Dates of Hearing: 23 & 24 January 2020

Date of Reasons for Decision: 12 March 2020

REASONS FOR DECISION

Application

1. On 10 December 2019, the Joint and Several Liquidators (the "JPLs") of Moody Technology Holdings Limited (the "Company") appointed by the Order of the Supreme Court of Bermuda (the "Bermuda Court") dated 24 October 2019, by an *Ex Parte* Originating Summons, applied to this Court for the recognition of their appointment and their powers as set out in the Letter of Request issued by the Chief Justice of the Supreme Court of Bermuda dated 20 November 2019.

Background and Procedural History

2. The Company is a company incorporated in the Cayman Islands on 29 April 2013. On 23 May 2019, the Company changed its domicile to Bermuda, and it now continues as an exempted company under the laws of Bermuda.

3. The Company is listed on the Main Board of Hong Kong Stock Exchange ("HKSE") with stock code 1400 since 25 April 2014, and it is a China-based investment holding company principally engaged in

manufacturing and sales of fabrics and yarns, which also engages in shoes and clothes trading.

4. On 29 September 2019, a winding up petition was presented against the Company in Hong Kong by Mr Su Dajie, the Petitioner in HCCW No.283 of 2019 (the "Petition") on the ground that the Company has failed and refused to settle a debt due to the Petitioner in the sum of HK$2,890,247.13.

5. On 10 October 2019, the Company presented a winding up petition against itself to the Supreme Court of Bermuda (the "Bermuda Petition").

6. On 15 October 2019, the Company made an application for the appointment of joint and several provisional liquidators on a "light touch" basis for restructuring purposes.

7. On 20 November 2019, the Chief Justice of the Bermuda Court made an Order (the "Letter of Request Order") that a Letter of Request directed to the Hong Kong Court seeking its assistance and recognition of the appointment of the JPLs in aid of the Bermuda Court proceedings be issued (the "Letter of Request").

8. Mr Tai for the JPLs drew this Court's attention to the details of the restructuring proposal and submitted that judicial assistance and recognition should be given pursuant to the Letter of Request.

9. As a recognition order by this Court would inevitably affect the interest of the Petitioner, the supporting creditor and the Company, I directed that notice be given to parties to the Petition. At the hearing on

24 January 2020, both the Petitioner and the supporting creditor, Mr Wang Zhiyong, through their solicitors' letters, informed this Court that they adopt a neutral stance to the recognition application.

10. It is clear that the JPLs are attempting to restructure the Company and its debts in Bermuda. The question is whether Hong Kong Courts should give recognition to the same when it entails a moratorium. Further, under our current law, provisional liquidators cannot be appointed for the sole purpose of propounding a scheme of arrangement. (See *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192)

Legal Analysis

11. In *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [2019] HKCFI 805, Harris J recognised provisional liquidators appointed in Bermuda on a soft-touch basis and granted restructuring powers to the provisional liquidators by way of common law assistance.

12. Mr Justice Harris recognised and assisted the Bermuda soft-touch provisional liquidators even though the Hong Kong Court could not appoint provisional liquidators solely for the purpose of enabling a corporate rescue to take place. At §9, the learned Judge said:

> " …It is not in my opinion inconsistent with Hong Kong law for restructuring powers to be granted by way of assistance to a provisional liquidator appointed over a foreign company by the court of its place of incorporation, in which a soft-touch provisional liquidation is permissible, as such powers can be granted, albeit in the more limited circumstances discussed in *China Solar*, to a Hong Kong provisional liquidator."

What is soft-touch provisional liquidation?

13. As the High Court of the British Virgin Islands ("BVI") explained in *Re Constellation Overseas Ltd* (5 February 2019) at §3 *per* Adderley J:

> " The essence of a "soft touch" provisional liquidation is that a company remains under the day to day control of the directors, but is protected against actions by individual creditors. *The purpose is to give the Group the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation.* It may be appropriate where there is no alleged wrongdoing of the directors." (Emphasis added.)

14. However, because of the Court of Appeal decision in *Re Legend International Resorts Ltd* (supra), soft-touch provisional liquidation is at present impermissible in Hong Kong.

15. In this regard, the present Hong Kong position is an uncommon and peculiar one in the common law world. As the authorities reviewed in *Re Constellation Overseas Ltd* show, soft-touch provisional liquidation is consistent with the insolvency legislation in England, Bermuda, the Cayman Islands and BVI, which is in *pari materia* with section 193 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("Ordinance"). Indeed soft-touch provisional liquidation is commonplace in offshore jurisdictions.

What is 'recognition' and 'assistance' in the context of cross-border insolvency?

16. In *Re Da Yu Financial Holdings Ltd* [2019] HKCFI 2531 at §§ 49-50, I explained the notion of recognition in the context of cross-border insolvency thus:

> " Requiring foreign office-holders to commence parallel proceedings is the very antithesis of cross-border insolvency cooperation. A crucial feature of cross-border insolvency cooperation is the recognition of foreign proceedings. In Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), the learned author at p. 61 said:
>
> > 'Recognition of international bankruptcy orders and judgments is particularly needed because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding.'
>
> The raison d'être for recognising foreign proceedings is the avoidance of parallel proceedings. As pointed out by Lord Hoffmann in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007]1 AC 508 at §22, "[t]he purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum"."

17. Recognition carries with it the active assistance of the recognising Court (*Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675 at §19 *per* Lord Sumption).

18. In *Re CEFC Shanghai International Group Limited* [2020] HKCFI 167 at §§10-11, Harris J explained the notion of cross-border assistance as follows:

> " Upon the foreign insolvency proceedings being recognised, the Court will grant assistance to the foreign officeholders by applying Hong Kong insolvency law…
>
> The Companies Court does not, however, grant a foreign liquidator, whose appointment it has recognised all the powers available to a liquidator appointed by it pursuant to the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 ... The principles that circumscribe the limits of the common law power of assistance are explained by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* … :

(a) The power of assistance exists for the purpose of enabling foreign courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. Therefore, the power of assistance is not available to enable foreign officeholders to do something which they could not do even under the law by which they were appointed.

(b) The power of assistance is available only when it is necessary for the performance of the foreign officeholder's functions.

(c) An order granting assistance must be consistent with the substantive law and public policy of the assisting court."

19. However, it is important to note that despite obtaining recognition and assistance from Hong Kong Courts, the foreign officeholders will not be acting as, acting in the capacity of, or having the status of officeholders appointed by Hong Kong Courts in a domestic insolvency.

20. In this regard, the English Court of Appeal decision in *Candey Ltd v Crumpler* [2020] EWCA Civ 26 is instructive. The material facts for present purposes are these. In February 2016, the BVI court wound up a BVI incorporated company and appointed liquidators. Shortly afterwards, the BVI liquidators obtained recognition and assistance from the English court under the Cross-Border Insolvency Regulations 2006 ("CBIR") which implemented the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain.

21. On behalf of the company, the BVI liquidators engaged in litigation in England with the company's former solicitors ("Candey") in respect of Candey's unpaid fees. The proceedings commenced by the BVI liquidators against Candey included applications to seek directions under Article 21(1)(g) of Schedule 1 to CBIR and/or section 168(3) of the

UK Insolvency Act 1986. Article 21(1)(g) of Schedule 1 to CBIR permits the English court to grant "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain". Section 168(3) of the UK Insolvency Act 1986 is in *pari materia* with section 200(3) of the Ordinance.

22. To participate in the litigation, Candey entered into a conditional fee agreement ("CFA") with its solicitors which required Candey to pay a success fee to its solicitors.

23. As the BVI liquidators lost some of the proceedings they issued and were ordered to pay some of Candey's legal costs, the issue was whether the BVI liquidators could be required to pay the success fee which Candey had to pay its solicitors under the CFA. Section 44 of the UK Legal Aid, Sentencing and Punishment of Offenders Act 2012 prevents a court from making a costs order which requires the payment by one party of a success fee payable by another party under a conditional fee agreement unless the relevant proceedings are "proceedings in England and Wales brought by a person acting in the capacity of a liquidator of a company which is being wound up in England and Wales" (Article 4(c)(i) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (SI 2013/77)).

24. Therefore, the issue before the court turned on whether, in issuing applications for directions under Article 21(1)(g) of Schedule 1 to CBIR and/or section 168(3) of the UK Insolvency Act 1986, the BVI liquidators were acting *in the capacity* of a liquidator of a company which is being wound up in England and Wales ("English Liquidator").

25. The English Court of Appeal concluded that the BVI liquidators were not acting in the capacity of an English liquidator and reasoned as follows (at §§18-23 *per* Rose LJ):

> " An analysis of the CBIR shows that the recognition order does not have the effect that the foreign representatives are thereafter treated as either acting as or acting in the capacity of an English liquidator. The CBIR provide that the Model Law has the force of law in Great Britain in the form set out in Schedule 1 to the Regulations. Article 1 of Schedule 1 provides that the Model Law applies where assistance is sought in Great Britain by a foreign representative in connection with the foreign proceeding. A foreign representative is defined in article 2(j) as including a person or body authorised in a foreign proceeding to administer the liquidation of the debtor's assets or affairs. This can be contrasted with the definition of a 'British insolvency office holder' defined as including a person acting as an insolvency practitioner within the meaning of section 388 of the IA 1986, other than an administrative receiver.
>
> Article 12 of Schedule 1 provides that upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under British insolvency law defined, in relation to England and Wales, as law made by or under the IA 1986, subject to certain exceptions. Chapter III of Schedule 1 deals with the recognition of the foreign proceeding and provides that a foreign proceeding shall be recognised if it meets the criteria set out in Article 17. Article 20 then imposes a stay on the commencement or continuation of proceedings against the debtor upon recognition of the foreign proceeding. The stay is described as being 'the same in scope and effect' as if the debtor had been made the subject of a winding up order under the IA 1986: see Article 20(2)(a). Article 20(5) provides that the recognition of the foreign proceeding does not affect the right to request or otherwise initiate the commencement of a proceeding under British insolvency law or the right to file claims in such a proceeding.
>
> Article 21 deals with the power of the court to grant any appropriate relief at the request of the recognised foreign representative where necessary to protect the assets of the debtor or the interests of creditors. That relief includes providing for the examination of witnesses, the taking of evidence or the delivery of information and entrusting the administration or realisation of the debtor's assets located in Great Britain to the foreign representative. The appropriate relief that can be

> granted by the court also includes, at Article 21(1)(g) 'any additional relief that may be available to a British insolvency officeholder under the law of Great Britain including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986'. Article 23 then provides expressly that upon recognition of a foreign proceeding, the foreign representative has standing to make an application to the court for an order under or in connection with a list of specified provisions of the IA 1986.
>
> It was common ground between the parties before us that the relief available to a recognised foreign representative who applies to the court under Article 21 of Schedule 1 is the relief that is available to a British insolvency officer; the court cannot award any other relief that might be available to the foreign representative according to the domestic law of the court where the foreign proceedings are taking place...
>
> I agree with the judge's conclusion at para. 39(4) of his judgment that the effect of recognition is to confer on the foreign representatives the right to request or initiate proceedings under the IA 1986. When foreign representatives make such an application, they are exercising the right conferred on them by Article 21(1)(g) of Schedule 1 and not the right conferred on them by section 168 IA 1986. The fact that the Liquidators' Application referred to section 168 as well as to Article 21 does not affect the legal analysis of the powers that are available to them. Indeed, if the effect of the recognition order was generally to deem a foreign representative to have the same abilities, capacities and powers of a British insolvency practitioner, Article 21 would be redundant because the foreign representative would automatically have the powers that the Schedule expressly confers on him.
>
> There is nothing in the structure or wording of Schedule 1 that supports the contention that a recognised foreign representative is to be treated as a British insolvency officeholder or that he acts in the capacity of a British insolvency officeholder." (emphasis added).

26. While *Candey Ltd v Crumpler* concerns recognition of foreign officeholders under CBIR, the reasoning above applies *mutatis mutandis* to the effect of common law recognition of foreign officeholders. In particular:

(a) the relief that may be granted under CBIR is very similar to the common law cross-border assistance often granted by Hong Kong Courts;

(b) just as under CBIR, foreign officeholders granted common law recognition in Hong Kong do not have all the powers available to a Hong Kong-appointed officeholder;

(c) just as foreign officeholders recognised under CBIR derive their powers from CBIR (rather than the UK Insolvency Act 1986), foreign officeholders granted common law recognition in Hong Kong derive their powers from the common law recognition order (rather than the Ordinance).

27. Therefore, foreign provisional liquidators recognised in Hong Kong will not be acting as, acting in the capacity of, or having the status of provisional liquidators appointed by Hong Kong Courts. It follows that the fact that Hong Kong Courts may not appoint domestic soft-touch provisional liquidators cannot constitute a bar to recognising and assisting foreign soft-touch provisional liquidators.

28. To say that recognising foreign soft-touch provisional liquidators would be to bypass and circumvent the Hong Kong domestic provisional liquidation regime would be to misunderstand the true notion of recognition.

Universalism mandates the recognition of foreign soft-touch provisional liquidators

29. It is well established that the rationale underlying the common law power of assistance is modified universalism (eg *Re Joint Liquidators*

of Supreme Tycoon Ltd [2018] HKCFI 277; [2018] 1 HKLRD 1120 at §12 *per* Harris J).

30. Applying the universalism rationale, the authorities show that, in order to be eligible for recognition, a foreign insolvency proceeding needs to meet the following criteria (eg *Re CEFC Shanghai International Group Limited* [2020] HKCFI 167 at §8 *per* Harris J):

(a) the foreign insolvency proceeding is a collective insolvency proceeding; and

(b) the foreign insolvency proceeding is opened in the company's country of incorporation.

31. The eligibility criteria do not require the foreign insolvency proceeding to be capable of being opened in Hong Kong.

32. To add an eligibility criterion that there must be complete identity between Hong Kong insolvency law and foreign insolvency law would be to undermine the universalism rationale.

33. Indeed, one commentator has expressed the logical conclusion of universalism thus:

> " [R]ecognition may be given even though there does not exist under local insolvency law a procedure equivalent to the foreign insolvency proceeding" (Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), p. 142).

34. Copious authorities bear out the above proposition.

35. In *Tacon v Nautilus Trust Company Limited* [2007] JRC 107, the Royal Court of Jersey recognised a provisional liquidator appointed by the BVI court even though Jersey law did not have a provisional liquidation procedure. The Royal Court of Jersey made these pertinent remarks (§§26 and 37):

> " The person entitled under BVI law to act on behalf of Montrow is Mr Tacon as provisional liquidator. The Court should therefore recognise him even though Jersey does not have the concept of a provisional liquidator. The same point would arise in respect of a duly appointed administrator of an English company. Jersey does not have the concept of placing a company in administration but, given that under English law, an administrator once appointed is the person empowered to act for the company, this Court would, in conformity with the remarks of Lord Hoffmann [in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; [2007] 1 AC 508], recognise the administrator of an English company as being the person entitled to act on behalf of that company…
>
> The BVI Court has maintained the appointment of Mr Tacon and has not withdrawn its Letter of Request to this Court. Montrow is a BVI company. Decisions relating to matters such as whether there should be a liquidation, whether a provisional liquidator should be appointed, the powers which should be conferred on such provisional liquidator and the nature of his role are therefore matters of BVI law for determination by the BVI Court. Whilst of course this Court retains a discretion as to whether it should assist an overseas court in such matters and, if so, the nature and degree of such assistance, the fact remains that this Court is playing a secondary role and it is merely assisting the BVI court insofar as concerns matters within Jersey. We should therefore pay considerable regard to any relevant decisions of the BVI Court."

36. In the United Kingdom, there is no debtor-in-possession regime like the United States Chapter 11 regime. But in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, the English court was prepared to assist the operation of Chapter 11 proceedings. Hoffmann J (at pp. 117-118) said:

> " This court is not of course bound by the stay under United States law but will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under ch 11. This court has jurisdiction to make interlocutory orders for the preservation of Inc's property in this country by way of assistance to the United States Bankruptcy Court …"

37. These authorities amply confirm that cross-border recognition premised on universalism does not require foreign insolvency law and local insolvency law to be identical twins. In this case, failing to recognise foreign soft-touch provisional liquidation just because Hong Kong domestic law contains no such regime would be to fail to appreciate, adhere to, and apply the universalism rationale.

Recognising foreign soft-touch provisional liquidation is consistent with Hong Kong private international law and cross-border insolvency policy

38. While soft-touch provisional liquidation is *per se* impermissible in Hong Kong, "[i]t is well established that where the circumstances warrant the appointment of provisional liquidators, the provisional liquidators may be granted powers to explore and facilitate a restructuring of the company" (*Re China Solar Energy Holdings Ltd (No 2)* [2018] HKCFI 555; [2018] 2 HKLRD 338 at §26 *per* Harris J).

39. Therefore, soft-touch provisional liquidation and Hong Kong provisional liquidation differ only on the scope of the provisional liquidators' powers; they differ only in degree, not in kind. Both are species of collective insolvency proceedings. This is borne out by the US Bankruptcy Court's remarks on the function of typical soft-touch provisional liquidators as follows:

> " The JPLs are conducting the BVI Proceedings as so-called "soft-touch" provisional liquidations in which the JPLs will independently oversee the restructuring of the BVI Debtors while leaving the form and terms of that restructuring to be proposed by the BVI Debtors …
>
> The JPLs are officers of the BVI Court whose function is to represent the collective interests of the creditors of each debtor for which they are appointed, in particular by overseeing and protecting from undue dissipation the assets of that debtor and protecting the interests of creditors in the course of restructuring negotiations… In this way, they are a voice for the collective creditors of each BVI Debtor..." (*In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 253-254 (Bankr. S.D.N.Y. 2019) *per* Judge Martin Glenn).

40. In these circumstances, recognising and assisting foreign soft-touch provisional liquidation can hardly be described as contrary to Hong Kong insolvency policy.

41. What is more, refusing to recognise foreign soft-touch provisional liquidation on the basis that Hong Kong domestic law does not have soft-touch provisional liquidation will create discriminatory consequences which have been rejected by authorities. For example, it is well established that if a foreign officeholder is recognised one would normally expect assistance, which may extend to granting orders that give the foreign officeholder substantially similar powers to, for example, investigate the affairs of the company as would be available to a local liquidator if the foreign jurisdiction has similar provisions in its insolvency regime (*Re China Fishery Group Ltd* [2019] HKCFI 174; [2019] 1 HKLRD 875 at §26 *per* Harris J).

42. Provisional liquidators often have the same need to investigate the debtor's affairs, whether or not they were appointed on a soft-touch basis. If the Hong Kong Court refuses to assist foreign provisional

liquidators simply on the basis that they were appointed on a soft-touch basis, it would constitute an unwarranted discrimination.

43. This is demonstrated in *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277; [2018] 1 HKLRD 1120 which held that a BVI voluntary liquidation is eligible for recognition in Hong Kong. In the course of his Lordship's reasoning, Harris J (at §16) approved the following proposition in Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), p. 230:

> " It is suggested that the discrimination against non-court appointed officeholders is unhelpful. Insolvency representatives may be officers of the court without court appointment and they need the same information for the performance of their functions as their court-appointed counterparts."

44. In other words, *Supreme Tycoon* stands for the proposition that, in determining whether recognition and assistance should be granted to foreign officeholders, Hong Kong Courts would not countenance any discrimination based on the mode of their appointment abroad. Just as it would be wrong to discriminate against foreign officeholders appointed out-of-court, so it would be wrong to discriminate against foreign provisional liquidators appointed on a soft-touch basis.

45. A potential criticism premised on legal consistency is this: Hong Kong domestic insolvency law does not permit the appointment of provisional liquidators for the sole purpose of granting them restructuring powers, but Hong Kong cross-border insolvency law permits the recognition of foreign provisional liquidators for the sole purpose of granting them restructuring powers. A vivid example is *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165. Thus, so the criticism goes, Hong

Kong cross-border insolvency law simply circumvents and bypasses the restrictions on provisional liquidator's powers under Hong Kong domestic insolvency law.

46. In my view, on proper analysis, there is nothing in this criticism. In recognising foreign provisional liquidators appointed in the company's country of incorporation and granting them restructuring powers, Hong Kong Court is merely recognising the provisional liquidators' status as agents of the company, and giving effect to their management and governance powers under the law of the company's incorporation (*Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165 at §13 *per* Harris J). This is orthodox and well established. As pointed out by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675 at §12:

> " even without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation."

47. Therefore, with or without getting a technical recognition order in Hong Kong, foreign provisional liquidators – as agents and managers of the foreign company – may promulfate a restructuring scheme of arrangement in Hong Kong. See, for example, *Re LDK Solar Co Ltd* [2015] 1 HKLRD 458 and *Re China Lumena New Materials Corp* [2020] HKCFI 338. Recognising and assisting foreign soft-touch provisional liquidators is thus to a large extent merely applying orthodox principles of private international law. Hence, there is no conceptual or legal inconsistency at all.

48. It follows that recognising and assisting foreign soft-touch provisional liquidators are fully consistent with Hong Kong private international law and cross-border insolvency policy. Failing to do so would create a discriminatory environment which would be unjust, unprincipled, and unsupported by authorities.

49. Whilst our insolvency, in particular, corporate rescue regime is in need of reform for many years, there is no legitimate reason, policy or otherwise, why Hong Kong Courts should not recognise foreign provisional liquidators appointed on a soft-touch basis.

50. Hence, I am of the view that Harris J's statements of the law in *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* (supra) are correct and sound.

Disposition

51. For all the reasons stated above, a recognition order, with limited powers, as revised during the hearing, was granted.

52. Finally, it remains for me to thank Mr Tai for his very helpful assistance to this Court.

(William Wong SC)
Deputy High Court Judge

Mr Terrence Tai, instructed by Winston & Strawn, for the Applicants

Ms Jennifer Li, of Robertsons, for the Respondent in HCCW 283/2019

Attendance of the Petitioner in HCCW 283/2019 represented by C&T Legal LLP was excused

The Supporting Creditor in HCCW 283/2019 represented by Yung Yu Yuen & Co. was absent

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 169 OF 2020 (ASCJ)

IN THE MATTER OF COMPANIES LAW (2020 REVISION) ("the Companies Law").

AND IN THE MATTER OF SUN CHEONG CREATIVE DEVELOPMENT HOLDINGS LIMITED ("the Company")

Appearances: Marc Kish and Gemma Lardner of Ogier for the Company.

REASONS

Cayman Islands company listed on the Hong Kong Stock Exchange – petitions for winding up filed before Hong Kong Court – application to this Court by the company for appointment of provisional liquidators for "soft touch" restructuring – applicable principles.

1. The Company is incorporated in this jurisdiction and is registered in Hong Kong and listed on the Hong Kong Stock Exchange ("**HKSE**"). It is the holding company of a corporate group (the "**Sun Cheong Group**") which designs, develops, manufactures and sells a large range of plastic household products. The Group's products are manufactured in mainland China ('the PRC") and sold either under the brand name of "clipfresh" or on an "original design manufacturing" basis. The Group distributes its products within Hong Kong and abroad, including Australia, the United Kingdom, the United States, New Zealand and Germany.

2. By its petition filed on 27 July 2020, the Company petitioned for its own winding up ("**the Petition**"). However, by *ex parte* summons filed on the same date, the Company applied for the postponement of the Petition and the appointment of representatives of FTI Consulting (Cayman) Limited and FTI Consulting (Hong Kong) Limited as its joint provisional liquidators, pursuant to section 104(3) of the Companies Law. By this process the Company seeks to be given an opportunity to restructure its assets and liabilities under the supervision of this Court instead of being placed into official liquidation by the High Court of Hong Kong, pursuant to a petition (one of two) already pending before that Court.

3. On 31 July 2020 I acceded to the Company's application. I now provide these reasons not only for the sake of those interested in the Company but also in deference to the Hong Kong Court whose jurisdiction is also engaged.

4. On behalf of the Company, it was submitted that it is undoubtedly in the best interests of the Sun Cheong Group's employees, shareholders and creditors, that the Company be given an opportunity to restructure its assets and liabilities under the supervision of this Court, before the irreversible step of placing it into official liquidation is taken by the Hong Kong Court, in circumstances where:

   a. The Company has a historical record of generating significant revenue and profit prior to 2019;

   b. There is already a "white knight" investor in place who is willing to inject HK $75 million in funding into the Company;

   c. There has been a wholesale change of the board of the Company (the "**Board**"),

providing independence, as well as significant financial and distressed asset expertise at Board level; and

d. An independent financial report has estimated that, on the basis of an immediate winding up, creditors would be unlikely to receive a return of any more than 1 cent on the dollar.

5. It was said to be critical, on the date of hearing, that the JPLs be appointed on an urgent basis in order to avoid the making of a winding up order by the Hong Kong Court, where one (of the two) creditor's petitions was listed to be heard on 3 August 2020. It was said to be obvious that the grant of that petition could damage irrevocably the ability of the Company to restructure its liabilities and preserve value for its stakeholders.

6. Such considerations, critical as they were, could not in and of themselves have been determinative of whether this Court should assume jurisdiction where there may be proper grounds for insolvency proceedings in another jurisdiction. Rather, I acceded to the hearing of the ex parte summons on the basis that where proceedings have been issued in more than one jurisdiction but an appointment has yet to be made, the starting point for the Court (as the case law to be discussed below reveals), should be to consider which jurisdiction is the more appropriate to assume the role of primary insolvency proceeding. All other things being equal, this will generally be assumed to be the place of incorporation of the company, being the place that its investors, service providers and trade creditors would typically associate with, among other things, the company's registered office and the law governing the duties of its board of directors and its Articles of Association. In the present case, I accepted that the starting point would be for the

Company to be wound up by, or reorganised under the supervision of this Court, unless there were compelling reasons justifying the displacement of the Cayman Islands as the primary jurisdiction. It will become apparent below that such countervailing factors as were disclosed were considered.

7. It was also recognised that there have however, been instances where a foreign court has assumed the role of primary insolvency proceeding in respect of Cayman Islands domiciled companies and where this has been acknowledged by this Court, which went on to recognise office holders appointed by the foreign court. The cases show that such instances are typically limited to circumstances where:

   a. there is a particularly strong nexus between the company and the foreign jurisdiction such that the legitimate expectation of interested parties as to the locus of the primary insolvency proceedings, has shifted to that foreign jurisdiction;[1]

   b. the foreign court had already appointed officers seeking to effect a restructuring for the benefit of stakeholders; and

   c. where there were no competing proceedings in the Cayman Islands.

8. It is not the practice of this Court to defer automatically to winding up proceedings begun in a foreign jurisdiction simply because a petition was presented there first in time. Instead this Court will consider, on the case by case basis, whether it is satisfied

[1] Akin to the concept of COMI-shifting where the jurisdiction concerned has enacted legislation pursuant to the UNCITRAL Model Law or, in the common law context, in deference to the principles of "modified universalism" (see further below), where the Court recognises the order of a foreign Court to wind up a Cayman Islands company on the basis of significant connections to the foreign jurisdiction, such as in ***Re China Agrotech Holdings Limited*** 2017 (2) CILR 526 ("***China Agrotech***").

that there is a genuine intention on the part of the company to present a plan of re-organisation in the Cayman Islands, and the merits of the proposal for carrying out such a plan for the benefit of the company's shareholders and creditors worldwide.

9. It was submitted on behalf of the Company and I accepted that it would be far more appropriate in the present case for this Court to make an order appointing the JPLs in Cayman, notwithstanding the impact that order will likely have on the proceedings in Hong Kong. To the extent that any creditors may oppose the appointment of the JPLs, those views can be articulated upon the return date of the Company's summons, once all other proceedings against the Company have been stayed. In the intervening period, I was satisfied that representatives of the firm of FTI Consulting with insolvency practitioners in both jurisdictions, should be appointed to safeguard the assets of the Company for the benefit of creditors.

BACKGROUND

Company Overview

10. As mentioned above, the Sun Cheong Group is involved in the design, manufacture and sale of plastic household products which are sold either under the brand name of "clipfresh" or on an "original design manufacturing" basis.

11. In the affidavit evidence filed in support of the summons and Petition[2], it is explained that as income levels increase and living standards improve, there has been increased demand in developed economies such as the United States, the United Kingdom,

[2] Primarily that contained in the First and Second Affirmations of Chan Sui On Bill ("Mr Bill Chan"), the executive director of the Company.

Australia and Hong Kong for premium household products which are safe, environmentally friendly and aesthetically appealing. Accordingly, until 2019, the Sun Cheong Group was a successful and profitable business, generating annual revenue in excess of HK $300 million (US $38 million) and returning dividends to its shareholders, approximately 30% of whom are members of the public who subscribed for shares through the HKSE.

12. The Company's recent financial difficulties are said to have arisen from an unfortunate confluence of events in 2019 and 2020 which include: [3]

a. The need to relocate the Company's factory twice in 18 months because the first premises were not appropriate for the Company's business, necessitating additional and unforeseen capital expenditure of RMB48.9 million (approximately US $7 million), causing attendant disruptions to production and consequential lost revenue.

b. The trade war between China and the United States, which led to a significant drop in the value of the Australian dollar as against the US dollar (to which the Hong Kong dollar is pegged), meaning that the value of the Company's sales in Australia were significantly diminished and the Company's revenue proportionately reduced. This coincided with stricter lending terms from financiers due to the deterioration of the global economy more broadly. In particular, the reduction of available credit lines from the Company's banks led

[3] Per the First Affirmation of Mr Bill Chan, paragraphs 21 to 22.

to liquidity issues for the Company.

c. The departure of Mr Tong Ying Chiu Eddie ("**Mr Eddie Tong**"), the founder and ex- chairman of the Company and legal representative of the Group's factories in in the PRC, due to health reasons, without any transition period. Mr Eddie Tong's sudden departure, together with the fact that the Company was only in the initial stages of investigating new investment/financing options to enable it to make a proposal to the Group's creditors, ultimately resulted in a winding up order being made against Chase On Development Limited ("**Chase On**"), an indirect, wholly owned subsidiary of the Company.

d. The incidence of the COVID-19 pandemic, which significantly disrupted production and sales in the first six months of 2020.

13. Mr Bill Chan affirms that as a result of these events, the Company is indebted to 11 different bank creditors (the "**Bank Creditors**") in the sum of HK $168 million and has net liabilities of HK $155.2 million. A number of creditors (Nanyang Commercial Bank, Fubon Bank (Hong Kong) Limited, O-Bank Co., Ltd and DBS (Hong Kong) Limited) commenced civil proceedings in the High Court of the Hong Kong Special Administrative Region (the "**Hong Kong Court**") to recover amounts owing to them by the Company in its capacity as guarantor of the debts of Chase On (together, the "**Debt Claims**").

14. There are also the aforementioned two winding up petitions on foot against the Company in the Hong Kong Court (the "**HK Petitions**"):

a. On 13 December 2019, CTBC Bank Co Ltd ("**CTBC**") presented a petition to

wind up the Company for non-payment of HK $44.3 million (the "**CTBC Petition**"). The CTBC Petition was listed for hearing on 3 August 2020 and unless this Court granted the relief sought by the Company and appointed the JPLs, it was highly likely that the Company would have been wound up on that date. It is for this reason to be expanded upon below, that the application was taken on the urgent basis.

b. On 19 January 2020, Orix Asia Limited ("**Orix**") presented a further petition to wind up the Company for non-payment of HK $ 7 million (the "**Orix Petition**"). The Orix Petition was next listed for hearing on 2 September 2020.

15. The evidence in support of the application, elaborated by the First Affidavit of Mr Cheung Wai Lein Jacky (the Counsel from the firm of Loeb & Loeb LLP appointed to the Company ("Mr Jacky Cheung")), is that the Company does not have sufficient assets to satisfy the debts which are the subject of the Debt Claims or the HK Petitions. Both Mr Bill Chan and Mr Jacky Cheung also explain the restructuring proposal.

RESTRUCTURING OPTIONS

Details of Restructuring Proposal

16. The Cachet Group is the proposed "white knight" investor for the Company. The Cachet Group's relationship with the Sun Cheong Group began in April 2019 when an affiliate of Cachet Group, Cachet Multi Strategy Fund SPC ("**Cachet SPC**"), entered into a loan agreement in the sum of HK $150 million with Uni-Pro Ltd ("**the loan agreement**" and "**Uni Pro**"), the majority shareholder of the Company (holding 50.5% of the Company's issued shares).

17. Cachet SPC is an exempted company incorporated with limited liability and registered as a segregated portfolio company under the laws of the Cayman Islands, with registration number OG-315809. It focusses on distressed debt investing through its two segregated portfolios:

    a. Cachet Special Opportunities SP, a hybrid equity/private credit segregated portfolio fund; and

    b. Cachet Deep Value Fund SP, a private credit segregated portfolio fund.

18. Cachet Asset Management Limited ("**Cachet Asset Management**") is a Hong Kong Securities and Futures Investment Commission-licensed wealth and fund management specialist in Greater China, and is the Investment Manager of Cachet SPC.

19. Uni-Pro's obligations under the loan agreement were secured by:

    a. Guarantees provided by Mr Eddie Tong (the Company's ex-chairman), Ms Sylvia Ng (an ex-director and Mr Eddie Tong's wife) and Mr Ivan Chan, all of whom were directors of the Company at the time; and

    b. a debenture dated 16 January 2020 incorporating fixed and floating charges over all the undertaking, property, assets, goodwill, rights and revenues of Uni-Pro, including but not limited to its shares in the Company.

20. Following Uni-Pro's default under the loan agreement, on 3 June and 8 June 2020, Cachet SPC appointed Mr Cheung Hok Hin Alan of Wing United CPA Limited ("**Mr Alan Cheung**" or "**Receiver**") as a receiver over the shares in the Company held by

Uni-Pro and Mr Ivan Chan respectively, comprising 68.31% of the total issued share capital of the Company.

21. If the Company were wound up, Cachet SPC would not be able to recover all of the monies owed under the Uni-Pro loan.

22. However, the Cachet Group believes that the Company's new management (which includes Mr Bill Chan, its executive director) will be able to salvage the Sun Cheong Group provided that JPLs are given an opportunity to work alongside them. As such, on 12 June 2020, the Cachet Group provided immediate bridging finance to the Company in the sum of HK$10,000,000 in order to enable the Company to investigate and, if appropriate, implement a restructuring of the Company.

23. On 26 June 2020, Cachet Group appointed FTI Consulting (Hong Kong) Limited as an independent financial advisor to advise Cachet Group in relation to the merits of a potential investment in the Company and its subsidiaries. Cachet Group instructed FTI to prepare a report for the benefit of both Cachet Group and the Bank Creditors. A copy of the Independent Financial Advisor Report (the "**FTI Report**") was provided on 14 July 2020.

24. The restructuring proposal in the FTI Report (the "**Proposed Restructuring**") provides for a capital and debt restructuring whereby Cachet Group will subscribe for shares in the Company in the amount of HK $75 million and the proceeds of the share subscription will be allocated as follows:

    a. HK $60 million for a creditors' settlement to be distributed by way of scheme

of arrangement;

b. HK $10 million for working capital; and

c. HK $5 million for payment of professional fees and expenses.

25. An important aspect of the Proposed Restructuring is that once the scheme of arrangement has become effective, it is intended that the Company will transfer to the scheme administrator all rights in any cause of action or claim against former management, auditors and advisors to a special purpose vehicle to be established by the scheme administrator. This means that the creditors have the prospect of receiving a pro rata distribution of the settlement amount of HK$60 million, plus any proceeds of the investigations and claims pursued by the scheme administrator. In contrast, in an official liquidation scenario, there is likely to be very little cash available for distribution to creditors at all and little to no funding to support investigations or pursuit of claims.

26. The Proposed Restructuring would also be closely supervised and scrutinised by this Court pursuant to the provisions governing schemes of arrangement under section 86 of the Companies Law.

Viability of Restructuring Proposal

27. This must be considered recognising that antithetically in an official liquidation there is, as is usually the case, only one option available to the liquidators: a forced sale of assets, potentially at distressed values. Accordingly, I was urged to accept that in the event that the Company is wound up:

a. The assets of the Sun Cheong Group (primarily plant and equipment) have very little re-sale value as they are unique to the Sun Cheong Group's business. The

Report estimates that their sale value is unlikely to exceed 10% of their book value and notes that they are, in any event, subject to a first ranking charge in favour of KM Plastic, which is the seller, so there are unlikely to be any proceeds of sale returned to the unsecured creditors.

b. Although the Company's "listing status" may have value of up to HK $150 million, recent transactions have demonstrated a decreasing trend in price that is further worsened by the COVID-19 environment. Further, in order to extract value from the Company's "listing status", one of the key determinants of the value to be derived is whether there is a white knight investor available to provide sufficient resources and capital in order for the Company to maintain its operations.

c. Other valuable contractual rights will be lost, including rights of use in relation to the Sun Cheong Group factories in the PRC.

d. Preferential payments will need to be made to the PRC Government in respect of taxes and to employees in respect of severance and other entitlements, which would rank ahead of any payments to the general body of creditors and potentially extinguish any funds available for distribution (but would not necessarily need to be paid in a restructuring scenario).

28. Additionally, the shareholders of the Company, 30% of whom are public investors, would receive nothing at all in an official liquidation.

29. Conversely, as explained in paragraphs 16 to 22 above, pursuing the Proposed Restructuring by way of scheme of arrangement under the supervision of the JPLs and

this Court provides creditors with a realistic prospect of a return of approximately 30% of their debt (the Proposed Restructuring contemplates distributing HK $60 million among creditors whose current liabilities as at 31 December 2020 amounted to HK $195.5 million). It is estimated that the restructuring could be completed in as little as 17 weeks, which is likely far quicker than an official liquidation would provide a return to creditors (if such a return was even available). It also provides for HK $10 million of working capital to be injected into the Company to get it back on its feet for the long term benefit of shareholders (and creditors, should any elect a debt for equity swap, for example) and leaves open the prospect of further returns to creditors if the scheme administrator makes any recoveries from claims against third parties.

30. While the Company has struggled in recent months, there are a number of business lines which management of the Company has identified as being potential sources of revenue, provided that the Company is provided with working capital and a pathway to discharge its liabilities, as contemplated by the Proposed Restructuring. In particular:

    a. The Company has been developing a master cook-shop business since 2018 which is an online platform for kitchen and household products. It was suspended in late 2019/early 2020 due to a change in management but the Company considers launching this platform now would benefit from the change in customer shopping preferences as a result of the COVID-19 pandemic.

    b. The Company is currently finalising the relevant agreement with customers for a medical equipment manufacturing business. This business line would also benefit from the recent COVID-19 pandemic which has increased demand for

medical equipment, substantial parts of which are made from plastic.

c. The Company's staple business of plastic manufacturing remains in demand with stable profit margins.

d. The Company has obtained distribution rights in Hong Kong for *Quantum PPF*, which is described as a famous brand of energy efficient coated glass for buildings and vehicles.

e. There is already a "white knight" investor lined up to provide the funding proposed under the Proposed Restructuring and confirmation from independent financial advisors (and the proposed JPLs) that the Proposed Restructuring is realistic and commercially viable.

31. Having regard to all the foregoing and in particular the circumstances which led to the Company's insolvency and its prospects for recovery, I regarded it as plain that the appointment of JPLs to facilitate a restructuring is in the best interests of the Company's stakeholders.

APPOINTMENT OF JOINT PROVISIONAL LIQUIDATORS

32. Section 104(3) of the Companies Law provides that the Court may appoint joint provisional liquidators after the presentation of a winding up petition[4] on the application of the Company where a two-limbed test is satisfied:

a. The Company is or is likely to become insolvent; and

[4] The Company is authorised by article 162(2) of its Amended and Restated Articles of Association to present a petition for the Company to be wound up: Mr Chan's 1st Affirmation, page 55. See also Section 94(2) of the Companies Law and ***China Shanshui Cement Group*** [2015] (2) CILR 255 which establishes and explains that a company may resolve to present a petition for winding up only if authorised by its articles.

b. The Company intends to present a compromise or arrangement to its creditors.

33. The Court's power to adjourn a winding up petition in order to facilitate such a restructuring is derived from section 95(3) of the Companies Law which enables the Court upon hearing the winding up petition to adjourn the hearing conditionally or unconditionally.

Discretionary Power

34. Given the pendency of the HK Petitions, it became of crucial importance that by virtue of section 97 of the Companies Law, when a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings shall be proceeded with or commenced against a company except with the leave of the Court and subject to such terms as the Court may impose.

35. Under sections 104(3) and 95(3) of the Companies Law, the Court has a broad and flexible discretion. The breadth and flexibility of this discretion was first described by this Court in ***In the Matter of the Fruit of the Loom*** (Unreported, 26 September 2000but noted at 2000 CILR Note 7) ("***Fruit of the Loom***"). The breadth of the Court's discretionary power under section 104(3) to facilitate the rescue of a company was described as follows:

> *"The discretionary power vested in the Court by section 99 [as it then was] of the Companies Law is* ***very wide****. As the orders already made herein recognise, the power admits of a discretion which the Court will be prepared to use to appoint provisional liquidators as the basis for the rescue of a company. This is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interest in the company to be rescued This Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors' prior interests, the benefit of shareholders.*

> *In the absence of jurisdiction given by specific statutory powers in the Courts for the making of administration orders over the affairs of companies, it is apt that the* ***flexible discretionary power*** *given in section 99 for the appointment of provisional liquidators be used to enable the rescue of a company where it is just to do so in the sense described above*" (emphasis added).

36. This discretion was affirmed more recently by Parker J in ***CW Group Holdings Limited*** (unreported, 3 August 2018) at [36] ("***CW Group Holdings***") and by Kawaley J in ***ACL Asean Towers Holdco Limited*** (Unreported, 8 March 2019) ("***ACL Asean***") at [11].

37. As to how the Court's broad discretion is to be exercised, there is no prescriptive list of factors to be taken into consideration. However, matters to which the Court may have regard include:

    a. The express wishes of creditors (though the Court should be cautious not to "*count up the claims of supporting and opposing creditors*" per Segal J in ***Grand T G Gold Holdings Limited*** (Unreported 21 August 2016) ("***Grand T G Gold***") at [6(f)iv)]);

    b. Whether the refinancing is likely to be more beneficial than a winding up order; (***Fruit of the Loom*** at p 9-10)

    c. That there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; (***Re Fruit of the Loom*** (*ibid*));and

    d. The considered views of the board as to the best way forward. (***CW Group Holdings*** at [72].

38. In this case, while the Petitioner and the Company are one and the same and the application for the appointment of JPLs is being made *ex parte,* the effect of the Court's order will be to stay the HK Petitions (by virtue of section 97 of the Companies Law), thereby necessitating an adjournment of those proceedings for the period of the provisional liquidation. In those circumstances, in deference to the Hong Kong Court's expectation of comity and to the principles of modified universalism which seek to maximise enterprise value for the sake of all stakeholders[5], I regarded it as important that this Court considered the general principles outlined above on which it will exercise its discretion to adjourn a winding up petition of an admittedly insolvent company.

39. I recognised that three creditors in particular, CTBC, Orix and American Express Travel Related Services Company, Inc. ("**AMEX**") are likely to oppose any order in the Cayman Islands which would have the effect of requiring an adjournment of the HK Petitions (CTBC and Orix being the petitioners themselves and AMEX having previously expressed opposition to an adjournment of one of the HK Petitions).[6] However, according to Mr Bill Chan in his First Affirmation:

    a. No other creditors have expressed support for the immediate winding up orders sought by the HK Petitions;

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[5] Defined by Lord Hoffman ***In Re HIH Casualty and General Insurance*** [2008] 1 WLR 852 at [30] as requiring that the *"[local] courts should, so far as consistent with justice and [local] public policy, co-operate with the courts in the country of the principal liquidation to ensure that all of the company's assets are distributed to its creditors under a single system of distribution*". The principle was reaffirmed by Lord Sumpton on behalf of the Privy Council in ***Singularis*** [2014] UK PC 36 at [23]. "…The principle of modified universalism is a principle of the common law. It is founded on the public interest of the courts exercising insolvency jurisdiction in the case of the company's incorporation to conduct an orderless winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction…" And all as discussed by Segal J in ***Re China Agrotech***.

[6] See the letter from K & L Gates on behalf of AMEX to the Company on 14 July 2020, indicating that it is unwilling to accept any proposal which does not provide a full repayment of its debt: Mr Bill Chan's Second Affirmation, page 386.

b. Letters of support for the Company's application for the appointment of JPLs have been provided by two creditors, as well as the Receiver appointed by Cachet SPC and Cachet Group itself (in its capacity as creditor of the Company and prospective "white knight" investor); and

c. A number of Bank Creditors actively engaged with FTI in relation to the Restructuring Proposal, in the course of a creditor meeting held on 22 July 2020. Based on the feedback provided, a revised timeline was put to Bank Creditors following the meeting to which no one had objected as at the date of Mr Bill Chan's First Affirmation.

40. That being the wider context, I accepted that the Court should be cautious not to abrogate the rights of the majority of the Company's creditors who may be better served by exploring a restructuring than an immediate winding up order.

41. As explained above, there is also independent evidence before the Court that the refinancing is likely to be more beneficial than a winding up order and that there is a real prospect of such a refinancing being effected. There is no better evidence of this than the willingness of Cachet Group, an experienced distressed debt investor, to invest HK $75 million in the Proposed Restructuring.

42. Finally, the resolution of the Board to seek the appointment of the JPLs confirms that it is the considered view of the Board that a restructuring is in the best interests of the Sun Cheong Group.

43. For all of the reasons set out above, I was satisfied that the broad discretion under section 104(3) should be exercised in favour of the relief sought by the Company.

The Company is or is likely to become insolvent

44. But what of the strict requirements of the two-limbed test of section 104(3) itself as set out above at [32]? The Company has acknowledged in its evidence (per Mr Bill Chan) that it is cash flow insolvent. The meaning and purpose of this first-limb of the test "is or is likely to become insolvent", are therefore satisfied. As was recently reaffirmed by this Court, it would be unjust to a company's creditors to impose on them the regime of a "soft touch" provisional liquidation, if the company is able to pay its debts as they fall due but only for the purpose of allowing the company to improve and perhaps expand its business. See ***In Re OneTradex Ltd (in provisional liquidation)*** FSD 166 of 2019 (ASCJ) written judgment delivered 1 October 2020 (Unreported) at [7] applying dictum of Vinelott J from ***In Re Primarkes*** [1989] BCLC 734.

45. In circumstances where a creditor has submitted a winding up petition in respect of an undisputed debt (as two creditors have in the HK Petitions), the primary approach of the Court will be that the creditor is entitled to a winding up order *ex debito justiciae* (as of right), unless special reasons can be shown that the relief should not be granted. This principle was explained by Park J in ***Re Lummus Agricultural Services Ltd*** [2001] 1 BCLC 137 at 141(g-h):

> *"I begin with the basic proposition that, although both s122 (which uses the word 'may') and s 123 give the Court a discretion to make a winding up order, it is well settled that if a creditor with standing to make an application wants to have the company wound up, and if the Court is satisfied that the company is unable to pay its debts, a winding up order will follow unless there are some special reasons why it should not. It is sometimes said that in such a case, a petitioning creditor is entitled to a winding up order 'ex debito justiciae'. I therefore start with the assumption that such an order should be made in this case. and the*

burden of the argument rests on Mr Lightman to show me why it should not".

46. However, it is now broadly accepted in the Cayman Islands that an intention on the part of the Company to present a compromise or arrangement under section 104(3) can be sufficient justification to depart from this principle. In particular:

a. In ***ACL Asean***, Kawaley J observed (at [26] that "*where an insolvent company takes the initiative and seeks to implement a court-supervised restructuring, this Court will accord the company's management a generous margin of appreciation when faced with attempts by creditors to impose a full-blown provisional or official liquidation instead.*"

b. In ***Grand TG Gold***, Segal J accepted that the Company was insolvent but nevertheless concluded (at [6(f)]) that "*While I accept the seriousness of and take fully into account these concerns, I consider that on balance the most appropriate course, having regard to the interest of all the Company's creditors as a whole and all the circumstances, is to adjourn the petition for a suitable period that is long enough to allow the Company to make and demonstrate substantial progress in advancing the Resumption Proposal but short enough to permit a further review of the position by the Court to ensure that the position of creditors is being protected and to review whether a winding up order should be made.*"

c. In ***CW Group Holdings***, Parker J accepted that the Company was insolvent but concluded (at [76 to 77] that "*To allow the company to continue as a going*

concern and to give the board and its advisers the best possible opportunity to secure a favourable restructuring is in my view in the best interests of the body of general creditors as a whole. By contrast the winding up of the company and the commencement of official liquidation is likely to have an adverse impact on the business: on contractual and other relationships; future trading prospects; market reputation and position, and regulatory relationships, all of which would adversely affect the value of the Company."

d. In ***Re Abraaj Holdings*** (Unreported, 4 January 2019), McMillan J pointed to the fact that the creditor opposing an adjournment "*failed to establish or even to identify any immediate tangible benefit to be derived from an official liquidation, as distinct from the very wide ranging scope of the provisional arrangements already in place*"

The rights of the HK Petitioners are of course to be determined by the Hong Kong Court in accordance with Hong Kong law in relation to the HK Petitions. However, the foregoing principles reflect how their rights would be viewed had they petitioned in the Cayman Islands. And so, notwithstanding the HK Petitioners' rights to a winding up order *ex debito justiciae*, I was satisfied that compelling reasons have been demonstrated for this Court to exercise its discretion to make an order in these proceedings which would have the effect of adjourning the HK Petitions in this instance.

Intention to present a compromise or arrangement

47. As to this, the second limb of the section 104(3) test, the Company has made clear its intention to present a compromise or arrangement, which is sufficient to satisfy this second limb. Importantly, in that respect, the language of section 104(3) does not impose a requirement on the Company to already have a pre-formulated restructuring plan. Nor does it require the Company to provide evidence of the viability of its restructuring plan.

48. The requirements of this limb of the test were considered by Parker J in ***CW Group Holdings*** where he specifically considered the language that the Company "*intends*" to present a compromise or arrangement to its creditors. Parker J accepted (at [70] that "*it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the Company.*" The rationale for this approach was described by him as follows in terms which must now be regarded as settled principle in Cayman Islands law (at [36]:

> "*The rationale for that language is to give effect to the practice which has developed of appointing provisional liquidators to provide companies with some 'breathing space' before the actions of creditors, acting in their own interests, might interfere with attempts to reach a consensual restructuring or if that should prove not to be possible, a scheme of arrangement – see* ***Esal (Commodities) Ltd*** *[1985] BCLC 450 at page 460 Harman J.*"

49. Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted that it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan.[7]

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[7] ***ACL Asean*** and ***Grand TG Gold*** (both above); and ***Enka Insaat Ve Sanayi AS, Capital City Investment BV v Mass Energy Group***

50. In this case, where there is no reason to doubt the viability of the proposed restructuring, the principles are a fortiori applicable in favour of the Company's application. Here the Company comes to the Court with a detailed restructuring plan, a "white knight" investor in place, and confirmation from independent financial advisors that the proposed restructuring is both viable and in the best interests of creditors. While the terms of the Proposed Restructuring remain to be agreed with creditors, this will take place within the framework of a scheme of arrangement to be promoted under section 86 of the Companies Law.

51. Accordingly, I accepted that both limbs of the test under section 104(3) have been satisfied and that it is appropriate in all the circumstances that the Court exercises its broad discretion to adjourn the Petition (which would also have the effect of prompting the adjournment of the HK Petitions) and appoint the JPLs to facilitate the restructuring of the Company for the benefit of all stakeholders, by way of scheme of arrangement under section 86 of the Companies Law, or otherwise. Having regard to the pendency of the HK Petitions, the appointment of the JPLs was granted on the urgent basis and I turn below to expand upon the reasoning in that regard.

URGENCY AND COMITY

52. I should express more fully, my thinking for the taking of this application on the ex parte basis. It became critical that the JPLs were appointed to the Company before Monday 3 August 2020, being the date on which it was likely that a winding up order may be made

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Holdings Ltd and others, (FSD 188 of 2020 (ASCJ). (Unreported 4 May 2020).

in the Hong Kong Court in respect of the Company on the CTBC Petition, the effect of which would be to limit the options available to the Company in pursuing its intended plan of reorganisation. If such an order were to be made by the Hong Kong Court, it was likely to become more difficult to promote a scheme of arrangement under section 86 of the Companies Law (and/or a parallel scheme of arrangement in Hong Kong) as, among other things:

a. Any provisional liquidators appointed in the Cayman Islands may have difficulty obtaining recognition in Hong Kong in circumstances where other insolvency practitioners will have been appointed there as official liquidators; and

b. There was likely to be significant duplication of efforts and costs between the Hong Kong official liquidators and the Cayman JPLs.

53. As already discussed, the Company submitted and I accepted that any insolvency proceedings, including any restructuring or scheme of arrangement, should be supervised by the Grand Court of the Cayman Islands as the court of the place of incorporation of the Company. This was in light also of the circumstances where the Cayman Islands is an advanced and reputable international financial centre which frequently deals with international disputes involving Cayman Islands companies[8] and shareholders in and creditors of a Cayman Islands company may have a "*reasonable*

[8] ***Daiwa Capital Markets Europe Limited v Mr Maan Abdul Wahed Al Sanea*** (Unreported, 19 August 2019)

expectation that the courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner."[9]

54. I also had in mind that the common law jurisdiction to recognise and assist foreign insolvency officeholders appointed in the country of incorporation of a company is well established in Hong Kong. As explained by Mr Jacky Cheung: "*There is an established line of case authority that the HK Court will provide recognition and assistance to offshore joint provisional liquidators in aid of offshore court proceedings*" and there are numerous examples of the Hong Kong Court recognising Cayman appointed restructuring provisional liquidators in Hong Kong (and adjourning petitions in Hong Kong to facilitate this); see for instance: ***China Oil Gangran Energy Group Holdings Limited (in Provisional Liquidation)*** [2020] HKCFI 825 and ***Moody Technology Holdings Limited (in Provisional Liquidation)*** [2020] 4 HKC 78.

55. On the other hand, while the Grand Court will also grant reciprocal recognition and assistance of foreign insolvency officeholders appointed in the country of incorporation, the jurisdiction of the Grand Court to recognise and grant assistance to liquidators of Cayman Islands incorporated companies appointed by the courts of another country is more limited. In the instances where the Grand Court has recognised insolvency practitioners appointed to Cayman Islands companies by foreign courts, the Court has identified the following relevant considerations having regard to one or other of the categories of circumstances identified at [7] above:

[9] Per Smellie CJ in ***KTH Capital Management Limited v China One Financial Limited & Others*** [2004-5] CILR 213 **[AB/18]**.

a. Whether parallel proceedings will only serve to incur additional costs and unnecessary delay. In ***Re China Agrotech*** above the Court recognised Hong Kong liquidators of a Cayman Islands company as having authority to act on behalf of the company for the purpose of presenting a petition for a scheme of arrangement in the Cayman Islands as part of a corporate restructuring, which involved a parallel scheme in Hong Kong.

b. Whether reputational, regulatory or policy reasons militate in favour of a Cayman Islands proceeding (***China Agrotech***).

c. The breadth of powers available in each jurisdiction. It is worth nothing that "soft touch" provisional liquidation is not available under Hong Kong Law.[10] In ***Changgang Dunxin Enterprise Company Limited*** (Unreported, 1 March 2018) , Mangatal J recognised the appointment of JPLs over a Cayman Islands company by the Courts of Hong Kong for the purpose of applying on behalf of the company for the same individuals to then be appointed as JPLs of the company in the Cayman Islands. It was proposed that the JPLs would then seek recognition of their appointment in Hong Kong and, if recognised, that they would be discharged as JPLs in Hong Kong and would conduct parallel restructuring proceedings in the Cayman Islands and Hong Kong in their capacity as Cayman Islands JPLs of the company. A relevant factor in seeking the application was the broader powers to effect a corporate restructure

[10] Cheung 1st Affirmation, paragraph 29 and ***Re Legend International Resorts Ltd*** [2006] 3 HKC 565

available to JPLs in the Cayman Islands. Mangatal J held that it was appropriate to grant the Hong Kong JPLs recognition for the purpose of making an application to the Grand Court for the winding up of the Company and to seek the Hong Kong JPLs' appointment as JPLs of the company in the Cayman Islands.

d. Whether comparable relief has been sought in the foreign jurisdiction. In the Bermudian decision of ***In re Dickson Group Holdings Ltd*** 2008 BDA LR 34 ("***Re Dickson***"), Kawaley J (as he then was) approved the entry by the Company into a scheme of arrangement sanctioned by the Courts of Hong Kong (impliedly recognising the Hong Kong appointees), pursuant to which its creditors would receive part-payment of the debts owed to them, and the Company could then be returned to trading in the hands of new investors.

e. Whether the foreign petitioner is seeking to wind up the Company or avoid the need for a winding up; see ***Re Dickson***.

f. The locus of the Company's business.

56. Thus, it appears from the cases that the Grand Court has considered the purpose of the appointment on each occasion that it has been asked to recognise insolvency practitioners appointed to a Cayman Islands domiciled company by a foreign court. Where the purpose has been to facilitate a restructuring or otherwise avoid the need to wind up the company, the cases show that the Court will be more willing to grant recognition as being in the best interests of the company's stakeholders. Conversely, the Grand Court will be slow to give primacy to pure winding-up proceedings brought overseas in respect of a

Cayman Islands company where it is satisfied that there is an intention on the part of the company to present a plan of reorganisation for the benefit of its creditors.

57. In this case, both HK Petitions seek orders that the Company be wound up. The Company successfully argued that if such an order were made in Hong Kong, there would be important public policy grounds on which the Grand Court should be disinclined to recognise such an appointment, particularly where the Company itself and a number of creditors wish to explore the possibility of pursuing a restructuring by way of a Cayman Islands scheme of arrangement.[11]

58. Moreover, while the Company is listed on the HKSE, is registered as a foreign company in Hong Kong and has submitted to the jurisdiction of the Hong Kong courts, 87.5% of the Company's business is outside of Hong Kong. Accordingly, it was accepted that any insolvency proceedings should be commenced in and supervised by the Grand Court of the Cayman Islands.

59. As the purpose of appointing the JPLs in the Cayman Islands is to enable them to effect a restructuring scheme, it is appropriate that an application to give effect to the scheme would be made pursuant to section 86 of the Companies Law. Enabling this Court to supervise both the winding-up proceedings in respect of the Company as well as the planned Scheme of Arrangement is likely to avoid unnecessary duplication of costs and delays in resolving the Company's situation.

[11] See letters of support from Mr Kit Wong, Mr Benjamin Lau, Mr Alan Cheung and Cachet Group: Mr Bill Chan's 1st Affirmation, pages 398 to 402.

A FULL AND FRANK DISCLOSURE

60. On an *ex parte* application such as this, the applicant has a duty of full and frank disclosure, which requires the applicant to identify all defences that may be available to the respondent(s). I therefore note that the Company raised the following five issues (A-E) for my consideration.

A. Reliability of Financial Information

61. While FTI undertook extensive analysis of the Sun Cheong Group's cash flows and financial records, procured valuations of its assets and met with management to understand the Group's structure and business operations, they were not able to undertake an analysis of certain aspects of the Group's finances, such as its trade receivables and payables, due to the Company's lack of access to certain financial records. As such, their findings as to assets and liabilities may need to be revised when this information becomes available.

B. Departure of Mr Eddie Tong and Investigations of Previous Board

62. There have been significant changes to the Board over the last 6 months which may give rise to concerns on the part of creditors or shareholders as to the viability of any restructuring. In particular as Mr Jacky Cheung and Mr Bill Chan explain:

a. The sudden departure of Mr Eddie Tong and his wife as executive directors in December 2019 and shortly thereafter the resignations of Mr Ivan Chan, Mr Wei Un and Ms Jiselle Chan as executive directors in June 2020;

b. The resignation of five non-executive directors between August 2019 and 10

June 2020; and

c. The identification by former executive directors of transactions between the Company and Chase On which may require investigation by the liquidators of Chase On.

63. However, the Company's position is that these changes in fact reflect the Company's focus on taking the necessary steps to address the serious challenges faced by the Company. I was urged to accept that the Company's new management is actively working on a debt restructuring plan in the interests of all creditors. Further, that the timeline of the steps taken since Cachet Group's decision to act as white knight, as outlined in the Company's letter to the Court sent prior to the hearing on 24 June 2020, reinforces the new Board's commitment to advancing the interests of creditors and shareholders.

C. HK Petitions

64. The HK Petitions have been on foot for over 6 months and Mr Justice Harris of the Hong Kong Court expressed the view at the hearing of the CTBC Petition that the Court would not be willing to adjourn the CTBC Petition again when it came back before him on 3 August 2020 in the absence of a concrete settlement agreement between CTBC and the Company. No such settlement has been reached.

65. In those circumstances, CTBC (and AMEX, who also supported the making of a winding up order) may argue that the Company has had sufficient time to consider, present and negotiate restructuring terms. However, given the demonstrated efforts of the Company to progress the Restructuring Proposal as quickly as possible once a "white

knight" was identified and having regard to the potentially significant benefits to creditors and other stakeholders of a restructuring over an immediate winding up order, in my view the balance of convenience lies in favour of urging further adjournment of the Hong Kong Petitions.

D. Listing Status

66. While the "listing status" of a Company registered on the HKSE has historically been worth up to HK $150 million (see paragraph 27(b) above), there has been a decreasing trend in price in more recent transactions (which has been worsened by the COVID-19 pandemic) and it remains difficult to extract value from the listing status due to the tightening of rules. The evidence reveals that the sale process can also be time consuming and expensive. As such, the potential sale of the listing is by no means a guaranteed source of revenue for the Company in a provisional liquidation scenario.

67. Having said that, in the event that a winding up order is made, it would be much more difficult to sell the listing for the reasons explained at paragraph 27(b) above.

E. Independence of Proposed JPLs

68. In the course of preparing the FTI Report, members of the firm met and worked with management of the Company and as such, some creditors may be concerned about the independence of the nominated JPLs. However, the test for independence of an insolvency practitioner in the Cayman Islands as set out in section 6(2) of the Insolvency Practitioner Regulations is whether the insolvency practitioner or his firm has acted in relation to the company as its auditor within 3 years of the appointment. The test is an objective one which was set out in ***Hadar Fund Ltd*** [2013] (2) CILR Note 4 and cited

more recently by me ***In the Matter of Alpha Re Limited (in Voluntary Liquidation)*** (Unreported , 23 February 2018) at [74] as follows:

> "*The independence of insolvency practitioners from any particular company, as required by the Insolvency Practitioners' Regulations 2008, reg. 6(1) depends upon the existence (or non-existence) of professional or economic relations with that company which, in the opinion of the court, precludes the appearance of complete impartiality. It is not sufficient that the practitioners be honest and capable. When determining whether a particular professional or economic relationship leads to a conclusion about whether an insolvency practitioner can be properly regarded as independent, the court must identify the relationship and determine whether it is capable of impairing the appearance of independence and, if so, whether it is sufficiently material to the liquidation in question that a fair minded stakeholder would reasonably object to the appointment of the nominated practitioner in question*" (emphasis added).

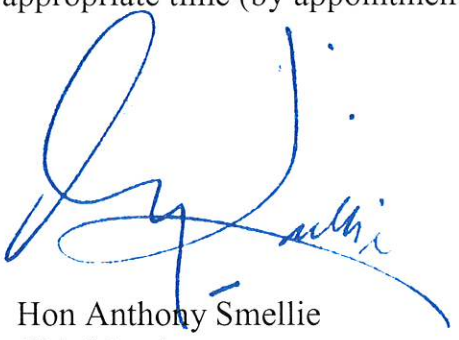
69. In this instance, FTI was engaged to prepare the FTI Report by the Cachet Group and not the Company and purported to do so for the benefit for the Cachet Group and the Bank Creditors, not the Company. As such, the Company submitted that there is no basis on which the relationship between FTI and the Company is capable of impairing the appearance of independence.

70. Moreover, similar objections were raised in relation to a nominee in ***CW Group Holdings*** at [67] where Parker J observed that "*it makes sense to appoint as a provisional liquidator a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy*" and emphasised that "[o]*nce appointed, the joint provisional liquidators would act as officers of the court and in the best interests of all of the company's creditors and stakeholders, irrespective*

of who sought the appointment. I have no doubt that those proposed by the Company would do so in this case". I accepted that those same principles would also apply here.

71. FTI have separately been appointed as joint official liquidators ("**JOLs**") of the Company's wholly-owned subsidiary Chase On in Hong Kong. The Company does not consider that FTI's appointment as JOLs of Chase On constitutes a relationship with the Company so as to impair the appearance of independence such that a fair minded stake holder would reasonably object to their appointment as JPLs. Rather, the Company submitted and I accepted that, in the attendant circumstances, this is a further reason that FTI should be appointed as the JPLs. As Parker J held in ***CW Group Holdings Limited*** at [67] : "*It makes sense to use entities from the same group to allow for better coordination and communication between* [in that case] *Singapore and Hong Kong which is likely to be of value to the company as they further engage with creditors to seek to propose and implement a restructuring.*"

72. I accepted that, to the extent that any conflict may arise in the future, if for example the Company identifies potential claims against Chase On, this can be dealt with at the appropriate time (by appointment of a conflict liquidator or otherwise).



Hon Anthony Smellie
Chief Justice

20 October 2020

HCMP 1308/2020
[2020] HKCFI 2931

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1308 OF 2020

IN THE MATTER of FDG Electric Vehicles Limited (Provisional Liquidators Appointed)

and

IN THE MATTER of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and the inherent jurisdiction of the Court

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BY

THE JOINT AND SEVERAL PROVISIONAL LIQUIDATORS OF FDG ELECTRIC VEHICLES LIMITED (PROVISIONAL LIQUIDATORS APPOINTED) — Applicants

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Before: Hon Harris J in Chambers

Date of Hearing: 3 November 2020

Date of Decision: 3 November 2020

Date of Reasons for Decision: 19 November 2020

R E A S O N S F O R D E C I S I O N

The application

1. FDG Electric Vehicles Limited ("**Company**") has been put into provisional liquidation in Bermuda where it is incorporated. The Joint and Several Provisional Liquidators ("**PLs**") applied in writing for an order of recognition and assistance. As there were a number of matters arising from the form of the order that was sought about which I had questions I directed that a hearing take place. At the hearing an opposing subsidiary (FDG Kinetic Limited) appeared through Mr Look Chan Ho to address some of the matters about which I had questions. There is no suggestion that the PLs should not be recognised and some assistance granted. The two issues, which require consideration are as follows:

(a) Should the order contain a paragraph, which on its face gives the PLs the power to take control of all directly and indirectly owned subsidiaries of the Company?

(b) What, if any, stay should be ordered in respect of existing or prospective proceedings against the Company in Hong Kong?

2. As it transpired there was no issue in respect of the first matter as Mr Tom Ng, who appeared for the PLs, accepted Mr Ho's submissions that the power to take control of subsidiaries should be limited to those which are incorporated in Hong Kong and held either directly or, if indirectly, through Hong Kong incorporated intermediate subsidiaries. The reason for this is as follows.

What assets can a foreign liquidator be empowered to take control of?

3. When the court recognises foreign corporate insolvency proceedings, the court may permit the foreign liquidator to take control of the Company's assets in Hong Kong. This will extend, if relevant, to shareholdings in Hong Kong incorporated companies. It appeared initially that the PLs were seeking the power to take control of subsidiaries incorporated in other jurisdictions such as Bermuda. Mr Ho characterised this as being akin to asking the court to empower a foreign liquidator take control of the Company's bank account in another jurisdiction, which would be impermissible judicial overreach. I agree.

4. The assumption that an order could be obtained giving a power to take control of subsidiaries without a jurisdictional qualification came, so it would appear, from my decision in *Re Shenzhen Everich Supply Chain Co Ltd* [1]. It is correct as can be seen from [2(vi)] that the express power did not contain any jurisdictional qualification. However, the power, which was sought was directed to Hong Kong subsidiaries (see [7] of the decision) and [2] of the order commences with "The Liquidator do have and may exercise in the Hong Kong Special Administrative Region the following powers".

5. This application as originally formulated seemed to envisage a power to take control of foreign incorporated subsidiaries and in so doing overlooked the significance of two conflict of laws rules. **First**, property and contractual claims to shares in a company should be determined by the *lex situs*, and shares have their situs in the place of incorporation of the company: *Chen Lingxia v* 中國金谷國際信託有限

[1] [2020] HKCFI 965.

責任公司[2]. **Secondly**, the question of whether foreign liquidators are agents of the debtor company is governed by the law of a company's incorporation (*lex incorporationis*): *Re Moody Technology Holdings Limited* [3].

6. As originally formulated the application overlooked both that the scope of the PLs powers as representatives of the Company are governed by the law of Bermuda not Hong Kong law, and that the relevant Bermuda subsidiary is owned through the British Virgin Islands ("**BVI**") subsidiaries. To take control of the Bermuda subsidiary thus involves taking control of the BVI subsidiaries. Assuming that the powers granted to the PLs extends to obtaining control of the BVI subsidiaries, whether the PLs are able to obtain control of the BVI subsidiaries is a matter of BVI law not Hong Kong law. One can test this by considering what the BVI registrar of companies is likely to want to see if the PLs attempt to change ownership of shares in the BVI companies and register the changes [4]. It seems to me obvious that the BVI registrar of companies would be interested in the powers conferred by the order appointing the PLs in Bermuda. He would have no interest in the powers purportedly conferred on the PLs in Hong Kong.

Staying proceedings in Hong Kong

7. The recognition orders that have until recently been granted have contained a paragraph in the following terms: "*For so long as the Company remains in liquidation in [relevant jurisdiction], no action or proceedings shall be proceeded with or commenced against the Company*

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2 [2019] HKCFI 379; [2019] HKCLC 89, [17].
3 [2020] 2 HKLRD 187, [46].
4 This is explained in [39] of the decision of the Court of Final Appeal in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501.

or its assets or affairs, or their property within the jurisdiction of this Honourable Court, except with the leave of this Honourable Court and subject to such terms as this Honourable Court may impose". This was intended to be in the nature of a case management provision, which would ensure that action would not take place in Hong Kong without the relevant parties being aware of the impact of the foreign insolvency proceedings and, if appropriate, a stay granted. However, I recognise that there are a number of questions that the order so worded gives rise to. **First**, that if (which was not the case with the initial orders that were granted) there are already proceedings on foot in Hong Kong, one would expect an application for a stay to be made in those proceedings. **Secondly**, whether or not it is appropriate to grant a stay in respect of unidentified prospective proceedings about which, necessarily, nothing is known. Both Mr Ng and Mr Ho agreed that the paragraph was more appropriately drafted in terms, which did not purport to impose a stay, but required appropriate applications in High Court proceedings to be issued and returnable before the judge granting the recognition order. The order that I will grant in the present case, and be amenable to granting in the future, is as follows:

> "If the Provisional Liquidators wish to apply for a stay or other directions in respect of proceedings in the High Court of any sort as a consequence of the recognition of their appointment by this order such application shall be listed before the Honourable Mr. Justice Harris or such other judge as he shall direct. The Provisional Liquidators shall write to the clerk to the Honourable Mr. Justice Harris seeking case management directions for the determination of any application that they wish to make pursuant to this order".

I note in passing that in a recent recognition and assistance decision in the Cayman Islands, Mr Justice Segal granted a similar order [5].

8. This order does not assist if the proceedings are in the District Court. It may also commonly be the case that other parties and their legal advisers are not familiar with the law in this area. It will, therefore, be useful if I say something about the court's power to stay proceedings in Hong Kong in aid of foreign liquidations.

9. It is well established that the court has a power at common law to assist a foreign liquidation by ordering a stay of proceedings within its jurisdiction. This is explained by Lord Collins in [54] of his judgment in *Singularis Holdings Ltd v PricewaterhouseCoopers* [6]:

> "Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33. They include (subject to what is said below) In *re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction again a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of

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[5] *China Agrotech Holdings Limited* FSD 157/2017, 19 September 2017, [41]. The critique in [40] does not apply to the present case in my view for the reasons explained later in this decision. *Agrotech* is unusual and reflects the common structure of Chinese business groups listed in Hong Kong. It involved provisional liquidators appointed in Hong Kong over a Cayman Islands company applying for recognition and assistance in the Cayman Islands.

[6] [2015] AC 1675.

> Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency)."

10. The underlying rationale for the common law power of assistance is modified universalism. I explain this in [10] of my judgment in *Joint Official Liquidators of A Co v B* [7], quoting from Lord Collins judgment in *Rubin v Eurofinance SA* [8]:

> "19. In *HIH* [2008] 1 WLR 852, para 30, Lord Hoffmann said:
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> > 'The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.'
>
> And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc ("Cambridge Gas")* [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:
>
> > 'The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.'
>
> 20. The US Bankruptcy Court accepted in *In re Maxwell Communication Corpn* (1994) 170 BR 800 (Bankr SDNY) that the United States courts have adopted modified universalism as the approach to international insolvency:
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> > 'the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets

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7 [2014] 4 HKLRD 374.
8 [2013] 1 AC 236.

> should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.'"

11. It follows from this that the common law power exists to assist collective insolvency processes. If an application for recognition is made by liquidators, or their equivalent, appointed over a company that has been wound up for the purpose of collecting a company's assets and distributing them amongst its creditors, it is likely that the court will accept that it is being asked to use its common law powers for the purpose that it is intended, namely, to ensure that all a company's assets are distributed to its creditors under a single system of distribution. However, it is important to understand that many of the applications that have been made to the court since *Joint Official Liquidators of A Co v B* was decided in 2014 have not been made by liquidators for this purpose. Many have been made by provisional liquidators appointed in the place of incorporation on a soft-touch basis with a view to facilitating a restructuring of a company's debt using a scheme of arrangement introduced in both the jurisdiction of incorporation and Hong Kong. This technique is often referred to by the name of the case in which it first emerged: *Z-Obee* [9]. It was developed to overcome difficulties created by the Court of Appeal's decision in *Legend International Resorts Limited* [10], which rejected the appointment of provisional liquidators as a means to restructure debt. The recognition of the foreign appointments is justified by reference to the principles of private international law discussed in *Joint Official Liquidators of A Co v B* [11]. Assistance in the form of powers to facilitate a restructuring in Hong Kong is justified by

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[9] [2018] 1 HKLRD 165.

[10] [2006] 2 HKLRD 192; see also the detailed decision of the limits of *Legend* in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338.

[11] *Supra*.

the application of the common law principles most recently discussed in *Re Moody Technology Holdings Ltd* [12] in which DHCJ William Wong SC considers in detail recognition of soft-touch provisional liquidators appointed for the purposes of restructuring. The Deputy Judge agreed with my conclusion in *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Limited* [13], namely, that [9]:

> "….It is not in my opinion inconsistent with Hong Kong law for restructuring powers to be granted by way of assistance to a provisional liquidator appointed over a foreign company by the court of its place of incorporation, in which a soft-touch provisional liquidation is permissible, as such powers can be granted, albeit in the more limited circumstances discussed in *China Solar*, to a Hong Kong provisional liquidator."

12. However, the fact that the courts have found that the common law principles support assisting a soft-touch provisional liquidation does not mean that the courts have accepted that a foreign soft-touch provisional liquidation is for all purposes to be treated as a collective insolvency process.

13. If soft-touch provisional liquidation is properly characterised (viewed from the perspective of the Hong Kong statutory insolvency regime), as a collective insolvency process it would suggest that there is nothing objectionable in appointing provisional liquidators in Hong Kong with a view to them restructuring the debt of a company including restructuring through introduction of a scheme of arrangement. I note in passing that Glenn J in the Southern District of New York accepted in *Re Winsway Enterprises Holdings Ltd* [14] that for the purposes of an application for a stay under *Chapter 15* of the *US Bankruptcy Code* a scheme is a collective insolvency process. However, if this is the case it

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12 [2020] 2 HKLRD 187.
13 [2019] HKCFI 805; [2019] HKEC 945.
14 [2017] 1 HKLRD 1, [37]; and also in the case of a number of subsequent similar debt restructurings involving schemes of arrangements.

would suggest that *Legend* was wrongly decided. This way of viewing the character of the jurisdiction is not considered in the judgment in which the Court of Appeal proceeds on the basis that provisional liquidation is to be used only for the purpose of protecting assets prior to a winding-up order being made. It is, however, difficult to see why, if a soft-touch provisional liquidation is a collective insolvency process, appointment of a provisional liquidator for such a purpose pursuant to *s193* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32 is impermissible.

14. The relevance of this issue in the present context is as follows. The passages that I have quoted in [9] from *Singularis*[15] envisage a stay being granted in aid of a collective insolvency process. It is not clear that if the foreign proceedings have a different character a stay can be justified. This is not an issue that I have to decide in this case, because the PLs are content with a case management direction, but it would require further consideration if an application for a stay of particularly proceedings, including a Hong Kong winding up petition, were to be sought in these or other proceedings.

15. Another consideration is the impact of the English court of Appeal's decision in *Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux*[16]. In short this decision, which is followed in Hong Kong, establishes that the discharge or compromise of liabilities under a contract is governed the law of the contract. It follows that the fact that a foreign incorporated company is subject to a foreign collective insolvency process does not prevent a Hong Kong creditor attempting to

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[15] *Supra*.
[16] (1890) 25 QBD 399.

establish a right to payment in Hong Kong [17]. Consequently, it would seem that a stay should not be granted in respect of, for example, an action to establish a right to payment under a contract governed by Hong Kong law in aid of a foreign insolvency process. Whether or not once a judgment has been obtained the creditor should be able to take enforcement action is a different question. In the absence of full argument it is not a question at this stage I will comment on other than to draw attention to the decision of the English Court of Appeal in *Re OJSC International Bank of Azerbaijan* [18]. The Court of Appeal confirmed that it is the practice of the court when exercising its insolvency jurisdiction not to grant a stay (going beyond the automatic stay under *art 20* of the Model Law) where to do so would in substance prevent English creditors from enforcing their English law rights in accordance with the *Rule in Gibbs*. However, in [95] Henderson LJ envisaged circumstances in which to a limited extent the *Rule in Gibbs* might be qualified by permitting assets within the jurisdiction of the English court to be remitted to a foreign liquidator. Henderson LJ may have seen this as a qualification (although it is not clear from the decision) because it would be likely that the creditor would receive less as a result of having to prove in the foreign liquidation in which the *Rule in Gibbs* would not apply than the creditor would if he was able to enforce the against the asset all the time it remained located in England. This would seem to involve a recognition of the creditor's right to enforce directly against the asset, which could only be interfered with to a limited extent by the court making orders facilitating steps in the foreign liquidation intended to result in a *pari passu* distribution of assets. This is an issue, which if it arises will require careful consideration. It is a further reason

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[17] See the discussion in *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038, [16]–[27].

[18] [2019] BCC 452.

why it would be wrong for the court in my view to make orders staying proceedings other than as a result of an applications to the court for an order at which the party effected will have the opportunity to argue the alternative.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Tom Ng, instructed by Wilkinson & Gris, for the applicants

Mr Look Chan Ho, instructed by Michael Li & Co, for FDG Kinetic Limited (in HCCW 106/2020) & the 12th defendant (in HCA 562/2020)

Attendance of C Y Lam & Co, for the 1st defendant (in HCA 276/2020), was excused

Attendance of Johnnie Yam, Jacky Lee & Co, for the 2nd defendant (in HCA 276/2020) & the plaintiff (in HCA 562/2020), were excused

HCMP 644/2022
[2022] HKCFI 1789

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 644 OF 2022

IN THE MATTER of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)

and

IN THE MATTER of the inherent jurisdiction of the Court

BETWEEN

PROVISIONAL LIQUIDATOR OF GLOBAL BRANDS GROUP HOLDING LIMITED (IN LIQUIDATION)	Applicant
and	
COMPUTERSHARE HONG KONG TRUSTEES LIMITED	1st Respondent
THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED	2nd Respondent

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Before: Hon Harris J in Chambers

Date of Hearing: 1 June 2022

Date of Decision: 23 June 2022

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D E C I S I O N

The Application

1. On 25 May 2022 the Provisional Liquidator of Global Brands Group Holdings Limited ("**Provisional Liquidator**" and the "**Company**" respectively) issued an originating summons to which Computershare Hong Kong Trustee Limited ("**Computershare**") and The Hong Kong and Shanghai Banking Corporation Limited ("**HSBC**") are Respondents seeking an order for recognition and assistance. The Company is incorporated in Bermuda and was wound up in Bermuda on 5 November 2021. The circumstances of the application provide an opportunity to consider in more detail an issue I discuss in *Re Li Yiqing v Lamtex Holdings Limited*[1], namely, whether in future the Hong Kong court will recognise and assist a foreign insolvency process conducted in the place of company's centre of main interests ("**COMI**") and it is not sufficient, nor necessary, that the foreign insolvency process is conducted in a company's place of incorporation.

Background

2. The Provisional Liquidator, John McKenna, had been appointed on 16 September 2021 and continued in office on the making of the winding-up order. The principle reason for seeking recognition and assistance from the Hong Kong court is to obtain the proceeds of the sale of shares held by Computershare in Hong Kong on behalf of the Company, totalling approximately HK$9 million, and the rather more modest balance

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[1] [2021] HKCFI 622; [2021] HKCLC 329.

held by HSBC in the Company's bank account in Hong Kong, which totals approximately US$5,000. The originating summons also seeks certain other general powers. I will explain them later in this judgment.

3. In his affidavit in support of the application the Provisional Liquidator explains the background to the Company and the circumstances leading up to its liquidation in Bermuda. The Company is an investment holding company. The Company, along with its subsidiaries ("**Group**"), were engaged in the business design, development, marketing and sale of branded children's, men's and women's apparel, footwear, fashion accessories and related lifestyle products in North America and Europe. The Company and its subsidiaries were also engaged in brand management and offered expertise in expanding its clients' branded assets new product categories, new regions and retail collaborations, as well as assisting in distribution of licensed products on a global basis.

4. The Company was listed on the Main Board of The Stock Exchange of Hong Kong ("**HKEX**") Limited in 2014 as a result of a spin-off from Li & Fung of which it had formed part. Due to the ongoing COVID-19 pandemic and geopolitical uncertainties, as well as structural shifts in the retail industry, the business of the Company and its subsidiaries was seriously challenged. As a result, the Company had been facing immense financial difficulties since 2020. For the year ended 31 March 2020, the Group reported: **(a)** a net loss after tax of US$586,590,000; **(b)** current liabilities exceeding current assets by US$772,125,000; and **(c)** cash and cash equivalents amounting to US$83,880,000. For the six months ended 30 September 2020, the Group reported: **(a)** a net loss after tax of US$119,838,000; **(b)** that current

liabilities exceed current assets by US$899,391,000; and **(c)** that the Group's cash and cash equivalents were US$55,805,000.

5. From around January 2021, the Company actively engaged in discussions with the lenders of a syndicated loan to the Group ("**Lenders**") of which the Company was a guarantor, other creditors, and potential investors in relation to revising repayment obligations of loans and injecting new equity from prospective investors. The Company also explored different debt restructuring options including potential transactions or corporate actions involving the sale, disposal and/or restructuring of various assets or businesses of the Group (collectively, "**Restructuring**").

6. While the Company explored various restructuring options to improve its financial position, the board of the Company resolved that it was in the interests of the Company and its creditors to commence its own winding-up proceedings and apply to the Bermuda Court to appoint a provisional liquidator with limited powers, which could maximise the chance of success of the restructuring and provide a moratorium on claims against the Company to avoid a potential disorderly liquidation by the Company's creditors. The appointment was apparently intended to create an environment for a successful restructuring. The board could continue to manage the Group's business operations, a provisional liquidator would monitor and consult with the board on implementing a group-wide and coordinated debt restructuring plan, and the business of the Group could continue to operate to generate revenue as a whole instead of assets being subject to fire sale at a significant discount.

7. On 10 September 2021, the Company presented a petition to the Bermuda Court for the winding-up of the Company ("**Petition**") and made an application for appointment of Mr McKenna as provisional liquidator of the Company on a "limited powers" basis for restructuring purposes only. Suffice to say the attempts to restructure proved unsuccessful, the board recognised that a winding-up would be in creditors' best interests and the Company applied successfully for a winding-up order on 5 November 2021.

8. Since his appointment, the Provisional Liquidator has been trying to take possession of the Company's assets in Hong Kong. The Company's assets in Hong Kong are:

(1) cash balances in the sum of about HK$8 million held by Computershare, which represents a surplus arising from the Group's employee share schemes; and

(2) cash balances in the sum of about US$4,800 held in the Company's bank accounts with HSBC.

Both Computershare and HSBC require the Provisional Liquidator to obtain a recognition order before they will release the cash balances. Nearly all the Company's creditors are in Hong Kong. As is to be expected as it is a holding company, the creditors are largely financial or professional companies and are all unsecured. The remainder of the liquidation will be straightforward. The Provisional Liquidator will adjudicate proofs, which seems likely to be uncontroversial, and declare a dividend to be paid out of the assets, which he will receive if a recognition and assistance is granted, which consists of the monies I have referred to in the previous paragraph.

9. The Provisional Liquidator accepts that before the Bermuda liquidation the Company's COMI was probably in Hong Kong. In the light of the Provisional Liquidator's activities after the Bermuda liquidation commenced the COMI may have become either Hong Kong or Bermuda. For the purposes of this decision the Provisional Liquidator accepts that the core requirements that need to be satisfied before the Hong Kong court will exercise its winding-up jurisdiction over a foreign company are satisfied[2].

Recognition and Assistance in Hong Kong—Background

10. Commencing in 2014 recognition and assistance has increasingly been used to address issues arising in transnational restructuring and insolvency in Hong Kong that largely arise as a consequence of the extensive use of holding companies incorporated in offshore jurisdictions rather than Hong Kong or the Mainland, although the business groups affected commonly consist of operating and asset owning companies in Hong Kong and the Mainland. This practice has become the norm in the case of companies listed on the HKEX. The operating and asset owning subsidiaries are commonly separated from the holding company by a layer of intermediate subsidiaries incorporated in an offshore jurisdiction different from the holding company. The most common structure recently adopted would appear to involve a Cayman holding company and intermediate subsidiaries incorporated in the British Virgin Islands. The business groups have no assets, creditors or debtors in the offshore jurisdictions. When such business groups encounter financial difficulties and creditors and the companies themselves are considering what steps to take to protect their interests they encounter problems arising

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[2] *Silver Starlight Ltd v China CITIC Bank Corporation Ltd, Tianjin Branch* [2021] HKCA 1248; [2021] HKCLC 1347 at [15] (G Lam JA).

from the artificial structure of the group, which it is difficult to address because unlike comparable jurisdictions Hong Kong has neither legislation dealing with rehabilitation of distressed businesses nor legislation dealing with transnational insolvency other than the discretionary power given to the court by *section 327* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap. 32 ("**Ordinance**"), to wind up a foreign company. The absence of the tools available in other jurisdictions, including the Mainland, to address these issues has been a well-publicised source of concern to those involved in restructuring and insolvency for over two decades. In the absence of any legislation to address these issues the Court has worked with practitioners to use common law techniques to address them so far as the common law permits. There have been two major problem areas.

11. The first concerns the restrictions that exist on winding up a foreign incorporated company. It is not necessary to explore this issue in depth as it is comprehensively dealt with in a number of authorities well known to practitioners. In summary the court has adopted what Ma CJ and Lord Millett NPJ refer to in the Court of Final Appeal's judgment in *Kam Leung Sui Kwan v Kam Kwan Lai*[3] as "*necessary self-imposed constraints on the making of a winding-up order against a foreign company*". In some cases, these are easy to satisfy. Others less so resulting in delay in creditors or shareholders being able to take action in Hong Kong to protect their economic interests while complicated questions concerning jurisdiction are resolved. It was this problem that led to the application and decision in *Joint Official Liquidators of A Co v B*[4]. The liquidators

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[3] (2015) 18 HKCFAR 501. See [18]–[24] in which Ma CJ and Lord Millett NPJ explain the constraints, commonly referred to as "the 3 core requirements" and their application.

[4] [2014] 4 HKLRD 374; [2014] HKEC 1244.

appointed in the Cayman Islands, where the Company was incorporated, initially sought (ultimately successfully) to wind up the Company in Hong Kong, but pending the determination of the petition wished to be able to obtain documents from the Company's bankers in Hong Kong concerning a substantial fraud. The bankers refused to provide them without an order of the Hong Kong court confirming the liquidators' authority to represent the company in Hong Kong.

12. The second issue concerns the problems caused by Hong Kong's lack of any legislation facilitating debt restructuring and rehabilitation of financially distressed companies. In the period following the Asian Financial Crisis of 1997 and 1998 the practice was developed of companies, mainly listed companies, being put into a form of soft-touch provisional liquidation in Hong Kong to facilitate a debt restructuring. This practice was brought to a halt by the Court of Appeal's decision in *Re Legend International Resorts Ltd*[5], which determined that the power to appoint provisional liquidators conferred by *section 193* of the *Ordinance* could not be used to appoint provisional liquidators for the principle purpose of restructuring a company. Many of these companies were incorporated in offshore jurisdictions. To circumvent the practical problem to which the Court of Appeal's decision gave rise a technique was developed[6], which involved a company incorporated in an offshore jurisdiction being put into soft-touch provisional liquidation in its domestic jurisdiction, the courts of those jurisdictions treating this as a proper use of the power to appoint provisional liquidators, and the provisional liquidators being recognised in Hong Kong and assistance being provided in the form

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5 [2006] 2 HKLRD 192; [2006] 3 HKC 565.

6 *Z-Obee Holdings Ltd* [2018] 1 HKLRD 165; *Re Joint and Provisional Liquidators of Hsin Chong Group Holdings* [2019] HKCFI 805; *Re Moody Technology Holdings Limited* [2020] 2 HKLRD 187.

of the limited powers necessary for provisional liquidators to participate in the restructuring process in Hong Kong. Unfortunately, it has become increasingly apparent that what is commonly referred to as the *Z-Obee* technique has been abused by certain insolvency practitioners and offshore law firms[7]. It seems to me tolerably clear that many of the offshore soft-touch provisional liquidations adopt a debtor in possession model, which has been rejected in Hong Kong, the principal purpose of which, viewed from the Company's point of view, is to obtain so far as possible a moratorium on action being taken to recover unpaid debts. The application to appoint provision liquidators in the present case would appear to be an example. Hong Kong has consciously decided not to enact legislation that provides for this kind of debt moratorium. Although it is not an issue that I need to decide in the present case and is one which requires detailed consideration, my preliminary view is that in future the Hong Kong court should generally decline to recognise soft-touch provisional liquidators appointed by offshore jurisdictions on the kind of terms I have summarised.

13. There is another consideration. As I have already explained the businesses of companies of the sort with which I am concerned are carried on in China; primarily the Mainland. The Mainland has a different economic system to Hong Kong. Reconciling the differences between the Hong Kong and the Mainland systems can be challenging. It requires an understanding of the different insolvency systems and the different social and economic considerations, which are reflected in the differing statute law and the decisions that judges and others involved in the insolvency and restructuring process are required to make. To take one example, the

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[7] See for example *Re China Bozza Development Holdings Ltd* [2021] 2 HKLRD 977; [2021] HKEC 1993; [2021] HKCFI 1235.

Enterprise Bankruptcy Law gives primacy to rehabilitation of businesses reflecting the importance placed in the Mainland on maintaining economic and social stability. Consistent with this the Mainland favours debtor in possession solutions. As I have explained Hong Kong does not. Hong Kong and Mainland judges are familiar with these issues and are well placed to deal with them; courts outside China considerably less so. Relevant to this are the concerns that have recently been expressed by two leading academics in the field of international insolvency, Professor Jay Westbrook of the University of Texas at Austin and Professor Christoph Paulus of Humboldt-Universität zu Berlin [8], about judicial decision making and bankruptcy law becoming increasingly remote from territorial or political control. The suggestion that a Chinese business can avoid the supervision of its affairs by Chinese courts[9] when bankrupt by using a company incorporated in, what has been called by the European Court of Justice, amongst others, a "*letter box jurisdiction*"[10] invites the question that Professor Westbrook and Professor Paulus pose as to the extent to which it is congruent with the purpose of insolvency law and the expectations of creditors to allow a commercial enterprise to use a bankruptcy process in a jurisdiction with which it or its debt[11] has no economic or social connection rather than one in which it carries on business. The question is relevant to the issue, which I am considering, which in practice amounts to this: should a jurisdiction in which a company's business is conducted recognise an insolvency process

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8 International Insolvency Institute's podcast 23 April 2022.

9 Whether the courts of the Hong Kong SAR or the Mainland.

10 *In re Eurofood IFSC Ltd* [2006] Ch 508; *Creative Finance Ltd* Case No. 14-10358 (REG) 13 January 2016; *Re Bear Stearns High-Grade Strategies Master Fund, Ltd* 381 B.R. 37 (Bankr. S.D.N.Y. 2007), aff'd 389 B.R. 325 (S.D.N.Y.) (Sweet J).

11 As opposed, for example, to US$ debt governed by United States Law, which would have an economic connection with the United States and might be compromised under *Chapter 11* of the *United States Bankruptcy Code* and normally recognised in Hong Kong in accordance with the *Rule in Gibbs, Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux* [1890] LR 25 QBD 399.

conducted in a place with which the company has no material economic connection.

The Order

14. I will grant an order for recognition of the Provisional Liquidator with assistance limited to the power to receive and transfer out of Hong Kong the balances in the account to which I have referred in [8]. My reasons for so ordering are explained in [48]–[50]. The majority of the remainder of this decision concerns the basis on which in future Hong Kong should grant recognition and assistance to foreign insolvency practitioners. The decision is divided into sections addressing the following:

(1) The established principles for common law recognition and assistance relevant to this application.

(2) COMI as the criteria for recognition and assistance.

(3) Principles of recognition—modified universalism.

(4) Modified universalism—criteria for determining home or principal jurisdiction in comparative authorities.

(5) Adopting the COMI criteria in Hong Kong.

(6) Authorities in Hong Kong.

(7) The recent case of Up-Energy.

(8) Conclusion.

Principles of Common Law Recognition and Assistance

15. There is a distinction between recognition and assistance. Recognition concerns acknowledging and confirming the status of a

foreign insolvency process and officer. Assistance involves granting expressly to the foreign insolvency officer powers to act in the local jurisdiction. The distinction is well understood. In *Kireeva v Bedzhamov*[12], Snowden J held:

> "[T]here is a conceptual distinction between the principles that apply to the decision whether to recognise a foreign bankruptcy, and the principles that apply to the question of what, if any, further assistance ought to be given by the English court to a foreign trustee in bankruptcy following recognition."

In *Net International Property Limited v ADV Eitan Erez*[13], Webster JA explains the distinction in more detail:

> "The starting point on the issues of recognition and assistance is to determine what, if any, is the difference between recognition and assistance. There is, at least in theory, a difference between the two principles. Recognition is the formal act of the local court recognising or treating the foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. In this case, this means recognising the Trustee's position granted by the courts of Israel as being the trustee in bankruptcy of the assets of Mrs. Sofer and treating him as the trustee of those assets in the BVI.
>
> Assistance goes further. If granted by the BVI court, it allows the Trustee to deal with the BVI assets of Mrs. Sofer, namely, her legal and beneficial interest in the shares of Net International. Put another way, recognition gives the foreign office holder status in the BVI and assistance gives him or her power to deal with the BVI assets. However, the dividing line between the two principles is blurred in practice because recognition by itself is generally of little assistance to the foreign office holder unless it is accompanied by the grant of assistance to deal with the local assets. Viewed in this way, recognition is generally treated as recognition and assistance. The blurring of the lines between the two concepts is illustrated by the judgment of the Supreme Court of Transvaal, South Africa, in *Re African Farms Ltd*…
>
> Notwithstanding the blurring of the lines between recognition and assistance, it is important to bear in mind that recognition

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12 [2021] EWHC 2281 (Ch); [2021] BPIR 1465 at [107].
13 (Eastern Caribbean Court of Appeal, 22 February 2021) at [19]–[21].

> does not necessarily include assistance. In this case, the trial judge's order recognising the Trustee included assistance."

A simple practical example of the distinction is to be found in my decision in *Re China Bozza Development Holdings Ltd*[14]. I held:

> "[N]otwithstanding my misgivings about how this matter has developed the JPLs should be recognised and I will so order. However, granting an order providing active assistance is a different matter. I am not currently satisfied that I should make an order granting the type of general assistance which I have on previous occasions ..."

16. The authorities establish that the orthodox common law position is that the court may recognise foreign insolvency proceedings that comply with two criteria[15]. First, that the foreign insolvency proceedings are collective insolvency proceedings; and secondly, that the foreign insolvency proceedings are opened in the company's country of incorporation. Part of the rationale for recognising and assisting foreign officeholders appointed in the country of incorporation is to be found in ordinary conflict of laws principles for corporations as opposed to pure insolvency law. As Lord Sumption explains in *Singularis Holdings Ltd v PricewaterhouseCoopers*[16]:

> "12. [E]ven without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile."

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14 [2021] HKCFI 1235; [2021] HKCLC 831 at [23].
15 See *Re CEFC Shanghai International Group Ltd* [2020] HKCFI 167; [2020] HKCLC 1 at [8].
16 [2014] UKPC 36; [2015] AC 1675.

COMI as the criteria for recognition and assistance

17. To date the court in Hong Kong has not used COMI as the yardstick for granting common law recognition or assistance. The criteria applied are those explained in the previous paragraph. It is, however, open to the court as a matter of principle and authority to develop these common law principles. As the then Chief Justice Li observed in *Solicitor (24/07) v Law Society of Hong Kong*[17]: "*[t]he great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions*". For the reasons discussed in the remainder of this judgment in my view the criteria to be adopted in future in determining whether or not foreign insolvency proceedings should be recognised and assisted are, in short, that the foreign proceedings constitute a collective insolvency process and that the proceedings (subject to limited exceptions) are conducted in the jurisdiction in which the Company's COMI is located.

18. As I have already explained Hong Kong is unusual in not having any legislation dealing with cross-border insolvency and restructuring. The Government has largely left it to the Judiciary to use common law tools to address the challenges that have arisen in this area as Hong Kong's economy has developed in line with the Mainland's rapid economic expansion. This is not an oversight. On 14 May 2021 the Secretary for Justice and the Supreme Court signed a "*Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland*

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[17] (2008) 11 HKCFAR 117 at [19].

and of the Hong Kong Special Administrative Region". This Cooperation Mechanism consists of two parts. The first is the Record of meeting. The second is "*The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region.*"[18] As is explained in both documents the purpose of the Mechanism is to facilitate economic integration and development in Hong Kong and the Mainland. Paragraphs 3 and 5 of the Record of Meeting make it clear that the parties expect the High Court to grant assistance to Mainland Administrators and cooperate on the implementation and improvement of the Mechanism. The absence of relevant legislation and the purpose of the Cooperation Mechanism are relevant to a consideration of the development of common law assistance in Hong Kong, its necessity and what form it might take. Hong Kong is not in the same position as jurisdictions, which have enacted comprehensive statutory codes to regulate recognition and assistance of foreign insolvencies. As the Cooperation Mechanism to which I have referred demonstrates, the absence of a statutory code to regulate recognition and assistance does not imply that the court is to take a restrictive view of its ability to develop the common law principles to address the issues that come before it. It is clear that the opposite is the case.

19. In *Rubin v Eurofinance SA*[19] Lord Collins at [129] describes the limits of a court's ability to develop the law in this field. Lord Collins says this:

> "A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the

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18 最高人民法院關於開展認可和協助香港特別行政區破產程序試點工作的意見

19 [2012] UKSC 46; [2013] 1 AC 236.

> identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco [1992] 2 AC 443*, 489."

20. It can readily be understood why the courts in England would approach the development of the common law relating to international insolvency as Lord Collins describes. Judge initiated developments in the law, which in the context of a system, which has introduced deliberate and comprehensive legislation to regulate cross-border insolvency, may be viewed as judicial overreach, are not necessarily to be viewed similarly in a jurisdiction, which lacks comparable legislation and whose current circumstances justify modifying the common law to implement more effectively an established legal principle. The development of the basis upon which foreign liquidations are recognised which I am considering does not involve the creation of a new legal principle. It involves a modification of an existing one, namely, recognition and assistance of a foreign insolvency process. The purpose of the modification is to implement the principle in a manner better suited to the circumstances in which transnational insolvencies currently arise in Hong Kong and the development of the principle in comparable jurisdictions.

21. It is apparent from its terms that the Cooperation Mechanism is premised on the assumption that the common law as practiced in

Hong Kong has developed to provide for judicial assistance to insolvencies conducted in different jurisdictions; albeit in the China context different legal jurisdictions within one unitary State. There are many examples of common law assistance being granted by the Hong Kong court to foreign insolvency office holders. In [43]–[44] I give a number of examples of the Court of Final Appeal and the Court of Appeal recognising the court's power to do so. In the case of administrators from the Mainland the Court of First Instance has made a number of orders for recognition and assistance in recent years: *Re Liquidator of CEFC Shanghai International Group Ltd*[20]; *Re Shenzhen Everich Supply Chain Co, Ltd*[21]; *Re HNA Group Co., Limited*[22]*; Nuoxi Capital Limited v Peking University Founder Group Company Limited*[23].

Principles of recognition—modified universalism

22. Underpinning the principle of recognition is the principle that the insolvency law of a company's home insolvency jurisdiction is applicable across the world. This is illustrated by the English Court of Appeal's decision in *Tchenguiz v Grant Thornton UK LLP*[24], which concerned whether Icelandic Insolvency Law applied throughout the European Economic Area, including England, by virtue of *Article 10* of the *Parliament and Council Directive 2001/24/EC*, given effect in *England by the Credit Institutions (Reorganisation and Winding Up) Regulations 2004*. Briggs LJ explains the character of the extraterritorial effect of Icelandic bankruptcy law in the following paragraphs[25]:

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20 *Supra* footnote 14.
21 [2020] HKCFI 965, [2020] HKEC 1188.
22 [2021] HKCFI 2897.
23 [2021] HKCFI 3817; [2021] HKEC 5793.
24 [2017] EWCA Civ 83; [2018] QB 695.
25 *Ibid* [68].

> "66. This much more confined part of the appeal also breaks down into two sections. The first raises the question whether Icelandic insolvency law (and its equivalents in all other home member states) is 'internationalised' by virtue of the Winding up Directive (and the Insolvency Regulation) regardless whether, viewed separately, it has purely domestic or both domestic and extraterritorial effect. The judge concluded that it was internationalised in that sense, and the claimants' third ground of appeal challenges that conclusion.
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> …
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> 68. The answer to the first of those questions flows in my view inexorably from the analysis of the purposes and terms of the Insolvency Instruments, as described above. The very essence of the universalism sought to be achieved by making the insolvency law of the home member state applicable across the territory of all member states depends upon that being achieved in relation to every potential home member state in which a credit institution is regulated and has its head office regardless whether, apart from those instruments, that state's insolvency law would be anything more than domestic in its application. If that were not so, then the creation of a universally applicable law (subject to strict exceptions) for the insolvency of credit institutions, and other entities, would fall at the first hurdle, in relation to any home member state the insolvency law of which did not already have cross-border effect."

23. Consistent with this principle the aim of modified universalism is that there should be a unitary bankruptcy proceeding in the court of the home insolvency jurisdiction which receives world-wide recognition and it should apply universally to all the bankrupt's assets. This is explained by Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd*[26]:

> "6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the

[26] [2008] UKHL 21; [2008] 1 WLR 852 at [6].

> bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."

24. Universalism is to be contrasted with territorialism where each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction[27]. Modified universalism is a compromise between these two opposites, recognising that the theoretical ideal of universality must in some circumstances give way to the practical reality of territorial or local interests. Lord Hoffmann describes the principle in *HIH* in the paragraph immediately following the one I have just quoted[28]:

> "7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corp u Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher, Insolvency in Private International Law*, 2nd ed (2005), pp 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

This principle has been part of the English common law since the 18th century[29].

25. In *Singularis* the Privy Council considered three propositions derived from the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of*

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27 *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41; [2015] AC 616 at [15] (Lord Sumption and Lord Toulson).

28 *Supra* at [7].

29 *Re HIH Casualty and General Insurance Ltd supra* at [30]; *Singularis Holdings Ltd v PricewaterhouseCoopers supra* at [19] and [23]; *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Co)* [2020] EWHC 2483 (Comm); [2021] 2 All ER (Comm) 1121 at [80] (Foxton J); *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at [81]–[88] (Newey LJ).

Navigator Holdings plc[30]. "*First the principle of modified universalism, namely, that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it [the court] could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant*."[31] The Privy Council concluded that the 2nd and 3rd principles had been wrongly decided, but not the first, which Lord Sumption explains in [19]:

> "19. However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH* [2008] 1 WLR 852, and by Lord Collins of Mapesbury (with whom Lord Walker and Lord Sumption JJSC agreed) in *Rubin v Eurofinance SA* [2013] 1 AC 236. Nothing in the concurring judgment of Lord Mance JSC in that case casts doubt on it. At paras 29–33, Lord Collins summarised the position in this way:
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> > '29. Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition … carries with it the active assistance of the court": *In re African Farms Ltd* [1906] TS 373, 377; "This court … will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Chapter 11": *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.
> >
> > 30. In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said: "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each

[30] [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 AER 829.
[31] *Supra* Lord Sumption [15].

> other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."
>
> 31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there ….
>
> 33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.

In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and,

> secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so."

26. It is clear from this passage that modified universalism is the foundation of the common law power to recognise and assist a foreign insolvency process and that the power may be developed if the development is consistent with modified universalism and is consistent with the applicable domestic legal framework. Although the formulation of the principle in *Singularis* is considerably more restrictive than that to be found in *Cambridge Gas*, as is apparent from the final paragraph of the extract of Lord Collin's judgment that I have quoted, it envisages further development of the common law power of assistance.

Modified universalism—criteria for determining home or principle jurisdiction in comparative authorities

27. Universalism and modified universalism are premised on there being a home or principal insolvency jurisdiction. The criteria for determining the home or principal insolvency jurisdiction have evolved over time. First, there is the concept of the debtor's domicile[32]. Secondly, there is the concept of the debtor's country of incorporation: In *Singularis*,

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[32] *Re HIH Casualty and General Insurance Ltd supra* at [6] and [8]; see also *Stichting Shell Pensioenfonds v Krys supra* at [14].

Lord Sumption talks of the common law principle of modified universalism treating the place of incorporation as being the principal insolvency jurisdiction:

> "The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction."[33]

Thirdly, there is the concept of COMI. Lord Hoffmann explains in *HIH*[34]. the emergence of the criteria for assessing the most appropriate country to be treated as the principal jurisdiction in which a transnational insolvency is to be conducted:

> "In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings ((EC) No 1346/2000 of 29 May 2000) uses the concept of the '*centre of a debtor's main interests*' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate."

28. Assuming one uses the old concept of domicile, there appear to be two schools of thought on the meaning of "domicile" of a company. One view is that the domicile of a company is in its place of incorporation. Lord Collins explains this in *Rubin v Eurofinance SA*[35]:

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33 *Singularis Holdings Ltd v PricewaterhouseCoopers supra* at [23].
34 *Supra* at [31].
35 *Supra* at [31].

> "31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there."

The alternative view is that the domicile of a company is in its principal place of business, which may or may not be the country of incorporation. This is explained by Murison CJ in *Re Lee Wah Bank*[36]:

> "The general principle in cases of this kind is clear enough. It is laid down by Vaugham Williams J in *In re English Scottish and Australian Chartered Bank* [[1893] 3 Ch 385] thus:—'Where there is a liquidation of the concern the general principle is—ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation.' The domicile of a trading company is fixed by the situation of its principal place of business (*Jones v Scottish Accident Insurance Company Limited* [(1886) 17 QBD 421]) and there is no doubt at all that in this case the domicile of the liquidating Company is Hong Kong."

29. In Singapore, the common law recognition regime has developed to embrace the COMI concept for reasons explained by Abdullah JC in *Re Opti-Medix Ltd*[37]:

> "Under a universalist approach, one court takes the lead while other courts assist in administering the liquidation…
>
> A consequence of a greater sensitivity to universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an

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36 (1926) 2 Malayan Cases 81, 84.

37 *Re Opti-Medix Ltd* [2016] SGHC 108; [2016] 4 SLR 312 at [17]–[18] (Aedit Abdullah JC).

> accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality"

30. The position adopted in Hong Kong has historically been that a liquidator appointed in the place of incorporation is recognised[38]. However, it would be incorrect to say that the Hong Kong recognition criteria has exclusively been tied to the debtor's country of incorporation. There are instances of the Hong Kong court granting, or being willing to grant, recognition to insolvency office-holders appointed in a foreign jurisdiction which was not the jurisdiction of incorporation. In *Re The Russo-Asiatic Bank*[39], the Court recognised liquidators appointed by the English court over a Russian bank. In *Bank of Credit and Commerce International (Overseas) Ltd v Bank of Credit & Commerce International (Overseas) Ltd—Macau Branch*[40], the Court of Appeal recognised liquidators appointed in Macau over a Cayman-incorporated bank. In *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*[41], I took the view that there was no objection in principle to granting recognition to an English administrator over a Bermuda-incorporated company with its COMI in England.

Adopting the COMI criteria in Hong Kong

31. In *Re Li Yiqing v Lamtex Holdings Limited*[42] at [22] and [26] I suggested that the Hong Kong court should, as Singapore has done, consider whether common law recognition based on place of incorporation

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38 *Re China Fishery Group Ltd* [2019] HKCFI 174; [2019] HKCLC 45 at [24]–[25].
39 (1929-30) 24 HKLR 16.
40 [1997] HKLRD 304.
41 [2015] HKCFI 645; [2015] HKCLC 323.
42 *Supra* footnote 1.

is consistent with contemporary commercial practice in the SAR and the Mainland:

> "22. It is becoming increasingly apparent that it is desirable, and it might reasonably be suggested essential, that the Hong Kong courts are able to deal with recognition and assistance using methods that are consistent with commercial practice in the SAR and the Mainland. In response to suggestions for legislation to address this subject, it has been the Government's position that for the time being it is a matter for the courts of Hong Kong to address using the techniques available at common law. The current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation. In my view we have reached the stage at which this question needs to be reconsidered at there is much in my view to be said in support of Abdullah J's conclusion that the common law in this area contains sufficient flexibility to develop so as to be consistent with commercial practice and there is nothing in principle preventing recognition of liquidators appointed in a company's COMI or a jurisdiction with which it has a sufficiently strong connection to justify recognition, just as the Hong Kong court will exercise its discretion to wind up a foreign incorporated company if the connection between it and Hong Kong is substantial and the other core requirements are satisfied [43]. It might, I appreciate, be objected that there is a material difference in the case of the jurisdiction to wind up a foreign incorporated company, namely, the power is expressly conferred by statute. This takes me back to *Singularis* [44].
>
> …
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> 26. As I have already observed Hong Kong has no legislation dealing with recognition of foreign insolvencies. Issues such as recognition of foreign soft-touch provisional liquidation do not involve using the common law to extend legislation. In Hong Kong it is purely a matter of common law. *Singularis* is authority that the common law generally permits recognition and assistance of foreign liquidations. The issue I am currently considering is whether the common law of Hong Kong should be extended to permit recognition of insolvencies in places other than a company's place of incorporation and in particular in which its COMI or something similar is to be found. I can see no doctrinal reason why it should not be."

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[43] See the authorities discussed in *Re China Huiyuan Juice Group Limited* [2020] HKCFI 2940, [18]–[29].

[44] *Supra* at [11].

32. In my view the criteria for recognition should in future primarily be determined by the location of a company's COMI. As I suggest in *Lamtex*[45], this better reflects the current commercial practice in Hong Kong. The use of companies incorporated in offshore jurisdictions as holding companies and intermediate subsidiaries for business groups conducting their activities in Hong Kong and the Mainland is widespread. The connection between such companies and the place of their incorporation is entirely formal. It is rare for such companies to conduct any business in the jurisdiction and I imagine commonly no director or employee ever visits them. Normally in my experience when such companies are put into provisional or final liquidation two or three liquidators are appointed by the offshore court at least one of whom, commonly two, are based in Hong Kong from where they conduct the liquidation. Treating the place of incorporation in such circumstances as being the natural home or commercially most relevant jurisdiction of the company for the purpose of determining, which jurisdiction is the appropriate place for the seat of a principal liquidation is highly artificial. It also encounters problems of the type discussed recently by Linda Chan J in *Re Up Energy Development Group Limited*[46], namely, the need in the case of a genuine liquidation (as opposed to the type of soft-touch provisional liquidation that I have referred to in [12]) for the liquidator to be able to access the wide, express powers provided for in the *Ordinance*, which cannot be granted by way of recognition at common law. I discuss *Up Energy* in more detail later in [46]. If a company's COMI is in Hong Kong I would not normally expect there to be any difficulty in a petitioner demonstrating that the court can properly exercise its discretion

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45 *Supra*.
46 [2022] HKCFI 1329.

to wind up a foreign incorporated company[47]. A winding up order made in Hong Kong will allow the liquidator to use the powers available under the *Ordinance* and, importantly, seek recognition and assistance in the Mainland, which is normally where a company's business is primarily conducted and its assets located. The Cooperation Mechanism I have referred to in [18] permits the relevant Mainland courts to recognise liquidators appointed in Hong Kong over companies whose COMI is located in Hong Kong at the time the application for recognition and assistance is commenced. Adopting the COMI criteria would bring Hong Kong in line with the approach in the Mainland, which is of itself desirable.

33. Adopting and framing the COMI criteria requires consideration of five subsidiary questions. **First**, it is necessary to decide the relevant date for determining COMI. There are three alternatives:

(1) the COMI location as at the date of commencement of the foreign insolvency proceedings;

(2) the COMI location as at the date of the hearing of the foreign officeholder's recognition application in Hong Kong; and

(3) the COMI location as at the date the foreign office-holder's Hong Kong recognition application is made. This approach would be consistent with the position under *Article 6* of *The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region*, which forms part of the Cooperation Mechanism. See also *Re Zetta Jet*[48].

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47 See [11].

48 [2019] SGHC 53; [2019] 4 SLR 1343 at [52]–[61] (Aedit Abdullah J).

34. **Secondly**, it is necessary to decide the elements of COMI. There are four established approaches. All are similar. Under the Cooperation Mechanism, COMI generally means the place of incorporation, although other factors are also relevant, including the place of the debtor's principal office, the debtor's principal place of business, and the place of the debtor's principal assets (*Article 4* of the Cooperation Mechanism). In the context of the common law Lord Hoffmann in *HIH*[49] regarded the following as the key COMI elements—the place of incorporation, the place of central management, and the location of assets and liabilities. In *Re Opti-Medix Ltd*[50], the Singapore court suggested the following common-law COMI test:

> "The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there…
>
> I would note that on a common law adoption of the COMI test, there need not necessarily be a presumption in favour of the registered office, as there is under the Model Law or the EU Insolvency Regulation. However, such a presumption provides a sound default rule in the absence of evidence to the contrary, and provides certainty and regularity. The adoption of such a presumption would also harmonise the results on common law and statutory applications of the COMI test."

35. ICC Judge Mullen explains the key COMI considerations under the EU Insolvency Regulation, in *Re Investin Quay House Ltd*[51]:

> "[T]here is a presumption that the COMI of a company corresponds to the place in which it is registered. Ms Staynings took me to factors that have been held to be relevant in rebutting the presumption, which include—

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49 *Supra* at [31].
50 *Supra* at [18] and [25].
51 *Re Investin Quay House Ltd* [2021] EWHC 2371 (Ch) at [35].

> i) Where the majority of the company's administration is undertaken in the UK, particularly if the company's creditors would consider the UK to be the place where the important functions are carried out …;
>
> ii) Where day to day conduct of the business and activities of the company was handled by an agent appointed in England and dealings with third parties were arranged from offices in London, particularly since a third party would not have known that board meetings took place in Jersey …;
>
> iii) Where a company is a 'letterbox' company that does not carry out any business in the country where its office is situated …; and
>
> iv) Generally, factors going to the 'head office functions test', including the law governing the main contracts, the location of business relations with clients, the location of creditors, and the management of the company …
>
> I bear in mind of course that the question is fact specific and the cases cited are simply examples of factors that the court has considered relevant in the particular circumstances of those cases."

36. The term COMI is not defined in the UNCITRAL Model Law on Cross-Border Insolvency. The key COMI considerations are summarised by Abdullah JC in *Re Zetta Jet*[52] at [29] and [85]:

> "The term 'COMI' is not … defined in the Model Law or the Singapore Model Law. There is only a presumption under Art 16(3) of the Singapore Model Law that the place of the debtor's registered office is its COMI …
>
> I will assess the various factors raised by the parties in the following categories:
>
> (a) the location from which control and direction was administered;
>
> (b) the location of clients;
>
> (c) the location of creditors;
>
> (d) the location of employees;

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[52] *Supra*.

(e) the location of operations;

(f) dealings with third parties; and

(g) the governing law."

37. A more comprehensive discussion of the criteria for determining COMI under the Model Law is to be found in the judgment of Glenn J in *In re Ocean Rig UDW Inc*[53], which concerned an application for recognition under *Chapter 15* of the *United States Bankruptcy Code*. The case concerns the restructuring of the debt of four companies through a scheme of arrangement sanctioned in the Cayman Islands. One which was incorporated in the Cayman Islands was the holding company of the other three, which were incorporated in the Republic of the Marshall Islands. Until sometime in 2016 each of the companies had its COMI in the Marshall Islands. It was the companies' case that subsequently the COMI was moved to the Cayman Islands. Whether or not this was correct was relevant because recognition under *Chapter 15* requires that a company is in an insolvency process in the location of its "centre of main interests", in which case it is a "foreign main proceeding", or in a place in which it has an "establishment", in which case it is a "foreign non-main proceeding": the terms in quotes being defined in *Chapter 15*, which adopts the *UNCITRAL Model Code* on cross-border insolvency. The legal framework and the issue is summarised by Glenn J at page 695:

> "[O]f course, more than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign nonmain proceeding. For example, a so-called 'letter box company,' with no real establishment or other required indicia for its proposed COMI, cannot support recognition. See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129-31 & n.8 (Bankr. S.D.N.Y.), *aff'd*, 389 B.R. 325 (S.D.N.Y.

[53] 570 B.R. 687 (Bank. S.D.N.Y. Aug. 24, 2017); the decision was upheld on appeal 585 B.R. 31 (S.D.N.Y. April 5, 2018).

> 2007) (stating that 'the COMI presumption may be overcome particularly in the case of a "letterbox" company not carrying out any business' in the country where its registered office is located) (citation omitted). The question that must be addressed here is whether the Foreign Debtors' change of COMI from the RMI to the Cayman Islands satisfies the requirements of the Bankruptcy Code, permitting this Court to recognize the Cayman Proceedings as a foreign main proceeding. A U.S, bankruptcy court that is asked to recognize a foreign proceeding as a foreign main proceeding must decide where a foreign debtor has its center of main interest."

38. It is not necessary for me to consider the detailed analysis by Glenn J of the evidence relied on as demonstrating that the COMI for each company had moved from the Marshall Islands to the Cayman Islands. It is sufficient to note that Glenn J considered evidence of the following matters as being relevant: the location of directors and board meetings, the location of the companies' principal officers, notices of relocation to the Cayman Islands, location of operations, location of assets, location of bank accounts, location of books and records and the location in which the restructuring activities took place. Glenn J concluded that the COMI of each of the companies was in the Cayman Islands and the proceedings in the Cayman Islands to restructure the debt were "foreign main proceedings". His conclusion is contained in the following passages on page 704.

> "[I]n assessing these factors, a chapter 15 debtor's COMI is determined as of the filing date of the chapter 15 petition, without regard to the debtor's historic operational activity. See *In re Fairfield Sentry*, 714 F.3d at 137 ('[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests.'). However, as discussed in greater detail below, to the extent that a debtor's COMI has shifted prior to filing its chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith.
>
> The JPLs submit that, as of the Petition Date, each Debtor's 'center of main interests' within the meaning of chapter 15 of the

> Bankruptcy Code was in the Cayman Islands and that COMI was not manipulated prior to the filing in bad faith. As explained more fully below, the Court agrees. The Court concludes that the Cayman Proceedings are foreign main proceedings based on the facts discussed at considerable length in Section F. of the Background section (I.) above. Those facts establish that, among other things, the Foreign Debtors (i) conduct their management and operations in the Cayman Islands, (ii) have offices in the Cayman Islands, (iii) hold their board meetings in the Cayman Islands, (iv) have officers with residences in the Cayman Islands, (v) have bank accounts in the Cayman Islands, (vi) maintain their books and records in the Cayman Islands, (vii) conducted restructuring activities from the Cayman Islands, (viii) provided notices of relocation to the Cayman Islands to paying agents, indenture trustees, administrative and collateral agents, and investment service providers, and (ix) filed a Form 6-K with the SEC showing that their office was in the Cayman Islands."

In my view similar matters are relevant to the Hong Kong court's determination of whether or not the COMI of a company is in the jurisdiction of the foreign insolvency proceedings.

39. **Thirdly**, how the relationship between the COMI criteria and the Hong Kong court's winding-up jurisdiction may be relevant; a subject I touched on in [32]. The position in my view is as follows. The recognition regime is distinct from the winding-up jurisdiction. The Court may recognise foreign insolvency proceedings whether or not the debtor may be wound up in Hong Kong: *Singularis Holdings Ltd*[54]. The fact that the debtor could be, or has been, wound up in Hong Kong is not of itself a bar to the Court granting assistance to the foreign insolvency office-holders. Recognition as an ancillary liquidation is one form of assistance that may be granted to foreign insolvency office-holders.

40. **Fourthly**, whether an inconsistency between the principles of private international law and the principles of recognition and assistance,

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[54] *Supra* at [5] and [13].

the former supporting recognition of foreign office-holders appointed in the country of incorporation as the company's lawful agents in accordance with agency theory and ordinary conflict of laws principles for corporations and the latter supporting recognition largely determined by COMI, will cause practical problems. In my view not. The COMI test is relevant in cases in which a foreign liquidator requires more than an order that confirms the liquidator's status and rights arising from his appointment in the place of incorporation (which is justified by orthodox principles of private international law) and seeks a power necessary to exercise a right in furtherance of a liquidation (which engages the principle of modified universalism); the sort of order referred to by Lord Sumption in [23] of *Singularis*[55], albeit on the assumption that the Liquidator had been appointed in the place of incorporation and this justifies recognition:

> "[T]he right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the companies title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holders right to act on the company's behalf in the same way as any other agent or company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them."

41. **Fifthly**, cases where the location of the COMI is unclear. In my view where the location of COMI is unclear, the Court may nevertheless grant recognition and assistance if for practical reasons it is necessary and the foreign insolvency process is in the place of

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[55] *Supra*.

incorporation. This type of pragmatic approach was supported by Abdullah JC in *Re Opti-Medix Ltd*[56]:

> "Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking …, and there was no competing jurisdiction interested in the winding up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both *Re Lee Wah Bank* … and *Re RussoAsiatic Bank* … could perhaps be explained on this practical basis."

42. In my view none of the subsidiary matters I have considered suggest that adopting the COMI criteria conflicts in a material and problematic way with other principles and practical considerations, which are potentially engaged.

Authorities in Hong Kong

43. The authorities show the following types of specific assistance having been granted. In *Re Irish Shipping Ltd*[57] concerned a petition to winding up an unregistered company pursuant to *section 327* of the *Companies Ordinance*, Cap. 32. The company was incorporated and in liquidation in Ireland. The petition was presented by the company's liquidator. Jones J in accepting that assistance in the form of an ancillary liquidation should be granted says this:

> "Another factor that I have taken into account in exercising my discretion is the comity of nations whereby it is desirable that

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56 *Supra* at [26].
57 [1985] HKLR 437, 439, 445 (Jones J).

> the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward and I find none in this case. The jurisdiction of this court in the liquidation would be ancillary as far as possible to the winding up in Ireland and would provide assistance to the official liquidator in the collection and preservation of the assets within Hong Kong."

In *Re Information Security One Ltd*[58] the winding-up petition was brought by the company in compulsory liquidation in the Cayman Islands in which it was incorporated acting by its joint and several liquidators. Kwan J as she then was held that:

> "8. Authorities for the proposition that an ancillary liquidation may be brought in Hong Kong in respect of a foreign company where there is principal liquidation in its place of incorporation are found in *Re Irish Shipping Ltd* [1985] HKLR 437 and *Re Zhu Kuan Group Co Ltd* (unrep., HCCW No 874 of 2003) …"

Similarly, in *Re China Medical Technologies Inc (No 1)*[59] where the Court of Appeal permitted Cayman Liquidators to act on behalf of the debtor in Hong Kong. Barma JA explains the situation in [5]–[6] and [24]:

> "The Company, incorporated in the Cayman Islands, was not registered in Hong Kong. It was the holding company of a group of companies which developed, manufactured and marketed surgical and medical equipment in China. It was wound up in the Cayman Islands in July 2012 and placed into bankruptcy in New York in August 2012…
>
> The petition to wind up the Company in Hong Kong was, as noted above, brought by the Company itself, acting through its Cayman Islands Joint Official Liquidators…
>
> In the present case, it is pertinent to note that while the winding up order sought is in respect of an insolvent company, the petition is not in fact brought by a creditor, but by the Company itself, acting through its liquidators appointed in its home jurisdiction, by the courts of its place of incorporation."

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58 [2007] 3 HKLRD 780 at [1]–[2] and [8] (Kwan J).
59 [2018] HKCA 111; [2018] HKCLC 65.

44. The following cases demonstrate that it is permissible for foreign insolvency office-holders to take possession of the debtor's assets: In *Singularis Holdings Ltd*[60] Lord Sumption explains that:

> "The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company."

The Court of Final Appeal in *Chen Li Hung v Ting Lei Miao*[61] recognised and assisted Taiwanese bankruptcy trustees. Bokhary PJJ held:

> "By suing to establish that shares registered in other persons' names are beneficially owned by a bankrupt, his trustees in bankruptcy would be doing nothing materially different from suing to recover debts due to him. And I am satisfied that we should proceed on the footing that under the law in operation where they were appointed, the Trustees have the right to sue in their own names here with a view to getting the disputed 1.25 million Nikko shares into Mr Ting's estate. This is because it is not in dispute that every step taken by the Trustees, including every step which they have taken in Hong Kong, is in conformity with directions obtained by them from the bankruptcy court in Taiwan…
>
> I hold that the Taiwanese bankruptcy order extends to Mr Ting's assets situated in Hong Kong…
>
> In my judgment, the Taiwanese bankruptcy order is to be given effect by the Hong Kong courts…
>
> That the Trustees act in accordance with the directions of the Taiwanese bankruptcy court is an unremarkable matter consistent with routine insolvency practice the world over."

45. It is permissible to grant foreign insolvency office-holders the power to gather information from third parties. Continuing from his explanation quoted in [25] above Lord Sumption explains in *Singularis*[62]:

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60 *Supra* at [10].
61 (2000) 3 HKCFAR 9 at 16-17, 21.
62 *Supra*.

> "[T]here is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in *In re African Farms Ltd* and in *HIH* and *Rubin*, that such an order must be consistent with the substantive law and public policy of the assisting court ... It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information."

Also in *Singularis* a stay was imposed on creditors trying to levy execution against local assets[63].

Up Energy

46. Mr Ho drew my attention to a very recent decision of Linda Chan J in *Re Up Energy Development Group Limited*[64]. As Chan J notes in the first paragraph of her judgment *Up Energy* is an unusual case. *Up Energy* is incorporated in Bermuda, listed in Hong Kong and its business was conducted in the Mainland. The winding-up petition in Hong Kong came on for substantive hearing before Chan J on

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63 *Supra* at [12]–[14] and [19] (Lord Sumption), and [54] (Lord Collins).
64 *Supra*.

10 January 2022. As I understand the position the company sought initially to have the petition adjourned until after a hearing to convene a meeting of creditors, which it intended would be made before me a few months later. Chan J was not satisfied that all the relevant issues had been properly addressed before her and adjourned the petition for further argument on 14 February 2022. Chan J ordered further submissions to be made. The company was wound up in Bermuda on 11 March 2022. The company had been put into soft-touch provisional liquidation in 2017, which was recognised by an order made by me in August 2017. Obviously this proved unsuccessful. The Company argued that it should not be wound up in Hong Kong and instead the liquidation in Bermuda should be recognised and the powers necessary to conduct the liquidation in Hong Kong extended to the liquidators by way of common law recognition. Chan J rejected this argument. Chan J held, and I simplify, that it was not possible for a foreign liquidator to conduct a winding up in Hong Kong, which required the liquidators to exercise the powers available to a Hong Kong liquidator under the *Ordinance*. The common law power of assistance did not permit the court "*to make the provisions under the CWUO available to the Bermuda liquidators or the Company in the absence of a winding up order made by the Hong Kong court.*"[65] Mr Ho in the present case agreed that Chan J's conclusion represented the current orthodox view for the reasons explained in *Rubin v Eurofinance*[66] and *Singularis*[67]. I agree. So far as the present case is concerned what requires consideration is sub-paragraph (3) of [81], which contains Chan J's determinations. Chan J says this: "*In the absence of a winding up order [in Hong Kong] made against the [c]ompany, the court does not have*

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65 [59].
66 *Supra*.
67 *Supra*.

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)] available to the [c]ompany." Mr Ho quite properly brought it to my attention, because although the second part of the sentence, which concerns the issue that I understand was central in the case is not relevant to the present matter as the order sought does not require a power under the *Ordinance* to be extended to the Liquidator, the first part of the sentence suggests that no powers at all can be conferred at common law.

47. As I have explained, in the present case the order that I have made is justified by established principles of private international law. As Lord Sumption demonstrates in the parts of *Singularis* referred to in [16] above the court is not constrained from granting any assistance at all to a foreign liquidator. The court can grant assistance to facilitate a foreign liquidator whose appointment has been recognised on orthodox principles of private international and which engages the principles of modified universalism. As Chan J refers at length to *Singularis* in her judgment I think a fair reading of [81(3)] is that her Ladyship had in mind (A) an argument that the common law allowed powers analogous to those provided in the Ordinance to be granted to foreign liquidators rather than (B) powers intended to assist a foreign liquidator effectively to exercise rights that a domestic court recognises because the liquidator had been appointed in the place of incorporation; in other words the situation discussed by Lord Sumption in [23] of *Singularis*. I am concerned with the latter type of case. For the reasons I have explained in earlier paragraphs, in my view it is entirely consistent with modified universalism and the established common law principles of recognition and assistance

for the Hong Kong court to grant powers intended to assist a foreign liquidator appointed in the jurisdiction of a company's COMI effectively to exercise rights, which arise from the liquidator's status in the COMI jurisdiction.

Form of Order

48. I will grant an order in the form annexed to this judgment. In [1] I will order that the liquidation is recognised. This I do on the basis discussed in [39]–[40] alternatively on practical grounds. The Liquidator is the lawful agent of the Company as a matter of the law of its place of incorporation and entitled to direct that its assets are transferred from accounts in Hong Kong to accounts in Bermuda. Paragraph 2 confirms that the Provisional Liquidator has the power to secure and obtain the Company's assets and documents in Hong Kong. This is simply confirming the position under orthodox principles of private international law and gives the Provisional Liquidator assistance, which might fairly be described as more managerial in nature than of a type associated specifically with insolvency.

49. Paragraph 3 permits the transfers of the relevant sums of money as directed by the Provisional Liquidator. Paragraphs 4 and 5 are self-explanatory.

Conclusion

50. In my view the correct approach to assessing whether or not a foreign liquidation should be recognised is first to determine if at the time the application for recognition is made the foreign liquidation is taking place in the jurisdiction of the Company's COMI. If it is not recognition

and assistance should be declined unless the application falls within one of the following two categories. **First**, it is limited to recognition of a liquidator's authority, if appointed in the place of incorporation, to represent a company and orders that are an incident of that authority; which might be described as managerial assistance. As the Provisional Liquidator in the present case only requires an order that demonstrates 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 in my view the application, when the superfluous paragraphs dealing with more general assistance in the originating summons are deleted, is justified by established principles of private international law. **Secondly**, recognition and limited and carefully prescribed assistance which does not fall within the first category required by a liquidator appointed in the place of incorporation as a matter of practicality; the type of situation in other words, which Abdullah JC describes as justifying assistance on practical grounds in *Opti-Medix*.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Stephenson Harwood, for the applicant

The 1st respondent was not represented and did not appear

The 2nd respondent was not represented and did not appear

Order

UPON the application of Mr. John Christopher McKenna of Finance & Risk Services Limited in his capacity as the sole provisional liquidator of Global Brands Group Holding Limited (In Liquidation in Bermuda) ("**Company**") by way of ex-parte originating summons filed on 25 May 2022

AND UPON reading the Letter of Request issued by the Supreme Court of Bermuda dated 28 March 2022, the Affidavit of John Christopher McKenna filed on 26 May 2022 and the exhibit referred to therein, and the 2nd Affidavit of Lau Po Wa Vivian filed on 27 May 2022 and the exhibit referred to therein

AND UPON hearing counsel for the Applicant, the 1st and 2nd Respondents being absent

IT IS ORDERED THAT:-

(1) The liquidation of the Company pursuant to the order of the Supreme Court of Bermuda ("**Bermuda Court**") dated 5 November 2021 and the appointment of John Christopher McKenna of Finance & Risk Services Limited, Suite 502, 26 Bermudiana Road, Hamilton, Bermuda, as provisional liquidator ("**Provisional Liquidator**") pursuant to the order of the Bermuda Court dated 16 September 2021, and his continuation in office pursuant to the order of the Bermuda Court dated 5 November 2021, be recognised by this Court.

(2) The Provisional Liquidator has and may exercise in the Hong Kong Special Administrative Region the following powers:

a) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of this Court. The books, records and documents of the Company include:

i. Emails exchanged and other correspondences between the Company and its auditors, and the Company and other third parties; and

ii. Documents and information provided by the Company to its auditors and provided by the auditors to the Company in relation to the audit work;

b) to take all necessary steps to prevent any disposal of the Company's assets and, in particular, to secure any credit balances in any bank accounts in the name or under the control of the Company within this jurisdiction;

c) to operate and open or close any bank accounts in the name and on behalf of the Company for the purpose of collecting the assets and paying the costs and expenses of the Provisional Liquidator;

d) to retain and employ barristers, solicitors or attorneys, accountants and/or such other agents or professional persons as the Provisional Liquidator considers appropriate for the purpose of advising or assisting in the execution of their powers and duties under this Order; and

e) to bring legal proceedings and make applications to this Court, whether in his own name or in the name of the Company.

(3) Subject to any adjustments for additional interest accrued and for bank charges or fees incurred, the following balances comprising receivables due in respect of dividends and interest income derived from shares that are not vested under the Company's 2014 and 2016 share award schemes ("**GBG Share Award Schemes**") because of staff termination standing to the credit of the 1st Respondent, the trustee for the GBG Share Award Schemes, and maintained with the 2nd Respondent, be delivered up to the Company in accordance with the instructions issued by the Provisional Liquidator:

Type of account	**Name of Account**	**Account number**	**Balances (HKD)**
Cash Custodian Account	Computershare Hong Kong Trustees Limited Account No. 0018	848-674503-001	64,860.54 or any balances remaining therein
Cash Custodian Account	Computershare Hong Kong Trustees Limited Account No. 0047	741-018584-001	8,399,057.66

	Computershare Hong Kong Trustees Limited Account No. 0047 - No.2 Account		or any balances remaining therein

(4) The sum of HK$135,250 be returned by the 1st Respondent to the Company in accordance with the instructions issued by the Provisional Liquidator. Such sum is the total amount deducted by the 1st Respondent from the cash balance held by them as trustee under the GBG Share Award Schemes to set off their outstanding fees for the months of April to August 2021.

(5) The following balances standing to the credit of the Company maintained with the 2nd Respondent, subject to any adjustments for additional interest accrued and for bank charges or fees incurred be delivered up to the Company in accordance with the instructions issued by the Provisional Liquidator:

Type of account	**Account number**	**Balances**
EUR Current Account	848-580056-220	EUR 9.85
HKD Current Account	848-580056-001	HKD 730.01
USD Current Account	848-580056-201	USD 4,748.79

(6) The Provisional Liquidator does have liberty to apply; and

(7) The costs of this application be paid out of the assets of the Company as an expense of the liquidation.

HCMP 172/2021
[2021] HKCFI 1235

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 172 OF 2021

IN THE MATTER OF China Bozza Development Holdings Limited（中國寶沙發展控股有限公司）(formerly known as China Agroforestry Low-Carbon Holdings Limited（中國農林低碳控股有限公司）(in Provisional Liquidation in the Cayman Islands)

and

IN THE MATTER OF the inherent jurisdiction of the Court

BY

THE JOINT PROVISIONAL LIQUIDATORS OF CHINA BOZZA DEVELOPMENT HOLDINGS LIMITED (IN PROVISIONAL LIQUIDATION IN THE CAYMAN ISLANDS) — Applicants

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Before: Hon Harris J in Chambers

Date of Hearing: 15 April 2021

Date of Decision: 11 May 2021

D E C I S I O N

Introduction

1. China Bozza Development Holdings Limited ("**Company**") is incorporated in the Cayman Islands and listed on the GEM Board of the Stock Exchange of Hong Kong Limited ("**SEHK**"). According to the affirmation evidence that has been filed in support of this application the Company is an investment holding company and its business operations are mainly conducted in the Mainland through companies incorporated in the Mainland and held indirectly by the Company through intermediate holding companies incorporated in the British Virgin Islands ("**BVI**"). The Company and its subsidiaries, are principally engaged in forestry management, provision of services in relation to container houses and moneylending. The group's major assets are the rights of use in respect of forests in the Mainland which are held by a number of mainland companies held by the BVI intermediate subsidiaries.

2. On 15 May 2020 a petition was presented in Hong Kong for the Company to be wound up on the grounds of insolvency.

3. On 30 November 2020 a director of the Company presented a petition in the Cayman Islands for the winding up of the Company. On 1 December 2020 the Company applied for the appointment of soft-touch provisional liquidators to facilitate a restructuring of the debt of the Company. On 3 December 2020 the Cayman Court appointed Lai Wing Lun and Osman Mohammed Arab of RSM Corporate Advisory (Hong Kong) Limited as soft-touch provisional liquidators along with Martin Nicholas John Trott, who is based in the Cayman Islands ("**JPLs**"). On 5 February 2021 an application was made supported by a letter of request from the Cayman Court for recognition and assistance of the JPLs in Hong Kong.

4. These kind of applications have become increasingly frequent and commonly they have been dealt with on the papers. I declined to do so in the present case and directed that there be a hearing, which took place on 1 March 2021. I did so for a number of reasons. Until recently applications for recognition of soft-touch provisional liquidators appointed in a company's place of incorporation took place in respect of listed companies, which were not subject to winding up petitions in Hong Kong. The applications occurred in cases in which a company was using a technique commonly called the *Z-Obee* [1] technique to restructure debt. I had become aware that with increasing frequency such applications are being made after a petition had been presented in Hong Kong. At the time this application first came on before me I heard during the same week two winding up petitions involving companies, which had recently been placed in soft-touch provisional liquidation in the jurisdiction of incorporation: *Lamtex Holdings Limited* [2] and *Ping An Securities Group (Holdings) Limited* [3]. *Lamtex, Ping An* and the present case all involved the same firm of insolvency practitioners: RSM. In short I was concerned that the *Z-Obee* technique, (which had been developed in order to address the problems faced by a company attempting to restructure its debt caused by the absence in Hong Kong of any statutory mechanism, which provides for restructuring under the supervision of independent professionals and also the court and the impact of the Court of Appeal's decision in *Legend International Resorts Ltd* [4]) is being abused to obtain a *de facto* moratorium of enforcement action by creditors in Hong Kong.

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1 [2018] 1 HKLRD 165 and see the discussion in [31]–[33] of *Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255.
2 [2021] HKCFI 622.
3 [2021] HKCFI 651.
4 [2006] 2 HKLRD 192.

5. At the hearing on 1 March 2021 I informed the JPLs that the papers told me little about the circumstances in which the application in the Cayman Islands came to be made. Although I had some of the papers put before the Cayman court they suggested that at the time the application had been made the Company did not have any restructuring plan, which it wished to implement out of provisional liquidation, rather it was seeking to appoint soft-touch provisional liquidators, who would then make efforts to formulate such a plan. This was done without any creditor input or regard to the proceedings in the Hong Kong SAR, the jurisdiction in which the Company is listed and in which, along with the Mainland, most of its creditors appear to be based. I adjourned the application in order that I could be provided with comprehensive evidence as to the circumstances in which the Company came to make the application in the Cayman Islands and RSM nominated. The JPLs asked for a month to prepare the necessary evidence and I fixed the next hearing for 15 April 2021. I, therefore, proceed on the basis that the Company and JPLs put before me all the advice sought and obtained by the Board of the Company concerning the Company's obligations to creditors (the Company clearly being cash flow insolvent) and options open to the Board if they thought there was any justification for trying to prevent liquidation.

The Company and JPLs' evidence

6. The evidence that was adduced demonstrated that the Board did not seek legal or other professional advice on the consequences and implications of the Company's dire financial position or the statutory demand after it received the statutory demand or the Petition issued against it. What appears to have happened can be explained briefly. Professor Phillip Fei, who became Chairman of the Board in July 2019, explains in his affirmation that from 12 February 2020 the Company began to issue

occasional circulars to creditors informing them of its financial position and giving the impression that it had commenced some form of debt restructuring. Details of the restructuring were not provided. There is no evidence that the Board had anything one could sensibly describe as a plan to restructure the Company's debt or business. I am told nothing about the Company's business, how it came to be unprofitable, why any investor might be interested in injecting funds into the Company or how the Board thought that the Company's business might be rehabilitated.

7. Apparently in June 2020 discussions with an investor, Chen Jianwei, resulted in an agreement being signed pursuant to which the Company could borrow up to HK$83,500,000 to be used to refinance the Company's debt. However, it would appear that Mr Chen only provided HK$3,300,000 and the hope that his loan would facilitate repayment of the creditors, nearly all of whom appear to be individual lenders to the Company resident in the Mainland, proved in vain.

8. In 2020 the Company began with no success to look for investors to improve its financial position. In November 2020 Professor Fei became acquainted with Perry Ng. Apparently Mr Ng shared with Professor Fei his experience in another listed company in Hong Kong, which was also facing financial difficulties at the time and was attempting to restructure its debts through a scheme of arrangement with the help of soft-touch provisional liquidator, who happened to be RSM, who were assisted by Michael Li & Co and Conyers, Dill and Pearman, who the Company subsequently instructed in the present matter.

9. Professor Fei subsequently met with RSM, who explained to him soft-touch provisional liquidation. This left Professor Fei believing, and I quote from [16] of his affirmation, "*.... that the Company will be*

better placed to negotiate with its creditors and may have a higher chance of restructuring its debt with the help of soft-touch Joint provisional liquidators. More particularly, the majority of the creditors of the company are retail bond creditors who have lost confidence in the management after the Company failed to honour the previous settlement proposal." At the meeting with RSM, RSM produced a presentation explaining something about the firm and the services that it could provide. I will quote what the presentation says about the Company's current position as RSM understood it and how the Company might proceed:

> "We understand that you intends to carry out debt restructuring and formulate, promote and implement a restructuring plan. However, as the Petitioner has filed a winding-up petition in the High Court of Hong Kong, the board of directors of your company needs to consider the potential outcome which the company appears before the winding-up hearing on 2 December 2020 and provisional liquidator be appointed by the High Court of Hong Kong.
>
> According to the public information, the Petitioner has not yet applied for the appointment of a provisional liquidator. At the same time, as mentioned earlier, under the existing judicial system of Hong Kong, even if the appointment power lies with the Hong Kong court, it is still difficult for the company to request the Hong Kong court to appoint a provisional liquidator for restructuring purposes. In Hong Kong, the appointment of a provisional liquidator means that the powers of the company's existing board of directors and management will immediately cease, and its role will become to cooperate with the provisional liquidator in taking over, investigating and reorganising the company according to the power granted by the court when the provisional liquidator considers appropriate. Then, the provisional liquidator needs time to understand the company the management's restructuring plan. Therefore, the debt restructuring plan that your company originally intended to promote will therefore face great delay and uncertainty.
>
> However, there is an alternative plan for China Bozza. Since China Bozza is a company incorporated in the Cayman Islands, you can seek to appoint an independent professional institution jointly accepted by the company, investors and creditors as a restructuring consultant or the aforementioned provisional liquidator (with power for restructuring purposes only) in the Cayman Islands courts. On the basis of low intervention (Soft-touch Basis), the provisional liquidators could work with the

> company's board of directors and management to design and promote a debt restructuring plan that balances the best interests of all stakeholders.
>
> In order to achieve the above objectives and gradually realise your company's debt restructuring in a planned way, we recommend that your company implement a restructuring plan in stages. The main task of the first stage is to apply to the Cayman Islands for the appointment of provisional liquidators limited to the purpose of restructuring. The following is the preliminary idea and timetable of our proposed debt restructuring plan."

10. This description of the options open to the Company was incorrect. It was not necessary to appoint soft-touch provisional liquidators in the Cayman Island in order to restructure the Company's debt. The Board could have appointed RSM to advise it on restructuring in Hong Kong and attempted to persuade creditors and the Court in Hong Kong to adjourn the Petition in order to allow the Company the opportunity to progress a restructuring.

Directors' Duties to Creditors

11. It is unclear what in practice either the Company or RSM had in mind. Restructuring is a term used to describe the process of altering existing debt obligations and business activities of a company with a view to improving its medium to long term financial and business viability. It is not a thing in itself; a kind of medication for the ills of a distressed company.

12. If one views restructuring of an insolvent listed company simply as a commercial transaction consisting of selling the Company at a price attractive to investors interested in acquiring a listed vehicle for their own business, it is likely influence to whose interests one gives weight and the different parties will all have different interests. An investor's imperative is to buy at the lowest price, which necessarily means paying

creditors as little as possible. The owners of the Company, and I think it might reasonably be assumed the Board they have appointed and in cases such as the present who choose the provisional liquidators, are interested in avoiding liquidation as it would result in them loosing their entire investment. For the owners anything is better than liquidation, which literally. For the professionals involved it is an opportunity to earn fees underwritten by an investor. If these considerations are what motivates the decisions of the parties to which I have referred and creditors are not involved in the restructuring process that creditors' interests are largely unheard, and not as they should be driving the process.

13. What a company should be advised once it appears likely that it is insolvent is that the interests of the creditors become paramount. In *West Mercia Safetywear v Dodd* [5] Dillon LJ approves the statement of Street CJ in *Kinsela v Russell Kinsela Pty Ltd*:

> "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

14. Various other authorities include dictum to the effect that once a company becomes insolvent the directors' fiduciary duties are owed to the general body of creditors not to the shareholders. A recent example is

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[5] [1988] BCLC 250, 252.

the decision of Coleman J in *Cyberworks Audio Video Technology Limited v Remedy Asia Ltd and others* [6]. In [66]–[68] Coleman J explains:

> "66. At the point in time when a company is insolvent or nears insolvency or is in doubtful solvency, or if a contemplated payment or course of action would jeopardise its solvency, the interests of the creditors 'intrude' on the directors' duties, and will require the directors to take into account those interests. This may be termed the 'creditors' interests duty'. This arises because creditors become prospectively entitled through a liquidation to displace the power of the shareholders and the directors so as to deal with the company's assets. The underlying principle is that directors are not free to take action which create a real, as opposed to remote, risk to the creditors' prospects of being paid, without first having considered their interests rather than just those of the company and its shareholders. However, that does not give rise to any duty on the part of the directors owed directly to the creditors. Rather, the directors will owe a duty to the company to take care to protect the interests of creditors: see Geraghty, Sinclair & Snowden 'Company Directors: Law and Liability' at §6.122.
>
> 67. Exactly when the risk to creditors' interests becomes real for these purposes will ultimately have to be judged on a case-by-case basis. There have been different verbal formulations ('verge of insolvency', 'dubious solvency', 'parlous financial state of affairs', etc), but they generally fit the different factual circumstances in which they were expressed: see, for example, *Re HLC Environmental Projects Ltd (in liq)* [2014] BCC 337 at §§88-89.
>
> 68. In the case of *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, at §§213-220, the English Court of Appeal considered possible answers to the question of when the creditors' interests duty is triggered. First, it was recognised that the duty is engaged at least at the point when the company is actually insolvent, either on a cash-flow or balance sheet basis (and in most of the cases the focus is on balance sheet solvency or insolvency). But the court found more difficult the question as to where the trigger might lie, short of actual insolvency. It noted that the qualified way in which judges have expressed the trigger reflects that the directors of a company may often not know, nor be expected to know, that the company is actually insolvent until sometime after it has occurred. But it is for that reason, among others, that a test falling short of established insolvency is justified. In its conclusion, the court considered that the relevant formulation which accurately encapsulates the trigger is that the duty arises when the directors know or should

[6] [2020] HKCFI 398; see also *Re Pantone 485 Ltd* [2002] BCLC 266.

> know that the company is or is likely to become insolvent. In that context, 'likely' means probable, not some lower test."

15. In the context of a group of companies it will also be relevant for directors to understand that the duty to consider the interests of creditors, requires the directors to consider the interests of the creditors of each company in a group separately. As Godfrey Lam J explains in [235] in *Re Wing Fai Construction Co Ltd* [7]:

> "As a matter of principle, it is not a sufficient justification for the directors involved in such payments to say that they looked to the benefit of the group as a whole. Each company, albeit within a group, is a separate legal person with separate interests and separate and probably different creditors. It is the duty of the directors of a company "to consult its interests and its interests alone" in deciding how to exercise their powers as directors of that company; they are not entitled to sacrifice the interests of that company in order to promote the interests of other group companies, even if they are also directors of them: *Walker v Wimborne* (1976) 137 CLR 1 at 6–7; *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] 1 Ch 62, 74D–E; *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580, 620."

16. These principles and how they apply is something of which directors should be informed by lawyers and informed insolvency practitioners when they are asked to advise a board of a company, which it seems likely is insolvent. Consistent with this one would expect creditors to have a central role in the development of any plan to restructure a company's debt. Historically this has been the case in Hong Kong when dealing with listed companies. I touch briefly on the history of the use of provisional liquidation as a vehicle to facilitate restructuring in [31] of my decision in *China Huiyuan* [8]. I think it will be useful if I say more about this in this decision in order to give greater context to the present issues and my reasoning.

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7 (Unreported HCCW 735/2002, 24 November 2017).
8 *Supra*.

Soft-touch provisional liquidation in Hong Kong

17. As a consequence of the Asian Financial Crisis, which began to effect Hong Kong from about the second half of 1997 a number of listed companies began to experience financial difficulties. Commonly local banks such as HSBC and Standard Chartered were their major creditors. The banks required a number of these companies to appoint independent financial advisers ("**IFA**"), which the banks approved, to assist them address their financial difficulties. The advisers were specialist insolvency practitioners. In a number of cases a stage was reached at which the IFAs and the banks took the view that control of the companies needed to be taken out of the hands of management, who they had concluded were not capable of finding means to maximise value for the benefit of creditors. At the time it was easier than is currently the case to sell a listed company to a purchaser primarily interested in acquiring a listed vehicle. If this was thought to be the best method of maximising value it required the involvement of personnel capable of managing the process. This was achieved by a creditor issuing a petition and applying for appointment of provisional liquidators, normally the IFAs, with the agreement of other actively involved creditors, who, particularly in the case of banking creditors, were informed and involved in the formulation of the terms of the restructuring. As far as I am aware the first case in which this happened was *Seapower Resources International Limited* [9], which followed from a series of cases concerning members of the *HIH* [10] insurance group, in which Hartmann J had accepted in the face of opposition from the Official Receiver, that the companies could be restructured out of provisional liquidation. In the case of *Seapower* the provisional liquidators' powers

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[9] HCCW 1325/2001, 31 December 2001 and 22 April 2002. No reasons were given for the decision to appoint provisional liquidators. However, the decision on the resulting petition to approve a scheme was reduced to writing: [2003] HKEC 1372.

[10] (Unreported, HCCW 337, 339 & 340/2001, 21 December 2001).

were extended to allow them to introduce a scheme of arrangement 4 months after their appointment. This technique continued to be used [11] until the decision of the Court of Appeal in *Re Legend International Resorts Limited* [12] brought it to halt. The Court of Appeal took a differing view to Hartmann J and the judges who had heard the reported cases referred to in footnote 11, and held that *section 193* of what is now the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, did not allow provisional liquidators to be appointed, and I simplify, principally for the purpose of restructuring.

18. It will be appreciated that in the circumstances I have described there was little risk of proper regard not being given to the interests of the general body of unsecured creditors. The cases that have currently been coming before this court are increasingly very different. The present case illustrates one reason why this is so. The Company does not appear to have any banking debt in Hong Kong. The creditors are nearly all what are described as purchasers of "bonds". This suggests, particularly in the context of a listed company, that the creditors are holders of a series of publicly tradeable bonds. They are not. Their debts arise from individual loans at remarkably low interest rates made by members of the public. Commonly the loans are made because the "bond" (whose holder will normally be from the Mainland) give the purchaser residency rights in Hong Kong, or for reasons touched on in my recent decision in *China Greenfresh Group Co Ltd* [13], provide a mechanism to evade

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[11] See by way of example: *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363; *Re Rhine Holdings Ltd* [2000] 3 HKC 543; *Re Albatronics (Far East) Ltd* [2002] 4 HKC 99; *Re Luen Cheong Tai International Holdings Ltd* [2002] 3 HKLRD 610 (CFI), [2003] 2 HKLRD 719 (CA).

[12] *Supra*; see also my discussion of the case and the extension of a provisional liquidators powers to permit them to develop and implement a restructuring in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338.

[13] [2021] HKCFI 1182.

Mainland exchange controls. *Lamtex* [14] and *Ping An* [15] are recent examples. In many cases the procuring of such loans seems to be little more than a scam as the companies are already distressed and the risk of default is significant. Unsurprisingly the creditors have little understanding of their rights or the methods available for securing the maximum return on the loans that they have made.

The Present Case

19. As I have already explained, in the present case the Board neither sought nor were offered proper legal advice. It is suggested in the evidence filed for this application that the reason soft-touch provisional liquidation was sought was because the Board believed that creditors might be more trusting of attempts to restructure debt if independent professionals were appointed. This is not, however, mentioned in the minute of the Board meeting at which the Board resolved that the Company commence proceedings in the Cayman Islands with a view to appointing soft-touch provisional liquidators. I note in passing the first of the resolutions passed by the Board is in the following terms:

> "It is in the interest and commercial benefit of the company and its shareholders as a whole to implement a debt restructuring and to present the petition and make the application to the Grand Court to facilitate such debt restructuring."

This was drafted by this Company's Hong Kong solicitors Michael Li & Co. As I have demonstrated in [12]–[14] this evidences a failure to understand to whose interests, namely the creditors, the Board need to have regard.

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[14] *Supra*.
[15] *Supra*.

20. Creating confidence amongst creditors also does not feature as a consideration in any of the documents RSM have produced contemporary to the application or in the evidence submitted to the Cayman Court. We probably find the primary driver behind appointing RSM and applying for soft-touch provisional liquidation explained in [30] of Professor Fei's 2nd affirmation filed in the proceedings in the Cayman Islands:

> "In addition, I understand they have an established network of investors who might be interested in becoming 'White Knights' of the Company after carrying out a suitable due diligence process. In the event that it is not feasible to rescue the Company, appointing Provisional Liquidators at this juncture would ensure that the assets of the Company will be properly preserved, which is in the interests of the creditors, public shareholders and all other stakeholders of the Company."

It is also apparent that no consideration appears to have been given by the Company or its advisers to whether or not it might be in the interests of its creditors for the Company to be wound up.

21. I think it a fairly compelling inference that RSM were selling their ability to find an investor and work with it to avoid a liquidation and retain some shareholder value. The creditors were a group to be bought off; not the group whose financial interests took priority to other considerations. I note that the wording used by the drafter from Conyers Dill & Pearman also suggests a lack of familiarity with the principles I have explained in [12]–[14].

Conclusion

22. This case illustrates that the way soft-touch provisional liquidation commenced in the place of incorporation of listed companies has been used recently has strayed materially from the way it was originally

used in Hong Kong. The indifference shown in the present case by both the insolvency practitioners and legal advisers to the relevant guiding principles is troubling particularly as *Lamtex* and *Ping An* involve the same professionals and a body of creditors who are ripe for exploitation and whose rights need protection. That does not mean that a restructuring involving a sale of the Company to an investor is not in the best interests of creditors, but it does mean that the court needs to supervise closely the use of the *Z-Obee* technique to avoid it being misused by professionals more concerned with generating fees than the interests of creditors.

23. As I explain in [7] of *China Huiyuan* [16] as a matter of private international law, a liquidator, including a provisional liquidator, should be recognised as having the powers to act on behalf of the company over whom they are appointed that have been bestowed on them by the courts of the place of incorporation. It follows that notwithstanding my misgivings about how this matter has developed the JPLs should be recognised and I will so order. However, granting an order providing active assistance is a different matter. I am not currently satisfied that I should make an order granting the type of general assistance which I have on previous occasions, because of concerns that I have about the way in which the JPLs are approaching this and other cases. I will grant general liberty to apply thus giving the JPLs the option to seek a further order if it is required and they can justify it.

24. I would also add the following observations. As I explain in *Lamtex* [17] the fact that provisional liquidators have been appointed in the place of incorporation does not mean that the Hong Kong Court will automatically adjourn a petition issued in Hong Kong. I will not repeat the

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[16] *Supra*.
[17] *Supra*.

reasoning to be found in *Lamtex*. I note, however, that there does appear to be a material difference in the approach of the Cayman Court and Hong Kong Court to granting adjournments at the request of a company seeking time to restructure its debt. As I explain in [38] of *Lamtex* the Hong Kong Court will grant an adjournment if it is demonstrated by a company that it has a proposal to address its financial difficulties that is in the best interests of the general body of unsecured creditors, particularly if there is in principle support from sufficient of the creditors in terms of value of the unsecured debt to suggest that if a scheme of arrangement is introduced it is likely to achieve the necessary statutory majority in value (75%) to engage the court's discretionary power to sanction the scheme. If the skeleton argument submitted to the Cayman Court is accurate it would appear that the Cayman Court's criteria are less onerous and that a proposal does not have to be demonstrated in order to obtain an adjournment of a petition and the giving of time for a company to attempt to restructure its debt through soft-touch provisional liquidation. If this is correct, practitioners need to be mindful of the differences in the approach of the Cayman and Hong Kong Courts and their consequences.

25. Practitioners should be alive to the need for evidence to be filed that provides an informed and candid description of a company's financial position and what is envisaged to be the most likely solution to its problems. This should not need stating, but the evidence filed in a large number of cases involving Mainland listed businesses suggests that it requires emphasising. If the reality is, for example, that a company is (a) hopelessly insolvent, (b) there is no prospect of realising value from sale of its indirectly owned assets in the Mainland as they will be seized by Mainland creditors and (c) the only hope of achieving other than a *de minimis* return to off-shore creditors is the sale of the company to an

investor, who may wish to acquire it to use as a listed vehicle for a different type of business; this should be explained and justified. Simply referring to a possible "debt restructuring" and treating the expression as a kind of magical incantation, the recitation of which will conjure up an adjournment of the petition is as inadequate as it is facile.

26. I will grant an order for recognition in the terms appended in this decision.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Terrence Tai, instructed by Michael Li & Co, for the applicants

Appendix

Order

IT IS ORDERED THAT:-

1. The provisional liquidation of China Bozza Development Holdings Limited (in Provisional Liquidation in the Cayman Islands) ("**Company**") and the appointment of Mr. Martin Nicholas John Trott of R&H Restructuring (Cayman) Limited, Windward 1, Regatta Office Park, PO Box 897, Grand Cayman, KY1-1103, Cayman Islands; and Mr. Osman Mohammed Arab and Mr. Lai Wing Lun, both of RSM Corporate Advisory (Hong Kong) Limited, 29/F., Lee Garden Two, 28 Yun Ping Road, Causeway Bay, Hong Kong, as the Joint Provisional Liquidators for the Company for restructuring purposes ("**JPLs**"), pursuant to the Order of the Grand Court of the Cayman Islands dated 3 December 2020, be recognised by this Court.

2. The JPLs do have liberty to apply.

3. The costs of this application be paid out of the assets of the Company as an expense of the provisional liquidation.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 329 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF SILVER BASE GROUP HOLDINGS LIMITED

Appearances: Mr. Jonathon Milne and Róisín Liddy-Murphy for the Petitioner

Before: The Hon. Justice David Doyle

Heard: 22 November 2021

Judgment Delivered: 22 November 2021

HEADNOTE

Failure to give creditors adequate notice of the hearing of an application to appoint provisional liquidators for restructuring purposes – adjournment – information and documentation to creditors – sharing documentation with Hong Kong Court dealing with winding up proceedings – comity concerns

JUDGMENT

1. Before the court are two applications by Silver Base Group Holdings Limited (the "Company" and the "Petitioner"). On 11 November 2021, the Company filed a winding up petition pursuant to section 92 (d) of the Companies Act (2021 Revision) (the "Act") on the ground that the Company was unable to pay its debts. On the same day, the Company issued a summons seeking the appointment of joint provisional liquidators for restructuring purposes pursuant to section 104(3) of the Act. I should add that the Company is incorporated under the laws of the Cayman Islands, is listed on the Hong Kong Stock Exchange with its main business conducted in Hong Kong and elsewhere within the People's Republic of China and it is in that region where its creditors are located.

2. Before coming into Court, I had read into the documentation that had been filed and the emails that that had been sent to court administration this morning. This afternoon I have heard from Mr. Jonathon Milne for the Company, the Petitioner in this case. I have decided that it is not appropriate to proceed with the hearing this afternoon. I am going to adjourn the proceedings until 10am on Wednesday 1 December 2021 and I give reasons for that decision as follows:

3. As expressed during my exchanges with counsel, I am concerned over the lack of notice to creditors. Although I accept that the word "*ex-parte*" is used in section 104(3) of the Act, the developing case law stresses the importance of the court taking into account the position of creditors when a company is in the zone of insolvency. See for example the decision of Parker J in *CW Group Holdings Limited* (unreported 3 August 2018), the decision of Kawaley J in *ACL Asean Tower Holdco Limited* (unreported 8 March 2019), the decision of Smellie CJ in *Sun Cheong Creative Development Holdings Limited* (unreported 20 October 2020) and the decision of Segal J in *Midway Resources International* (unreported 30 March 2021). The latter authority was not in the bundle of authorities filed by the Petitioner but my personal assistant on my instruction brought it to the attention of the Petitioner's attorney by email at 8.52am this morning.

4. There were further developments this morning including the filing of the first affirmation of Yung Yin Yee Jasamine affirmed in Hong Kong today 22 November 2021. Attached to it

was an announcement to the Hong Kong Stock Exchange dated 15 November 2021 giving in effect public notice of the petition for the winding-up of the Company and the application for the appointment of joint provisional liquidators. On page 3 it was stated "*The JPL Application is listed for hearing by the Cayman Court on 22 November 2021 (Cayman Islands time)".* No time was in fact specified; there was no reference to 2.30pm in the announcement. I was also concerned to see at the top of page 1 of the announcement the following words "*Silver Base Group Holdings Limited (Provisional Liquidators Appointed) (For Restructuring Purposes) (Incorporated in the Cayman Islands with limited liability*)". I require an affidavit or an affirmation to be filed before 2pm on Thursday 25 November 2021 providing an explanation for the inclusion of the words "*(Provisional Liquidators Appointed) (for Restructuring Purposes)*". This court has not appointed provisional liquidators in respect of the Company.

5. My principal concern however was over the lack of notice to the creditors. My personal assistant notified the attorneys for the Petitioner by email dated Friday 12 November 2021 at 5pm that the hearing date was 22 November 2021 at 2.30pm. The attorneys acknowledged receipt of this email promptly at 5.02pm that day.

6. It appears that letters notifying some of the creditors of the time of today's hearing were sent out, a week later, on Friday 19 November 2021. We are now Monday 22 November 2021. It appears that the letters were not forwarded by email. It appears they may have been delivered simply by post or by hand to the Hong Kong addresses specified. There is no real information provided in that respect, although I have copies of the letters with the addresses. Moreover it appears that some of the letters were not sent direct to creditors but rather to placing agents for onward transmission. There is no evidence before the court that such letters were forwarded on to creditors.

7. In the second affirmation of Dr Liang Guoxing affirmed in Hong Kong on 11 November 2021 at paragraph 66 he states that the Company wishes to "*remain transparent with the creditors and instill their confidence in the proposed debt restructuring process*". Extremely short and in some cases no notice of today's proceedings is unlikely to instill the confidence of creditors in the Petitioner's proposals. The creditors should be given more time within which to communicate their views. The Company should positively and constructively engage with all creditors. Short notice on a Friday with a hearing on the

Monday is, as I say, unlikely to inspire trust and confidence in the Company amongst the creditors.

8. At paragraph 51(e) of the Company's skeleton argument dated 17 November 2021 it was stated that: "*The Company has been consulting with bondholders on a regular basis and discussing plans to restructure the debt*" but no real detail was given. At paragraph 51(f) it was stated that: "*The creditors are on notice of the application for the appointment of provisional liquidators*". That notice went out to some creditors and placing agents last Friday for this Monday afternoon's hearing. That is woefully inadequate notice.

9. It is in these rather unsatisfactory circumstances that I adjourn the matters presently before the court (that is the winding-up petition and the application for the appointment of provisional liquidators) to 10am on Wednesday 1 December 2021.

10. The Company must forthwith notify all creditors of the adjourned hearing, the date and the time and indicate to them that the court has requested that the creditors make their views known by filing with the court and serving on the Petitioner's attorneys concise written submissions and in particular indicating whether they support, oppose or take a neutral stance in respect of the Company's application to appoint provisional liquidators for restructuring purposes and that should be done by 2pm on Monday 29 November 2021.

11. I also direct that the Company should provide to the Company's creditors copies of the documents filed with this court including pleadings, evidence, exhibits, skeleton argument, draft orders and all other documentation filed with the court. The creditors need to have that information to express their views on an informed basis. Moreover if the Hong Kong Court proceedings remain active then the Company should also share the documentation filed with this court with the Hong Kong Court.

12. If the Company wishes and is able to put more flesh on the bones of the restructuring proposals and to give an update as to the Hong Kong proceedings, it should do so by filing additional evidence before 2pm on Thursday 25 November 2021.

13. The Company must also before 2pm on Thursday 25 November 2021 file evidence which confirms and exhibits the documentation exhibited to the Written Resolution of the Directors of the Company dated 11 November 2021 (described in the Written Resolution

as "*a draft Affirmation of Dr Liang Guoxing*").

14. I should also record in order that the Petitioner may consider the position that, as would have been apparent from my exchanges with counsel, I have comity concerns in respect of the Hong Kong proceedings. I would be reluctant to in effect stay them without further detailed consideration but I keep a mind open to persuasion and will hear further argument on that issue at the adjourned hearing. It may be that I could, subject to considering the view of the creditors, either further adjourn until after 29 December 2021 when a winding-up petition in respect of the Company is before the Hong Kong Courts or I could appoint joint provisional liquidators but exclude any pre-existing Hong Kong proceedings from the stay. These points will have to be considered further and I stress that I keep a mind open to persuasion.

15. Those are the decisions I have arrived at this afternoon for the brief reasons I have specified.

16. The following Order was made:

(1) The hearing of the JPL Application be adjourned until 10am on 1 December 2021;

(2) All known creditors of the Company shall be given written notice of the adjournment and the return date (including the time of the hearing) specified at paragraph 1 of this Order forthwith;

(3) All known creditors of the Company shall be provided with copies of the documents filed with this Honourable Court in connection with the Petition and the JPL Application as soon as practicable;

(4) If Hong Kong winding-up proceedings with cause numbers HCCW 372 of 2021 and HCCW 385 of 2021 remain active, the Hong Kong court shall be provided with copies of the pleadings and all evidence filed by the Company with this Honourable Court;

(5) The Company shall file additional evidence by 2pm on 25 November 2021 to address at least the following points: (a) provide an update on any and all winding-up proceedings presented against the Company in Hong Kong; (b) provide further detail

in relation to the Proposed Restructuring Plan (as defined in the Second Affirmation of Dr. Liang Guoxing); (c) confirm and exhibit the documentation which was exhibited to the written Board Resolution dated 11 November 2021 (described in the written Board Resolution as "a draft affirmation of Dr. Liang Guoxing"); and (d) provide an explanation for the reference to "(*Provisional Liquidators Appointed*)" in the header of the announcement on the Hong Kong Stock Exchange dated 15 November 2021;

(6) Any creditors of the Company may file and serve on the Company's Cayman Islands attorneys (Conyers Dill & Pearman) concise written submissions by 2pm on 29 November 2021 which, in particular, indicate whether the creditor supports, opposes or remains neutral in relation to the JPL Application; and

(7) Costs shall be paid out of the assets of the Company.

THE HON. JUSTICE DOYLE
JUDGE OF THE GRAND COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 329 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF SILVER BASE GROUP HOLDINGS LIMITED

Appearances: Mr Jonathon Milne and Ms Róisín Liddy-Murphy of Conyers Dill & Pearman LLP for the Company

Before: The Hon. Justice David Doyle

Heard: 8 December 2021

Judgment Delivered: 8 December 2021

HEADNOTE

Appointment of light-touch provisional liquidators for restructuring purposes – importance of the laws of the place of incorporation of a company – the need to take into account the position of creditors – sections 95(1)(b) and 104 of the Companies Act (2021 Revision) – adjournment of winding up petition – winding up proceedings also filed in Hong Kong – comity concerns dealt with

JUDGMENT

Introduction

1. This judgment should be read in the light of the judgment I delivered on 22 November 2021.

2. I have considered the pleadings, the evidence, the skeleton arguments and the oral submissions of Mr Jonathon Milne who with Ms Róisín Liddy-Murphy appears today on behalf of Silver Base Group Holdings Limited (the "Company"). I am grateful to them for their helpful assistance to the Court. In allaying the concerns of the creditors and the Court they have displayed first class written and oral advocacy skills. No one has appeared today to oppose the relief requested by the Company.

3. I have however considered the views of the creditors which have been put before the court including the letters dated 29 November 2021 and 6 December 2021 from Katherine Chan Law Office for Mr WANG Jianfei a dissatisfied significant creditor of the Company, communications from Shao Bin, Mayfair & Ayers Financial Group Limited, Patrick Chu, Conti Wang Lawyers LLP, Fan Wu on behalf of his father, and numerous others.

The Law

4. I have considered the relevant statutory provisions including sections 95(1)(b) and 104 of the Companies Act (2021 Revision) (the "Companies Act").

5. I have considered the relevant local case law, emanating from the formidable judicial quartet of Justices Smellie, Kawaley, Segal and Parker including the following judgments:

    (1) Parker J in *CW Group Holdings Limited* (FSD; unreported judgment 3 August 2018);
    (2) Kawaley J in *ACL Asean Towers Holdco Limited* (FSD; unreported judgment 8 March 2019);

(3) Smellie CJ in *Sun Cheong Creative Development Holdings Limited* (FSD; unreported judgment 20 October 2020); and

(4) Segal J in *Midway Resources International* (FSD; unreported 30 March 2021).

The importance of the laws of the place of the Company's incorporation

6. The Company is incorporated under the laws of the Cayman Islands. I have full regard to the importance of the laws of the place of a company's incorporation and the international recognition of light-touch provisional liquidators appointed for restructuring purposes. See *The Law of Insolvency* 5th Edition (2020) Ian Fletcher at paragraph 30-054; *Dicey, Morris & Collins* on *The Conflict of Laws* (Fifteenth Edition) rules 175 and 179; Chief Justice Smellie in *Sun Cheong*; Harris J in *Re China Huiyan Juice Group Limited* [2020] HKCFI 2940 (19 November 2020) and Harris J in *Li Yiging v Lamtex Holdings Ltd* [2021] HKCFI 622.

7. Ian Fletcher puts it well at paragraph 30-054 when he refers to the long accepted fundamental principle that the law of the place of a company's incorporation is primarily, "possibly immutably", competent to control all questions concerning a company's initial formation and subsequent existence. Dicey Rule 179 sets out the common law and private international law position that the authority of a liquidator (and I would add a provisional liquidator) appointed under the law of the place of incorporation should be recognised in other jurisdictions.

8. Dicey Rule 175(2) under the heading "Corporations and Insolvency" citing at footnote 78 caselaw from as long ago as 1843 states:

> "All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

This fundamental principle has been etched on my mind ever since *Buckmaster and Moore*

v Fado Investments 1984 – 86 MLR 252 (in respect of foreign partnerships) – challenging experiences in court are always memorable.

9. Lord Sumption (who also sits in the Hong Kong Court of Final Appeal) at paragraph 23 of his much read judgment in *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36 also emphasised the importance, in international insolvency cases, of respecting and having full regard to the laws of the relevant company's place of incorporation.

10. I note Mr Milne's observation that the Cayman Islands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and that this court should place emphasis on the laws of the place of the Company's incorporation and in effect not be too influenced by the observations of Harris J in Hong Kong in respect of the laws of a company's centre of main interests.

11. Mr Milne is right to stress that the Cayman Islands is a jurisdiction of substance:

> "…the Cayman Islands is a highly sophisticated jurisdiction with a predictable and highly-regarded legal system. There are many reasons that Hong Kong-listed companies, in particular, choose to be incorporated in the Cayman Islands, such as:
>
> a. the essential basic company law framework is based on English law concepts covering the whole life cycle of the company from incorporation to dissolution. The statutory regime and corporate governance framework is modern and flexible, which enables companies to meet and adapt to the listing rule requirements of a major stock exchange;
>
> b. there is an appropriate balance under the Companies Act in relation to restructuring and insolvency issues, with officeholders and the Court ensuring careful regard to the interests of management and all stakeholders; and

c. incorporation and maintenance costs of a Cayman Islands company are relatively low. There are experienced practitioners in the areas of legal, corporate and accounting services for Cayman Islands companies located in Hong Kong."

12. The Cayman Islands is plainly a jurisdiction of substance which legitimately facilitates world trade and develops the common law to the great economic benefit of many jurisdictions worldwide. If higher authority is required to support that proposition one need only turn to Lady Arden's important lecture at The Peace Palace in The Hague (3 February 2020) on *The Judicial Committee of the Privy Council as an important source of financial services jurisprudence* which generously acknowledged the significant contribution of the Cayman Islands to such jurisprudence and its "importance in today's world in commercial terms", emphasising how the jurisdiction legitimately attracts "massive funds for investment" and how the determination of those weighty financial cases "inspires respect for the rule of law."

Hong Kong case law

13. In view of the Company's substantial connections with Hong Kong and other areas of the People's Republic of China I have considered some of the Hong Kong case law including:

(1) Deputy High Court Judge William Wong SC in *Moody Technology Holdings Limited (in provisional liquidation for restructuring purposes)* (12 March 2020);
(2) Harris J in *Re China Huiyan Juice Group Ltd* [2020] HKCF 1 2940;
(3) Harris J in *Li Yiqing v Lamtex Holdings Ltd* [2021] HKCFI 622 ;
(4) Harris J in *Re China Bozza Development Holdings Ltd* [2021] HKCFI 1235;
(5) Harris J in *Ping An Securities (Holdings) Ltd* [2021] HKCFI 651;
(6) Harris J in *Victory City International Holdings Ltd* [2021] HKCFI 1370; and
(7) Harris J in *China Oil Gangran Energy Group Holdings Limited* [2021] HKCFI 1592.

The initial lack of notice to creditors and comity concerns

14. I was initially concerned over lack of notice to the creditors and comity in respect of the Hong Kong proceedings. These two concerns have now been dealt with.

15. Firstly, I adjourned on 22 November 2021 to enable creditors to be given further notice. The initial adjournment was to 1 December 2021 and then a further adjournment to today 8 December 2021 to give the creditors more time to express their views.

16. Secondly, in relation to the comity concern Mr Milne has skillfully and pragmatically dealt with that concern in amended paragraph 4 of the latest draft Order. In effect the Hong Kong proceedings are carved out of the statutory moratorium if the Hong Kong Court sees fit to do so. Moreover it is open to any creditor to apply to this court seeking leave to proceed against the Company notwithstanding the appointment of the joint provisional liquidators ("JPLs").

Various other concerns and issues

17. In light of the opposition of numerous creditors I had concerns as to the viability of any restructuring proposals but again Mr Milne has skillfully and pragmatically allayed those concerns by including an amended paragraph 3(v) of the latest draft Order in effect requiring the JPLs to report to the court on the feasibility of a restructuring for the benefit of the Company's creditors.

18. I was also concerned that the original draft Order did not require the JPLs to consult with the Company's creditors. I see from paragraph 3(i) of the amended draft that there is now a provision giving the JPLs power to consult with the Company's creditors. I would expect the JPLs to exercise that power. Moreover paragraph 3(ii) now expressly includes a power for the JPLs to do all things necessary to implement the Restructuring Proposal not only in consultation with the board of directors of the Company but also "the Company's creditors".

19. A significant creditor has expressed concerns in respect of the Chairman of the Company. The JPLs under paragraph 3(ii) of the Order are given express power to monitor, oversee and supervise the board of directors of the Company (the "Board") and the continuation of the business of the Company under the control of the Board pending the implementation of the restructuring proposals. Again I would expect the JPLs to exercise that power and keep a close eye on the Chairman in light of the concerns expressed by the creditor. The JPLs have power under paragraph 3(v) to conduct investigations into the affairs of the Company and in particular in respect of three areas of specific concern. Moreover under paragraph 6 of the proposed Order there can be no payment or disposition of the Company's assets (including real and personal property) without the express written approval of the JPLs.

20. I should record that I am satisfied as to the identity of the proposed JPLs. Another creditor preferred others within Ernst & Young and R&H Restructuring (Cayman) Ltd who were stated to have more experience and resources but their consents to act were not filed and there was no good reason not to appoint the individuals proposed by the Company. I have no doubt as to their significant experience and resources. I considered the case law in this area including my judgment in *Global Fidelity Bank, Ltd (in voluntary liquidation)* (FSD; unreported judgment 20 August 2021) and was satisfied that there were no issues of lack of independence in respect of the JPLs.

21. I cannot see any prejudice to the creditors in appointing JPLs at this stage to monitor the Board, conduct investigations and to consult with creditors in respect of the feasibility of a debt restructuring plan and then to report to the court in that respect. The appointment will not stop the winding up proceedings in Hong Kong if the Hong Kong Court decides not to recognise the statutory moratorium in respect of any proceedings in Hong Kong. It will, of course, be entirely a matter for the Hong Kong Court as to what orders it makes in respect of any active proceedings before it involving the Company. Looking at the matter through Cayman Islands' eyes, in the judgment of this court, it would be sensible and appropriate for the Hong Kong Court to recognise and give assistance to the JPLs which

this court has appointed over a company incorporated under the laws of the Cayman Islands. I leave these matters however to the Hong Kong Courts having endeavoured to deal with the concerns previously expressed by Harris J.

22. It may be that in the future a detailed protocol can be arrived at for appropriate communications between this court and the Hong Kong Court when dealing with similar cases involving companies with connections to both jurisdictions but for the moment I endeavour to communicate my messages to the Hong Kong Court through this judgment.

23. I think it also sensible to adjourn the winding up petition in this jurisdiction to 10am on Friday 11 February 2022 with the JPLs to report, after consultation with the creditors, on the feasibility of a debt restructuring before 2pm on 27 January 2022. If such is not feasible then the court can make a winding up Order on the 11 February 2022.

Summary

24. In summary:

(1) I am satisfied that the Company has been duly authorised to present the winding up petition and the application to appoint JPLs. I considered Article 162(1) of the Company's Articles of Association and the resolutions passed by the Board. The Company was incorporated on 12 September 2007 prior to the 1 March 2009 date referred to in section 94(2) of the Companies Act so I also considered the rule in *Emmadart* [1979] 1 Ch 540 and the judgment of Smellie J (as he then was) in *Banco Economico S.A. v Allied Leasing and Finance Corporation* 1998 CILR 102.

(2) I have concluded that the Company is or is likely to become unable to pay its debts and that it intends to present a compromise or arrangement to its creditors. The section 104(3) conditions are met. My initial reservations have been dealt with by Mr Milne and I am now content to appoint JPLs for restructuring purposes. Moreover there is good reason to adjourn the winding up petition to give some breathing space in the best

interests of the creditors and to enable the JPLs to report back as to whether a restructuring is feasible;

(3) I have noted the concerns of Harris J expressed in the judgments I have referred to above. I have considered those concerns prior to deciding to appoint JPLs in this case. I have given the creditors an opportunity to be heard. I have ordered that the documents filed in these proceedings should be filed with the Hong Kong Court. In this case the Board has taken professional advice and sought the assistance of experts. There is a plan and information has been provided about the past and potential future of the Company. The Board are well aware that as the Company has entered the zone of insolvency focus moves to the best interests of the creditors. The JPLs will be able to consult with the creditors and endeavour to take matters forward in their best interests.

The Order

25. I make an Order substantially in terms of the amended draft filed yesterday such draft to include the further amendments I specified during my exchanges with counsel.

26. The following Order was made:

(1) Ms. CHAN Pui Sze and Ms. MAK Hau Yin, both of Briscoe Wong Advisory Limited and Mr. Martin Nicholas John Trott of R&H Restructuring (Cayman) Ltd, are hereby appointed joint provisional liquidators ("JPLs") of the Company.

(2) The JPLs shall not be required to give security for their appointment.

(3) The powers of the JPLs appointed pursuant to paragraph 1 above shall be limited to the following:

(i) to consult with the Company and the Company's creditors in respect of, and review, on an ongoing basis, all issues relating to the feasibility of a debt restructuring plan (the "Restructuring Proposal") as to be recommended by

the directors of the Company and the JPLs, including with respect to the necessary steps which need to be taken in order for the Restructuring Proposal to be successfully implemented to allow the Company to continue as a going concern;

(ii) to do all things necessary to implement the Restructuring Proposal in consultation with the board of directors of the Company (the "Board") and the Company's creditors;

(iii) to monitor, oversee and supervise the Board and the continuation of the business of the Company under the control of the Board pending the implementation of the Restructuring Proposal;

(iv) with the consent of the Board to do all acts and to execute in the name of and on behalf of the Company, all deeds, receipts and other documents and for that purpose to use, when necessary, the seal (if any) of the Company;

(v) for the purpose of reporting to the Court on the feasibility of a restructuring and for the benefit of the Company's creditors, to ascertain and conduct investigations into the affairs of the Company and its subsidiaries. Such investigations shall include, *inter alia*, an investigation into: (i) prepayments of approximately RMB534,191,000 (equivalent to approximately HK$652,034,000) to three purchase agents for the purchase of liquor products, of which approximately RMB164,691,000 (equivalent to approximately HK$201,022,000) was paid to a company controlled by the Chairman's brother; (ii) restrictions (if any) placed on the use of the Company's RMB cash reserves in the context of paying current debts owed to the Company's creditors located in Hong Kong, and the People's Republic of China and elsewhere; and (iii) the status of the Company's redemption of its investment in the collective investment scheme managed by Guotai Junan.

(vi) to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency.

(vii) to locate, protect, secure and take into their possession and control all assets and property within the jurisdiction of the courts of the Cayman Islands to which the Company is or appears to be entitled.

(viii) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of the courts of the Cayman Islands and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency.

(ix) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the JPLs consider appropriate for the purpose of advising or assisting in the execution of their powers and duties.

(x) seek recognition of the provisional liquidation and/or the appointment of the JPLs in any jurisdiction the JPLs consider necessary together with such other relief as they may consider necessary for the proper exercise of their functions within that jurisdiction, including but not limited to potential applications for recognition in Hong Kong and the People's Republic of China; and

(xi) to bring or defend legal proceedings and make all such applications to this Court whether in their own names or in the name of the Company on behalf of and for the benefit of the Company including any applications for:

(a) orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made by the JPLs to facilitate their investigations into the assets and affairs

of the Company and the circumstances which gave rise to its insolvency; and/or

(b) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.

(4) For the avoidance of doubt, for so long as provisional liquidators are appointed to the Company, pursuant to section 97(1) of the Companies Act and subject to the proviso below, no suit, action or other proceeding, including criminal proceedings, shall be proceeded with or commenced against the Company except with the leave of the Court and subject to such terms as the Court may impose. Provided however, this Order is made without prejudice to the jurisdiction of The High Court of the Hong Kong Special Administrative Region (the "Hong Kong Court") to determine whether to recognise the statutory moratorium under section 97(1) of the Companies Act, including in relation to extant winding-up proceedings presented in action HCCW 385 of 2021 which are pending before the Hong Kong Court.

(5) This Order, along with all other Orders, judgments and court filings in the Cayman Islands in this matter, shall be filed forthwith in electronic and hard copy form with the Hong Kong Court under cover of a letter which makes reference to all extant proceedings concerning the Company and/or subsidiaries of the Company currently before the Hong Kong Court.

(6) For the avoidance of any doubt, no payment or disposition of the Company's assets (including real and personal property) or any transfer of shares or any alteration in the status of the Company's members shall be made or effected without the express written approval of the JPLs but no such payment or other disposition or transfer of shares or alteration in the status of the Company's members made or effected by or with the authority or approval of the JPLs in carrying out their duties and functions and in the exercise of their powers under this Order shall be avoided by virtue of the provisions of section 99 of the Companies Act.

(7) In the event that a winding-up order is made against the Company by this Court, any fees and expenses of the JPLs, including all costs, charges and expenses of any attorneys and all other agents, managers, accountants and other persons that they may employ, which are payable in accordance with the terms of the orders which may be made by this Court, and which are outstanding at the date of the winding-up order, shall be treated as fees and expenses properly incurred in preserving, realising or getting in the assets of the Company for the purposes of Order 20 of the Companies Winding Up Rules, 2018.

(8) Save as are specifically set out herein:

(a) the JPLs will have no general or additional powers or duties with respect to the property or records of the Company; and

(b) the Board shall continue to manage the Company's affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association, provided always that, should the JPLs consider at any time that the Board is not acting in the best interests of the creditors of the Company, the JPLs shall have the power to report same to this Court and seek such directions from this Court as the JPLs consider are appropriate.

(9) The Company shall provide the JPLs with such information as the JPLs may reasonably require in order that the JPLs should be able properly to discharge their functions under this Order and as officers of this Court.

(10) The powers exercisable by the JPLs pursuant to this order may be exercised jointly and severally.

(11) The remuneration and expenses of the JPLs, including the expenses associated with the exercise of their powers, shall be paid out of the assets of the Company subject to approval of the Court.

(12) The JPLs, the Company and any creditors of the Company do have liberty to apply.

(13) The winding up petition presented by the Company on 11 November 2021 be adjourned until 10 am on Friday 11 February 2022.

(14) The JPLs provide their report on the status of their investigations and the feasibility of a debt restructuring process to this Honourable Court, with a copy served upon the Company's creditors and filed with the Hong Kong Court before 2 pm on 27 January 2022.

(15) No order as to costs.

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THE HON. JUSTICE DOYLE
JUDGE OF THE GRAND COURT

HCCW 385/2021 & HCMP 859/2022
(HEARD TOGETHER)
[2022] HKCFI 2386

HCCW 385/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

COMPANIES WINDING-UP PROCEEDINGS NO 385 OF 2021

IN THE MATTER of section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

and

IN THE MATTER of Silver Base Group Holdings Limited （銀基集團控股有限公司）

AND

HCMP 859/2022

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 859 OF 2022

IN THE MATTER of Silver Base Group Holdings Limited (In Official Liquidation in the Cayman Islands)

CHAN PUI SZE, MAK HAU YIN, MARTIN NICHOLAS JOHN TROTT AS THE JOINT OFFICIAL LIQUIDATORS OF SILVER BASE GROUP HOLDINGS LIMITED (IN OFFICIAL LIQUIDATION IN THE CAYMAN ISLANDS) Applicants

(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 July 2022

Date of Decision: 27 July 2022

Reasons for Decision: 5 August 2022

R E A S O N S F O R D E C I S I O N

1. On 21 October 2021 Wang Jianfei issued a petition to wind up the Company on the grounds of insolvency. His Petition was amended on 16 December 2021. The Company is incorporated in the Cayman Islands and its shares were listed on the Main Board of the Stock Exchange of Hong Kong ("**HKSE**"). The Company applied successfully to be put into soft-touch provisional liquidation in the Cayman Islands on 11 November 2021. This was intended to facilitate a restructuring of its debt. The restructuring was unsuccessful. On 5 May 2022 the Company was put into liquidation in the Cayman Islands and liquidators appointed ("**Cayman Liquidators**"). The Hong Kong Petition is now unopposed. Initially the Cayman Liquidators applied for recognition in Hong Kong ("**Recognition Application**"). They no longer do so and take the view that the Company should be wound up here; although ideally the Hong Kong liquidators will be the same individuals as the Cayman Liquidators for reasons of economy and efficiency. I will make no order in respect of the Recognition Application with no order as to costs.

2. As the matter has developed there are very limited issues for the Court to consider. As I have already explained, the Petition is no longer contested. As the Company is incorporated in the Cayman Islands it is necessary for it to satisfy the three core requirements[1] which guide the Court in determining whether or not it should exercise its statutory discretion pursuant to *section 327* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, which permits the court to order the winding up in Hong Kong of a foreign incorporated company. The three criteria in my view are clearly satisfied in the present case. **First**, the Company was listed in Hong Kong and this is enough to constitute sufficient connection. **Secondly**, there is a reasonable prospect of a winding up in order in Hong Kong benefiting the Petitioner. There are clearly assets here including cash in bank. The fact that the Cayman Liquidators consider it necessary that there is a liquidation in Hong Kong supports this conclusion. **Thirdly**, there are creditors in Hong Kong other than the Petitioner over whom the Court can exercise jurisdiction. I will, therefore, make the normal winding up, order one set of costs for the supporting creditors and also order that the Cayman Liquidators' costs be paid out of the assets of the Company.

3. There is one other matter that I will comment on, although it is not necessary for me to decide it. The Cayman Liquidators' decision not to pursue their Recognition Application is partly a consequence of my recent decision in *Re Global Brands Holding Ltd*[2]. I held that in future foreign liquidators should be recognised and assisted if they were appointed in a company's centre of main interests ("**COMI**") rather than the place of incorporation, unless they happened to be the same. The

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1 *Shandong Chenming Paper Holdings Ltd. v Arjowiggins HKK 2 Limited* [2022] HKCFA 11, [3].
2 [2022] HKCFI 1789.

Cayman Liquidators recognise that the Company's COMI is not in the Cayman Islands. Initially they took the view that they could, however, properly seek limited recognition, what I call in *Global Brands* managerial recognition, of their authority as the duly appointed agents of the Company appointed in accordance with the law of its place of incorporation, which established principles of private international law recognise determines matters of internal management and authority to represent a foreign company. In *Global Brands* the company was not in liquidation in Hong Kong. It seems to me that if a foreign company is in liquidation in Hong Kong then the principle I have just explained may be qualified. A number of matters will need further consideration in the future:

(1) What, if any, recognition should be granted to a foreign liquidator appointed in the place of incorporation (if it is not the COMI) if the company is wound up in Hong Kong? In such circumstances should the Hong Kong court proceed on the basis that within its jurisdiction only the Hong Kong appointed liquidator is the duly authorised agent of the company?

(2) It is commonly assumed that if a company is in liquidation in its place of incorporation and wound up in another jurisdiction, the latter is to be treated as an ancillary liquidation[3]. Should this be the case if the place of incorporation is not the COMI and the reality is, as is commonly the case with letter box jurisdictions, that a company's connection with it is formal and it has no assets, creditors or debtors located there? There is no practical reason for requiring realisations to be transferred to the liquidators appointed in the place of incorporation if all the creditors, or the large majority, are

[3] *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, Sir Richard Scott VC, 246C-F; *Re Up Energy Development Group Limited* [2022] HKCFI 1329, [33]–[34].

located in Hong Kong and the Mainland. On the contrary it just increases costs and delay. It also needs to be borne in mind that proceeding on the basis that the liquidation in the place of incorporation (which is not COMI) is the main liquidation involves recognising it; which is inconsistent with (1).

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Edward K H Ng, instructed by Katherine Chan Law Office, for the Petitioner

Mr Jason Yu, instructed by Karas LLP, for the joint official liquidators

Mr Look Chan Ho, instructed by Patrick Chu, Conti Wong Lawyers LLP, for the Supporting Creditor (Brender Services Limited)

H Y Leung & Co LLP, for the supporting creditors (Wang Qi & 王建東), did not appear

Attendance of D S Cheung & Co, for the company, was excused

Attendance of Gall, for the supporting creditor (Zhao Hong Li), was excused

Attendance of Li, Kwok & Law, for the supporting creditor (Huang Zeming), was excused

Attendance of Patrick Chu, Conti Wong Lawyers LLP, for the supporting creditor (Crosby Securities Limited), was excused

Attendance of the Official Receiver was excused

HCCW 263/2020
[2021] HKCFI 622

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 263 OF 2020

IN THE MATTER of section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

and

IN THE MATTER of the Lamtex Holdings Limited（林達控股有限公司）(Company No F 8057)

BETWEEN

LI YIQING（李益清）	Petitioner
and	
LAMTEX HOLDINGS LIMITED（林達控股有限公司）	Respondent

Before: Hon Harris J in Court

Date of Hearing: 28 January 2021

Date of Decision: 11 March 2021

D E C I S I O N

Introduction

1. The Petition before me, which was issued on 20 August 2020, gives rise to an issue of some importance in the development of the principles, which guide the Hong Kong court in dealing with cross-border insolvency and, in particular, cross-border debt restructuring. The company which is the subject of the Petition, Lamtex Holdings Limited, ("**Company**") is incorporated in Bermuda and listed on the Main Board of The Stock Exchange of Hong Kong Limited ("**SEHK**"). Until it encountered the problems that have caused its current financial difficulties, which it is not in dispute have rendered it insolvent, it carried on a series of unrelated businesses in the Mainland and Hong Kong: loan financing, securities brokerage, trading and manufacturing electronic businesses in the Mainland and Hotel operations also in the Mainland.

2. It is subject to two winding-up petitions. The present Petition has been issued by Li Yiqing, whose undisputed debt of HK$10,200,000 as at 2 July 2020 arises under a series of bonds governed by Hong Kong law issued very largely to individuals resident in the Mainland. The attraction of the bonds is that they satisfy Hong Kong Immigration's investment requirements and are capable of supporting an application for the right to reside in the SAR. Six other bond holders support Ms Li's Petition for an immediate winding up order. No creditors of the Company oppose Ms Li's application.

3. On 30 October 2020 the Company presented a petition in Bermuda seeking a winding up order and also an order appointing Osman Mohammed Arab and Wong Kwok Keung of RSM as provisional liquidators for restructuring purposes. On the same day the Company issued an application for Messrs Arab and Wong's appointment as

soft-touch provisional liquidators ("**JPLs**"). On 10 November 2020 the Chief Justice granted that application. The application was unopposed, although given the short notice of the application given to the bondholders, who I am told by the JPLs constitute nearly the Company's entire debt, and the fact that they are individuals resident in the Mainland, this is unsurprising particularly given the complications created by Covid-19.

4. A letter of request seeking the recognition and assistance of the JPLs by the High Court of Hong Kong was issued by the Chief Justice. On 23 November 2020 I granted the application made by the JPLs for their recognition and assistance in progressing a restructuring of the Company's debt.

5. What I am required to do is to determine whether to put the Company into immediate liquidation in Hong Kong or to adjourn the Petition in order to allow the Company and the JPLs the opportunity to restructure the debt. In practice I understand that this is likely to involve the Company's principal shareholder finding another investor who with him will subscribe for new shares in sufficient value to repay the bondholders. I will explain how the attempts to achieve this have developed later in this Decision.

6. It is not in dispute that Ms Li and the supporting creditors are owed the sums they claim. Neither is it in dispute that the Petition satisfies the three core requirements that guide the court in determining whether to exercise its discretionary jurisdiction to wind up a company incorporated in a foreign jurisdiction. Ms Li is on the face of the matter entitled to a winding up order *ex debito justitae* unless the Company can demonstrate

some relevant and persuasive reason to adjourn the Petition. Various issues require consideration in order to determine the Petition:

(1) The private international law principles governing recognition of a foreign winding up order.

(2) The impact of a winding up order on a company's assets and their distribution during a liquidation.

(3) Recognition and assistance of a foreign insolvency process generally at common law.

(4) How a dispute over which jurisdiction is to be the primary one to conduct an insolvency process is to be resolved.

(5) The application of the principles applied to the facts of this case.

Recognition of a foreign winding up order

7. A winding up in a company's country of incorporation will as a matter of Hong Kong rules of private international law be given extra-territorial effect in Hong Kong [1]. This is a consequence of the more general established principles of private international law that apply to foreign companies. This is demonstrated by rules 175 to 179 in *The Conflict of Laws*, Dicey, Morris and Collins (15th ed.,). These rules recognise that, as one would expect, generally matters concerning the constitution and management of the affairs of a foreign company are determined by the laws of the place of its incorporation. The authors of *Conflict of Laws* explain in [3-102] of the 2nd volume that Rule 179 is justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation and in footnote 430 various authorities are cited as establishing this principle. Consistent with this, as a general principle the domiciliary

[1] *Re International Tin Council* [1987] Ch. 419, Millet J 446.

law of a company is the appropriate law and system under which to liquidate a company [2]. *Section 327* of the *Companies (Winding Up and Miscellaneous Proceedings) Ordinance*, Cap 32 ("**Ordinance**"), which gives the Court of First Instance the jurisdiction to wind up a company incorporated in a foreign jurisdiction, is a statutory exception to this principle. The authors of the Conflicts of Laws in [3-102] go on to explain in the same paragraph that "*If under that law [the law of the place of incorporation] a liquidator is appointed to act then his authority should be recognised here*".

8. From this foundation the common law has developed a doctrine commonly referred to as "modified universalism", which guides courts determining cross-border issues arising in transnational insolvencies. Its principal feature is the requirement that so far as consistent with justice and public policy the courts in the local jurisdiction (in this case Hong Kong) cooperate with the courts in the country of the principal liquidation to ensure that all of a company's assets are distributed to its creditors under a single system of distribution [3]. The present case requires consideration of the extent to which the principles of private international law and modified universalism require primacy to be given to a company's place of incorporation in the process of determining which single system is to be recognised by courts in different jurisdictions dealing with transnational insolvencies. The facts of this case require consideration of a refinement of that issue, namely, whether primacy is to be accorded to the proceedings in the place of incorporation if it is not a winding up, but a soft-touch provisional liquidation. That issue itself requires further

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2 *The Law of Insolvency*, 4th ed., Fletcher, [30-007] and the authorities referred to in the relevant footnotes.

3 See the discussion in [9]–[10] of *Joint Official Liquidators of A Co v B* [2014] 4 HKLRD 374 and the authorities referred to in those paragraphs.

refinement as the local jurisdiction (Hong Kong) is the one which for the purposes of liquidation of the Company's assets and distributions to creditors the Company has the closest connection.

Effect of a winding up order on a company's assets

9. I have already explained that under Hong Kong rules of private international law a winding up in a company's place of incorporation will be given extra-territorial effect in Hong Kong. The effect extends to the distribution of a company's assets to its creditors.

10. The making of a winding up order divests a company of its beneficial ownership of its assets and subjects to them to a statutory trust for their distribution in accordance with the rules of distribution in the *Ordinance*. This applies to assets wherever they are located. This follows from the language of *section 197* of the *Ordinance* [4]. As Lords Sumption and Toulson explain in *Stichting Shell* [5] this "…*reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. They will fall to be distributed in the BVI liquidation pari passu among unsecured creditors and, to the extent of any surplus, among its members*."[6]

11. Their Lordships continue:

> "15. The necessarily excludes a purely territorial approach in which each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction. The lex situs is of course relevant to the question what assets are truly part of the insolvent estate. It will generally determine whether the

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4 See in relation to the equivalent English provision *Stichting Shell Pensioenfonds v Krys* (PC) [2015] AC 616, Lord Sumption & Lord Toulson [14].

5 *Ibid*.

6 *Ibid*.

> company had at the relevant time a proprietary interest in an asset, and if so what kind of interest. Thus, if execution is levied on an asset of the company within the territorial jurisdiction of a foreign court before the company is wound up, it will no longer be regarded by the winding up court as part of the insolvent estate. But short of a transfer of a proprietary interest in the asset prior to the winding up order, it is generally for the law of that jurisdiction to determine the distribution of the company's assets among its creditors and members, at any rate where the company is being wound up in the jurisdiction of its incorporation. In England and the BVI the court may, and commonly does, assert dominion over the local assets of an insolvent foreign company by conducting an ancillary winding up. But it does so in support of the principal winding up, and so far as it can in such a way as to ensure that creditors and members are treated equally regardless of the location of the assets…"

12. As a consequence the court may intervene to enjoin a creditor who commences proceedings in another jurisdiction from continuing with them if they will achieve a result which will interfere with the statutory scheme for distribution of assets [7]. The court acts in such cases in the interests of the general body of creditors. Their Lordships continue "*In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends on its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent's domicile in which that result can be achieved. The alternative is a free-for-all in which the distribution of assets depends on the adventitious location of assets and the race to grab them is to the swiftest , and the best informed, best resourced or best lawyered*" [8]. However in order for the court to be able to intervene the creditor must be subject to the *in personam* jurisdiction of the court of the place of incorporation and if the creditor is a foreign entity it will have

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7 *Ibid*, [18]–[24].
8 *Ibid*, [24].

to have taken some steps to submit to that jurisdiction. In the present case there is no suggestion that the Petitioner has submitted to the jurisdiction of the Bermuda court and could be enjoined in Bermuda from taking action to interfere with the insolvency process in Bermuda.

13. This principle suggests that the place of incorporation should, viewed from the perspective of Hong Kong law, generally be the system of distribution and a winding up of a company's assets in Hong Kong is ancillary to it.

Recognition of foreign insolvencies at common law

14. As Lord Collins explains in [21]–[22] of *Rubin v Eurofinance SA* [9] jurisdiction in international bankruptcy has been the subject of discussion and debate since the late 19th century. In the case of personal bankruptcy the significance of domicile was considered and determined as early as 1764 in *Solomon v Ross* [10], in which it was held that there should be one process of distribution of a bankrupt's property, and that it should be administered by the bankrupt's place of domicile. The Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers* [11] explains the significance of the place of incorporation when considering whether a foreign insolvency process should be recognised at common law. In [19] Lord Sumption explains modified univeralism by quoting [29]–[33] of Lord Collins decision in *Rubin v Eurofinance SA* [12]:

> "29. Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element.

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9 [2013] 1 AC 236.
10 (1764) 1H BI 131N.
11 [2015] AC 1675.
12 *Ibid*.

The underlying principle has been stated in different ways: 'recognition … carries with it the active assistance of the court': In *re African Farms Ltd* [1906] TS 373, 377; 'This court … will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11': *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.

30. In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:

> 'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention… It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'

31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there…

33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf In *re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include In *re*

> *Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company."

15. In Lord Collins own judgment in *Singularis* his Lordship in explaining how local statutory powers and the common law may be used in aid of foreign insolvencies also says this:

> "52. In my judgment in *Rubin v Eurofinance SA*, at para 29, I quoted what Millett LJ had said in *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827:
>
> > 'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention… It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'
>
> …
>
> 54. Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33. They include (subject to what is said below) In *re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2

> HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).
>
> …
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> 58. A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation. In *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 Sir Richard Scott V-C conducted an exhaustive analysis of the cases on ancillary liquidations, and concluded (at p 246): (1) Where a foreign company was in liquidation in its country of incorporation, a winding up order made in England would normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England would not be ancillary in the sense that it would within the power of the English liquidators to get in and realise all the assets of the company worldwide: they would necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it would be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England would be ancillary in the sense, also, that it would be the liquidators in the principal liquidation who would be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which was brought before the court."

16. These decisions establish that so far as the common law in England is concerned recognition is limited to liquidators appointed in a company's place of incorporation. This is consistent, in my view, with the principles I have described in [7]–[13] and the significance they give to a collective insolvency process commenced in a company's place of incorporation. However, not all jurisdictions adopt the same approach to recognition as the English courts and are willing to countenance recognition of liquidations commenced in jurisdictions other than that of the place of incorporation. This is a consequence of local statutory

provisions, in particular the incorporation of the *UNCITRAL Model Law on Cross-Border Insolvency* ("**Model Law**") into the law of the local jurisdiction, and partly the common law developing differently: in particular in Singapore.

17. Prior to Singapore adopting the Model Law, which generally treats a company's centre of main interest ("**COMI**") as the determinant of whether or not a liquidation should be recognised as the relevant foreign main proceedings for the purposes of recognition and enforcement, the courts of Singapore had to rely on the common law in order to grant orders assisting foreign liquidators. In *Opti-Medix Limited* [13] Abdullah JC considered whether the court's recognition and assistance of foreign liquidators should be limited to office holders appointed in a company's place of incorporation. Abdullah JC acknowledges that the English position limits recognition to liquidators appointed in the place of incorporation [14]. However, the Judge goes on to suggest in the following paragraphs that this approach does not sit well with the common commercial practice in jurisdictions like Hong Kong and Singapore of using companies incorporated in jurisdictions other than their COMI citing Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* [15], whose views were later rejected in *Rubin v Eurofinance*.

> "19. In *HIH* [2008] 1 WLR 852, para 30, Lord Hoffmann said:
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> > 'The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the

[13] [2016] SGHC 108.
[14] [20] referring to the passages of Lord Collins in *Rubin v Eurofinance* that I have quote in [15].
[15] [2008] 1 WLR 852, [31].

> country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.'

And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc ('Cambridge Gas')* [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

> 'The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.'

20. The US Bankruptcy Court accepted in In *re Maxwell Communication Corpn* (1994) 170 BR 800 (Bankr SDNY) that the United States courts have adopted modified universalism as the approach to international insolvency:

> 'the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.'"

18. Abdullah J agreed with passages from *Cross-Border Insolvency* by Tom Smith QC that the authorities do not support the restrictive approach to development of the common law to permit recognition of insolvency proceedings taking place in jurisdictions other than the place of incorporation and concluded that in Singapore the common law did permit recognition of insolvency proceedings in a company's COMI [16] if it is different from the place of its incorporation.

19. As the increasing number of applications in Hong Kong for recognition and assistance illustrate it is common for business people in

[16] It is not necessary for the purposes of this decision to delve into what constitutes COMI.

Hong Kong to use offshore companies [17]. The owners of such companies and the businesses they operate have no connection with the offshore jurisdiction. Their COMI is likely to be in Hong Kong or in the Mainland. In my view it is becoming increasingly clear that the restricted view of recognition and assistance explained in the judgments of Lord Sumption and Lord Collins does not serve Hong Kong well. It is a common feature of the corporate structure of Hong Kong and Mainland business groups that their holding companies are incorporated in an offshore jurisdiction with whom they have no connection other than registration. These jurisdictions have been described by various courts as "letterbox" jurisdictions reflecting the common absence of any connection other than registration with the offshore jurisdiction. As far as I am aware the term was first used by the European Court of Justice in *In re Eurofood IFSC Ltd* [18] in the context of an assessment of whether or not the presumption in the Community legislation that COMI is in the location of registration had been rebutted and also the process of determining COMI under the EU Insolvency Regulation. The relevant passages are at page 542 [34]-[35]:

> "It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the member state in which its registered office is situated."

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[17] I have dealt with 20 applications for recognition and assistance from companies incorporated in offshore jurisdictions since May 2020 when the High Court reopened after the end of the General Adjournment period necessitated by Covid-19. These have nearly all been Mainland business groups listed on the SEHK.

[18] [2006] Ch 508.

20. We find a similar characterisation of an offshore company by the US Bankruptcy Court in the context of determining COMI under Chapter 15 of the US Bankruptcy Code. In *Creative Finance Ltd* [19] Judge Gerber of the United States Bankruptcy Court for the Southern District of New York refers to the British Virgin Islands as a "letterbox jurisdiction", and consequently not normally eligible for recognition under Chapter 15. The relevant passages are at page 5:

> "And while a COMI can (and not infrequently does) change from the jurisdiction in which a foreign debtor actually did business to a 'letterbox' jurisdiction, it can do so only where material activities have been undertaken in the jurisdiction in which the foreign proceeding was filed—thus providing a meaningful basis for the expectations of third parties …….. Though they did most of their business in the U.K. and suffered entry of a judgment there, and though their operations were directed out of Spain and Dubai, the Debtors were organized under the law of a letterbox jurisdiction—the British Virgin Islands—though they did not do business there..."

21. In *re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.* [20], Judge Lifland denied recognition because the insolvency practitioners of the company, which was incorporated in the Cayman Islands by whose court they were appointed, failed to demonstrate that the company's COMI was located there. Subsequent to Bear Stearns, In *re Basis Yield Alpha Fund (Master*[21]*)*, Gerber J. similarly rejected an application for recognition by insolvency practitioners appointed in Cayman where the company was incorporated, finding material issues of fact as to the propriety of foreign "main" recognition (notwithstanding the section 1516 presumption) with respect to Cayman liquidation proceedings where recognition was sought virtually immediately after the filing of the proceedings in the Cayman Islands. In each of these cases, the

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19 Case No. 14-10358 (REG) 13 January 2016.
20 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd* 389 B.R. 325 (S.D.N.Y. 2008) (Sweet J.).
21 381 B.R. 37 (Bankr. S.D.N.Y. 2008).

Cayman Islands is characterised as a letterbox jurisdiction. The evidence showed (or at least strongly suggested) that the foreign debtors had been organized under Cayman law for tax or regulatory reasons, had principal places of business elsewhere in the world before their Cayman filings and had done little or no business in the Cayman Islands before U.S. recognition was sought thus impairing the U.S. courts' ability to find that the debtors' COMIs had shifted from the nations where they previously did business to the Cayman Islands. I understand that since *Bear Stearns* and *Basis Yield* were decided, foreign representatives from jurisdictions such as the Cayman Islands and BVI have increasingly frequently filed their U.S. chapter 15 cases only after they have undertaken substantial work in the offshore jurisdictions in order to address this problem.

22. It is becoming increasingly apparent that it is desirable, and it might reasonably be suggested essential, that the Hong Kong courts are able to deal with recognition and assistance using methods that are consistent with commercial practice in the SAR and the Mainland. In response to suggestions for legislation to address this subject, it has been the Government's position that for the time being it is a matter for the courts of Hong Kong to address using the techniques available at common law. The current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation. In my view we have reached the stage at which this question needs to be reconsidered at there is much in my view to be said in support of Abdullah J's conclusion that the common law in this area contains sufficient flexibility to develop so as to be consistent with commercial practice and there is nothing in principle preventing recognition of liquidators appointed in a company's COMI or a jurisdiction with which it has a sufficiently strong connection to justify recognition, just as the

Hong Kong court will exercise its discretion to wind up a foreign incorporated company if the connection between it and Hong Kong is substantial and the other core requirements are satisfied [22]. It might, I appreciate, be objected that there is a material difference in the case of the jurisdiction to wind up a foreign incorporated company, namely, the power is expressly conferred by statute. This takes me back to *Singularis* [23].

23. In *Singularis* [24] the Privy Council considered the limits on the proper development of the common law to address issues arising in cross-border insolvency. As Lord Sumption states in [19] "*The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise*."

24. Lord Collins in the introductory section of his judgment says this in [38]:

> "In my judgment the answer to the present appeal is to be found in the following propositions. First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy 'as if' the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case."

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22 See the authorities discussed in *Re China Huiyuan Juice Group Limited* [2020] HKCFI 2940, [18]–[29].

23 *Supra*, [11].

24 *Supra*, [11].

25. Lord Collins expands on this summary in [65]–[69]. In [70] Lord Collins notes that how, if at all, the common law as it applies to recognition and assistance of foreign liquidators should be developed was not the issue on the part of the appeal under consideration, which as summarised in the first holding in the headnote was "*...that there was a power at common law to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers by ordering the production of information in oral or documentary form which was necessary for the administration of a foreign winding up, but the power was not available to enable them to do something which they could not do under the law by which they had been appointed; and that, although the fact that express provision was made in Bermuda for the powers exercisable on the winding up of companies to which the Companies Act 1981 applied did not exclude the use of common law powers in relation to other companies which lay outside the scope of the statute altogether it was not a proper exercise of the power of assistance for the Bermudan court to make the order sought by the liquidators since the material which they sought in Bermuda was not obtainable under the domestic law of the court which had appointed them*". As Lord Collins notes in [70] the issue before the court was "*... whether, as the liquidators argue, legislation may be extended by the judiciary to apply to cases where the legislature has not applied it. It raises a much more radical question than the familiar question whether a common law rule should be extended or developed or whether the extension or development should be left to Parliament*."

26. As I have already observed Hong Kong has no legislation dealing with recognition of foreign insolvencies. Issues such as recognition of foreign soft-touch provisional liquidation do not involve using the common law to extend legislation. In Hong Kong it is purely a

matter of common law. *Singularis* is authority that the common law generally permits recognition and assistance of foreign liquidations. The issue I am currently considering is whether the common law of Hong Kong should be extended to permit recognition of insolvencies in places other than a company's place of incorporation and in particular in which its COMI or something similar is to be found. I can see no doctrinal reason why it should not be.

27. This, I recognise, is tangential to the issue I am considering, but if circumstances justify, as in my view they probably do, accepting the location of COMI as a basis for recognition it suggests that where, as in the present case, there is a contest for recognition between insolvency proceedings in the place in which a company's COMI is located and in the company's place of incorporation there is less reason to give primacy to the place of incorporation than the principles of private international law and the effect of a winding up order on the distribution of a company's assets might suggest. I have already illustrated in [20] that in a jurisdiction (New York), which applies the Model Law such a contest is likely to be resolved in favour of the place in which COMI is located. If the place of incorporation is an offshore jurisdiction in most cases this is likely to better reflect the reality, namely, that a company's assets, management and creditors have little connection with the place of incorporation and it is more efficient and effective for an insolvency process to be managed out of the location of COMI.

28. Ms Cheung suggested that the principles of modified universalism militated in favour of staying local (Hong Kong) proceedings in favour of foreign proceedings opened in the place of incorporation in order to preserve unitary global proceedings. This may be so in many cases,

but not so where the foreign proceedings are soft-touch provisional liquidation of the type in the present case, which involves a technique developed in Hong Kong to circumvent the problems caused by the Hong Kong Court of Appeal's decision in *Re Legend International Resorts Limited* [25] and the soft-touch provisional liquidation is managed out of Hong Kong. In other words, we are not here considering, which of two jurisdictions, in both of which are located a company's creditors and assets, should be the jurisdiction controlling the system for distributions to creditors. There is no dispute that any restructuring will involve a Hong Kong scheme of arrangement to which any scheme in Bermuda will in practice be ancillary. The reality will be that if I adjourn the Petition and grant the JPLs the recognition and assistance they request the work that they undertake will take place in Hong Kong. This is apparent from the fact that two of the three JPLs are Hong Kong liquidators and it is clear from their evidence that their work is being undertaken here and involves prospective investors from Hong Kong or the Mainland.

29. In a recent judgment of in the Financial Services Division of the Grand Court of the Cayman Islands in *Re Sun Cheong Creative Development Holdings Limited* [26] Chief Justice Smellie sets out the principle applicable under Cayman Law to recognition and assistance. They can be summarised as follows:

(1) All other things being equal, the jurisdiction to assume the role of primary insolvency proceeding will generally be

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[25] [2006] 2 HKLRD 192. See also the decision in *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165, which was the first case in Hong Kong in which a foreign incorporated listed company was put into soft-touch provisional liquidation in its place of incorporation (Bermuda) and the provisional liquidators introduced a scheme of arrangement in Hong Kong. See also *Re The Joint and Provisional Liquidators of Hsin Chong Group Holdings* [2019] HKCFI 805 and *The Joint Provisional Liquidators of Moody Technology Holdings Ltd* [2020] HKCFI 416, which discuss and conclude that the court can recognise and assist soft-touch provisional liquidators appointed to introduce a scheme of arrangement in Hong Kong.

[26] FSD 169 of 2020, 20 October 2020.

presumed to be the place of incorporation of the company. As such, the starting point would be for the company to be wound up by, or reorganized under the supervision of the court of the place of incorporation, unless there are compelling reasons justifying the displacement of the court of the place of incorporation as the primary jurisdiction: [6].

(2) The Cayman court had acknowledged foreign courts to have assumed the role of primary insolvency proceedings in respect of the Cayman Islands incorporated companies in the limited situations where (i) there is a "*particularly strong nexus*" between the company and the foreign jurisdiction such that the legitimate expectation of interested parties as to the locus of the primary insolvency proceedings has shifted to that foreign jurisdiction; (ii) the foreign court had already appointed officer seeking to effect a restructuring for the benefit of stakeholders; and (iii) there were no competing proceedings in the Cayman Islands: [7].

(3) It is not the practice of the Cayman court to defer automatically to winding up proceedings begun in a foreign jurisdiction simply because a petition was presented there first in time. Instead, the Cayman court will consider on a case by case basis whether it is satisfied that there is a genuine intention on the part of the company to present a plan of reorganisation in the Cayman Islands for the benefit of the company's body of creditors: [8].

(4) The Cayman court will be slow to give primacy to pure foreign winding up proceedings in respect of a Cayman Islands company where it is satisfied that there is an intention on the part of the company to present a plan of reorganisation in the Cayman Islands for the benefit of its creditors. On the other hand, the Cayman court will be more likely to recognise

> foreign insolvency proceedings over a Cayman Islands company where the purpose is to facilitate a restructuring or otherwise avoid the need to wind up the company: [56].

30. The 3rd and 4th principles suggest that the Cayman court's readiness to recognise a foreign insolvency processes may be limited to a foreign restructuring process. With the limited exception discussed in *Re China Solar Energy Holdings Ltd (No 2)*[27] involving provisional liquidators appointed on conventional asset protection grounds being granted after appointment additional powers to restructure a company's debt normally through a scheme of arrangement, there is no insolvency process in Hong Kong for reorganisation, to use the Chief Justice's term. Occasionally attempts at reorganisation are made after winding up has been ordered using a scheme of arrangement, but currently this is rare. Either debt can be restructured before an order to wind up a company is made or liquidation takes place. This is largely a consequence of nearly all restructuring in Hong Kong, which involves the court involving listed companies. It was the practical imperative of restructuring listed companies out of provisional liquidation that drove the development of what is referred to as the "*Z-Obee*"[28] technique.

31. A reluctance on the part of an offshore jurisdiction to recognise a Hong Kong winding up order if the company is in local soft-touch provisional liquidation might, depending on the circumstances, seriously impede a Hong Kong liquidation of a company, which sits, as is common, at the apex of a group, whose principal assets and operations are in the Mainland and owned by Mainland subsidiaries, which are in turn

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27 [2018] 2 HKLRD 338.
28 See footnote 25.

owned by intermediate subsidiaries incorporated in other offshore jurisdictions. A common structure is a Cayman incorporated holding company, which owns intermediate subsidiaries incorporated in the British Virgin Islands, which own the Mainland subsidiaries. As I discuss in detail in *China Huiyuan* [29], in cases in which a listed company's business is in the Mainland it may be necessary because of the common structure of such groups for the holding company, if it is incorporated in an offshore jurisdiction, to be wound up in its place of incorporation in order for liquidators to have any prospect of obtaining control of Mainland subsidiaries. If this is a material consideration it would normally be appropriate for the place of incorporation to be the primary insolvency jurisdiction.

32. Another consideration is the principles of comity. Generally, the courts of Hong Kong are slow to ignore the express requests of other courts particularly in the present context a request from the court of the jurisdiction of the company's incorporation. It is but one factor to which regard is to be had. It is, however, a weighty one, which requires careful scrutiny of the reasons advanced by a party asking the Hong Kong court not to comply with a request.

33. It was also submitted by Ms Cheung that the Petitioner cannot sensibly argue that there is something unfair to the Petitioner in restricting her right to wind up the Company in Hong Kong, because she must be taken to have understood that she was investing in a foreign company. As the Privy Council pointed out in [43] of *Stichting Shell* [30], where an anti-suit injunction was granted against a creditor seeking via Dutch

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[29] *Supra*, at [16].
[30] *Supra*.

proceedings to attach the assets of a company that had gone into liquidation in its place of incorporation (namely the BVI) thereby obtaining prior access to the insolvent estate, there was "*nothing to suggest that allowing Shell an advantage over other comparable claimants would be consistent with the ends of justice. Nor, in the circumstances, should Shell find this surprising. It invested in a company incorporated in the British Virgin Islands and must, as a reasonable investor, have expected that if that company became insolvent it would be wound up under the law of that jurisdiction.*"

34. I accept that it is not sufficient for the Petitioner to object that it is unfair for her to have to pursue recovery of the debt through a winding up in the Company's place of incorporation. Conversely, if the three core requirements are satisfied it is not in my view sufficient for the Company simply to point to insolvency proceedings commenced sometime after the Hong Kong Petition was presented in its place of incorporation and request in the face of objection from local creditors this court simply to defer to that of its place of incorporation. It seems to me unrealistic to expect the court not to have regard to the fact that companies such as the present conduct businesses in the People's Republic of China which commonly is also the location of a high proportion of their shareholders, creditors and assets. What appears to have happened over the course of the last 20 years or so is that many Mainland businesses have been permitted to list in Hong Kong using corporate vehicles incorporated in jurisdictions which have no connection with either Hong Kong or the Mainland. Little regard appears to have been had by the SEHK or the regulators to the jurisdictional problems that this might cause in the event of a company running into financial problems. It might also be thought surprising that the Mainland regulators have been willing to allow Mainland business groups to list

using offshore incorporated companies rather than Hong Kong ones thus potentially ceding judicial supervision at the holding company level to a jurisdiction outside Hong Kong. The increasing number of problems with which the court is having to deal arising from what appears to be a poorly considered acceptance of the use of holding companies incorporated in offshore jurisdiction justifies consideration being given to whether changes are required.

How a dispute over which jurisdiction is to be the primary one to conduct an insolvency process is to be resolved

35. The principles that emerge from the authorities that I have considered, which explore and identify the common law principles that guide the court in determining how to deal with the types of issues that arise in cross-border insolvency do not point clearly to how the court should resolve the present dispute. However, I would suggest that they do support the following approach to its determination:

(1) Generally, the place of incorporation should be the jurisdiction in which a company should be liquidated; in practice this means it will be the system for distributions to creditors.

(2) However, if the COMI is elsewhere regard is to be had to other factors:

(a) Is the company a holding company and, if so, does the group structure require the place of incorporation to be the primary jurisdiction in order effectively to liquidate or restructure the group.

(b) The extent to which giving primacy to the place of incorporation is artificial having regard to the strength of the COMI's connection with its location.

(c) The views of creditors.

36. Ultimately, this means that which insolvency process should be given primacy will depend on the circumstances of the case and involve giving appropriate weight to the location of a company's COMI. In my view, acknowledging that the place of incorporation is not necessarily determinative is more consistent with both commercial practice and the common factual matrix, which commonly connect a company far more closely with Hong Kong than an offshore jurisdiction.

37. The views of creditors are also a major consideration. In the present case the dispute is about whether or not the Company should be wound up immediately or the Petition adjourned in order to allow the JPLs time to attempt a restructuring of the Company. It has not been argued that if the Company is to be wound up, this should take place in Bermuda and liquidators appointed in Bermuda recognised in Hong Kong in order that they can carry out the liquidation in Hong Kong.

38. The principles that guide the court when determining whether or not to accede to an application for an adjournment to permit a company to progress a restructuring are explained by me in [50]–[51] of *China Huiyuan* [31].

> "50. As the New Zealand Court of Appeal has recently observed '*Insolvency law is a mix of principle and pragmatism. The [insolvency legislation] is to be used in a practical way. It does not require liquidation when that will not serve any useful purpose*'[32]. The way in which the courts assess applications by financially distressed companies that seek adjournments of petitions reflects this.

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31 *Supra*, at [17].

32 *90 Nine Limited v Luxury Rentals NZ Limited* [2019] NZCA 424, [12].

> 'When the court considers the possibility of benefit resulting from an order, the normal starting point is to consider any possible benefit to the petitioner, whether it be a debtor or a creditor. In many cases, showing benefit to the petitioner will be sufficient to persuade the court to make the order… I do not see why a consideration of benefit should be restricted to the possibility of benefit to the petitioner; benefit to others should also be relevant. *Conversely, disadvantages or unfairness to others may also be relevant*. After all, the court is exercising a discretion and is surely required to consider the effect of the proposed order on all relevant persons. In such a case, as is normal, the court will consider the effect of making the order and the effect of not making the order and will then consider what to do, having regard to all relevant considerations, including the legitimate aspirations of all potentially affected persons.'[33] (emphasis added)

> 'I accept that as a general proposition, in the absence of good discretionary grounds to the contrary, an applicant for winding up who has proved its debt and has proved insolvency ought to achieve a winding up order. However, … *the discretion can be exercised in favour of granting a stay where the refusal of a stay would be likely to work a substantial injustice*.'[34] (emphasis added)

51. I summarise how this balancing exercise is to be approached when, as in the present case, creditors take differing views about what is in their best interests in *Re Chase On Development Ltd* [35]:

> 'In cases in which a company is clearly insolvent and a petitioner's debt is not in dispute an important consideration, when a court it being asked to adjourn a petition by a Company in order to allow it to attempt to restructure its debt, are the views of its unsecured creditors.
>
> If the creditors are taking different views the Court will normally take into account all the circumstances including the following considerations:
>
> (a) A qualitative assessment of the number of creditors for and against a winding-up order. It is not just a matter of counting the number of creditors in favour and those against or the proportion of the value of the debt they hold.

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33 *JSC Bank of Moscow v Kekhman* [2015] EWHC 396 (Ch); [2015] 1 WLR 3737 at [63].
34 *New Acland Coal v Oakey Coal Action Alliance Inc* [2020] QSC 212 at [37].
35 [2020] HKCFI 629, [4]–[5].

(b) The reasons proferred by the supporting and opposing creditors.

(c) The feasibility of the proposed restructuring.'"

Application of the principles to the facts of this case

39. It is not disputed by the Company or the JPLs that the Company's COMI has been located at all material times in Hong Kong. Clearly, the Company has a close connection with Hong Kong and the People's Republic of China more generally. As I mention in [2]–[3] the Petitioner and nearly all the other creditors of the Company are Chinese nationals, who are resident in the Mainland. The Petitioner has obtained affirmations from five creditors resident in the Mainland and one in Malaysia, who support the Petition. No creditor has appeared to oppose the Petition. The Petitioner also obtained a report from an experienced insolvency practitioner, Yuen Tsz Chun, pointing out what Mr Yuen says are shortcomings in the current restructuring proposal and the JPLs' evidence.

40. The evidence of the JPLs is contained in the affirmations of Wong Kwok Keung of RSM Corporate Advisory in Hong Kong dated 4 and 26 January 2021. The first affirmation describes the financial state of the Company to the extent that the Liquidators can assess it from the limited financial information that they obtained at the time the first affirmation was made, which was limited. It would appear the current management of the Company had not been able to obtain most of the books and records of the Company. Mr Wong says that on the limited information that he has available that the JPLs' estimate the return on a liquidation of 5.9 cents in the dollar. He then goes onto to describe two terms sheets (the first dated 20 November 2020 and immediately replaced

with a new one dated 27 November 2020, which was terminated on 9 December 2020) and memorandum of understanding dated 12 December 2020 with potential investors. These are short and vague. Mr Wong's 2nd affirmation takes issue with some of Mr Yuen's criticism and adds nothing to the evidence concerning a restructuring.

41. I do not consider it necessary to comment in any greater detail on Mr Wong's evidence. What appears to have happened is that sometime after the Petition was presented in Hong Kong, the Company came into contact with RSM and the possibility of avoiding a winding up in Hong Kong was discussed. This resulted in the presentation of a petition in Bermuda on 30 October 2020 and an application on the same day to appoint soft-touch provisional liquidators, which was granted on 10 November 2020. This resulted in evidence being filed by a director of the Company dated 16 November 2020 seeking an adjournment of the Hong Kong Petition at its first hearing before me on 23 November 2020 on the grounds that the JPLs had been appointed. At that hearing I ordered that both the application for recognition and assistance that I was told would be forthcoming, and the Petition be listed for hearing on 28 January 2021. The more substantial evidence I have described was filed in the intervening period.

42. It does not seem to me that the Company has demonstrated a good reason to adjourn the Petition. The information about the restructuring is scanty in the extreme. The evidence that was filed by a director of the Company for the purposes of the application to appoint soft touch provisional liquidators in Bermuda refers in [94]–[101] to a restructuring proposal contained in a term sheet dated the 10 June 2020. The information about the restructuring was sparse and the term sheet was

promptly terminated and replaced with the November terms sheets to which I have referred, which were also promptly terminated. The evidence does not suggest that at the time of the appointment of soft-touch provisional liquidators the Company had, or has now, a credible plan to restructure its debt. It looks considerably more likely that the application in Bermuda was an attempt to engineer a *de facto* moratorium, which could not be obtained under Hong Kong law, with a view to then searching for a solution to the Company's financial problems. Viewed from a Hong Kong perspective this is a questionable use of soft-touch provisional liquidation and one, which will encourage the court to view with care similar applications for recognition in the future. Going forward I anticipate that unless the agreement of a petitioner and supporting creditors have been obtained in advance the court will not deal with recognition and assistance applications made by soft-touch provisional liquidators after a winding up petition has been presented in Hong Kong on the papers.

43. The Petitioner and the other creditors who support a winding up are quite understandably sceptical of the prospects of the Company's unimpressive attempts at restructuring being successful. The court will normally defer to the creditors on matters of commercial judgment unless there is a difference between them, which requires determination. In the present case I can see no good reason not to defer to their views.

44. In conclusion it seems to me that the facts of this case justify the court making the order sought by the creditors who have come forward to express a view on the present controversy. The COMI of the Company is in Hong Kong and it has not been argued before me that if the Company is to be wound up this should be done in Bermuda or that a winding up order in Hong Kong would be futile because of factors such as those

discussed in [31]. Essentially the contest in the present case would appear to be between some of the shareholders and the creditors. I can see nothing in the principles that I have discussed or the facts of the present case, which necessitate or justify refusing to grant the order that the Petitioner seeks. I will, therefore, making the normal winding up order. I shall adjourn the application for recognition and assistance in order that the JPLs can consider how it should be dealt with in the light of my decision.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Leung Sze Lum, instructed by Au Yeung, Cheng, Ho & Tin, for the petitioner

Ms Elizabeth Cheung, instructed by Wilkinson & Grist, for the respondent

Mr Michael Lok and Ms Sharon Yuen, instructed by Chungs Lawyers, for the joint provisional liquidators

The attendance of the Official Received was excused

HCCW 217/2020
[2021] HKCFI 1394

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 217 OF 2020

IN THE MATTER of Ping An Securities Group (Holdings) Limited（平安證券集團（控股）有限公司） ("the Company")

and

IN THE MATTER of section 327(4)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

Before: Hon Harris J in Court

Date of Hearing: 10 May 2021

Date of Decision: 10 May 2021

D E C I S I O N

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1. On 5 March 2021 there was a substantive hearing of Yang Xueli's petition (the "**Petitioner**"). For reasons that can be found in my decision dated 12 March 2021 I granted an adjournment until

10 May 2021. Directly relevant to my reasons for doing so are [21] and [22] of the decision [1]. In [22] I say this:

> "22. The JPLs expect it to be possible to sign the subscription agreement in April. Once this is done they can take steps to introduce a scheme of arrangement at the end of April or beginning of May. This explains why the Company and the JPLs are content with a short adjournment of two months by which time they hope to be able to have commenced the formal restructuring process."

2. A number of matters were clear by the time the hearing had been completed. The relevant ones are that, firstly, Ms Yang was firmly of the view that it was in her best interests that the Company be wound up. Ms Yang was sufficiently strongly of that view that subsequent to my decision, Ms Yang issued a notice of appeal. Secondly, in agreeing to make an order for an adjournment I had relied on what I had been told which is summarised in [22] of the decision.

3. The expectation that is recorded in [22] has not been realised, instead, matters have progressed as follows. The provisional liquidators have made no effort to contact the Petitioner and not provided her with any information at all about the progress of the restructuring until Ms Yang received a copy of the 2nd affirmation of Lai Wing Lun, one of the provisional liquidators, on Friday 7 May 2021, in other words, the working day before the petition came back on for hearing before me. The only other source of information received by Ms Yang would have been Ms Yuen's skeleton argument which was also served sometime on Friday.

4. Mr Lai's 2nd affirmation summarises, it did exhibit any documents, the progress of the restructuring. It would appear that

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[1] [2021] HKCFI 651.

agreements including a subscription agreement were signed, on Thursday 6 May 2021. It would also appear that on Monday 3 May 2021 a 54-page PowerPoint presentation was provided to the three largest unsecured creditors who the provisional liquidators have decided they would inform of the progress of the restructuring. Those three opposing creditors support a further adjournment. The way in which this matter has progressed, is in my view, entirely unsatisfactory. Clearly the Petitioner had a right to be kept properly informed of the progress of the restructuring.

5. Neither Ms Yang nor the Court, should had been put in the position of being given information which is manifestly incomplete, so close to the hearing that it was difficult to deal with. I have reached the stage at which I am increasingly concerned about the way soft-touch provisional liquidation, and what is generally referred to as the *Z-Obee* [2] technique, is being used. I have explained this in a number of decisions and I have recently completed other decisions which will be handed down very shortly developing those concerns further. Soft-touch provisional liquidation need close monitoring by the Court and I expect soft-touch provisional liquidators and their legal advisers to ensure that this is possible not, as in the present case, make representations to the court on which they know the court has relied and then ignore them.

6. It seems to me to be perfectly reasonable for the Petitioner to seek a winding up today. She has a substantial claim against this Company, the return if the restructuring were to be completed would according to the provisional liquidators only be approximately 2.75%, and proper regard to her interests has manifestly not been given. In these circumstances

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[2] [2018] 1 HKLRD 165.

I consider it appropriate to exercise my discretion and make the normal winding up order. I would only add one comment, namely, that the provisional liquidators are not appointed by this court and therefore, the Official Receiver will become the first provisional liquidator in Hong Kong.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Felix Ng, instructed by Edward Lau Phoebe Ng Solicitors LLP, for the petitioner

Ms Sharon Yuen, instructed by DLA Piper Hong Kong, for the respondent

Mr Raymond Kong, instructed by Official Receiver's Office, for the Official Receiver

HCCW 91/2016
[2022] HKCFI 1329

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) PROCEEDINGS NO 91 OF 2016

IN THE MATTER of section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 of Laws of Hong Kong

and

IN THE MATTER of Up Energy Development Group Limited

Before: Hon Linda Chan J in Court
Date of Hearing: 1 April 2022 (remote hearing)
Date of Judgment: 6 May 2022

J U D G M E N T

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1. This is a somewhat unusual case. An unpaid creditor to which a substantial sum is owed asks the court to make a winding up order against an insolvent listed company, but the provisional liquidators appointed by the court of the place of incorporation oppose the application on the ground that there is no benefit in the court making such an order. The proposition, if accepted, would mean that an unpaid creditor which advanced loan to a foreign company in Hong Kong and is able to satisfy the 3 core requirements cannot seek a winding up order under s.327(1) of the Companies (Winding up and

Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWUO**") so as to bring into operation the statutory scheme of winding up in Hong Kong. It is unusual because the proposition flies against the long line of authorities decided in the context of s.327 (and the equivalent provisions in other jurisdictions) and the fact that the court has in the past wound up many foreign listed companies. It is also unusual for office holders to oppose a winding up order in circumstances where they have not carried out any meaningful investigation into the affairs of the company, despite having been appointed to office for over 5 years.

A. BACKGROUND

2. The company concerned is Up Energy Development Group Limited ("**Company**"). It was incorporated in Bermuda on 30 October 1992. Apart from maintaining a registered office where the register of members, register of directors and register of convertible notes have been kept, the Company has not carried on any other activity in Bermuda.

3. The Company is registered under Part 16 of the Companies Ordinance (Cap. 622) ("**CO**") as a non-Hong Kong company. It has since at least 1992 established a principal place of business in Hong Kong. Since 2 December 1992, the shares of the Company have been listed on The Stock Exchange of Hong Kong Limited ("**HKEx**").

4. As required by the Listing Rules[1], the Company had sufficient management presence in Hong Kong. The Company and all the directors, irrespective of where they reside, gave an undertaking to HKEx to comply with the Listing Rules.

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[1] LR 8.12

5. The Company is an investment holding company and its subsidiaries principally engage in development, construction and operation of coal mining and coke processing facilities in the Mainland (together "**Group**"). According to the financial information published by the Company, until December 2015, the major assets of the Group were:

(1) 3 coal mines in Northern Xinjiang in the Mainland namely, Xiaohuangshan Mine, Shizhuanggou Mine and Quanshuigou Mine, all of which had been under construction (collectively "**Three Mines**");

(2) Baicheng Mine in Xinjiang; and

(3) 3 ancillary production facilities for coal coking ("**Coking Plant**"), coal washing and water recycling.

6. Although the major assets of the Group are located in the Mainland, the Company has carried on most of its financing activities in Hong Kong. These included issuing convertible notes due in 2016 and 2018, borrowing long term facilities and loans from banks and issuing new shares.

7. During 2013 to 2016, the Company suspended construction of the Three Mines, the water recycling plant and the coal washing plant due to financial difficulties. Subsequently, the Company stated that it intended to focus on the development of Xiaohuangshan Mine first and would resume construction of the other 2 mines in the next step[2]. The Company failed to renew the mining licences in relation to these 2 mines, and the licences expired in December 2015.

[2] As stated in the Company's annual report for 2019, p.4

8. On 19 February 2016, the Company announced that it had not settled the principal amounts payable on the convertible notes due in 2016 or within the remedial period. This led to cross-default on the convertible notes due in 2018 and the amount of HK$3,459 million became payable.

9. On 1 March 2016, HEC Securities Limited[3] ("**Petitioner**") served a statutory demand requiring the Company to pay HK$230 million together with interest at 5% p.a. from 1 January 2016 ("**Debt**"), being the amount due and payable on the convertible notes issued by the Company. This was followed by the Petitioner presenting the petition on 29 March 2016 (as amended on 31 May 2016 and re-amended on 12 July 2016) ("**Petition**"). As the Company has failed to satisfy the statutory demand, it is deemed insolvent by virtue of s.178(1)(a)(ii) of the CWUO.

10. In the Petition (§6), the Petitioner referred to the Group structure chart as of 30 June 2015 which showed that the Company had the following direct and indirect wholly-owned subsidiaries in Hong Kong:

(1) Direct subsidiaries:

(a) West China Mining Holdings Ltd ("**West China**"), which owns indirectly 100% of Baicheng Mine;

(b) Up Energy (Hong Kong) Ltd ("**UE HK**"), which owns indirectly (i) 79.2% of Xiaohuangshan Mine, (ii) 70% of Water Recycling Plant, (iii) 79% of Coking Plant, and (iv) 70% of Up Energy (Fukang) Trading Ltd (a Mainland company);

(c) Up Energy Development (HK) Ltd ("**UE Development**"),

[3] Subsequently changed its name to Seekers Markets Limited

which owns 50% of Up Energy Management Ltd ("**UE Management**");

(d) UE Management;

(e) UP Energy Trading Ltd ("**UE Trading**"); and

(f) Up Energy Finance Ltd ("**UE Finance**").

(2) Indirect subsidiaries:

(a) Up Creative Technology (Hong Kong) Limited ("**UC Technology**"), held through Up Energy Development Group (BVI) Company Ltd ("**UE BVI**"); and

(b) Up Energy Resources (Hong Kong) Ltd ("**UE Resources**"), held through UE BVI. As at 30 September 2015, UE Resources obtained a long term facility of HK$317 million from Minsheng Bank Hong Kong, which was guaranteed by the Company and Qin Jun.

11. On 18 May 2016, Credit Suisse AG, Singapore Branch ("**CS**"), a creditor to whom HK$154.3 million was owed, presented a winding up petition against the Company in Companies (Winding Up) 2016: No. 183 ("**Bermuda Proceedings**"). Separately, CS filed a notice of intention to appear and supports the Petition.

12. On 30 June 2016, trading of the Company's shares was suspended due to its failure to release annual results for the financial year ended 31 March 2016.

13. On 18 October 2016, HKEx informed the Company that it had been placed into the first stage of delisting, and the Company was required to comply with the following resumption conditions[4]:

(1) demonstrate that it has a sufficient level of operations or assets of sufficient value as required under LR 13.24;

(2) publish all outstanding financial results and address audit qualifications (if any); and

(3) have the winding up petitions against the Company (and its subsidiaries), where applicable, withdrawn or dismissed and the provisional liquidators discharged.

14. In the meantime, CS applied for appointment of provisional liquidators to supervise the process of restructuring. By orders dated 7 and 28 October 2016, the Bermuda court appointed Mr Lai Win Lun and Mr Osman Mohammed Arab, both of RSM Corporate Advisory (Hong Kong) Limited, and Mr Roy Bailey of EY Bermuda Limited, as provisional liquidators of the Company (collectively "**PLs**").

15. On 19 April 2017, HKEx informed the Company that it had been placed in the second stage of delisting, and the Company must submit a viable resumption proposal at least 10 days before the second stage expired on 29 September 2017.

16. On 28 April 2017, the PLs obtained a further order from Bermuda court ("**2017 Order**") under which:

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[4] The events relevant to suspension of trading and the steps taken by the Company to satisfy the resumption conditions and to challenge the decision of HKEx have been fully set out in the Judgment of Coleman J in *Up Energy Development Group Limited v The Stock Exchange of Hong Kong Limited,* HCAL 949/2021, [2021] HKCFI 3813, §§3-27

(1) they were granted extensive powers, by virtue of s.170(3) of the Companies Act 1981 ("**Act**"), to the exclusion of the directors of the Company, to, *inter alia*, (a) ascertain and secure the assets of the Group, review the books of accounts of the Company wherever located, (b) conduct investigations and obtain information necessary to locate, secure, take possession of and recover assets of the Company, (c) enter into settlements and compromises with creditors and debtors without further sanction of the Bermuda court, (d) carry on the business of the Company so far as may be necessary for the restructuring of the Company, (e) commence proceedings outside Bermuda for the purpose of seeking recognition of their appointment in Hong Kong and the BVI, and (f) consider and implement a scheme of arrangement with the creditors under s.99 of the Act;

(2) they may bring or defend any proceedings in the name and on behalf of the Company which relate to the property of the Company or which is necessary for the purpose of effectually winding up the Company and recovering its property as provided under s.174 of the Act;

(3) any obligation upon the PLs to consult with the Company in respect of the restructuring proposal, funding of the restructuring and ongoing business operations of the Company is dispensed with;

(4) they may submit bills of costs for taxation in respect of all costs, charges and expenses of those persons employed by them which shall be taxed on an attorney-and-own-client basis;

(5) no payment or disposition made by or with the authority of the PLs in carrying out their duties and in the exercise of their powers under the Order shall be avoided by virtue of s.156 of the Act; and

(6) in the event that a winding up order is made against the Company, any fees and expenses of the PLs including all costs and charges of any persons employed by them in accordance with the terms of the orders made by the Bermuda court shall be treated as fees and expenses properly incurred in preserving, realizing or getting in the assets of the Company for the purpose of rule 140 of the Companies (Winding-Up) Rules 1982 and paid on a first priority basis.

17. Upon the PLs' application, the Bermuda court issued a letter of request dated 23 June 2017 requesting the Hong Kong court to recognise the appointment of the PLs. On 7 July 2017, the PLs issued an *ex parte* originating summons in HCMP 1570/2017 to seek recognition of their appointment in Hong Kong. The application was stated to have been made under the CWUO and inherent jurisdiction of the court, although the relevant provision was not identified.

18. By order dated 16 August 2017, Harris J made an order recognising the appointment of the PLs in HCMP 1570/2017 ("**Recognition Order**") in the following terms:

> "2. The [PLs] have and may exercise such powers as are available to them as a matter of Bermuda law and would be available to them under the laws of Hong Kong as if they had been appointed provisional liquidators of the Company under the laws of Hong Kong and in particular, without prejudice to the generality of the foregoing, for the following purposes:
>
> (a) to request and receive from third parties documents and information concerning the Company and its promotion,

formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency;

(b) to locate, protect, secure and take into possession and control all assets and property within the jurisdiction of this Honourable Court to which the Company is or appears to be entitled;

(c) to locate, protect, secure and take into their possession and control the books, papers and records of the Company including the accountancy and statutory records within this jurisdiction of this Honourable Court and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency;

(d) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the [PLs] consider appropriate for the purpose of advising or assisting in the execution of their powers and duties; and

(e) so far as may be necessary to supplement and to effect the powers set out at sub-paragraphs (a) to (c) above, to bring legal proceedings and make all such applications to this Honourable Court whether in their own names or in the name of the Company on behalf of and for the benefit of the Company including any applications for:

(i) orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made by the [PLs] to facilitate their investigations into the assets and affairs of the Company and the circumstances which gave rise to its insolvency; and/or

(ii) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.

3. Anything that is authorized or required to be done by the [PLs] is to be done by all or anyone or more of the persons appointed.

4. For so long as the Company remains in provisional liquidation in Bermuda, no action or proceeding shall be proceeded with or commenced against the Company or its assets or affairs, or their property within the jurisdiction of this Honourable Court, except with leave of this Honourable Court and subject to such terms as this Honourable Court may impose."

19. The Recognition Order was sought and obtained by the PLs upon their *ex parte* application. It appears that the PLs had *not* drawn to the attention of the court that:

(1) the Recognition Order would not bind the Company or its creditors as they are not parties to the OS;

(2) the powers sought and obtained by the PLs go far beyond the stated purpose of considering and implementing a restructuring proposal in respect of the Company's debts;

(3) almost all the fundraising activities had been carried out by the Company in Hong Kong or were governed by Hong Kong law. As such, any investigation or work required to be carried out by the PLs would have to be carried out in Hong Kong; and

(4) the PLs would not be subject to the supervision of the Official Receiver ("**OR**") or the court they would otherwise have been subject had they been appointed as provisional liquidators by an order made in these proceedings.

20. Since their appointment, the Company under the control of the PLs has taken elaborate steps with a view to resume trading on HKEx. These include:

(1) On 29 September 2017, the Company submitted a draft resumption proposal, which was subsequently modified on 9 November 2017. HKEx did not consider the proposal viable and so informed the Company in its letter dated 17 November 2017.

(2) On 28 November 2017, the Company applied to the Listing Committee ("**LC**") and subsequently to the Listing (Review) Committee ("**LRC**") for a review of the decision to place the Company in the third stage of delisting. On 31 August 2018, HKEx informed the Company that the decision was upheld, and

the Company was required to submit a viable resumption proposal by 25 February 2019.

(3) On 25 February 2019, the Company submitted a fresh resumption proposal. That proposal was subsequently modified and clarified in response to queries made by HKEx.

(4) By letter dated 20 March 2020, the LC informed the Company that it considered the resumption proposal not viable and decided to cancel the listing of the Company's shares ("**LC Decision**").

(5) On 30 March 2020, the Company requested for review of the LC Decision. On 30 October 2020, the LRC informed the Company that its resumption proposal was not viable and upheld the LC Decision ("**LRC Decision**").

(6) On 6 November 2020, the Company applied to the Listing Appeal Committee ("**LAC**") for a review. At the hearing on 21 April 2021, extensive written and oral submissions were made by the Company. In its decision dated 30 April 2021 ("**LAC Decision**"), the LAC upheld the LRC Decision.

(7) This notwithstanding, HKEx postponed execution of the LAC Decision on the basis that the Company would apply for leave for judicial review in respect of the LAC Decision.

(8) On 6 July 2021, the Company applied for leave to apply for judicial review of the LAC Decision. After a fully contested rolled-up hearing, on 21 December 2021, Coleman J refused the application with costs against the Company.

21. In the meantime, on 30 September 2019, a proposed scheme of arrangement between the Company and all its creditors ("**Scheme**") was approved by the requisite majorities of creditors. The Scheme was sanctioned by the Bermuda court on 1 November 2019, but would not become effective until (1) the Hong Kong court sanctions the Scheme; and (2) HKEx approved resumption of trading of the Company's shares. As the Company has not been able to resume trading, the Scheme lapses.

22. Notwithstanding the lack of success in obtaining HKEx's approval on resumption, the Petitioner (and the supporting creditors) did not seek a winding up order against the Company. Instead, the Petitioner and the PLs filed numerous consent summonses, in each instance, *without* the consent of the creditors who had given notice of intention to appear, asking the Court to adjourn the Petition. This resulted in the Petition having been adjourned many times.

23. Meanwhile, according to the information contained in the Company's public announcements and the annual report for the year ended 31 March 2019, the assets in Hong Kong as identified in the Petition continued to reduce in that:

(1) Baicheng Mine (owned indirectly by West China) was amongst the 109 mines required to be closed down pursuant to the notice dated 16 February 2017 issued by the Xinjiang Government, and the Company's shares in West China had been pledged in favour of China Minsheng Banking Corp., Ltd, Hong Kong Branch;

(2) The Company's shares in UE HK (alongside with the shares in 2 other wholly owned subsidiaries incorporated in Bermuda and the

Mainland) were charged as security in connection with the issue of convertible notes;

(3) The Company resolved to put UE Development into creditors' voluntary winding up on 29 March 2019, thereby reducing the Company's indirect shareholding in UE Management from 100% to 50%;

(4) The Company resolved to put UE Trading into creditors' voluntary winding up on 8 June 2018;

(5) The Company allowed UE Resources to be struck off from the Companies Register on 1 April 2021;

(6) UC Technology remains an indirect wholly owned subsidiary; and

(7) UE Finance remains wholly owned by the Company.

24. At the hearing on 31 August 2021, Harris J gave leave to the Petitioner to re-amend the Petition and declined to make an *immediate* winding up order against the Company for the reasons stated in his Decision [2021] HKCFI 2595. His Lordship adjourned the Petition until the 2nd Monday after the handing down of the application for judicial review brought by the Company and made clear (at §8) that "[i]f the judicial review is unsuccessful presumably the Company will be wound up either in Bermuda or possibly if there is no opposition, I may be prepared to make an order in Hong Kong."

25. The Petition was listed for hearing before this Court on 10 January 2022. Shortly before the hearing, the Petitioner and the PLs filed a consent summons to seek an order that the Petition be dismissed with no order as to costs save that the costs of the OR be deducted from the deposit. However:

(1) No explanation was provided by the Petitioner or the PLs as to why the Petition should be dismissed with no order as to costs and whether the creditors who had filed notices of intention to appear, had agreed to the proposed order.

(2) It appears that the PLs, who were supposedly under a duty to protect the interests of the unsecured creditors, had not considered the fact that after the dismissal of the Petition, the creditors would *not* be able to invoke the statutory scheme for winding up under the CWUO.

(3) Nor had the PLs considered why a winding up order to be made against the Company in Bermuda would be sufficient for the purpose of investigating and liquidating the affairs of the Company which had been carried out in Hong Kong and recovering assets located in Hong Kong or from persons or entities which are amenable to the jurisdiction.

26. The PLs were directed to address the question as to (1) whether a winding up order made against the Company in Bermuda would be sufficient to deal with all affairs of the Company in Hong Kong; (2) whether in the *absence* of a winding up order made in Hong Kong, the provisions under the CWUO would apply to the Company; (3) whether a winding up order would be recognised more easily and efficiently in the Mainland; (4) if liquidators are appointed in Hong Kong, whether they can take control over the BVI subsidiaries by appointing themselves as directors of those subsidiaries and any other means; and (5) any other matters which the PLs consider relevant to the question of whether or not the Company should be wound up in Hong Kong. The Petition was adjourned to 14 February 2022 to give sufficient time for the parties to address the questions.

27. At the hearing on 14 February 2022, Ms Tinny Chan, counsel for the Company, *opposed* the Petition on the following grounds[5]:

(1) The Company is expected to be wound up by the Bermuda court on 11 March 2022, whereupon the liquidation process will be commenced in Bermuda for the creditors' benefit;

(2) The creditors were "relatively apathetic" regarding where the Company is to be wound up in that (a) only CS (representing 2.57% of unsecured debt) appeared as supporting creditor; (b) Capital Sunlight Ltd, Integrated Capital (Asia) Ltd ("**ICA**") and Kaisun Holdings ("**Kaisun**") (representing 10.98% of unsecured debt) opposed the Petition, (c) China Minsheng Banking Corporation Ltd, Hong Kong branch, Deutsche Bank AG Singapore branch and Hao Tian Development Group Ltd (representing 20.99% of unsecured debt) were neutral, and 52 creditors (representing 65.46% of unsecured debt) had not indicated their stance;

(3) The second core requirement is indispensable. Harris J in his Decision of 31 August 2021 found that such requirement was not satisfied. In any event, on the basis of the matters pleaded in the Petition, the second core requirement was not satisfied;

(4) The BVI law expert confirmed that the liquidators appointed by the Hong Kong court would not be able to register themselves as members or directors of the Company's subsidiaries incorporated in the BVI;

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[5] Although Ms Chan stated in her skeleton that the Company/PLs were "neutral" to the petition. At the hearing, Ms Chan confirmed that her instructions were to oppose the Court making a winding up order against the Company

(5) The Mainland law expert opined that the Mainland court would only grant recognition and assistance if the requirements stipulated in articles 4 to 7 of the SPC Opinion are met, which included the centre of main interest ("**COMI**") of the company have been in Hong Kong for at least 6 months. This plainly cannot be met by the Company;

(6) 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, on the premise that the court "may grant orders that give the foreign officeholder substantially the same powers to, for example, investigate the affairs of the company as would be available to a liquidator if the foreign jurisdiction has similar provisions in its insolvency regime", citing *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, §§16-25, 41; *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177, §§7, 9, 13, 19 and 22; *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676, §§8-13; and

(7) Even if the powers of liquidators appointed in Hong Kong court are more extensive, it is not a reason to "bypass the second core requirement". Ms Chan contends that:

> "[t]he objective is to allow the company to be wound up in the place to which it is most connected or sufficiently connected, and to give effect to the winding up order pronounced in such jurisdiction; parties should not be encouraged to shop for the most potent and robust insolvency jurisdiction to wind up a company" ("**Contention**")

28. As the PLs had not dealt with the question of jurisdiction (as described in §26(2) above), they were directed to address that question. However, in her supplemental skeleton, Ms Chan repeated her contentions that

(1) the 3 core requirements must be satisfied; and (2) a recognition application "obviates rather than supports the need for another winding up order by the Hong Kong court", relying on *Re Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings pl*c [2007] 1 AC 508, §22. Ms Chan submits that the proper course would be the one suggested by Harris J in *Re G Ltd* [2016] 1 HKLRD 167, §6.

29. In view of the stance taken by the PLs and the lack of assistance on the question of jurisdiction, the Petition was adjourned to allow the parties to address the question which affects not just the Company but the right of the creditors to invoke the statutory regime of winding up in respect of a foreign company.

30. By order dated 11 March 2022, the Bermuda court made a winding up order against the Company. In the meantime, the Petitioner filed expert opinions on Bermuda law, BVI law and Mainland law in response to the opinions filed by the PLs in opposition to the Petition.

B. ISSUES

31. As can be seen from the above background, there is no dispute that the Company is insolvent and should be wound up. One would have thought that so long as the Petitioner is able to satisfy the 3 core requirements for the court to exercise its discretion to wind up the Company under s.327(3)(c) of the CWUO, the Petitioner is entitled *ex debito justitiae* to a winding up order against the Company. There is no dispute that the first and third core requirements are satisfied.

32. At the hearing, the PLs (represented by Ms Rachel Lam SC leading Ms Tinny Chan) and ICA (represented by Ms Audrey Eu SC leading

Mr Anson Wong Yu Yat) continue to oppose the Petition on the following grounds:

(1) Hong Kong court should give "primacy" to the Bermuda court and decline to make a winding up order against the Company (Primacy Ground);

(2) Harris J already made a finding that the second core requirement was not satisfied (Second Core Requirement Ground);

(3) If there are matters which need to be dealt with in Hong Kong, the liquidators appointed in Bermuda *can* seek recognition and assistance from the Hong Kong court under the common law or seek a winding up order in Hong Kong. There is no *present* need to seek such assistance (Recognition Ground); and

(4) An ancillary winding up order would lead to additional time and costs, and add to the burden of the estate rather than benefit it (Ancillary winding up Ground).

33. On the other hand, Mr Toby Brown (appearing with Ms Jacquelyn Ng), counsel for the Petitioner, submits that the real issue is whether an ancillary winding up order should be made by the court. It is difficult to fathom why the PLs would devote time and the Company's funds to oppose a winding up order in circumstances where the Company has assets in Hong Kong and there are clear advantages in the court making a winding up order against the Company.

34. In considering whether a company should be wound up, the court looks at the situation of the company as at the date of the hearing. As the Company has already been wound up in Bermuda, the real issue is whether the

Petitioner is able to satisfy the second core requirement so as to bring into operation the statutory scheme of winding up under CWUO with liquidators appointed to carry on an ancillary liquidation in Hong Kong.

35. As will be seen further below, the Recognition Ground is premised on the assumption that in the *absence* of a winding up order, the court has the power under the common law to make the provisions under the CWUO applicable to the Company. For the reasons explained in section B3 below, I do not think that the assumption is right.

B1. Primacy Ground

36. Ms Eu contends that the "normal rule" is to wind up a company at the place of incorporation and the other jurisdictions to recognise the foreign liquidators so as to give "primacy to the home jurisdiction". Reliance is placed on the expert evidence (which has not been identified in her written or oral submissions) and "a long line of authorities". When this Court asks Ms Eu which authorities she seeks to rely on, she points to the following authorities:

(1) *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] 1 HKLRD 1120 where Harris J said (at §12):

> "… the rationale underlying the common law power of assistance is modified universalism. In the conventional case, one would expect an insolvent company to be wound up in its place of incorporation and for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong. In the case of liquidators appointed in jurisdictions with similar insolvency regimes to Hong Kong, the assistance may extend to granting orders that give the foreign liquidators substantially similar powers to, for example, investigate the affairs of a company by examination and orders for the production of documents as a Hong Kong liquidator would have. Indeed, as recognised by the Privy Council, the common law power of assistance exists for the purpose of surmounting the practical problems posed for a worldwide winding-up of the company's affairs by the territorial limits of the powers of each country's court."

(2) In *Re Moody Technology Holdings Ltd (满地科技股份有限公司)* [2020] 2 HKLRD 187 where DHCJ William Wong SC said (at §16) that "[a] crucial feature of cross-border insolvency cooperation is the recognition of foreign proceedings" and "[t]he raison d'être for recognising foreign proceedings is the avoidance of parallel proceedings".

37. Neither *Supreme Tycoon* nor *Moody Technology* supports Ms Eu's contention:

(1) *Supreme Tycoon* was concerned with an *ex parte* application made by the foreign liquidators for recognition and assistance for the specific purpose of obtaining information and collecting assets from the persons amenable to the jurisdiction. There was no discussion or holding in support of Ms Eu's contention.

(2) Similarly, in *Moody Technology*, the court dealt with an *ex parte* application[6] made by the foreign liquidators for recognition of their appointment and the powers set out in the letter of request for restructuring purpose. Again, there was no discussion or holding which supports the notion that the local court should decline to make a winding up against the foreign company once winding up proceedings have been commenced at the place of incorporation.

38. It is not surprising that Ms Eu is unable to cite a single authority in support of her contention as it goes against the statutory right given to the creditor (and the company) to present a winding up petition against a foreign

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[6] Notice of application was subsequently given to the parties to the petition presented in the Hong Kong court, as directed by the Court

company under s.327(3) of the CWUO and the well established principles governing how the court would exercise the discretionary jurisdiction under that section.

39. Ms Lam readily accepts that the Petitioner's right to seek a winding up order from the court is a legitimate one, and there is *no* authority in support of the proposition that the local court should decline to make a winding up order against the foreign company on the "primary" ground when the 3 core requirements are satisfied.

40. In her written submissions, Ms Lam no longer advances the Contention. Instead, she sets out the "traditional" English and Hong Kong approach to cross-border insolvency where liquidations were commenced and carried on in the place of incorporation (as principal liquidation) and the jurisdictions where there are assets to be collected or affairs to be administered (as ancillary liquidations) so as "to bring about a distribution of the company's worldwide assets on as uniform a basis as was consistent with overriding principles of local insolvency law", citing *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, §10, *per* Lord Sumption; *In re International Tin Council* [1987] Ch 419, 446G-447B, *per* Millett J; *Re Information Security One Ltd* [2007] 3 HKLRD 780, §8, *per* Kwan J (as she then was).

41. Ms Lam also refers to the development of cross-border insolvencies in common law jurisdictions which she describes as "generally favoured an approach/doctrine commonly referred to as 'modified universalism'" in that:

(1) The principal feature of modified universalism is the requirement that so far as consistent with justice and public policy the courts

in the local jurisdiction cooperate with the court in the country of the principal liquidation to ensure that all of a company's assets are distributed to its creditors under a single system of distribution (*Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, §30, *per* Lord Hoffmann; *Cambridge Gas Transport Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, §16, *per* Lord Hoffmann).

(2) Thus, the common law regime of recognition and assistance is developed to obviate the need of a parallel winding up order in a foreign jurisdiction. As pointed out in *Cambridge Gas* at §22, cited in *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, §16.

(3) The doctrine of modified universalism was also reaffirmed in *Singularis*, which set down some limits to the common law power of the court to recognise and grant assistance to foreign insolvency proceedings (at §§19, 25).

(4) Since then, common law authorities continue to embrace modified universalism (*Stichting Shell Pensioenfonds v Krys* [2015] AC 616[7]).

42. Ms Lam acknowledges that the above authorities do *not* say that domestic court cannot wind up a foreign company. The real question is whether it is appropriate to do so on the facts of each case:

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[7] In that case, the Privy Council affirmed the power of the BVI courts to issue an anti-suit injunction at the request of the liquidators in order to restrain a creditor, a Dutch pension fund, from continuing proceedings that it had instituted in the Netherlands. In particular, the Board endorsed a uniform distribution scheme that was established by the jurisdiction of the insolvent's home jurisdiction and rejected a "race to the court" approach to find and release assets outside of the statutory scheme (§24)

(1) An ancillary winding up order can still be made in Hong Kong if the 3 core requirements are satisfied.

(2) By way of example, in *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177 the court decided not to give primacy to winding up proceedings in the place of incorporation where the COMI of the company was located in Hong Kong and a "soft-touch" restructuring had been abused to engineer a *de facto* moratorium when there was no credible plan for restructuring (§§28, 35-36, 39 and 42).

43. Lastly, Ms Lam contends that the current practice under Hong Kong law is that set out in *Re G Ltd* [2016] 1 HKLRD 167, §6

> "[O]ne would expect an insolvent company to be wound up in its place of incorporation and for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong. If they do the most straightforward way for them to proceed is to obtain a letter of request from the local court and then apply ex parte on paper for a recognition order … If the liquidators think that it is desirable that the foreign company is put into liquidation in Hong Kong and they are satisfied that they will be able to demonstrate to this Court that the criteria by which such petitions are assessed are satisfied, they can apply for a winding-up order and if the circumstances require it apply for themselves to be appointed provisional liquidators in Hong Kong pending the determination of the petition."

44. Except *Re Lamtex and Re G Ltd*, in all the authorities cited by Ms Lam, the courts were *not* concerned with the question whether the discretionary jurisdiction to wind up foreign companies should be exercised in favour of the petitioner. Instead, the courts were dealing with *specific* issues arising in the liquidation carried out in the place of incorporation of the company (*Stichting Shell, Re Moody*) or the liquidations carried out in different jurisdictions and the principles governing the approach of the courts in dealing with such issues (*Cambridge Gas*, *Singularis*, *HIH Casualty*). Indeed, the very fact that the

courts had to deal with such cross-border insolvency issues was precisely because it was permissible and unobjectionable for liquidations to have been commenced in the jurisdictions where the assets were located or where the company's affairs had been carried out and required investigation. They are *not* authorities to suggest that once the winding up process has been commenced in the place of incorporation, the court should decline to make a winding up order against that foreign company when the 3 core requirements are satisfied. The suggestion that it has been the *practice* of the court to exercise the discretion in this way does *not* accord with the fact that the court has made many winding up orders against foreign companies, in particular those companies whose shares had been listed on HKEx.

45. In my judgment, it is important to understand the genesis of the courts imposing the 3 core requirements in considering whether to exercise its discretionary jurisdiction to wind up a foreign company. This was sufficiently explained by CJ Ma and Lord Millett NPJ in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501, §§18-24, and may be summarised as follows:

(1) Section 327(1) and (3) of the CWUO confers a discretionary jurisdiction on the court to wind up a foreign company (§§18, 21).

(2) The most appropriate jurisdiction in which to wind up a company is the jurisdiction where it is incorporated. There must be "some connection between the foreign company and the jurisdiction" other than the petitioner's decision to present a winding up petition in the jurisdiction. It is unhelpful and potentially misleading to describe the jurisdiction under s.327 as "exorbitant" or as "usurping" the functions of the courts of the country of incorporation (§19).

(3) The courts have adopted self-imposed constraints on the making of a winding up order against a foreign company by requiring the petitioner to satisfy the 3 core requirements before it would exercise its statutory jurisdiction to wind up a foreign company.

(4) The origin of imposing the 3 core requirements is to be found in *Re Real Estate Development Co* [1991] BCLC 210, at 217, where Knox J said (§21):

> "the proposition that there must be a sufficient connection between the company and the jurisdiction in which it is sought to wind it up prompted the question: sufficient for what? He answered the question by saying that the connection must be:
>
> > sufficient to justify the court setting in motion its winding up procedures over a body which *prima facie* is beyond the limits of territoriality".

(5) As regards the second core requirement, the presence of significant assets normally means that a winding up order is likely to benefit the creditors but is *not* essential. It is sufficient that there is a reasonable possibility that the petitioner will derive a benefit from the making of a winding up order in the local jurisdiction. For this purpose, ownership of the assets by the company is not a matter of crucial importance: *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43 (§§22-23).

(6) Ultimately, the question to be considered by the court in the case of a creditor's petition is (§24):

> "whether there is a sufficient connection between the company and this jurisdiction to justify the court in ordering a company to be wound up despite the fact that it is incorporated elsewhere; and that in deciding that question the fact that there is a reasonable prospect that the petitioner will derive a sufficient benefit from the making of a winding up order, whether by the distribution of its assets or otherwise, will always be necessary and will often be sufficient" (underlined added)

(7) A creditor's purpose in presenting a winding-up petition is to obtain payment of his debt, so that the existence of significant assets within the jurisdiction will usually suffice; and if the creditor thinks it worthwhile, he may seek winding-up orders in different jurisdictions until his debt is satisfied (§26).

46. As is clear from *Kam v Kam* and the authorities discussed therein, the imposition of the 3 core requirements was in recognition of the fact that *prima facie* the most appropriate place to wind up a foreign company is the place of its incorporation and the domestic court would give primacy to that court. There is *no* separate or additional requirement for the domestic court to decline a winding up order against a foreign company on the ground that the company has been or will be wound up in the place of incorporation. Once the petitioner discharges the burden of showing that the foreign company is insolvent and the 3 core requirements are satisfied, the court will be prepared to make a winding up order against the company *unless* there is evidence to suggest that the debts will be paid from another source or that a viable restructuring proposal has the support of the requisite majority of creditors. If the company is not able to do either, it is difficult to see how the mere fact that foreign company has already been or will be wound up in the place of incorporation would affect or displace the right of the creditors to seek a winding up order from the Hong Kong court against that company.

47. In the case of a non-Hong Kong company whose primary listing has been on HKEx, it would not be difficult for the petitioner to satisfy the 3 core requirements. This is because save where exempted by HKEx, such listed company invariably have:

(1) maintained a principal place of business in Hong Kong and have given an undertaking to comply with the Listing Rules;

(2) maintained sufficient management presence in Hong Kong;

(3) raised funds through the issue of shares, convertible notes or bonds and benefitted from the ability to trade such equities and financial instruments on HKEx;

(4) borrowed loans from banks and other financial institutions in Hong Kong;

(5) the obligation to comply with the provisions under the CO which apply to a non-Hong Kong company; and

(6) the obligation to comply with the Securities and Futures Ordinance (Cap. 571) and the regulatory regime administered by the Securities and Futures Commission.

48. In respect of such listed company, it would be unreal or artificial to suggest that the court should ignore all the affairs carried out by the company in Hong Kong and the corresponding need to investigate them, and leave the control and supervision over the winding up to the court of the place of incorporation. This is particularly so where the company was incorporated in offshore jurisdictions like the BVI, Cayman Island and Bermuda which do not require the company to carry on any business or meaningful activity in the place of incorporation other than appointing agents to deal with the corporate filings and maintaining the registers of members, directors and charges.

49. The present case is a paradigm example. Other than maintaining its registers and complying with the statutory requirements of filings, the Company has not carried on any business or other activity in Bermuda. Nor does the Company have any assets in Bermuda. It is difficult to see why *all*

the affairs arising in the liquidation of such company in Hong Kong should be left to the liquidators appointed in Bermuda.

B2. Second Core Requirement Ground

50. Ms Eu submits that in his Decision dated 31 August 2021, Harris J already decided (at §§5-7) that the second core requirement was not satisfied. Unless this Court is convinced that the Decision is wrong, this Court should "follow it as a matter of judicial comity" (*Kan Fat-tat also known as Kan Fat v Kan Yin-tat also known as Kan Tat* [1987] HKLR 516 at 534, *per* DHCJ Robert Tang QC). Given the long and consistent line of authorities in this area of the law both in Hong Kong and other common law jurisdictions, certainty, more than comity, is also important.

51. I am unable to accept the submission. As is clear from the Decision, Harris J, after hearing arguments from the parties, was not satisfied that this was a case where an *immediate* winding up order should be made. Had the learned Judge reached a firm conclusion or made a finding to the effect that the second core requirement had not or would not be satisfied, he would have dismissed the Petition. This was not his view. Instead, the learned Judge made clear at §8 of the Decision that "[i]f the judicial review is unsuccessful presumably the Company will be wound up either in Bermuda or possibly if there is no opposition, I may be prepared to make an order in Hong Kong.".

52. Mr Brown submits (and I agree) that the second core requirement is not a high threshold to discharge and the Petitioner is only required to demonstrate a real possibility of benefit. In this regard:

(1) In *Kam v Kam*, the second core requirement was described as "a reasonable prospect that the petitioner will derive a sufficient

benefit from the making of a winding up order against the company".

(2) Recently, in *Re Shandong Chenming Paper Holdings Ltd v Arjowiggins HK2 Ltd* [2020] HKCA 670[8], at §27, a case where the Mainland company which maintained dual primary listing on HKEx and Shenzhen Stock Exchange and did *not* have any asset in Hong Kong, the Court of Appeal affirmed Harris J's decision that "the leverage created by the prospect of a winding-up petition" constituted a reasonable prospect that the defendant would derive a benefit from a winding up order and the second core requirement can be "moderated"[9]. The nature or extent of the benefit was explained by Barma JA (at §27) in this way:

> "Moreover, to insist on this requirement being met is clearly sensible, in that there would seldom be circumstances in which it would be justified to set in motion the court's winding-up machinery where to do so could provide no reasonable prospect of benefit of any kind to the petitioner. That said, the overarching nature of the enquiry, the purpose of which is to ascertain whether it would be appropriate to put into motion the winding-up machinery in respect of a particular overseas company, would, I think, allow for some flexibility as to the nature or extent of the likely benefit to the petitioner that should be shown in order to satisfy the second core requirement, as long as the benefit can be said to be a real possibility, rather than a merely theoretical one." (underlined added)

53. Ms Eu submits that the benefits and advantages identified by Mr Brown have not been pleaded in the Petition and it is not permissible for the Petitioner to rely on them. I disagree.

(1) While it is correct that normally a petitioner's case is confined to the matters pleaded in the petition, in the present case, it is the PLs who contend at the hearing on 10 January 2022 that there is *no*

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[8] The judgment is under appeal and will be heard by the Court of Final Appeal on 17 May 2022
[9] §§29-30 of Harris J's judgment in HCMP 3060 of 2016

benefit for the court making a winding up order against the Company. The Petitioner must be allowed to respond to the point by identifying the benefits and advantages which will be available to the Petitioner and the creditors generally upon the court making a winding up order against the Company.

(2) In any event, as stated in §§25-29 above, more than sufficient time and opportunity has been given to the parties to address the issue. There is no unfairness in the court considering the respective contentions raised by the parties.

54. It is indisputable that the Company has assets in Hong Kong which may be recovered by the liquidators appointed under CWUO for the benefit of the creditors:

(1) There is cash deposit in its bank account *presently* stands at HK$0.2 million.

(2) Although the PLs have *not* disclosed how much cash funds the Company has had during the past 5 years, it is reasonable to assume that the amount would be substantial as the Company had incurred substantial legal costs in dealing with resumption of trading, the Scheme, the Petition and the Bermuda Proceedings, and paying remuneration to the PLs. Ms Lam confirms that these costs and remuneration were paid by the Company, part of which had been derived from the loans advanced by 2 funders, Kaisun and ICA. Upon the court making a winding up order against the Company, these payments insofar as they were made after the presentation of the Petition (being the date of the commencement of the winding up) and not sanctioned by the court are void and liable to be returned to the Company.

(3) The Company has at least 3 direct subsidiaries in Hong Kong namely, (a) UE HK, (b) UE Resources (which can readily be revived), and (c) UE Finance which has HK$6 million of receivables.

55. For this reason alone, I am satisfied that there is a reasonable prospect that the Petitioner will derive a sufficient benefit from the making of a winding up order against the Company. It follows that the second core requirement is satisfied.

B3. Recognition Ground

56. Mr Brown points to the following clear advantages which will be available to the liquidators if the Company is wound up by the court, but would not be available to the liquidators appointed in Bermuda ("**Bermuda Liquidators**"), *assuming* the court has power and is prepared to grant a recognition order in their favour:

(1) It would provide the Bermuda Liquidators with more extensive powers under CWUO;

(2) Some powers that may be provided under a recognition order are more effectively exercised by the liquidators appointed in Hong Kong ("**HK Liquidators**"); and

(3) There would be saving in time and costs in the court making a winding up order as opposed to the Bermuda Liquidators making an application for a recognition order.

57. So far as "more extensive powers" is concerned, Mr Brown submits that:

(1) In an ancillary liquidation, the liquidators are entitled to the full suite of powers of winding up as available in the ancillary jurisdiction (*Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, at 246E).

(2) By contrast, the power to provide assistance by way of a recognition order is limited to rendering assistance in respect of matters which could be done under the law by which they had been appointed (*Penta Investment Advisers Ltd v Allied Weli Development Ltd (formerly known as Hennabun Capital Group Ltd)* (CACV 58/2016, 18 July 2017), at §7.5).

(3) Thus, the powers granted under a recognition order are the "lowest common denominator" between the two jurisdictions.

(4) In the schedule prepared by the PLs, while there are overlaps between the powers under the Act and the CWUO, there are no equivalent provisions of ss.276 and 277 of the CWUO. The potential claim for misfeasance and wrongful trading provide a reasonable possibility of benefit to the petitioner and other creditors for the purpose of the second core requirement (*Stocznia Gdanska SA v Latreefers Inc (No. 2)* [2001] 2 BCLC 116, at §40, per Morritt LJ, as applied by Harris J in *The Joint and Several Liquidators of China Medical Technologies Inc. v Samson Tsang Tak Yung* unrep., HCCW 435 of 2012, 28 August 2014, §§14-17).

(5) There is public interest in ensuring that the causes of the company's failure are properly investigated and any misconduct identified and sanctioned (*Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158, at 164, 172-173, 177, per Lord Walker). The ability to conduct investigations into the company's assets is sufficient to

meet the second core requirement (*Re Zhu Kuan Group*, HCCW 874/2003, 2 August 2003, at §§43-50)

58. Ms Lam does *not* dispute that the Company and the HK Liquidators may benefit from the above advantages. However, she submits 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". Reliance is placed on:

(1) *Re Lamtex*, §§7, 9, 13, 19, 22; *Re Moody*, §§16-25; *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676 §§8-13.

(2) Mr Tucker's opinion on Bermudian law, who opines that the recognition and assistance regime "would likely allow the liquidator appointed in Bermuda to deal with a range of matters in Hong Kong" such as (a) avoidance of disposition after commencement of winding up, (b) unfair preference, (c) fraudulent trading, (d) disclaiming onerous property, (e) examination of persons concerned with company's property and provision of information, and (f) delivery of property to liquidator.

(3) The *assumption* that the Hong Kong court has the power under the common law to confer all the powers under the CWUO to the Bermuda Liquidators if the same powers exist under the Act.

59. I shall first consider whether the court does have power under the common law to make the provisions under the CWUO available to the Bermuda Liquidators or the Company in the absence of a winding up made by the Hong Kong court.

60. The starting point is that winding up is the creature of statue. The *only* way to bring into operation the statutory scheme of winding up is by the court making a winding up order against the company. The principle has been sufficiently explained in *Ayerst v C&K (Construction) Ltd* [1976] AC 167, at 176E-177D, per Lord Diplock; and *In re International Tin Council* [1987] Ch 419, 446A-447B, per Millett J. In *In re BCCI (No. 10)* [1997] Ch 213, at 239F, Sir Richard Scott VC said:

> "Just as companies are creatures of statute, the law and procedure governing the dissolution of companies is statutory. Many of the rules of winding up have been borrowed from bankruptcy law and practice – rule 4.90 is an example – but, none the less, the power of the courts to wind up companies is a statutory power……The courts have, in my judgment, no more inherent power to disapply the statutory insolvency scheme than to disapply the provisions of any other statute" (underlined added)

61. Unless and until the court makes a winding up order against the Company, there is no basis to bring into operation the statutory scheme for winding up under the CWUO. Nor is there any basis for the court to confer any of the powers or provisions under the CWUO to the Bermuda Liquidators or the Company.

62. The same conclusion can be reached by examining the provisions under the CWUO which apply to company wound up by the court. It can be seen that except s.268B, *all* the provisions, as mandated by their wordings, *only* apply to a company wound up by the court and liquidator appointed in Hong Kong. These include:

(1) s.182 which renders any disposal of assets after the commencement of the winding up void unless sanctioned by the court;

(2) s.183 which renders any attachment, sequestration, distress, or execution put in force against the estate after the commencement of the winding up void;

(3) s.199 which gives a wide range of powers to the liquidators specified in Schedule 25 some of which may be exercised without the sanction of the court or the committee of inspection;

(4) s.200 and s.204 which empower the court and the OR respectively to supervise and control over the conduct of the liquidators. They provide the avenues for the creditors to challenge any conduct which has fallen short of the standards required of the liquidators. These are important safeguards to ensure that the liquidators would faithfully perform their duties and observe all the requirements imposed on them by statutes, rules or otherwise with respect to the performance of their duties;

(5) s.211 which empowers the court to order any contributories, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender, or transfer to the liquidators any money, property, or books and papers in their hands to which the company is *prima facie* entitled;

(6) s.224 which empowers the court, on proof of probable cause, for believing that a contributory or any past or present officer of the company has absconded or is about to quit Hong Kong or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of calls or debts due to the company or avoiding examination respecting the affairs of the company, to order that the contributory or officer be arrested and

his books, papers and movable personal property seized and safely kept;

(7) the provisions which confer a right on the *liquidator* of a company wound up by the court (and no one else) to set aside antecedent transactions which were not in the interests of the company or otherwise upset the *pari passu* distribution of assets amongst the creditors including (a) s.264B in respect of extortionate transaction entered into by the company 3 years before the winding up order; (b) s.265D in respect of transaction at an undervalue; and (c) s.266 in respect of unfair preference;

(8) s.267 which renders invalid a floating charge on the undertaking or property of the company created in favour of any person in the period of 1 to 2 years before the commencement of winding up of the company;

(9) s.268 which empowers the liquidator to disclaim any onerous property of the company;

(10) s.269 which restricts the right of a creditor as to execution or attachment over the company's property to retain the benefit thereof unless he has completed the execution or attachment before the commencement of winding up;

(11) ss.271 – 274 which give "teeth" to the liquidator's exercise of power to require the past or present officer of the company to provide information, disclose and deliver the property, books and papers to the liquidator by making it an offence if they fail to do so;

(12) s.275 which makes the directors liable for fraudulent trading, both in respect of having to compensate the company for the loss suffered and as a criminal offence;

(13) s.276 which provides for commencement of misfeasance proceedings against delinquent officer of the company, and makes them liable to pay damages to the company and as an offence; and

(14) s.268A which empowers the court to order public examination of promoters, directors, officers, provisional liquidator and provisional liquidator of the company, while s.268B empowers the court to order private examination of any person capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.

63. The above provisions have *no* application to a foreign company which has *not* been wound up by the Hong Kong court. No matter how one reads the wordings of the provisions, it is impossible to discern any basis for the court to make such provisions available to the foreign liquidator *as if* the company has been wound up when no such order has *in fact* been made by the court.

64. Although in the cases cited by Ms Lam the courts referred to the court's power under the common law to recognise and assist foreign liquidators and the principle of "modified universalism", those statements were made in the context of the company having *already* been wound up in the place of incorporation (and carried on as principal liquidation) and in other jurisdictions (and carried on as ancillary liquidations) or where the courts were dealing with the specific cross-border issues arising in the course of liquidations in one or more jurisdictions.

65. The only case (cited by the parties) where the court identified and explained the source of the court's power to assist foreign liquidation is *Singularis* where Lord Sumption (at §10) said this:

> "The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up was to create a statutory trust of the worldwide assets of the company to be dealt with in accordance with English statutory rules of distribution: *Ayerst v C&K (Construction) Ltd* [1976] AC 167, *Banco Nacional de Cuba v Cosmos Trading Corpn* [2000] 1 BCLC 813, 819-820 (Sir Richard Scott V-C). In practice, as Millett J pointed out in *In re International Tin Council* [1987] Ch 419, 446-447, 'Although a winding up in the country of incorporation will normally be given extraterritorial effect, a winding up elsewhere has only local operation.' The English courts recognised the limits of the international reach of their own proceedings by treating the English winding up as ancillary to the principal winding up in the country of the company's incorporation. They exercised their power of direction over the liquidator by limiting his functions to getting in English assets and to dealing with them in such a way as to bring about a distribution of the company's worldwide assets on as uniform a basis as was consistent with certain overriding principles of English insolvency law. The earliest reported case in which the practice was recognised is the decision of Kay J in *In re Matheson Bros Ltd* (1884) 27 ChD 225, but it is likely to have been older than that. In these cases, the court is exercising the ordinary powers of the English court to control the winding up of a company, which are wholly statutory. But the court was using them for a purpose which differed from that for which they were conferred, and on principles which departed from those applicable by law in the winding up of an English company. To that extent only, the English courts were exercising a common law power." (underlined added)

66. Much reliance has been placed by Ms Lam on the Privy Council's judgment in *Cambridge Gas* as authority in support of the proposition that the court has power under the common law to assist a foreign liquidator in the

absence of winding up in the domestic court. However, that part of the ratio has been held to be incorrect for the reasons explained by Lord Sumption in *Singularis*, at §18:

> "*Cambridge Gas* [2007] 1 AC 508 marks the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board. Lord Walker, giving the advice of the Board in *Al Sabah*, had expressed the view that there was no inherent power to set aside the Cayman trusts at the request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as *Cambridge Gas* suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins of Mapesbury. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more than there is such a power. It follows that the second and third propositions for which *Cambridge Gas* [2007] 1 AC 508 is authority cannot be supported." (underlined added)

67. The Hong Kong cases relied on by Ms Lam are all based on the principles expounded in *Singularis* or *Cambridge Gas* and do not take the point any further. In all these cases, the court was only concerned with recognising and assisting the foreign liquidators for the specific and limited purpose, such as implementing a restructuring or ordering a private examination against the persons within the jurisdiction. There was no analysis or conclusion as to how,

in the *absence* of a winding up order made against the foreign company, the court could make the provisions under the CWUO available to the foreign liquidators.

68. Even if (which I do not think is right) the court does have power under the common law to confer upon the Bermuda Liquidators the *powers* under the CWUO (such as ss.199, 200, 204, 211, 268A, 268B), one cannot equate the powers given to the foreign liquidators with the substantive provisions which *confer jurisdiction on the court* to set aside the specified types of antecedent transactions (ss.182, 183, 264B, 265D, 266-269) or the specific offences created by the provisions (ss.224, 271-276) and contend that the court can make such provisions or offences applicable to a foreign company which has not been wound up in Hong Kong. Neither Ms Lam nor Ms Eu has been able to cite any authority in support of such proposition.

69. Ms Lam submits that the PLs' concerns are 2 folds. First, the court should weigh the pros and cons of making a winding up order against the Company specifically, whether the order would benefit the creditors and whether those powers are necessary at the present stage. Second, there is not a hint that the Bermuda Liquidators require broader powers under the CWUO to investigate the affairs of the Company in Hong Kong or to collect and sell the assets in Hong Kong at this stage. I disagree.

(1) The first point is based on the assumption that the court can through a recognition order make available those provisions to the Company if the same powers exist under the Act, which I do not think can be done.

(2) The second point is made in circumstances where the PLs admittedly have *not* carried out any meaningful investigations

into the affairs of the Company. It does not seem to me that the PLs can rely on their own inaction to justify their view that there is no need for investigation. In any event, the PLs' view cannot be right. One of the basic functions of the liquidator is to investigate the causes of the Company's failure and the conduct of those concerned in the management of the Company in the interest of public (*Re Pantmaenog Timber Co Ltd*, as approved in *Re Kong Wah Holdings Ltd* (2006) 9 HKCFAR 766, §§23, 26). It is irrelevant that the PLs take a different view on the functions of liquidators.

70. I should add that Ms Lam acknowledges that it may be that the way to make the substantive provisions under the CWUO available to the Bermuda Liquidators is to seek a winding up order from the court and this can be done as and when the need arises in future. I am unable to accept the suggestion given that:

(1) the PLs have not carried on any meaningful investigation into the affairs of the Company; and

(2) the PLs are supposed to protect the interests of the unsecured creditors and to act in their best interests. The course suggested by Ms Lam is manifestly disadvantageous to the creditors as the commencement date of the winding up would be postponed by at least 6 years. This means that the Company would lose the benefits of most of the provisions whereby the Company or the HK Liquidators can seek to set aside the antecedent transactions entered into by the Company.

B4. Ancillary Winding up Ground

71. In light of my holding on the Recognition Ground, it is not necessary to consider the Ancillary Winding up Ground as all the submissions advanced by counsel are based on the assumption that in the absence of a winding up order, the court has power to make available the provisions under the CWUO to the Bermuda Liquidators if the same powers exist under the Act. Nevertheless, I will deal with the arguments advanced by the parties, in case this matter goes further.

72. Mr Brown submits that it is difficult, time consuming and costly for the Bermuda Liquidators to satisfy the court that it is appropriate for the court to grant a recognition order for the purpose of giving them the powers under the CWUO. The difficulty can be seen from *Re Rennie Produce (Aust) Pty Ltd (in Liq)* [2020] 3 HKLRD 685. In that case:

(1) the liquidators appointed in Australia sought an order for examination of and production of documents against certain parties in Hong Kong. The liquidators need to satisfy the court that the equivalent Australian legislation was at least as extensive as ss.286B and 286C (§17).

(2) DHCJ Maurellet SC declined to make the order and adjourned the application to allow the liquidators to seek an order from the Australia court (§50). As explained by the learned Judge, the issue was not whether an Australia court *could* make the order sought in Hong Kong but whether the Australia court *would* make the order if asked as a matter of that court's "settled practice" (§34).

(3) Even if it was unnecessary to obtain mirror order from the court of the jurisdiction of incorporation (§47), it would appear that at a minimum, expert evidence on the settled practice would be required, as stated in *Re Allied Weli Development Ltd*, CACV 58/2016, 18 July 2017.

73. Ms Lam does not dispute the point. Instead, she submits that:

(1) The existence of additional powers under the CWUO is a "hypothetical benefit that potentially arise in all cases" (*Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255 at §26). Whilst the powers may be seen as a "benefit", such approach would substantially widen the scope of the jurisdiction as previously exercised. It seems antithetical to there being a "requirement" if the mere existence of powers itself satisfies the second core requirement.

(2) Such approach could also encourage parties to take a "race to the court" approach, disapproved in *Stichting Shell Pensioenfonds v Krys*.

(3) As a matter of comity, the Hong Kong court will also be astute to the sensitivities of fellow courts in common law jurisdictions which often deal with cross-border insolvency issues involving Hong Kong.

74. I shall deal with the last 2 points first. In my view, they are based on a misunderstanding of the nature of ancillary winding up and how it has been conducted by the liquidators in the past. In as early as 1997, the English Court of Appeal has already in *Re BCCI (No. 10)*, at 238G-246F, analysed and

explained the concept of ancillary winding up and how it works in practice. As stated by Sir Richard Scott VC (at 246C-F):

> "This line of authority establishes, in my opinion, at least the following propositions. (1) Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England will be ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it will be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England will be ancillary in the sense, also, that it will be the liquidators in the principal liquidation who will be best placed to declare the dividend and to distribute the asses in the pool accordingly. (4) None the less, the ancillary character of an English winding up does not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which is brought before the court. It may be, of course, that English conflicts of law rules will lead to the application of some foreign law principle in order to resolve a particular issue."

75. Thus, 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. If and to the extent that there are assets within the domestic jurisdiction (which would normally be sufficient to satisfy the second core requirement and possibly, the first core requirement), those assets will be taken and dealt with by the liquidators appointed in that jurisdiction and the liquidation will be carried on as ancillary liquidation.

76. As pointed out by Ms Maureen Chan, solicitor for the OR, where the company concerned had been wound up in its place of incorporation, normally the same individuals would be appointed as liquidators in both jurisdictions. These liquidators would enter into protocols, approved by the courts of both jurisdictions, to regulate and harmonize the liquidations, so as

to reduce the conflicts and complications which may arise in cross-border insolvency matters. See for eg., *Re Kong Wah Holdings Ltd & anor (No. 2)* [2004] 3 HKC 596, per Kwan J (as she then was). This has been how liquidations in respect of foreign companies have been carried out in the places of incorporation and in Hong Kong. There is no reason why the same practice cannot be followed by the Company.

77. Ms Lam submits that if a winding up order is made against the Company on a "may as well do so" basis, this could very well add to the burden of the estate rather than benefit it, given that:

(1) The funds received by the HK Liquidators from realising the Company's assets would be subject to an *ad valorem* duty payable to the OR pursuant to ss.203 and 296 of the CWUO and ss.6-7 and Item 1 of Table B of Schedule 3 to the Companies (Fees and Percentages) Order (Cap. 32C).

(2) The costs of liquidation, such as the costs of compliance with statutory filing and advertising requirements, may be increased or even duplicated, especially if 2 different sets of liquidators are appointed in Hong Kong and in Bermuda. This may result in further delay.

78. The costs and expenses identified by Ms Lam are not substantial, at any rate, as compared to the benefits of the court making a winding up order against the Company. The *ad valorem* fee is only payable out of the assets realised in Hong Kong, and the rate ranges from 10%[10] to 1%[11]. There will be little duplication of costs if the same persons are appointed as liquidators in

[10] For the first HK$500,000 or fraction thereof
[11] For assets realized in excess of HK$50,000,000

both jurisdictions. As matter now stands, it is by no means clear that the PLs should be appointed or remain as liquidators of the Company. I say this because upon this Court's enquiry, Ms Lam confirms that the PLs have been acting with the benefit of the funding provided by the 2 funders. Although it has not been disclosed by the PLs as to whether they had entered into any funding agreement with the funders and, if so, on what terms, it is very likely that such agreement exists. This may be a cause for concern if and to the extent that the PLs have agreed to subject themselves to the control or influence of the funders, such that the court should appoint other persons as HK Liquidators (*Re Goodway Ltd* [1999] 1 HKC 141, §§23-29, per Yuen J). As the PLs have not carried out any meaningful investigation in respect of the Company's affairs, there is no question of any learning or costs being wasted if other persons are appointed as HK Liquidators.

79. In my view, far from avoiding parallel proceedings and saving any costs and time, if the Company were not wound up by the court, multiple proceedings would ensue which, in turn, would increase the time and costs for administering the affairs in Hong Kong. In this regard:

(1) Even if (which I do not think is right) the Bermuda Liquidators can through recognition and assistance ask the Hong Kong court to confer certain powers on them or make available certain substantive provisions to the Company, such application would involve the Bermuda Liquidators making an application to the Bermuda court for the order sought, follow by that court issuing a letter of request to the Hong Kong court. The Bermuda Liquidators would then rely on the letter of request and commence fresh proceedings in Hong Kong to seek the order. As it is not the practice of the court to give a *carte blanche* approval to foreign liquidators, it is likely that the Bermuda Liquidators would have

to make successive applications to the court for recognition orders for the specific purposes or issues.

(2) In so far as the application affects any third parties, in fairness to such parties and as a matter of expedience (so that the order would bind such parties), the application would have to be made *inter partes* by commencing fresh proceedings against such parties.

(3) The PLs would not be able to benefit from the procedure under the CWUO and the Companies (Winding up) Rules (Cap. 32H), which permit applications to be made summarily through a summons issued in the winding up proceedings against anyone within or outside jurisdiction.

80. It cannot be in the interests of the creditors for the Company to have to bear the time and costs in making successive applications to the court for recognition orders as suggested by Ms Lam.

C. DISPOSITION AND COSTS

81. For the reasons set out above, I hold that:

(1) The mere fact that the Company has been wound up by the Bermuda court is *not* a ground for the court to decline to make a winding up order against the Company;

(2) The Petitioner has demonstrated that there is a reasonable possibility of benefit to the creditors if a winding up order is made against the Company. This is sufficient for the purpose of the second core requirement;

(3) 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 CWUO available to the Company; and

(4) 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 the CWUO, even assuming the court has power to do so (which I do not think there is).

82. It follows that the Petitioner is entitled to a winding up order against the Company and I so order.

83. As for costs, I make a costs order *nisi* that:

(1) the costs of and occasioned by the hearings on 14 February 2022 and 1 April 2022 be paid by ICA and the PLs to the Petitioner and the OR, with certificate for 2 counsel, to be taxed if not agreed;

(2) For the purpose of Order 62 rule 6(2) of the Rules of the High Court, I direct that the PLs are not entitled to recover their costs from the estate of the Company; and

(3) Save as aforesaid, the costs of and occasioned by the Petition including one set of costs payable to the supporting creditors, shall be paid out of the assets of the Company.

84. It seems to me that it is appropriate to order the PLs and ICA to bear the costs of the 2 hearings, as such costs were incurred as a result of their opposition to the Petition when there is no valid ground for such opposition.

(Linda Chan)
Judge of the Court of First Instance
High Court

Mr Toby Brown and Ms Jacquelyn Ng, instructed by Lam & Co, for the Petitioner

Ms Rachel Lam SC leading Ms Tinny Chan, instructed by Chungs Lawyers, for Joint Provisional Liquidators of the Company

Ms Audrey Eu SC leading Mr Anson Wong Yu Yat, instructed by Fan Wong & Tso, for the opposing creditor (Integrated Capital (Asia) Limited)

Ms Maureen Chan, of Official Receiver's Office, for the Official Receiver

White & Case, for the opposing creditor (China Minsheng Banking Crop., Ltd.), is absent

Chiu & Partners, for the opposing creditor (Hao Tian Development Group Limited), is absent

Clifford Chance, for the supporting creditor (Credit Suisse AG, Singapore Branch), is absent

A

Supreme Court

Rubin and another *v* Eurofinance SA and others (Picard and others intervening)

In re New Cap Reinsurance Corpn Ltd (in liquidation)

B

New Cap Reinsurance Corpn Ltd and another *v* Grant and others

[2012] UKSC 46

2012 May 21, 22, 23, 24; Oct 24

C

Lord Walker of Gestingthorpe, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption JJSC, Lord Collins of Mapesbury

Insolvency — Liquidation — Foreign company — Liquidators of foreign companies seeking to enforce in England judgments of United States and Australian courts to recover moneys transferred to defendants before liquidation — Defendants claiming not to have been present in or submitted to jurisdiction of foreign courts — Whether judgments in personam — Whether ordinary rules for enforcing judgments in personam inapplicable to bankruptcy proceedings — Whether judgments enforceable at common law — Whether alternative method of enforcement through international assistance provisions of Model Law on Cross-Border Insolvency — Statutory provisions allowing English court to "assist" Australian court in insolvency matter and for registration and enforcement of Australian judgment in "civil or commercial" matter — Whether either provision allowing English court to enforce Australian judgment against defendants — Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 & 24 Geo 5, c 13), s 6 — Insolvency Act 1986 (c 45), s 426(4) — Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 (SI 1994/1901), art 4(a) — Cross-Border Insolvency Regulations 2006 (SI 2006/1030), Sch 1, art 21

D

E

In the first case the company settled a trust under English law to hold funds for consumers who successfully participated in sales promotions organised by it in the United States of America. Following a successful challenge to the promotion under United States consumer protection legislation, resulting in the trust having to pay a substantial sum by way of settlement, it obtained an order from the English High Court appointing the applicants as receivers of the trust's property and the applicants then filed for protection before the bankruptcy court in New York under Chapter 11 of the United States Bankruptcy Code. The applicants were appointed as legal representatives of the trust, as debtor, with authority to prosecute all causes of action against potential defendants, and they commenced adversary proceedings in New York, being the equivalent of undervalue transaction and preference claims under sections 238 and 239 of the Insolvency Act 1986[1], against the defendants, the company and its founder and his sons. The defendants, who were not present in New York at the relevant time, did not submit to the court's jurisdiction and did not defend the proceedings. Default and summary judgment was entered against them. The applicants applied to the High Court for enforcement of the orders in England against the defendants under CPR Pts 70 and 73 on the ground that the English court had power to do so both at common law and under article 21 of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency,

F

G

H

[1] Insolvency Act 1986, s 426(4)(5): see post, para 146.

scheduled to the Cross-Border Insolvency Regulations 2006[2]. The judge held that the Chapter 11 proceedings fell within the ambit of the Model Law but that its provisions for co-operation did not extend to the enforcement of judgments. He refused to recognise the New York court's judgment at common law on the ground that it was an in personam judgment which could not be enforced where the defendants had neither been present in nor submitted to the New York court's jurisdiction. On the applicants' appeal, the Court of Appeal held that the New York court's judgments made in the adversary proceedings, despite having the indicia of judgments in personam, were none the less judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings, that the ordinary rule precluding the enforcement of a foreign judgment in personam where the judgment debtor had neither been present in, nor submitted to the jurisdiction of the courts of, the country where judgment had been given did not apply to such proceedings, and that since there should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which received worldwide recognition, the judgment of the New York court could be enforced against the defendants at common law. Given that decision, the Court of Appeal deemed it unnecessary to decide whether the judgments could have been enforced under the 2006 Regulations.

In the second case the defendants were members of a Lloyd's syndicate which placed reinsurance with an Australian reinsurance company and had received payments from it shortly before it went into liquidation. The liquidator brought proceedings in New South Wales to recover the payments made to the syndicate, on the basis that the company had been insolvent when they were made. The defendants did not accept service of the proceedings or submit to the jurisdiction of the New South Wales court in that matter but did participate in creditors' meetings in Australia in relation to some unsettled claims which they had against the company. The New South Wales court held that the payments had been a preference and therefore liable to be set aside, and issued a letter of request asking, inter alia, that the English court exercise its jurisdiction under section 426(4) of the Insolvency Act 1986 to order the defendants to pay the sum specified in the order. The liquidator and the company issued proceedings in England for relief as sought in the letter of request. The judge held that the English court was entitled to enforce the Australian judgment either at common law, given the decision of the Court of Appeal in the first case, or under section 426(4). Dismissing the defendants' appeal the Court of Appeal, having decided that the Foreign Judgments (Reciprocal Enforcement) Act 1933[3] was applicable because the insolvency proceedings fell within the ambit of "civil or commercial matter" in article 4(a) of the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994[4], held that, by reason of section 6 of that Act, the judgement was enforceable under section 426 but not at common law.

On appeal by the defendants in both cases—

Held, (1) allowing the appeal in the first case (Lord Clarke of Stone-cum-Ebony JSC dissenting), that the common law would only enforce a foreign judgment in personam if the judgment debtors had been present or, where the 1933 Act was applicable, resident in the foreign country when the proceedings had been commenced, or if they had submitted to its jurisdiction; that, as a matter of policy, the court would not adopt a more liberal rule in respect of enforcement judgments in the interests of the universality of bankruptcy; that any change in the settled law of the recognition and enforcement of judgments was a matter for the legislature; that,

[2] Cross-Border Insolvency Regulations 2006, Sch 1, art 21: see post, para 136.

[3] Foreign Judgments (Reciprocal Enforcement) Act 1933, s 6: see post, para 149.

[4] Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, art 4: "The following judgments shall be judgments to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies, that is to say— (a) any judgment, decree, rule, order or other final decree for the payment of money (other than in respect of taxes or other charges of a like nature or an order requiring the payment of maintenance) given by a recognised court in respect of a civil or commercial matter . . . "

A moreover, the Model Law was not designed to provide for the reciprocal enforcement of judgments and so the 2006 Regulations could not be used to enforce a foreign judgment against a third party; and that, accordingly, applying the common law, since the proceedings against the defendants in the first case had been in personam and they had not submitted to the jurisdiction of the United States bankruptcy court, the orders which it had made against them could not be enforced by the English court (post, paras 10, 115, 128–129, 142–144, 169, 177, 178, 179).

B *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, HL(E) considered.

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, PC disapproved.

(2) Dismissing the appeal in the second case, that although the English court could give assistance to the Australian court under section 426 of the Insolvency Act 1986, such assistance did not extend to the enforcement of judgments; that the C defendants' participation in the Australian insolvency proceeding, albeit not the actual recovery proceedings, was sufficient for them to be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding; that it followed that there could be enforcement in the English court; that since the 1994 Order applied Part I of the 1933 Act to Australian judgments in respect of "civil and commercial matters" and since insolvency proceedings were not to be excluded from that term, enforcement in such cases would be under the D 1933 Act rather than at common law; and that, accordingly, the Australian judgment in the second case would be enforced by the English court on that basis (post, paras 152, 167, 175–177, 178, 203, 205).

England v Smith [2001] Ch 419, CA distinguished.

Per Lord Walker of Gestingthorpe, Lord Mance, Lord Sumption JJSC and Lord Collins of Mapesbury. Declining to sanction a departure from the traditional rules is unlikely to cause serious injustice. Several of the ways in which the claims were put in E the United States proceedings in the first case might have founded proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the express trust). There are several other avenues available to officeholders. Avoidance claims by a liquidator of an Australian company may be the subject of a request by the Australian court pursuant to section 426(4) of the Insolvency Act 1986, applying Australian law under section 426(5). In appropriate cases, article 23 of the Model Law will allow avoidance claims to be made by foreign representatives under the F Insolvency Act 1986. In the cases where the insolvent estate has its centre of main interests in the European Union, judgments will be enforceable under article 25 of Council Regulation (EC) No 1346/2000 (post, paras 131, 178).

Decision of the Court of Appeal in *Rubin v Eurofinance SA* [2010] EWCA Civ 895; [2011] Ch 133; [2011] 2 WLR 121; [2011] Bus LR 84; [2011] 1 All ER (Comm) 287 reversed.

Decision of the Court of Appeal in *In re New Cap Reinsurance Corpn Ltd* [2011] G EWCA Civ 971; [2012] Ch 538; [2012] 2 WLR 1095; [2012] Bus LR 772; [2012] 1 All ER 755; [2012] 1 All ER (Comm) 1207 affirmed on different grounds.

The following cases are referred to in the judgments:

Adams v Cape Industries plc [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929, Scott J and CA

African Farms Ltd, In re [1906] TS 373

H *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90

Akande v Balfour Beatty Construction Ltd [1998] ILPr 110

Al-Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 AC 333; [2005] 2 WLR 904; [2005] 1 All ER 871, PC

Amin Rasheed Shipping Corpn v Kuwait Insurance Co [1984] AC 50; [1983] 3 WLR 241; [1983] 2 All ER 884; [1983] 2 Lloyd's Rep 365, HL(E)

Bank of Credit and Commerce International SA, In re (No 10) [1997] Ch 213; [1997] 2 WLR 172; [1996] 4 All ER 796
Banque Indosuez SA v Ferromet Rescources Inc [1993] BCLC 112
Barcelona Traction, Light and Power Co Ltd (Second Phase), In re (Belgium v Spain) [1970] ICJ Rep 3
Beals v Saldanha 2003 SCC 72; [2003] 3 SCR 416
Bergerem v Marsh (1921) 6 B & CR 195; 91 LJKB 80
Berliner Industriebank Aktiengesellschaft v Jost [1971] 2 QB 463; [1971] 3 WLR 61; [1971] 2 All ER 1513, CA
Byers v Yacht Bull Corpn [2010] EWHC 133 (Ch); [2010] BCC 368
CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589
Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 All ER 829; [2006] 2 All ER (Comm) 695, PC
Cavell Insurance Co, In re (2006) 269 DLR (4th) 679
Condor Insurance Ltd, In re (2010) 601 F 3d 319
Credit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA
Desert Sun Loan Corpn v Hill [1996] 2 All ER 847, CA
England v Smith [2001] Ch 419; [2000] 2 WLR 1141, CA
F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma (Case C-213/10) (unreported) 19 April 2012, ECJ
Flightlease (Ireland) Ltd, In re [2006] IEHC 193; [2012] IESC 12
Galbraith v Grimshaw [1910] AC 508, HL(E)
German Graphics Graphicsche Maschinen GmbH v van der Schee (Case C-292/08) [2009] ECR I-8421, ECJ
Gibson (Gavin) & Co Ltd v Gibson [1913] 3 KB 379
Godard v Gray (1870) LR 6 QB 139
Gourdain v Nadler (Case 133/78) [1979] ECR 733, ECJ
Gourmet Resources International Inc v Paramount Capital Corpn (1991) 3 OR (3d) 286, [1993] ILPr 583; 14 OR (3d) 319
HIH Casualty and General Insurance Ltd, In re [2008] UKHL 21; [2008] 1 WLR 852; [2008] Bus LR 905; [2008] 3 All ER 869, HL(E)
Henderson, In re; Nouvion v Freeman (1889) 15 App Cas 1, HL(E)
Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 BCLC 497, CA
Impex Services Worldwide Ltd, In re [2004] BPIR 564
Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader) [1996] 2 Lloyd's Rep 585
Indyka v Indyka [1969] 1 AC 33; [1967] 3 WLR 510; [1967] 2 All ER 689, HL(E)
Maxwell Communication Corpn, In re (1994) 170 BR 800
Metcalfe & Mansfield Alternative Investments, In re (2010) 421 BR 685
Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512
Morguard Investments Ltd v De Savoye [1990] 3 SCR 1077
New Cap Reinsurance Corpn v Grant [2009] NSWSC 662; 257 ALR 740
New Cap Reinsurance Corpn v Renaissance Reinsurance Ltd [2002] NSWSC 856
Oakley v Ultra Vehicle Design Ltd [2005] EWHC 872 (Ch); [2006] BCC 57; [2006] BPIR 115
Owens Bank Ltd v Bracco [1992] 2 AC 443; [1992] 2 WLR 621; [1992] 2 All ER 193, HL(E)
Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA
Pattni v Ali [2006] UKPC 51; [2007] 2 AC 85; [2006] 2 WLR 102; [2007] 2 All ER (Comm) 427, PC
Picard v Harley International (Cayman) Ltd (unreported) 10 November 2010, US Bankruptcy Court, Southern District of New York

Rein v Stein (1892) 66 LT 469, DC
Robertson, Ex p; In re Morton (1875) LR 20 Eq 733
Seagon v Deko Marty Belgium NV (Case C-339/07) [2009] 1 WLR 2168; [2009] Bus LR 1151; [2009] ECR I-767, ECJ
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
Société Eram Shipping Co Ltd v Cie Internationale de Navigation [2003] UKHL 30; [2004] 1 AC 260; [2003] 3 WLR 21; [2003] 3 All ER 465, HL(E)
Solomons v Ross (1764) 1 H Bl 131n
Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843, HL(E)
Starlight International Inc v Bruce [2002] EWHC 374 (Ch), [2002] ILPr 617
Stone & Rolls Ltd v Moore Stephens [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431; [2010] 1 All ER (Comm) 125, HL(E)
SwissAir Schweizerische Luftverkehr-Aktiengesellschaft, In re [2009] EWHC 2099 (Ch); [2010] BCC 667
Television Trade Rentals Ltd, In re [2002] EWHC 211 (Ch); [2002] BCC 807; [2002] BPIR 859
Travers v Holley [1953] P 246; [1953] 3 WLR 507; [1953] 2 All ER 794, CA
Trepca Mines Ltd, In re [1960] 1 WLR 1273; [1960] 3 All ER 304, CA
Turners & Growers Exporters Ltd v The ship Cornelis Verolme [1997] 2 NZLR 110
Williams v Jones (1845) 13 M & W 628
Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA [1984] 1 WLR 438; [1984] 1 All ER 760; [1984] 1 Lloyd's Rep 453, HL(E)

The following additional cases were cited in argument:

AWB (Geneva) SA v North American Steamships Ltd [2007] EWHC 1167 (Comm); [2007] 1 CLC 749; [2007] EWCA Civ 739; [2007] 2 Lloyd's Rep 315; [2007] 2 CLC 117, CA
Atlas Shipping A/S, In re (2009) 404 BR 726
Barlow Clowes Gilt Managers Ltd, In re [1992] Ch 208; [1992] 2 WLR 36; [1991] 4 All ER 385
Drumm (A Bankrupt), In re 13 December 2010, High Court of Ireland
Fairfield Sentry Ltd v Citco Bank Nederland NV [2012] IEHC 81
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890
Pantmaenog Timber Co Ltd, In re [2003] UKHL 49; [2004] 1 AC 158; [2003] 3 WLR 767; [2003] 4 All ER 18, HL(E)
Stegmann, Ex p [1902] TS 40
UBS AG v Omni Holdings AG [2000] 1 WLR 916

APPEALS from the Court of Appeal

Rubin v Eurofinance SA

On 31 July 2009 Nicholas Strauss QC sitting as a deputy judge of the Chancery Division [2010] 1 All ER (Comm) 81 granted an application by the applicants, David Rubin and Henry Lan, being the foreign representatives of the Consumer Trust, for (1) recognition of proceedings brought under Chapter 11 of the United States Bankruptcy Code, including adversary proceedings, in relation to the trust and taking place in the United States Bankruptcy Court for the Southern District of New York, as a foreign proceeding under article 2(i) of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency and

(2) recognition of themselves as foreign representatives of the trust under article 2(j), but refused to grant an order that the United States Bankruptcy Court's order of 23 July 2008 be enforced as a judgment of the English courts in accordance with CPR Pts 70 and 73 against the defendants to the New York proceedings, Adrian Roman, Justin Roman, Nicholas Roman and Eurofinance SA.

On 30 July 2010, the Court of Appeal (Ward, Wilson LJJ and Henderson J) [2011] Ch 133 allowed the applicants' appeal against the dismissal of their claim for enforcement and dismissed the defendants' cross-appeal against the orders for recognition of the adversary proceedings as part of the Chapter 11 proceedings.

On 27 October 2010 the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Collins of Mapesbury JJSC) allowed an application by the defendants for permission to appeal, pursuant to which they appealed. On 29 November 2011, 3 April 2012 and 24 April 2012 respectively the Supreme Court gave leave to intervene in the appeal to (1) Irving H Picard, as trustee for the substantively consolidated "SIPA" liquidation (under the (United States) Securities Investor Protection Act 1970) of the business of Bernard L Madoff Investment Securities LLC and Bernard L Madoff, (2) Asphalia Fund Ltd, and (3) Vizcaya Partners Ltd. The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were whether (1) the relevant proceedings should be recognised as a "foreign main proceeding" in accordance with the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, scheduled to the Cross-Border Insolvency Regulations 2006; (2) the applicants should be recognised as "foreign representatives" within the meaning of article 2(j) of the Model Law in relation to those proceedings; and (3) that part of the United States Bankruptcy Court's order of 23 July 2008 relating to the avoidance proceedings be enforced against the defendants as a judgment of the English courts in accordance with CPR Pts 70 and 73.

The facts are stated in the judgment of Lord Collins of Mapesbury.

In re New Cap Reinsurance Corpn Ltd

On 15 March 2011 Lewison J [2011] EWHC 677 (Ch) granted an application by the first applicant, New Cap Reinsurance Corpn Ltd (in liquidation), and the second applicant, John Raymond Gibbons (the first applicant's liquidator) for an order enforcing in England an order made on 11 September 2009 by the Supreme Court of New South Wales that the defendants, AE Grant and others, as members of Lloyd's Syndicate 991 for the 1997 and 1998 year accounts, pay the applicants certain commutation payments made by the first applicant to the defendants, and in respect of which order the court had issued a letter of request to the English High Court requesting assistance in enforcing that order. The judge held that the order of the New South Wales court could not be registered and enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (as applied to Australia by the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994), that the High Court therefore had power to assist the New South Wales court either at common law or under section 426 of the Insolvency Act 1986 and that, in the exercise of his discretion, he would

A assist the New South Wales court by ordering payment of the Australian judgment debt under section 426.

On 9 August 2011, the Court of Appeal (Mummery, Lloyd and McFarlane LJJ) [2012] Ch 538 dismissed an appeal by the defendants against the judge's order.

On 30 November 2011 the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance, Lord Dyson JJSC) allowed an application by
B the defendants for leave to appeal, pursuant to which they appealed. On 18 January 2012 the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Dyson JJSC) allowed an application by the applicants to cross-appeal, pusuant to which they cross-appealed.

The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were (1) whether the court was being asked to apply
C section 426(4) of the Insolvency Act 1986 to the enforcement of foreign judgments or (2) whether instead the court was being asked (i) to apply that part of section 588FF(1) of the (Australian) Corporations Act 2001 which empowered the court to make an order directing the defendants to pay money to the claimants and/or (ii) to direct the defendants to pay money to the claimants under the court's general jurisdiction and powers; (3) whether,
D if the court was being asked to apply section 426(4) to the enforcement of foreign judgments, that section extended to the enforcement of foreign judgments; (4) whether section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 had application to judgments for the payment of money in foreign insolvency proceedings; (5) (on the cross-appeal) whether the Australian judgment was a judgment to which Part I of the 1933 Act (as applied by the Reciprocal Enforcement of Foreign Judgments (Australia)
E Order 1994) applied; (6) (on the cross-appeal) whether, if the Australian judgment was a judgment to which Part 1 of the 1933 Act applied, the declarations in the Australian judgment (a) were binding under section 8 of the 1933 Act and/or at common law, and/or (b) could form the subject of judicial assistance; (7) whether *Rubin v Eurofinance SA* [2011] Ch 133 was rightly decided; (8) whether, if *Rubin's* case was wrong, registration of the
F Australian judgment under the 1933 Act would be set aside by the English court, and whether the courts below were right to assist the Australian court under section 426(4) of the 1986 Act; (9) whether, if section 426(4) was available but registration of the Australian judgment under the 1933 Act would be set aside, it was appropriate to assist the Australian court under section 426(4); (10) whether the defendants had submitted to the insolvency jurisdiction of the Australian court and, if so, with what consequence; and
G (11) whether the English court should in any event assist the Australian court at common law.

The facts are stated in the judgment of Lord Collins of Mapesbury.

Robin Knowles QC and *Blair Leahy* (instructed by *Edwards Wildman Palmer UK LLP*) for the defendants in the second case.

Marcus Staff (instructed by *Brown Rudnick LLP*) for the defendants in
H the first case.

Robin Dicker QC and *Tom Smith* (instructed by *Chadbourne & Parke LLP*) for the applicants in the first case.

Gabriel Moss QC and *Barry Isaacs QC* (instructed by *Mayer Brown International LLP*) for the applicants in the second case.

Pushpinder Saini QC, *Adrian Briggs*, *Shaheed Fatima*, *Ian Fletcher* and *Stephen Robins* (instructed by *Taylor Wessing LLP*) for the first intervener, by written submissions.

Michael Driscoll QC and *Rosanna Foskett* (instructed by *Wilsons Solicitors LLP*) for the second intervener, by written submissions, and (instructed by *Wedlake Bell LLP*) for the third intervener, by written submissions.

The court took time for consideration.

24 October 2012. The following judgments were handed down.

LORD COLLINS OF MAPESBURY (with whom **LORD WALKER OF GESTINGTHORPE** and **LORD SUMPTION JJSC** agreed)

I Introduction

The appeals

1 There are two appeals before the court: *Rubin v Eurofinance SA* ("*Rubin*") and *New Cap Reinsurance Corpn Ltd v Grant* ("*New Cap*"). These appeals raise an important and novel issue in international insolvency law. The issue is whether, and if so, in what circumstances, an order or judgment of a foreign court (on these appeals the United States Bankruptcy Court for the Southern District of New York, and the New South Wales Supreme Court) in proceedings to adjust or set aside prior transactions, e g preferences or transactions at an undervalue ("avoidance proceedings"), will be recognised and enforced in England. The appeals also raise the question whether enforcement may be effected through the international assistance provisions of the UNCITRAL Model Law (implemented by the Cross-Border Insolvency Regulations 2006 ("CBIR")), which applies generally, or the assistance provisions of section 426 of the Insolvency Act 1986, which applies to a limited number of countries, including Australia.

2 In *Rubin* a judgment of the US Federal Bankruptcy Court for the Southern District of New York ("the US Bankruptcy Court") in default of appearance for about US$10m under State and Federal law in respect of fraudulent conveyances and transfers was enforced in England at common law. In *New Cap* (in which the Court of Appeal was bound by the prior decision in *Rubin*) a default judgment of the New South Wales Supreme Court, Equity Division, for about US$8m in respect of unfair preferences under Australian law was enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933, and, alternatively, pursuant to powers under section 426 of the Insolvency Act 1986.

3 In each of the appeals it was accepted or found that the party against whom they were given was neither present (nor, for the purposes of the 1933 Act, resident) in the foreign country nor submitted to its jurisdiction (which are the relevant conditions for enforceability at common law and under the 1933 Act), but that those conditions did not apply to judgments or orders in foreign insolvency proceedings.

4 In addition to the arguments on these two appeals, the court has had the great benefit of written submissions on behalf of parties to proceedings pending in Gibraltar. Those proceedings are to enforce default judgments entered by the United States Bankruptcy Court for some $247m in respect of

A alleged preferential payments to companies in the British Virgin Islands and Cayman Islands arising out of the notorious Ponzi scheme operated by Mr Bernard Madoff.

5 It has been necessary to emphasise that the judgments in all three matters were in default of appearance, because if the judgment debtors had appeared and defended the proceedings in the foreign courts, the issues on these appeals would not have arisen. The reason is that the judgments would B have been enforceable on the basis of the defendants' submission to the jurisdiction of the foreign court. Enforcement would have been at common law, or, in the *New Cap* case either under the common law, or under the 1933 Act which substantially reproduces the common law principles—there is a subsidiary issue on this appeal as to whether the 1933 Act applies to judgments in insolvency proceedings, dealt with in section IX below.

C **6** Under the common law a court of a foreign country has jurisdiction to give a judgment in personam where (among other cases) the judgment debtor was present in the foreign country when the proceedings were instituted, or submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings. In the case of the 1933 Act the foreign court is deemed to have jurisdiction where the judgment debtor submitted to the jurisdiction by D voluntarily appearing in the proceedings otherwise than for the purpose (inter alia) of contesting the jurisdiction; or where the judgment debtor was resident at the time when the proceedings were instituted, or being a body corporate had an office or place of business there: section 4(2)(a)(i)(iv).

The Dicey rule

E **7** The general principle has been referred to on these appeals, by reference to the common law rule set out in *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), as "*Dicey's* rule 36." This was only by way of shorthand, because the rules in the 1933 Act are not quite identical, and in any event has been purely for convenience, because the rule has no standing beyond the case law at common law which it seeks to re-state. What was rule 36 now appears (incorporating some changes which are not F material on this appeal) as rule 43 in the new 15th edition, and I shall refer to it as "the *Dicey* rule". So far as relevant, rule 43 (*Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 1, para 14R-054) states:

> "a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the G following cases:
>
> "*First Case*—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> "*Second Case*—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> "*Third Case*—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the H proceedings.
>
> "*Fourth Case*—If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

8 The first edition of *Dicey* in 1896 stated (rule 80) that the foreign court would have jurisdiction if "the defendant was resident [or present?]" in the foreign country "so as to have the benefit, and be under the protection, of the laws thereof." By the 6th edition in 1949 the formula was repeated by Professor Wortley (rule 68) but without the doubt about presence as a basis of jurisdiction. In the 8th edition in 1967 Dr (later Professor) Clive Parry removed the phrase (then rule 189) about the benefit and protection of the foreign country's laws. The rule, subsequently edited by Dr Morris and then by Professor Kahn-Freund, remained in that form until the decision in *Adams v Cape Industries plc* [1990] Ch 433 (CA), which established that presence in the foreign jurisdiction, as opposed to residence, was a sufficient basis for the recognition of foreign judgments. Then, edited by myself and later by Professor Briggs, the rule took substantially its present form in the 12th edition in 1993.

9 The theoretical basis for the enforcement of foreign judgments at common law is that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained: *Williams v Jones* (1845) 13 M & W 628, 633, per Parke B; *Godard v Gray* (1870) LR 6 QB 139, 147, per Blackburn J; *Adams v Cape Industries plc* [1990] Ch 433, 513 and *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484, per Lord Bridge of Harwich. As Blackburn J said in *Godard v Gray*, this was based on the mode of pleading an action on a foreign judgment in debt, and not merely as evidence of the obligation to pay the underlying liability: LR 6 QB 139, 150. But this is a purely theoretical and historical basis for the enforcement of foreign judgments at common law. It does not apply to enforcement under statute, and makes no practical difference to the analysis, nor, in my judgment, to the issues on these appeals.

10 Consequently, if the judgments in issue on the appeals are regarded as judgments in personam within the *Dicey* rule, then they will only be enforced in England at common law if the judgment debtors were present (or, if the 1933 Act applies, resident) in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction. It is common ground that the judgment debtors were not present or resident, respectively, in the United States or in Australia, although there is an issue as to whether the New Cap defendants submitted to the jurisdiction of the Australian court, which is dealt with in section VIII below.

Insolvency proceedings and the international dimension

11 There are some general remarks to be made. First, from as early as the mid-18th century the English courts have recognised the effect of foreign personal bankruptcies declared under the law of the domicile: *Solomons v Ross* (1764) 1 H Bl 131n, where Dutch merchants were declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt in priority to an English creditor of the merchants who had attached the debt after the bankruptcy: see *Nadelmann, Conflict of Laws: International and Interstate* (1972), p 273 and *Blom-Cooper, Bankruptcy in Private International Law* (1954), pp 107–108.

12 In *Galbraith v Grimshaw* [1910] AC 508 Lord Dunedin said that there should be only one universal process of the distribution of a bankrupt's

property and that, where such a process was pending elsewhere, the English courts should not allow steps to be taken in its jurisdiction which would interfere with that process:

> "Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution. . .": p 513.

13 Second, in the case of corporations the English courts have exercised a winding up jurisdiction which is wider than that which at common law they have accorded to foreign courts. The court exercises jurisdiction to wind up a foreign company if there is a sufficient connection between the company and England, there are persons who would benefit from the making of a winding up order, and there are persons interested in the distribution of assets of the company who are persons over whom the court can exercise jurisdiction: see *Dicey*, 15th ed, para 30R-036. But as regards foreign liquidations, the general rule is that the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation: *Dicey*, 15th ed, para 30R-100. That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) ("the EC Insolvency Regulation") and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties). It is ultimately derived from the civil law concept of a trader's domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor's centre of administration: see Report by M Lemontey on the draft EEC Bankruptcy Convention, Bulletin of the European Communities, Supp 2/82, p 58; American Law Institute, *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012), Principle 13, pp 83 et seq.

14 Third, it is not only in recent times that there have been large insolvency proceedings with significant cross-border implications. Even before then there were the Russian bank cases in the 1930s (arising out of the nationalisation and dissolution of the banks by the Soviet Government) and the *Barcelona Traction* case in the 1940s and 1950s (see *In re Barcelona Traction, Light and Power Co Ltd (Second Phase) (Belgium v Spain)* [1970] ICJ Rep 3), but there is no doubt that today international co-operation in cross-border insolvencies has become a pressing need. It is only necessary to recall the bankruptcies or liquidations of Bank of Credit and Commerce International, Maxwell Communications, or Lehman Brothers, each with international businesses, assets in many countries, and potentially competing creditors in different countries with different laws. There is not only a need to balance all these interests but also to provide swift and effective remedies to combat the use of cross-border transfers of assets to evade and to defraud creditors.

15 Fourth, there is no international unanimity or significant harmonisation on the details of insolvency law, because to a large extent

insolvency law reflects national public policy, for example as regards priorities or as regards the conditions for the application of avoidance provisions: "the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme": *In re HIH Casualty and General Insurance Ltd* ("*HIH*") [2008] 1 WLR 852, para 19, per Lord Hoffmann.

16 Fifth, there has been a trend, but only a trend, to what is called universalism, that is, the "administration of multinational insolvencies by a leading court applying a single bankruptcy law": Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276, 2277. What has emerged is what is called by specialists "modified universalism."

17 The meaning of the expression "universalism" has undergone a change since the time it was first used in the 19th century, and it later came to be contrasted with the "doctrine of unity." In 1834 Story referred to the theory that assignments under bankrupt or insolvent laws were, and ought to be, of universal operation to transfer movable property, in whatever country it might be situate, and concluded that there was great wisdom in adopting the rule that an assignment in bankruptcy should operate as a complete and valid transfer of all his movable property abroad, as well as at home, and for a country to prefer an attaching domestic creditor to a foreign assignee or to foreign creditors could

> "hardly be deemed consistent with the general comity of nations . . . the true rule is, to follow out the lead of the general principle that makes the law of the owner's domicil conclusive upon the disposition of his personal property,"

citing *Solomons v Ross* 1 H Bl 131n as supporting that doctrine: *Story, Commentaries on the Conflict of Laws*, 1st ed (1834), pp 340–341, para 406.

18 Professor Cheshire, in his first edtion (*Cheshire, Private International Law* (1935), pp 375–376), said that although English law "neglects the doctrine of unity it recognizes the doctrine of universality." What he meant was that English law was committed to separate independent bankruptcies in countries where the assets were situate, rather than one bankruptcy in the country of the domicile (the doctrine of unity), but also accepted the title of the foreign trustee to English movables provided that no bankruptcy proceedings had begun within England (universality). He cited *Solomons v Ross* for this proposition: "The English courts . . . have consistently applied the doctrine of universality, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee."

19 In *HIH* [2008] 1 WLR 852, para 30, Lord Hoffmann said:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal

liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

and in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* ("*Cambridge Gas*") [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

20 The US Bankruptcy Court accepted in *In re Maxwell Communication Corpn* (1994) 170 BR 800 (Bankr SDNY) that the United States courts have adopted modified universalism as the approach to international insolvency:

> "the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."

II International co-operation and assistance

21 Jurisdiction in international bankruptcy has been the subject of multilateral international instruments at least since the Montevideo Treaty on International Commercial Law of 1889, Title X, although bilateral treaties go back much further, and the subject of international recognition and co-operation in insolvency was the subject of early discussion by the International Law Association (1879), the Institut de droit international (1888–1912) and the Hague Conference on Private International Law (1904): see Nadelmann, pp 299 et seq.

22 In more modern times, the European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention) was concluded under the auspices of the Council of Europe in 1990, but never came into force. The European Community/Union initiative took 40 years to come to fruition. In 1960 the European Community embarked on a project for a Bankruptcy Convention, which resulted in a draft Convention in 1980, to which there was significant opposition. But the project was renewed in 1989, and this led to the tabling of a draft Convention in 1995, which provided that it would only come into force when signed by all 15 of the then member states. The United Kingdom, however, alone of the states, did not sign the Convention (for political reasons), and it never came into force. In 1999 the project was re-launched as a Council Regulation, which resulted in the EC Insolvency Regulation in 2000 (Council Regulation No 1346/2000).

23 The United Nations Commission on International Trade Law ("UNCITRAL") adopted a Model Law on cross-border insolvency in 1997. The Model Law was adopted following initiatives in the 1980s by the International Bar Association and later by INSOL International (the

International Association of Restructuring, Insolvency and Bankruptcy Professionals). In 1993 UNCITRAL adopted a resolution to investigate the feasibility of harmonised rules of cross-border insolvencies. In 1994 an expert committee was assembled consisting of members of INSOL and representatives of the UNCITRAL Secretariat, and following a series of reports and drafts, UNCITRAL adopted the Model Law in May 1997. The Model Law provides for a wide range of assistance to foreign courts and office-holders. It has been implemented by 19 countries and territories, including the United States and Great Britain (although by some states only on the basis of reciprocity). It was not enacted into law in Great Britain until 2006, by the CBIR.

24 Apart from the EC Insolvency Regulation, none of these instruments deals expressly with the enforcement of judgments in insolvency proceedings. The question whether the Model Law does so by implication will be considered below in section IV.

25 Consequently, there are four main methods under English law for assisting insolvency proceedings in other jurisdictions, two of which are part of regionally or internationally agreed schemes. First, section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England. They include Australia: the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123).

26 Second, the EC Insolvency Regulation applies to insolvency proceedings in respect of debtors with their centres of main interests (COMI) within the European Union (excluding Denmark). The EC Insolvency Regulation has no role in the present appeal because none of the debtors has its centre of main interests in the European Union.

27 Third, the CBIR came into force on 4 April 2006, implementing the Model Law. The CBIR supplement the common law, but do not supersede it. Article 7 of the Model Law provides: "Nothing in this Law limits the power of a court or British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain."

28 Article 23 of the Model Law allows avoidance claims to be made by foreign representatives under the Insolvency Act 1986, and the CBIR apply to preferences after they came into force on 4 April 2006. The UNCITRAL Guide to Enactment (to which resort may be had for the purposes of interpretation of the CBIR) also emphasises that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic insolvency (*UNCITRAL Legislative Guide on Insolvency Law* (2005), Annex III, Ch IV, p 311, para 20(b)):

> "The Model Law presents to enacting states the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law . . ."

29 Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an

A international element. The underlying principle has been stated in different ways: "recognition . . . carries with it the active assistance of the court": *In re African Farms Ltd* [1906] TS 373, 377; "This court . . . will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11": *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.

B 30 In *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:

> "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

C

31 The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

D

32 An early case of recognition was *Solomons v Ross* 1 H Bl 131n, where, as I have said, the bankruptcy was in Holland, and the bankrupts were Dutch merchants declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt: see also *Bergerem v Marsh* (1921) 6 B & CR 195 (English member of Belgian firm submitted to Belgian bankruptcy proceedings: movable property in England vested in Belgian trustee).

E

F 33 One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.

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34 Cases involving remittal of assets from England to a foreign office-holder include *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 (Luxembourg liquidation of Luxembourg company); and *HIH* [2008] 1 WLR 852 (the view of Lord Hoffmann and Lord Walker of Gestingthorpe) (Australian liquidation of Australian insurance company); and *In re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667 (Swiss liquidation of Swiss company).

III The Cambridge Gas and HIH decisions

35 The opinion of Lord Hoffmann, speaking for the Privy Council, in *Cambridge Gas* [2007] 1 AC 508 and his speech in the House of Lords in *HIH* [2008] 1 WLR 852 have played such a major role in the decisions of the Court of Appeal and in the arguments of the parties on these appeals that it is appropriate to put them in context at this point.

Cambridge Gas

36 The broad facts of *Cambridge Gas* [2007] 1 AC 508 were these. In 1997 a shipping business was initiated by a Swiss businessman, Mr Giovanni Mahler. The investors borrowed $300m on the New York bond market and the business bought five gas transport vessels. The venture was a failure, and ended with a Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man.

37 The corporate structure of the business was that the investors owned, directly or indirectly, a Bahamian company called Vela Energy Holdings Ltd ("Vela"). Vela owned (through an intermediate Bahamian holding company) Cambridge Gas, a Cayman Islands company.

38 Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc ("Navigator"), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

39 In 2003 Navigator petitioned the US Bankruptcy Court for relief under Chapter 11 of the US Bankruptcy Code, which allows insolvent companies, under supervision of the court and under cover of a moratorium, to negotiate a plan of reorganisation with their creditors. The petition was initiated by the investor interests, who proposed a plan to sell the ships nominally by auction but in fact to the previous investors, but the bondholders did not accept this and proposed their own plan under which the assets of Navigator would be vested in the creditors and the equity interests of the previous investors would be extinguished. The judge rejected the investors' plan and approved the creditors' plan.

40 The mechanism which the plan used to vest the assets in the creditors was to vest the shares in Navigator in their representatives, i e, the creditors' committee. That would enable them to control the shipping companies and implement the plan. The plan provided that upon entry of the confirmation order title to all the common stock of Navigator would vest in the creditors' committee to enable it to implement the plan. The order of the New York court confirming the plan recorded the intention of the court to send a letter of request to the Manx court asking for assistance in giving effect to "the

A plan and confirmation order" and such a letter was sent. The committee of creditors then petitioned the Manx court for an order vesting the shares in their representatives.

41 At this point it is necessary to emphasise two features of the case. The first feature is that Navigator was an Isle of Man company and 70% of its common stock was owned directly or indirectly by Cambridge Gas. Under the normal principles of the conflict of laws the shares would have B been situate in the Isle of Man: *Dicey*, 15th ed, para 22-045. That is why Lord Hoffmann said, at para 6, that the New York court was aware that the order vesting title to the common stock of Navigator in the creditors' committee could not automatically have effect under the law of the Isle of Man; and also why he accepted (paras 12–13) that if the judgment were a judgment in rem it could not affect title to shares in the Isle of Man.

C **42** The second feature which it is necessary to emphasise is that Cambridge Gas was a Cayman Islands company which (as held by the Manx courts) had not submitted to the jurisdiction of the US Bankruptcy Court. Lord Hoffmann said, at para 8, that the position that Cambridge Gas had not submitted to the jurisdiction of the US Bankruptcy Court bore little relation to economic reality since the New York proceedings had been D conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors; Vela, the parent company of Cambridge Gas, participated in the Chapter 11 proceedings; and they had been instituted by Navigator. Consequently the claim by Cambridge Gas that it had not submitted was highly technical, but there was no appeal from the decisions of the Manx courts that it had not submitted. But Lord Hoffmann also accepted that if the order of the US Bankruptcy Court were to E be regarded as a judgment in personam it would not be entitled to recognition or enforcement in the Isle of Man because "the New York court had no personal jurisdiction over Cambridge [Gas]": para 10.

43 Nevertheless the Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows: first, if the judgment had to be classified as in personam or in rem the appeal would F have to be allowed, but bankruptcy proceedings did not fall into either category:

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as G establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established . . .
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> H "15. . . . bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or

there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

44 Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency: paras 21–22. Third, exactly the same result could have been achieved by a scheme under the Isle of Man Companies Act 1931. Fourth, it was no objection to implementation of the plan in the Isle of Man that the shares in Navigator belonged to a person (Cambridge Gas) which was not a party to the bankruptcy proceedings for these reasons, at para 26:

"a share is the measure of the shareholder's interest in the company: a bundle of rights against the company and the other shareholders. As against the outside world, that bundle of rights is an item of property, a chose in action. But as between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152 [of the Isle of Man Companies Act 1931]. As a shareholder Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152."

45 At this point it is necessary to point out that the opinion in *Cambridge Gas* does not articulate any reason for holding that, in the eyes of the Manx court, the US Bankruptcy Court had international jurisdiction in either of two relevant senses.

46 The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (*Dicey*, 15th ed, vol 2, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation: *Dicey*, 15th ed, vol 2, para 30R-100. Under United States law the US Bankruptcy Court has jurisdiction over a "debtor", and such a debtor must reside or have a domicile or place of business, or property in the United States. From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.

47 The second sense in which international jurisdiction is relevant is the jurisdiction over the third party, Cambridge Gas, and its shares in Navigator. Cambridge Gas was not incorporated in the United States, and it was held by the Isle of Man courts that it had not submitted to the jurisdiction of the US Bankruptcy Court (and this was, as I have said,

A accepted with evident reluctance by the Privy Council). The property which was the subject of the order of the US Bankruptcy Court was shares in an Isle of Man company. Consequently the property dealt with by the US Bankruptcy Court was situate, by Manx rules of the conflict of laws, in the Isle of Man, and the shareholder relationship was governed by Manx law.

B **48** *Cambridge Gas* [2007] 1 AC 508 was the subject of brief comment a few months later by the Privy Council in *Pattni v Ali* [2007] 2 AC 85. The decision in that case was simply that a Kenyan judgment deciding that A was bound to sell shares in a Manx company to B was entitled to recognition in the Isle of Man. It resulted in an order in personam against a person subject to the jurisdiction of the Kenyan court, and was not a judgment in rem against property in the Isle of Man and outside the jurisdiction of the Kenyan C court, because the fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is in rem. Lord Mance, speaking for the Board, said, at para 23:

> "In *Cambridge Gas* . . . the Board touched on the concepts of in personam and in rem proceedings, but held that the bankruptcy order with which it was concerned fell into neither category. Its purpose was D simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established."

HIH

49 The decision in *HIH* does not deal with foreign judgments. *HIH* concerned four Australian insurance companies which were being wound up E in Australia and in respect of which provisional liquidators had been appointed in England. The question was whether the English court had power to direct remission of assets collected in England to Australia, notwithstanding that there were differences between the English and Australian statutory regimes for distribution which meant that some creditors would benefit from remission whilst some creditors would be F worse off. The House of Lords unanimously directed that remission should take place, but the reasons differed.

50 The reasoning of the majority (Lord Scott of Foscote and Lord Neuberger of Abbotsbury, with Lord Phillips of Worth Matravers agreeing) was based exclusively on the statutory power to assist foreign insolvency proceedings under section 426 of the Insolvency Act 1986, but Lord G Hoffmann (with whom Lord Walker agreed) also considered that such a power existed at common law.

51 Lord Hoffmann characterised the principle of universality as a principle of English private international law that, where possible, there should be a unitary insolvency proceeding in the courts of the insolvent's domicile which receives worldwide recognition and which should apply universally to all the bankrupt's assets, at para 6:

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> "Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be

A unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."

52 Other parts of Lord Hoffmann's speech have already been quoted above, and it is only necessary for present purposes to recall that he said that (a) "the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme" (at para 19) and (b) that the purpose of the principle of universality was to ensure that the debtor's assets were distributed under one scheme of distribution, and that the principle required that English courts should co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution: para 30.

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Subsequent treatment of Cambridge Gas

53 The decision in *Cambridge Gas* was not applied by the Supreme Court of Ireland in *In re Flightlease (Ireland) Ltd* [2012] IESC 12 (to which I shall revert) and has been subject to academic criticism. Professor Briggs has expressed the view ((2006) 77 BYIL 575, 581) that

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> "the decision in [*Cambridge Gas*] is wrong, for it requires a Manx court to give effect to a confiscation order made by a foreign court of property belonging to a person who was not subject to the personal jurisdiction of the foreign court. That a Manx court could have done so itself is nothing to the point."

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I shall return to the question whether it was correctly decided.

IV The cases before the court and the issues

Rubin

54 Eurofinance SA is a company incorporated in the British Virgin Islands. It was established by Adrian Roman, the second appellant on the *Rubin* appeal. Eurofinance SA settled "The Consumers Trust" ("TCT") under a deed of trust made in 2002 under English law, with trustees resident in England, of whom two were accountants and two were solicitors.

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55 TCT was established to carry on a sales promotion scheme in the USA and Canada. The class of beneficiaries was made up of persons who had successfully participated in the scheme by claiming validly in certain sales promotions owned and operated by Eurofinance SA. The trustees were to hold the capital and income of TCT for the beneficiaries and subject thereto for Eurofinance SA as beneficiary in default. The promotion, known as the cashable voucher programme, was entered into with participating merchants in the United States and Canada who, when they sold products or services to their customers, offered those customers a cashable voucher comprising a rebate of up to 100% of the purchase price for the product or service. Under the terms of the voucher the rebate was to be paid to customers in three years' time provided that certain conditions were followed by the customer involving the completion by the customer of both memory and comprehension tests.

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A **56** The participating merchants paid TCT 15% of the face value of each cashable voucher issued by the merchant during a week. TCT retained 40% of the payments received (i e 6% of the face value of each cashable voucher). About one half of the 60% balance received from merchants was paid to Eurofinance SA (and so effectively to Adrian Roman) and the remainder was paid to others involved in the operation of the programme, such as solicitors, accountants and US lawyers. From about 2002 Adrian Roman's sons, B Nicholas Roman and Justin Roman, each began to receive about 2%. The trustees maintained bank accounts in the USA and Canada where the payments they had received from merchants were kept.

57 Since the trustees only retained 6% of the face value of the issued vouchers, the success of the scheme necessarily involved the consumers either forgetting to redeem the vouchers or being unsuccessful in navigating C the process required to be followed in order to obtain payment. When the scheme folded in 2005 the trustees held nearly US$10m in bank accounts in the United States and Canada.

58 By about 2005 TCT's business ceased after the Attorney General of Missouri brought proceedings under Missouri's consumer protection legislation which resulted in a settlement involving a payment by the trustees of US$1,650,000 and US$200,000 in costs. D

59 When it became clear that further proceedings were likely to be brought by Attorneys General in other states, that the number of consumer claims would increase, and that TCT would not have sufficient funds to meet all the valid claims of its beneficiaries, in November 2005 Adrian Roman caused Eurofinance to apply for the appointment by the High Court of the respondents on the *Rubin* appeal, David Rubin and Henry Lan, as receivers E of TCT for the purposes of causing TCT then to obtain protection under Chapter 11 of Title 11 of the United States Code ("Chapter 11"). The English court was told that Chapter 11 reorganisation proceedings would result in an automatic stay of proceedings against TCT, would enable the receivers to reject unprofitable or burdensome executory contracts, and might result in the recovery as preferential payments of sums paid to consumers and to the Missouri Attorney General. F

60 In November 2005 the respondents were appointed as receivers by order of Lewison J, and in the following month, the respondents and the trustees then caused TCT to present a voluntary petition to the US Bankruptcy Court for relief under Chapter 11. TCT was placed into Chapter 11 proceedings in New York as virtually all of its 60,000 creditors were located in the United States or Canada as were its assets. As a matter of G United States bankruptcy law, TCT could be the subject matter of a petition for relief under Chapter 11 as a debtor. This is because a trust such as TCT is treated under Chapter 11 as a separate legal entity under the classification of a "business trust".

61 A joint plan of liquidation for TCT was prepared, and in September 2007 Lewison J ordered that the respondents (as receivers) be at liberty to seek approval of the plan from the US Bankruptcy Court. Under the terms of H the plan the respondents were appointed legal representatives of TCT and given the power to commence, prosecute and resolve all causes of action against potential defendants including the appellants. The US Bankruptcy Court approved the plan in October 2007, and appointed the respondents as "foreign representatives" of the debtor to make application to the Chancery

Division in London for recognition of the Chapter 11 proceedings as a foreign main proceeding under the CBIR; and to seek aid, assistance and co-operation from the High Court in connection with the Chapter 11 proceedings, and, in particular to seek the High Court's assistance and co-operation in the prosecution of litigation which might be commenced in the US Bankruptcy Court including "the enforcement of judgments of this court that may be obtained against persons and entities residing or owning property in Great Britain . . . "

62 In December 2007 proceedings were commenced in the US Bankruptcy Court by the issue of a complaint against a number of defendants including the appellants. These claims fall within the category of "adversary proceedings" under the US bankruptcy legislation, and I will use this term to refer to them. The adversary proceedings comprised a number of claims including causes of action arising under the US Bankruptcy Code, which related to funds received by TCT from merchants which were paid out to the defendants (including the appellants), or to amounts transferred to the defendants within one year prior to the commencement of the TCT bankruptcy case including the appellants.

63 The defendants were the appellants and other parties involved with the programme. The appellants were served personally with the complaint commencing the adversary proceedings but did not defend, or participate, in the adversary proceedings, although it appears from a judgment of the US Bankruptcy Court that Eurofinance SA had filed a notice of appearance in the main Chapter 11 proceedings: Order of 22 July 2008, paras 42–43.

64 On 22 July 2008 default and summary judgment was entered against the appellants in the adversary proceedings by the US Bankruptcy Court. The US Bankruptcy Court entered a judgment against the appellants on the ten counts of the complaint.

65 In November 2008 the respondents applied as foreign representatives to the Chancery Division for, inter alia, (a) an order that the Chapter 11 proceedings be recognised as a "foreign main proceeding" (b) an order that the respondents be recognised as "foreign representatives" within the meaning of article 2(j) of the Model Law in relation to those proceedings; and (c) an order that the US Bankruptcy Court's judgment be enforced as a judgment of the English court in accordance with CPR Pts 70 and 73.

66 Nicholas Strauss QC, sitting as a deputy judge of the Chancery Division, [2010] 1 All ER (Comm) 81 recognised the Chapter 11 proceedings (including the adversary proceedings) as foreign main proceedings, and the respondents as foreign representatives, but refused to enforce the judgments in the adversary proceedings because (a) at common law the English court will not enforce a judgment in personam contrary to the normal jurisdictional rules for foreign judgments; and (b) there was nothing in CBIR, articles 21(e) (realisation of assets) and 25 (judicial co-operation), which justified the enforcement of judgments in insolvency proceedings.

67 At first instance the respondents sought to enforce the entirety of the US Bankruptcy Court's judgment, but before the Court of Appeal they sought an order for the enforcement of those parts of the judgment which were based on state or federal avoidance laws, including fraudulent conveyance under State Fraudulent Conveyance Laws, and under federal

law, namely fraudulent transfers under section 548(a) of 11 USC; liability of transferees of avoided transfers under section 550; fraudulent transfers under section 548(b) and liability of transferees of avoided transfers under section 550.

68 The Court of Appeal (Ward, Wilson LJJ and Henderson J) [2011] Ch 133 allowed an appeal, and held that the judgment was enforceable.

New Cap

69 In the *New Cap* appeal the appellants are members of Lloyd's Syndicate Number 991 ("the syndicate") for the 1997 and 1998 years of account. The respondents are a reinsurance company ("New Cap") and its liquidator, a partner in Ernst & Young in Sydney.

70 New Cap is an Australian company, which was licensed as an insurance company in Australia under the (Australian) Corporations Act 2001 ("the Australian Act"). New Cap did not conduct insurance business in any country other than Australia, and the majority of New Cap's business was generated through reinsurance brokers conducting business in Australia and the balance was generated from overseas insurance brokers.

71 New Cap reinsured the syndicate in relation to losses occurring on risks attaching during the 1997 and 1998 years of account under reinsurance contracts which were subject to English law, and contained London arbitration clauses and also (oddly) English jurisdiction clauses. The reinsurance contracts were placed with New Cap by the syndicate's Australian broker, which was the sub-broker for the syndicate's London broker.

72 Each reinsurance contract contained a commutation clause. The syndicate and New Cap entered into a commutation agreement to commute the reinsurances with effect from 11 December 1998. Under the commutation agreement, New Cap agreed to make a lump sum payment to the syndicate by 31 December 1998 in consideration for its release from liability under the reinsurance contracts. The payments were calculated on the basis of a 7·5% discount and a deduction from premium. New Cap made payment pursuant to the commutation agreements in two instalments of US$2,000,000 and US$3,980,600 in January 1999. The commutation payments were made from a bank account held by New Cap at the Sydney branch of the Commonwealth Bank of Australia to a bank account in London.

73 The second respondent was appointed the administrator of New Cap by a resolution of its directors in April 1999. In September 1999 the creditors of New Cap resolved that New Cap be wound up and the second respondent ("the liquidator") was appointed its liquidator. Under the Australian legislation, the winding up is deemed to have commenced on the day on which the administration began.

74 In April 2002 the liquidator caused proceedings to be commenced against the syndicate in the Supreme Court of New South Wales alleging that because New Cap was insolvent when the commutation payments were made in January 1999, and because those payments were made within the period of six months ending on the date when the administrator was appointed, they constituted unfair preferences and were thus "voidable transactions" under Part 5.7B of the Australian Act.

75 The syndicate (which does not accept that the payments were preferences) refused to accept service of the Australian proceedings. The liquidator obtained leave from the Australian court to serve the Australian proceedings on the syndicate's English solicitors in London. The syndicate did not enter an appearance to the proceedings, but corresponded with the liquidator's solicitors, including commenting on an independent expert's report to be used by the respondents as evidence of New Cap's insolvency in all of the avoidance proceedings including the proceedings against the syndicate.

76 The Australian court (White J in a judgment in September 2008, and Barrett J in a judgment in July 2009) recognised that there had been no submission by the syndicate to the jurisdiction of the Australian court in that it did not enter an appearance, but White J held that the Australian court had jurisdiction over the syndicate because a cause of action available under the Australian Act for the recovery of a preferential payment to an overseas party made when the company is insolvent was a cause of action which arose in New South Wales for the purposes of the New South Wales provisions for service out of the jurisdiction.

77 Barrett J gave a reasoned judgment in July 2009 holding the syndicate liable. After the respondents had been given leave to re-open their case so that the orders made by the Australian court would more accurately reflect the differences between those appellants who were members of the syndicate for the 1997 year of account and those appellants who were members for the 1998 year of account, the Australian court entered final judgment against the syndicate in its absence on 11 September 2009. The Australian judgment declared that the commutation payments were voidable transactions within the meaning of part 5.7B of the Australian Act and ordered the syndicate to repay the amount of the commutation payments to the liquidator together with interest.

78 On the liquidator's application the Australian court issued, in October 2009, a letter of request to the High Court in England and Wales requesting that the court "act in aid of and assist" the Australian court and exercise jurisdiction under section 426 of the Insolvency Act 1986 by: (1) ordering the syndicate to pay the sums specified in the Australian judgment; alternatively (2) allowing the liquidator to commence fresh proceedings under the Australian Act in the English court; (3) granting such further and other relief as the High Court may consider just; and (4) making such further or other orders as may, in the opinion of the High Court, be necessary or appropriate to give effect to the foregoing orders.

79 On 30 July 2010, the Court of Appeal handed down judgment in *Rubin* [2011] Ch 133. As a result, the respondents' alternative application for permission to commence fresh proceedings against the syndicate under the Australian Act in England pursuant to section 426 of the Insolvency Act 1986 was adjourned generally, and the respondents were granted permission to seek relief at common law as an alternative to relief under section 426.

80 In *New Cap* Lewison J and the Court of Appeal were bound by the decision of the Court of Appeal in *Rubin*. Lewison J held [2011] EWHC 677 (Ch): (a) the judgment was not enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933 because, although it applied to Australian judgments, it did not apply to orders made in insolvency proceedings; but (b) the judgment was enforceable under the assistance

A provision of section 426 of the Insolvency Act 1986 and also at common law.

81 The Court of Appeal (Mummery, Lloyd and Macfarlane LJJ) [2012] Ch 538 affirmed Lewison J's judgment on these grounds: (a) the 1933 Act applied, and registration would not be set aside for lack of jurisdiction in the foreign court, because of the *Rubin* decision; (b) section 426 could also be used and was not excluded by section 6 of the 1933 Act; (c) but section 6 would preclude an action at common law; (d) it was not necessary to decide whether the court's power of assistance at common law was exercisable where the statutory power was available .

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Picard v Vizcaya Partners Ltd

82 This court gave permission for intervention by a written submission on behalf of Mr Irving Picard ("the trustee"), the trustee for the liquidation in the United States under the Securities Investor Protection Act of 1970 ("SIPA") of Bernard L Madoff Investment Securities LLC ("Madoff"), which was Bernard Madoff's broking company. The trustee is seeking to enforce at common law in Gibraltar judgments of the US Bankruptcy Court against Vizcaya Partners Ltd ("Vizcaya"), a British Virgin Islands company, for $180m, and against Asphalia Fund Ltd ("Asphalia"), a Cayman Islands company, for $67m, representing alleged preferential payments. He is also seeking to enforce a US Bankruptcy Court default judgment in excess of $1 billion in the Cayman Islands in *Picard v Harley International (Cayman) Ltd* (unreported) 10 November 2010. The Gibraltar and Cayman Islands proceedings have been adjourned to await the outcome of the present appeals.

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83 In *Picard v Vizcaya Partners Ltd* proceedings have been brought in Gibraltar to enforce the default judgments against Vizcaya and Asphalia because $73m is held there on behalf of Vizcaya which the trustee maintains is available to satisfy the judgments. Vizcaya and Asphalia have also, with the permission of the court, intervened by written submission.

84 There is no agreed statement of facts relating to this aspect of the case, and nothing which is said here about the facts should be taken as representing or reflecting any finding. According to Vizcaya and Asphalia the position is as follows. Between 2002 and 2007, a bank in Europe, acting as a custodian trustee for Vizcaya, sent $327m to Madoff for investment in securities. Unknown to the bank, or to Vizcaya, or its shareholder Asphalia, Madoff had been engaged in a Ponzi scheme for some 30 years, and their money was never invested in securities. In 2008, at the time of the credit crunch and the banking crisis, the custodian trustee withdrew $180m (leaving $147m with Madoff) and $67m of the $180m was paid to Asphalia.

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85 In late 2008, the Madoff fraud came to light, and the trustee was appointed. The trustee targeted investors who had withdrawn investments from Madoff in the two years before its collapse in December 2008 as a source for recovery of "customer property" for the benefit of other investors who had not withdrawn their investments. The trustee commenced adversary proceedings in the US Bankruptcy Court alleging preference and fraudulent conveyance against Vizcaya and Asphalia under SIPA and under the Bankruptcy Code, the effect of which, they say, is that (a) as the trustee argues, a person who, on the basis that he has received "customer money" has been required to repay a preference, does not necessarily become a

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"customer" and thereby entitled to share with other customers in the bankruptcy; and (b) the trustee may avoid a payment made by the bankrupt to a creditor 90 days before the commencement of the bankruptcy, irrespective of the intention with which the payment is made or received.

86 The trustee obtained judgments in default, and Vizcaya and Asphalia say that they took no part in the New York proceedings because they had no connection with New York, and in particular (a) Asphalia was not a customer of Madoff but a shareholder of Vizcaya; (b) arguably Vizcaya was not a customer since it had appointed the bank to act as custodian trustee and it was the bank which entered into contracts with Madoff.

The issues

87 The principal issue on these appeals is whether the rules at common law or under the 1933 Act regulating those foreign courts which are to be regarded as being competent for the purposes of enforcement of judgments apply to judgments in avoidance proceedings in insolvency, and, if not, what rules do apply: section V below. The other issues are whether, in the *Rubin* appeal, enforcement may be effected through the assistance provisions of the Cross-Border Insolvency Regulations 2006 (section VI) or, in the *New Cap* appeal, section 426 of the Insolvency Act 1986 (section VII); whether the judgments are enforceable as a result of the submission by the judgment debtors to the jurisdiction of the foreign courts (section VIII); and, in the *New Cap* appeal, if the judgment is enforceable, whether enforcement is at common law or under the 1933 Act: section IX.

V The first issue: recognition and enforcement of foreign judgments in insolvency proceedings

Reasoning of the Court of Appeal in Rubin and the issue on the appeal

88 The Court of Appeal in the *Rubin* appeal decided that a foreign insolvency judgment could be enforced in England and Wales at common law against a defendant not subject to the jurisdiction of the foreign court under the traditional rule as formulated in the *Dicey* rule.

89 As I have already said, on the *Rubin* appeal in the Court of Appeal the receivers sought only to enforce those parts of the judgment which in effect related to the avoidance causes of action. The Court of Appeal held that the judgment (as narrowed) was enforceable at common law. The reasoning [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61–62, 64 was as follows: (a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam; (b) it was common ground that the judgment debtors were not resident (this was a slip for "present" since the action was at common law and not under the 1933 Act) when the proceedings were instituted, and did not submit to the jurisdiction, and so at first blush had an impregnable defence; (c) *Cambridge Gas* decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2007] 2 AC 85, para 23; (d) bankruptcy was a collective proceeding to enforce rights and not to establish them: *Cambridge Gas* [2007] 1 AC 508, para 15; (e) the issue was whether avoidance proceedings which could only be

A brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, i e part of the collective proceeding to enforce rights and not to establish them; (f) the adversary proceedings were part and parcel of the Chapter 11 proceedings; (g) the ordinary rules for enforcing foreign judgments in personam did not apply to bankruptcy proceedings; (h) avoidance mechanisms were integral to and central to the
B collective nature of bankruptcy and were not merely incidental procedural matters; (i) the process of collection of assets will include the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] 1 WLR 852, para 19; (j) the judgment of the US Bankruptcy Court was a judgment in, and for the purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law
C rules relating to insolvency; (k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context; (l) there was a principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's
D domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets; (m) there was a further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency; (n) there was no unfairness to the appellants in upholding the judgment because they were fully aware of the proceedings, and after taking
E advice chose not to participate. It was unnecessary to decide whether the judgment was enforceable under the CBIR: para 63.

90 In short, Ward LJ accepted that the judgment was an in personam judgment, but he decided that the *Dicey* rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules.

F **91** The essential questions on this aspect of the appeals are these. Is the judgment in each case to be regarded as a judgment in personam within the scope of the traditional rules embodied in the *Dicey* rule, or is it to be characterised as an insolvency order which is part of the bankruptcy proceedings, i e part of the collective proceeding to enforce rights and not to establish them? Is that a distinction which has a role to play? Is there a
G distinction between claims which are central to the purpose of the proceedings and claims which are incidental procedural matters? As a matter of policy, should the court, in the interests of universality of insolvency proceedings, devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other
H officeholders, than the traditional common law rule embodied in the *Dicey* rule, or should it be left to legislation preceded by any necessary consultation?

92 Ward LJ's conclusion derives from a careful synthesis of dicta in Lord Hoffmann's brilliantly expressed opinion in *Cambridge Gas* and his equally brilliant speech in *HIH*, each of which has on these appeals been

subjected to an exceptionally detailed analysis. For reasons which will be developed, I do not agree with the conclusions which Ward LJ draws.

93 But I begin with two matters on which I accept the respondents' analysis. The first is that avoidance proceedings have characteristics which distinguish them from ordinary claims such as claims in contract or tort. The second is that, if it were necessary to draw a distinction between insolvency orders and other orders, it would not be difficult to formulate criteria for the distinction, along similar lines to that drawn by the European Court in relation to the Brussels Convention, the Brussels I Regulation (Council Regulation (EC) 44/2001) and the EC Insolvency Regulation.

Nature of avoidance proceedings

94 In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property so as to constitute the estate which is available for distribution. The principle of equality among creditors which underlies the pari passu principle may require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect. Systems of insolvency law use avoidance proceedings as mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to the insolvency. Thus under the Insolvency Act 1986 an administrator, or liquidator, or trustee in bankruptcy may, where there has been a transaction at an undervalue, or amounting to an unlawful preference, apply for an order restoring the position to what it would have been had the transaction not taken place: sections 238 et seq and 339 et seq. Other systems of law have similar mechanisms, but they will differ in matters such as the period during which such transactions are at risk of reversal and the role of good faith of the parties to the transaction.

95 The underlying policy is to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance: *Fletcher, The Law of Insolvency* , 4th ed (2009), para 26-002; *Goode, Principles of Corporate Insolvency Law*, 4th ed (2011), para 13-03.

96 Thus the UNCITRAL Legislative Guide on Insolvency Law (2005) says:

> "150. Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time (often referred to as the 'suspect' period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor's assets where they have certain effects. . . .
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> "151. It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual

A remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate."

97 In *In re Condor Insurance Ltd* (2010) 601 F 3d 319, 326, the Court
B of Appeals for the Fifth Circuit said that:

> "Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets . . . in favor of the collective priorities established by the distribution statute . . . [and] must be treated as an integral part of the entire bankruptcy system."

C 98 In different phases of the Australian proceedings in *New Cap* Barrett J made similar points. He said that in an action for unfair preference under the Australian legislation the liquidator might obtain an order for the payment of money, but the action did not contemplate recovery in the sense applicable to damages and debts; and the proceedings sought to remedy or counter the effects of that depletion caused by the payment by New Cap: *New Cap Reinsurance Corpn v Renaissance Reinsurance Ltd* [2002]
D NSWSC 856, paras 23, 27. The order does not vindicate property rights which the company itself would have had prior to liquidation, but statutory rights which the liquidator has under the statutory scheme in consequence of winding up. The purpose of the order for the payment of money to a company in liquidation is not to compensate the company, but to adjust the rights of creditors among themselves in such a way as to eliminate the effects
E of favourable treatment afforded to one or more creditors, to the exclusion of others, in the period immediately before an insolvent administration commences: *New Cap Reinsurance Corpn v Grant* (2009) 257 ALR 740, paras 20–21.

Difference between insolvency claims and others

F 99 I also accept that, if there were to be a separate rule for the recognition and enforcement of insolvency orders, it would not normally be difficult to distinguish between judgments in insolvency proceedings which are peculiarly the subject of insolvency law such as avoidance proceedings, and other judgments of the kind which are covered by the *Dicey* rule.

100 In the context of the Brussels Convention, the Brussels I Regulation and the EC Insolvency Regulation, the Court of Justice of the European
G Union has developed a distinction between claims which derive directly from the bankruptcy or winding up, and which are closely connected with them, on the one hand, and those which do not, on the other hand, and the distinction has been applied by the English court. In my judgment, the distinction is a workable one which could be adapted to other contexts should it be useful or necessary to do so.

H 101 Claims which were regarded as bankruptcy claims have been held to include a claim under French law by a liquidator against a director to make good a deficiency in the assets of a company (*Gourdain v Nadler* (Case 133/78) [1979] ECR 733); or a claim under German law to set aside a transaction detrimental to creditors: *Seagon v Deko Marty NV* (Case C-339/07) [2009] 1 WLR 2168. Claims outside the category of bankruptcy

claims have been held to include an action brought by a seller based on a reservation of title against a purchaser who was insolvent (*German Graphics Graphische Maschinen GmbH v van der Schee* (Case C-292/08) [2009] ECR I-8421) or a claim by a liquidator as to beneficial ownership of an asset: *Byers v Yacht Bull Corpn* [2010] BCC 368. In *Oakley v Ultra Vehicle Design Ltd* [2006] BCC 57, para 42 Lloyd LJ (sitting as an additional judge of the Chancery Division) said:

> "it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the [Brussels I] Regulation) by article 1.2(b): see *In re Hayward decd* [1997] Ch 45, and *UBS AG v Omni Holding AG* [2000] 1 WLR 916. By contrast, proceedings by a liquidator against a director or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving directly from the winding up and therefore excluded from the Brussels Convention and now from the [Brussels I] Regulation."

In personam or sui generis?

102 I have already quoted the passage in *Cambridge Gas* [2007] 1 AC 508 in which Lord Hoffmann distinguished between judgments in rem and in personam, on the one hand, and judgments in bankruptcy proceedings, on the other, but it is necessary to repeat it at this point. He said:

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

103 There is no doubt that the order of the US Bankruptcy Court in *Cambridge Gas* did not fall into the category of an in personam order. Even though the question whether a foreign judgment is in personam or in rem is sometimes a difficult one (*Dicey*, 15th ed, para 14-109), that was not a personal order against its shareholders, including Cambridge Gas. The order vested the shares in Navigator in the creditors' committee. It did not declare existing property rights. Indeed the whole purpose of what was the functional equivalent of a scheme of arrangement was to alter property rights. But it is not easy to see why it was not an in rem order in relation to property in the Isle of Man in the sense of deciding the status of a thing and purporting to bind the world: see *Jowitt's Dictionary of English Law*, 3rd ed (2010) (ed Greenberg), p 1249.

A **104** The judgments in the *Rubin* and *New Cap* appeals were based on avoidance legislation which, with some differences of substance, performs the same function as the equivalent provisions in the Insolvency Act 1986 and its predecessors. But Ward LJ in *Rubin* accepted that the judgment was in personam and the *Rubin* respondents have not sought to argue that it was not an in personam judgment. What they say is that, even if it is in personam, it is within a sui generis category of insolvency orders or
B judgments subject to special rules.

105 There can be no doubt that the avoidance orders in the present appeals are in personam. In *In re Paramount Airways Ltd* [1993] Ch 223, 238 Nicholls LJ said that the remedies under section 238 of the Insolvency Act 1986 (transactions at an undervalue) were "primarily of an in personam character," and that accords with the nature of the orders in these appeals.
C The form of judgment of the US Bankruptcy Court in the *Rubin* case was that "plaintiffs have judgment . . . against the defendants" in the sums awarded, and the orders of the New South Wales Supreme Court in the *New Cap* case included orders that "the defendants . . . pay to the first plaintiff" the sums due under section 588FF(1) of the Australian Corporations Act.

The question of principle and policy
D

106 Since the judgments are in personam the principles in the *Dicey* rule are applicable unless the court holds that there is, or should be, a separate rule for judgments in personam in insolvency proceedings, at any rate where those judgments are not designed to establish the existence of rights, but are central to the purpose of the insolvency proceedings or part of the mechanism of collective execution.

E **107** Prior to *Cambridge Gas* [2007] 1 AC 508 and the present cases, there had been no suggestion that there might be a different rule for judgments in personam in insolvency proceedings and other proceedings. There are no cases in England which are helpful. The normal rules for enforcement of foreign judgments were applied to a claim by a liquidator for moneys due to the company (*Gavin Gibson & Co Ltd v Gibson* [1913]
F 3 KB 379) and to a claim on a debt ascertained in bankruptcy under German law: *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 QB 463. A judgment of the US Bankruptcy Court in Chapter 11 proceedings for repayment of a preferential transfer was enforced in Ontario on the basis of the judgment debtor's submission to the New York court, without any suggestion that the normal rules did not apply: *Gourmet Resources International Inc v Paramount Capital Corpn* (1991) 3 OR (3d) 286, [1993]
G ILPr 583, appeal dismissed (1993) 14 OR (3d) 319 (Ont CA).

108 The principles in the *Dicey* rule have never received the express approval of the House of Lords or the UK Supreme Court and the leading decisions remain *Adams v Cape Industries plc* [1990] Ch 433 and the older Court of Appeal authorities which it re-states or re-interprets. But there can be no doubt that the references by the House of Lords in the context of
H foreign judgments to the foreign court of "competent jurisdiction" are implicit references to the common law rule: e g *In re Henderson*, *Nouvion v Freeman* (1889) 15 App Cas 1, 8 and *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484.

109 The *Rubin* respondents question whether the rules remain sound in the modern world. It is true that the common law rule was rejected in

Canada, at first in the context of the inter-provincial recognition of judgments. The Supreme Court of Canada held that the English rules developed in the 19th century for the recognition and enforcement of judgments of foreign countries could not be transposed to the enforcement of judgments from sister provinces in a single country with a common market and a single citizenship. Instead a judgment given against a person outside the jurisdiction should be recognised and enforced if the subject matter of the action had a real and substantial connection with the province in which the judgment was given: *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, para 45. This approach was applied, by a majority, to foreign country judgments in *Beals v Saldanha* [2003] 3 SCR 416 (applied to the recognition of an English order convening meetings in a scheme of arrangement in *In re Cavell Insurance Co* (2006) 269 DLR (4th) 679 (Ont CA)).

110 There is no support in England for such an approach except in the field of family law. In *Indyka v Indyka* [1969] 1 AC 33 it was held that a foreign decree of divorce would be recognised at common law if there was a "real and substantial connection" between the petitioner (or the respondent) and the country where the divorce was obtained. This rule (now superseded by the Family Law Act 1986) was in part devised to avoid "limping marriages", i e cases where the parties were regarded as divorced in one country but regarded as married in another country. It has never been adopted outside the family law sphere in the context of foreign judgments.

111 The Supreme Court of Ireland in *In re Flightlease (Ireland) Ltd* [2012] IESC 12 declined to follow *Cambridge Gas* (and also the decision of the Court of Appeal in *Rubin*) and also held that the *Dicey* rule should not be rejected in favour of a real and substantial connection test. In *Flightlease* the airline Swissair was in a form of debt restructuring proceeding in Switzerland, where it was incorporated. Flightlease is an Irish company in the same group as Swissair. An application was before the Swiss courts under the Swiss federal statute on debt enforcement and bankruptcy seeking the return of money paid by Swissair to Flightlease. The proceedings had reached the stage of judgment, but the liquidators of Flightlease were concerned to know whether a Swiss judgment would be enforceable in Ireland so that they could decide whether to appear in the Swiss proceedings.

112 The Irish Supreme Court held that the judgment would not be enforceable if Flightlease did not appear in the Swiss proceedings for these reasons: (1) the effect of the Swiss order would be to establish a liability on Flightlease to repay moneys and would therefore result in a judgment in personam; (2) it would be preferable for any change in the rules relating to the enforcement of foreign judgments to take place in the context of international consensus by way of treaty or convention given effect by legislation. In particular, the Irish Supreme Court said that it would not adopt the approach in *Cambridge Gas* because it had resulted from legislative changes in the United Kingdom (this appears to have been based on a misapprehension), and should not be adopted in Ireland in the absence of consensus among common law jurisdictions.

113 But there is no suggestion on this appeal that the principles embodied in the *Dicey* rule should be abandoned. Instead the *Rubin* respondents suggest that the principles should not apply to foreign insolvency orders.

A **114** The respondents accept that the *Dicey* rule applies to claims which may be of considerable significance by an officeholder in a foreign insolvency, such as a claim for breach of contract, or a tort claim, or a claim to recover debts. It is clear that such claims may affect the size of the insolvent estate just as much, and often more, than avoidance claims. Like claims to recover money due to the insolvent estate such as restitutionary claims not involving avoidance, avoidance claims may establish a liability to B pay or repay money to the bankrupt estate (as in the present cases). There is no difference of principle.

115 The question, therefore, is one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures? In my judgment the answer is in the negative for the following reasons.

C **116** First, although I accept that it is possible to distinguish between avoidance claims and normal claims, for example in contract or tort, it is difficult to see in the present context a difference of principle between a foreign judgment against a debtor on a substantial debt due to a company in liquidation and a foreign judgment against a creditor for repayment of a preferential payment. The respondents suggest that a person who sells goods to a foreign company accepts the risk of the insolvency legislation of D the place of incorporation. Quite apart from the fact that the suggestion is wholly unrealistic, why should the seller/creditor be in a worse position than a buyer/debtor?

117 The second reason is that if there is to be a different rule for foreign judgments in such proceedings as avoidance proceedings, the court will have to ascertain (or, more accurately, develop) two jurisdictional rules. There E are two aspects of jurisdiction which would have to be satisfied if a foreign insolvency judgment or order is to be outside the scope of the *Dicey* rule: the first is the requisite nexus between the insolvency and the foreign court, and the second is the requisite nexus between the judgment debtor and the foreign court.

118 In *Cambridge Gas* Navigator was an Isle of Man company, and the jurisdiction of the United States Bankruptcy Court depends on whether the F "debtor" resides or has a domicile or place of business, or property, in the United States. The shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. The Privy Council, as noted above, did not articulate any rule for the jurisdiction of the G US Bankruptcy Court over Navigator (although it had plainly submitted to its jurisdiction) or over Cambridge Gas (which, the Manx courts had held and the Privy Council accepted, had not submitted) or over Cambridge Gas' Manx assets.

119 Nor did the Court of Appeal in *Rubin* articulate the reasons why the English court recognised the jurisdiction of the US Bankruptcy Court over TCT, or over the appellants. The receivers appear to have proceeded H originally on the basis that the US Bankruptcy Court had jurisdiction under United States bankruptcy law because of TCT's residence and principal place of business in New York (petition, 5 December 2005), but the US Bankruptcy Court, in deciding to appoint the receivers as foreign representatives also noted that TCT's business operations were conducted

primarily in the United States, the majority of its creditors, substantially all of its assets, and its centre of main interests, were all in the United States. The basis of jurisdiction of the US Bankruptcy Court under United States law over the individual defendants in *Rubin* was that they were subject both to the general jurisdiction of the court (i e connection of the defendant with the jurisdiction) and also to the specific jurisdiction of the court (i e connection of the cause of action with the jurisdiction) because they specifically sought out the United States as a place to do business and specifically sought out United States merchants and consumers with whom to do business. Accordingly, the exercise of jurisdiction satisfied the due process requirements of the Fifth Amendment.

120 The basis of jurisdiction in *New Cap* over New Cap itself was of course that it was incorporated in Australia. The basis of jurisdiction over the syndicate under New South Wales law was that the cause of action against the syndicate arose in New South Wales.

121 The respondents do not put forward any principled suggestion for rules which will deal with the two aspects of jurisdiction. They accept, as regards the jurisdictional link between the foreign country and the insolvent estate, that English law has traditionally recognised insolvency proceedings taking place in an individual bankrupt's place of domicile, or, in the case of corporations, the place of incorporation, but (because the connection which the trustees of the TCT, or the TCT itself, had with the United States was that the trust's main business was there) they rely on what Lord Hoffmann said in *HIH* [2008] 1 WLR 852, para 31:

> "I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the 'centre of a debtor's main interests' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate."

122 They propose that each of these issues be resolved, not by a black letter rule like the common law rule for enforcement of judgments, but instead by an appeal to what was said in oral argument to be the discretion of the English court to assist the foreign court.

123 On the second aspect, the jurisdictional link between the foreign country and the judgment debtor, they accept that it is necessary for there to be an appropriate connection between the foreign insolvency proceeding and the insolvency order in respect of which recognition and enforcement is sought. They propose that, in the exercise of the discretion, the court should adopt an approach similar to that taken by the English court in deciding whether to apply provisions of the Insolvency Act 1986, such as section 238 (transactions at an undervalue), to persons abroad, relying on *In re Paramount Airways Ltd* [1993] Ch 223.

124 That case decided that there is no implied territorial limitation to the exercise of jurisdiction over "any person". The Court of Appeal rejected the argument that the section applied only to British subjects and to persons present in England at the time of the impugned transaction. In particular the

physical absence or presence of the party at the time of the transaction bore no necessary relationship to the appropriateness of the remedy. Nor was the test of "sufficient connection" with England satisfactory because it would hardly be distinguishable from the ambit of the sections being unlimited territorially: p 237. Instead, the approach was to be found in the discretion of the court, first to grant permission to serve the proceedings out of the jurisdiction, and secondly, to make an order under the section. On both aspects the court would take into account whether the defendant was sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.

125 The *Rubin* respondents say that *In re Paramount Airways Ltd* is instructive because, if the facts of the present case were reversed such that TCT had carried on the scheme in England and had been placed into insolvency proceedings here and the appellants were resident in New York, then it can be expected that the English court would have considered that England was the correct forum in which to bring section 238 proceedings to recover payments made to the appellants and would have given permission to serve out of the jurisdiction accordingly. They go on to say that it is implicit in this that the English court would have expected the New York court then to recognise and enforce any judgment of the English court even if the appellants had remained in New York and had not contested the proceedings; and that by the same token that the court seeks and expects the recognition and enforcement abroad of its own insolvency orders, the court should recognise and enforce in England insolvency orders made in insolvency proceedings in other jurisdictions.

126 There is no basis for this line of reasoning. There is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts, or its expectation of the recognition of its judgments abroad. It has frequently been said that the jurisdiction exercised under what used to be RSC Ord 11, r 1 (and is now CPR Practice Direction 6B, paragraph 3.1) is an exorbitant one, in that it was a wider jurisdiction than was recognised in English law as being possessed by courts of foreign countries in the absence of a treaty providing for recognition: see *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210, 254, per Lord Diplock; *Amin Rasheed Shipping Corpn v Kuwait Insurance Co* [1984] AC 50, 65, per Lord Diplock and *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, 481, per Lord Goff of Chieveley.

127 Outside the sphere of matrimonial proceedings (see *Travers v Holley* [1953] P 246, disapproved on this aspect in *Indyka v Indyka* [1969] 1 AC 33) reciprocity has not played a part in the recognition and enforcement of foreign judgments at common law. The English court does not concede jurisdiction in personam to a foreign court merely because the English court would, in corresponding circumstances, have power to order service out of the jurisdiction: *In re Trepca Mines Ltd* [1960] 1 WLR 1273.

128 In my judgment, the dicta in *Cambridge Gas* and *HIH* do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the *Dicey* rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for

enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.

129 A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, "if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it": *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489.

130 Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient connection," a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of the Madoff case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad.

131 Nor is there likely to be any serious injustice if this court declines to sanction a departure from the traditional rule. It would not be appropriate to express a view on whether the officeholders in the present cases would have, or would have had, a direct remedy in England, because there might be, or might have been, issues as to the governing law, or issues as to time-limits or as to good faith. Subject to those reservations, several of the ways in which the claims were put (especially those parts of the judgment which were not the subject of these proceedings) in the United States proceedings in *Rubin* could have founded proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the express trust). In addition there are several other avenues available to officeholders. Avoidance claims by a liquidator of an Australian company may be the subject of a request by the Australian court pursuant to section 426(4) of the Insolvency Act 1986, applying Australian law under section 426(5). In appropriate cases, article 23 of the Model Law will allow avoidance claims to be made by foreign representatives under the Insolvency Act 1986. In the cases where the insolvent estate has its centre of main interests in the European Union, judgments will be enforceable under article 25 of the EC Insolvency Regulation.

A **132** It follows that, in my judgment, *Cambridge Gas* [2007] 1 AC 508 was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to
B the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man.

VI Issue 2: Rubin: Enforcement under the Cross-Border Insolvency Regulations

C **133** In the *Rubin* appeal it was argued by the respondents that the judgment should also be enforced through the CBIR, implementing the UNCITRAL Model Law.

134 The order made by the deputy judge [2010] 1 All ER (Comm) 81, paras 46, 47 recognised the Chapter 11 proceeding "including the adversary proceedings," because "bringing adversary proceedings against debtors of the bankrupt is clearly part of collecting the bankrupt's assets with a view to
D distributing them to creditors" and "the adversary proceedings are part and parcel of the Chapter 11 insolvency proceedings". The Court of Appeal was of the same view [2011] Ch 133, para 61(2)–(3). The appellants no longer maintain that the adversary proceedings should not be recognised under the Model Law.

135 The issue which still arises in relation to the Model Law as
E implemented by the CBIR is whether the court has power to grant relief recognising and enforcing the relevant parts of the judgment.

136 Article 21 provides:

> "1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign
F representative, grant any appropriate relief, including— (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph l(a) of article 20; (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph l(b) of article 20; (c) suspending the
G right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20; (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; (e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or
H another person designated by the court; (f) extending relief granted under paragraph 1 of article 19; and (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986."

137 The reference to relief under paragragh 43 of Schedule B1 to the Insolvency Act 1986 (as inserted by section 248 of and Schedule 16 to the Enterprise Act 2002) is a reference to a moratorium on claims in an administration.

138 The Guide to Enactment states, at paras 154, 156:

> "154. . . . The types of relief listed in article 21, paragraph 1, are typical or most frequent in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting state and needed in the circumstances of the case . . .
>
> "156. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to conditions that it considers appropriate."

139 Article 25 provides (under the heading "Co-operation and direct communication between a court of Great Britain and foreign courts or foreign representatives") that:

> "1. . . . the court may co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency officeholder.
>
> "2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives."

140 Article 27 provides that the co-operation referred to in article 25 may be implemented "by any appropriate means", including

> "(a) appointment of a person to act at the direction of the court; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) approval or implementation by courts of agreements concerning the coordination of proceedings; (e) coordination of concurrent proceedings regarding the same debtor."

141 The respondents say that (a) the power under article 21 is to grant any type of relief that is available under the law of the relevant state, and that the fact that recognition and enforcement of foreign judgments is not specifically mentioned in article 21 as one of the forms of relief available, does not mean that such relief cannot be granted; (b) the recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court; and (c) the examples of co-operation in article 27 are merely examples and are not exhaustive.

142 But the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. As Lord Mance JSC pointed out in argument, recognition and enforcement are fundamental in international cases. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction.

143 It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.

144 The respondents rely on United States decisions but the only case involving enforcement of a foreign judgment in fact supports the appellants' argument. The Model Law has been implemented into United States law through Chapter 15 of Title 11 of the United States Code, which has in sections 1521, 1525 and 1527 provisions which are, with modifications not relevant for present purposes, equivalent to articles 21, 25 and 27 of the CBIR. In *In re Metcalfe & Mansfield Alternative Investments* (2010) 421 BR 685 (Bankr SDNY) the US Bankruptcy Court ordered that orders made by a Canadian court in relation to a plan of compromise and arrangement under the (Canadian) Companies' Creditors Arrangement Act 1985 be enforced. That decision does not assist the respondents because the US Bankruptcy Court applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States: pp 698–700. In my judgment the Model Law is not designed to provide for the reciprocal enforcement of judgments.

VII Issue 3: New Cap: Enforcement through assistance under section 426 of the Insolvency Act 1986

145 In view of my conclusion in the next section (section VIII) that the syndicate submitted to the jurisdiction of the Australian court, the issues on section 426(4)(5) of the Insolvency Act 1986, and their relationship with section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 do not arise, but since the matter was fully argued I will express a view on the applicability of section 426(4) to a case such as this.

146 Section 426(4)(5) of the Insolvency Act 1986 provides:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> "(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom, or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matter specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

147 The reference to the application of rules of private international law in section 426(5) is difficult and obscure: see *Dicey*, 15th ed, para 30-119; my discussion in *In re Television Trade Rentals* [2002] BCC 807, para 17, and the cases there cited; and *Al-Sabah v Grupo Torras SA* [2005] 2 AC 333, para 47. But nothing turns on it on these appeals.

148 The question is whether section 426(4) of the 1986 Act provides a procedure by which a judgment of a court having jurisdiction in relation to

insolvency law in a "relevant country or territory" may be enforced in the United Kingdom. As I have said, Australia is a relevant country. A

149 A further question arises if section 426(4) applies to the enforcement of foreign judgments and that is whether section 426 is ousted by section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides:

> "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of the Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom." B

150 Both Lewison J and the Court of Appeal [2012] Ch 538 held that section 426(4) was available as a tool for the enforcement of the judgment.

151 Section 426(4) has been given a broad interpretation: see *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 (CA); *England v Smith* [2001] Ch 419 (CA) and *HIH* [2008] 1 WLR 852. It has been held that the fact that a letter of request has been made is a weighty factor, and public policy and comity favour the giving of assistance: *Hughes v Hannover*, at pp 517–518 and *England v Smith*, at p 433. Thus in *England v Smith* the Australian court overseeing the liquidation of the Bond Corporation made an order for the examination of a London partner in Arthur Andersen. It issued a letter of request asking the English court to assist it by making its own order for the examination. The Court of Appeal decided that the order should be made. C D

152 But, despite the respondents' argument to the contrary, *England v Smith* was not a case of the enforcement of the Australian order, but rather the making of the court's own order in aid of the Australian liquidation. In my judgment, subsections 426(4) and 426(5) of the 1986 Act are not concerned with enforcement of judgments. Section 426(1)(2), by contrast, deals with enforcement of orders in one part of the United Kingdom in another part, and refer expressly to the enforcement of such orders ("shall be enforced" in section 426(1)). Section 426(4) deals with assistance not only for foreign designated countries such as Australia but also to intra-United Kingdom assistance. If section 426(4) applied to intra-United Kingdom enforcement of orders, then section 426(1) would be largely redundant, going beyond what the Court of Appeal [2012] Ch 538, para 57 described as "a degree of overlap". E F

153 Section 426(1)(4) has its origin in sections 121 and 123 of the Bankruptcy Act 1914. Section 121 of the 1914 Act provided that orders of bankruptcy courts in one part of the United Kingdom were to be enforced in other parts. Section 122 provided that the courts exercising bankruptcy and insolvency jurisdiction in the United Kingdom and "every British court elsewhere" were to act in aid of, and be auxiliary to, each other; and, upon a request by the non-English court, could exercise the jurisdiction of either court. G

154 The *Report of the Review Committee on the Insolvency Law and Practice* (1982) (Cmnd 8558) (the "Cork Report") said, at paras 1909–1913, that section 122 was the "vital section in this context", and recommended that the section should be extended to winding up. But, despite the respondents' arguments, I do not discern any recommendation which would suggest that section 426(4) applies to the enforcement of foreign judgments. H

A **155** Consequently the applicability of section 6 of the 1933 Act does not arise for decision, except in a context which makes little practical difference, and to which I will revert.

VIII Submission

156 If the *Dicey* rule applies the judgments in issue will be enforceable B in England if the judgment debtors submitted to the jurisdiction of the foreign court.

New Cap

157 The Australian court granted leave to serve these proceedings out of the jurisdiction on the syndicate: section IV, above. The syndicate did not C enter an appearance, but its solicitors commented in writing on evidence presented to the Australian court about New Cap's insolvency and their comments were placed before the Australian judge.

158 More relevant is the fact that from August 1999 the syndicate submitted proofs of debt (in relation to unsettled claims and outstanding premiums for the 1997, 1998, and 1999 years of account, and not to the reinsurance contracts which are the subject of these proceedings) and D attended and participated in creditors' meetings. In particular at an adjourned meeting of creditors on 16 September 2009 the syndicate had given a proxy for that meeting to the chairman, and submitted a proof of debt and proxy form for that meeting. The syndicate voted at a meeting of creditors in favour of a scheme of arrangement. The liquidator has admitted claims by the syndicate for the sterling equivalent of more than £650,000, E although the liquidator is retaining the dividend in partial settlement of the costs incurred in these proceedings.

159 The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction "has been actually waived, or if the objection has never been entertained at all": *Williams & Glyn's Bank plc v Astro Dinamico* F *Compania Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J).

160 The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: G *Adams v Cape Industries plc* [1990] Ch 433, 459 (Scott J) and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 96–97 (Thomas J); see also *Desert Sun Loan Corpn v Hill* [1996] 2 All ER 847, 856 (CA); *Akande v Balfour Beatty Construction Ltd* [1998] ILPr 110; *Starlight International Inc v Bruce* [2002] ILPr 617, para 14 (cases of foreign judgments) and *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 601 (a case involving the H question whether the party seeking an anti-suit injunction in support of an English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).

161 The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on

English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.

162 It is in that context that Scott J said at first instance in *Adams v Cape Industries plc* [1990] Ch 433, 461 (a case in which the submission issue was not before the Court of Appeal):

> "If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not . . . to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of procedural steps taken in foreign proceedings must . . . be assessed in the context of the foreign proceedings."

163 I agree with the way it was put by Thomas J in *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 97:

> "The court must consider the matter objectively; it must have regard to the general framework of its own procedural rules, but also to the domestic law of the court where the steps were taken. This is because the significance of those steps can only be understood by reference to that law. If a step taken by a person in a foreign jurisdiction, such as making a counterclaim, might well be regarded by English law as amounting to a submission to the jurisdiction, but would not be regarded by that foreign court as a submission to its jurisdiction, an English court will take into account the position under foreign law."

164 The syndicate did not take any steps in the avoidance proceedings as such which would be regarded either by the Australian court or by the English court as a submission. Were the steps taken by the syndicate in the liquidation a submission for the purposes of the rules relating to foreign judgments?

165 In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In *Ex p Robertson; In re Morton* (1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled Scotsman. On appeal from the county court, Sir James Bacon CJ held that the court had jurisdiction. He said, at pp 737–738:

A "what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it—that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of
B law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate. . . . can there be any doubt that the appellant in this case has agreed that, as far as he is concerned . . . the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit . . . [The
C appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England."

166 The syndicate objected to the jurisdiction of the Australian court. Barrett J in his judgment of 14 July 2009 accepted that it had made it clear that it was not submitting to its jurisdiction, and he also accepted that as a result the judgment of the Australian court would not be enforceable in
D England. His judgment is concerned exclusively with the preference claims, and he did not deal with the question of submission by reference to the syndicate's participation in the liquidation by way of proof and receipt of dividends. He decided that the court had jurisdiction because the New South Wales rules justified service out of the jurisdiction on the basis that the cause of action arose in New South Wales.

E **167** I would therefore accept the liquidators' submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding.

F

Rubin

168 The position is different in the *Rubin* appeal. It would certainly have been arguable that Eurofinance SA had submitted to the jurisdiction of the United States District Court, for these reasons: first, it was Eurofinance SA which applied for the appointment by the High Court of Mr Rubin and
G Mr Lan as receivers of TCT specifically for the purpose of causing TCT then to obtain protection under Chapter 11; second, it was Eurofinance SA which represented to the English court that officeholders appointed by the United States court would be able to pursue claims against third parties; third, the judgment of the US Bankruptcy Court states that the court had personal jurisdiction over Eurofinance SA not only because it did business in the United States but also (as I have mentioned above) because it had filed a
H notice of appearance in the Chapter 11 proceedings: Order 22 of July 2008, paras 42–43.

169 But the *Rubin* appellants did not appear in the adversary proceedings, and it was not argued in these proceedings that Eurofinance SA (or Mr Adrian Roman, who caused Eurofinance SA to make the

application) had submitted to the jurisdiction of the US Bankruptcy Court in any other way and it is not necessary therefore to explore the matter further.

IX New Cap: enforcement at common law or under the 1933 Act

170 In view of my conclusion that the Australian judgment in *New Cap* is enforceable by reason of the syndicate's submission, a purely technical point arises on the method of enforcement. The point is whether the enforcement is to be under the 1933 Act or at common law. If insolvency proceedings are excluded from the 1933 Act, then enforcement would be at common law. If they are not excluded, then (as I have said) section 6 has the effect of excluding an action at common law on the judgment and making registration under the 1933 Act the only method of enforcement of judgments within Part I of the Act.

171 Section 11(2) of the 1933 Act provides that the expression "action in personam" shall not be deemed to include (inter alia) proceedings in connection with bankruptcy and winding up of companies. But the effect of section 4(2)(c) is that in the case of a judgment given in an action other than an action in personam or an action in rem, the foreign court shall be deemed to have jurisdiction if its jurisdiction is recognised by the English court, i e at common law. Accordingly, the question whether insolvency proceedings are wholly excluded from the operation of the 1933 Act still arises. There is no other provision in the 1933 Act which throws any light on the point.

172 The main object of the 1933 Act was to facilitate the enforcement of commercial judgments abroad by making reciprocity easier. The only reference to insolvency proceedings in the *Report of the Foreign Judgments (Reciprocal Enforcement) Committee* (1932) (Cmnd 4213) ("the Greer Report"), which recommended the legislation, is the statement (para 4): "It is not necessary for our present purposes to consider the effect in England of foreign judgments in bankruptcy proceedings . . . " The report annexed draft Conventions which had been drawn up in consultation with experts from Belgium, France and Germany. The draft Conventions with Belgium (article 4(3), (4)) and Germany (article 4(4)) provided that the jurisdictional rules in the Convention did not apply to judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate, but that the jurisdiction of the original court would be recognised where such recognition was in accordance with the rules of private international law observed by the court applied to. That provision paralleled what became sections 4(2)(c) and 11(2) of the 1933 Act. The draft Convention with France did not apply to judgments in bankruptcy proceedings etc (article 2(3)), but provided that nothing was deemed to preclude the recognition and enforcement of judgments to which the Convention did not apply: article 2(4).

173 The Conventions concluded with countries to which the 1933 Act applied adopted similar techniques. It is unnecessary to set them out in detail. But there is no reason to suppose that bankruptcy proceedings were not regarded as being "civil and commercial matters". Thus the 1961 Convention with the Federal Republic of Germany of 1961 (set out in the Schedule to the Reciprocal Enforcement of Foreign Judgments (Germany) Order) (SI 1961/1199)) provided in article I(6) that the expression "judgments in civil and commercial matters" did not include judgments for fines or penalties, and had a separate provision in article II(2)

A that the Convention did not apply to judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate (although, in accordance with the usual technique, it did not rule out recognition and enforcement: article II(3)). Other Conventions simply excluded bankruptcy proceedings from the specific jurisdictional provisions of the Convention, like the draft Conventions annexed to the Greer Report: article IV(5) of the Schedule to the Reciprocal Enforcement of Foreign B Judgments (Austria) Order 1962 (SI 1962/1339), article IV(3) of the Schedule to the Reciprocal Enforcement of Foreign Judgments (Norway) Order 1962 (SI 1962/636), and article IV(3) of Schedule 1 to the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1963 (SI 1973/1894).

174 The Reciprocal Enforcement of Judgments (Australia) Order 1994 (SI 1994/1901) extended the 1933 Act to Australia, implementing the UK- C Australia Agreement for the reciprocal enforcement of judgments in civil and commercial matters. The Agreement (set out in the Schedule to the Order) is expressed in article I(c)(i) to apply to judgments in civil and commercial matters. The Order applies Part I of the Act to judgments in respect of a "civil or commercial matter": article 4(a).

175 There is no reason to conclude that the phrase "civil and commercial matters" does not include insolvency proceedings, and the D history of the 1933 Act and the Conventions shows that it does. The fact that insolvency was expressly excluded from the operation of the Brussels Convention, the original and revised Lugano Conventions and the Brussels I Regulation in fact suggests that otherwise they would have been within their scope. The respondents relied on a passage in the ruling of the Court of Justice of the European Union in *Gourdain v Nadler* (Case 133/78) [1979] E ECR 733, paras 3–4, as suggesting that the exclusion of bankruptcy in article 1 of the Brussels Convention was an example of a matter excluded from the concept of civil and commercial matters. But it is clear from the context (and from the opinion of Advocate General Reischl) that the court was simply saying that because the expression "civil and commercial matters" in article 1 had to be given an autonomous meaning, so also was the case with the expression "bankruptcy". That the exclusion of F bankruptcy proceedings does not affect their character as civil or commercial matters is confirmed by the recent ruling in *F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma* (Case C-213/10) 19 April 2012, where the court said that the Brussels I Regulation was "intended to apply to all civil and commercial matters apart from certain well-defined matters" and as a result actions directly deriving from insolvency proceedings and G closely connected with them were excluded: para 29.

176 It follows that the 1933 Act applies to the Australian judgment and that enforcement should be by way of registration under the 1933 Act.

X Disposition

177 I would therefore allow the appeal in *Rubin*, but dismiss the appeal H in *New Cap* on the ground that the syndicate submitted to the jurisdiction of the Australian court.

LORD MANCE JSC

178 I agree with Lord Collins of Mapesbury's reasoning and conclusions in his judgment on these appeals, essentially for the reasons he

gives, though without subscribing to his incidental observation (para 132) that the Privy Council decision in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 was necessarily wrongly decided. This was not argued before the Supreme Court, and I would wish to reserve my opinion upon it. *Cambridge Gas* is, on any view, distinguishable.

179 The common law question central to these appeals is whether the Supreme Court should endorse or introduce a special rule of recognition and enforcement, one falling outside the scope of the *Dicey* rule which Lord Collins has identified (rule 36 in the 14th and rule 43 in the 15th edition) and applicable to judgments in foreign insolvency proceedings setting aside voidable pre-insolvency transactions. For the principal reasons which Lord Collins gives in paras 95–131, I agree that we should not do so.

180 Since much weight was placed by the respondents and the Court of Appeal upon the Board's reasoning and decision in *Cambridge Gas*, I add some observations to indicate why, as the present appellants submitted, it concerned circumstances and proceeded upon factual assumptions and a legal analysis which have no parallel in the present case.

181 *Cambridge Gas* has attracted both Irish judicial dissent and English academic criticism, to which Lord Collins refers in paras 53 and 111–112. Giving the judgment of the Board in *Pattni v Ali* [2007] 2 AC 85, I said that the purpose of the bankruptcy order with which the Board was concerned in *Cambridge Gas* "was simply to establish a mechanism of collective execution against the property of the debtor [Navigator] by creditors whose rights were admitted or established": para 23.

182 This analysis, admittedly, involved treating the vesting in creditors of shares *in* Navigator as no different in substance from the vesting in creditors of Navigator's shares in its ship-owning subsidiaries. But it is clear from paras 8 and 9 and again 24–26 of the Board's advice in *Cambridge Gas* that the Board saw no difference. It did not regard Cambridge Gas as having any interest of value to advance or protect in the shares still held nominally in its name. Their vesting in Navigator's creditors was no more than a mechanism for disposing of Navigator's assets, which did not affect or concern Cambridge Gas. The Board was therefore, in its view (and rightly or wrongly), concerned with distribution of the insolvent company's assets in a narrow and traditional sense.

183 Amplifying this, the Board approached the situation in *Cambridge Gas* as follows. The New York court had jurisdiction over Navigator's assets, since Navigator had submitted to the New York proceedings. Cambridge Gas's shares in Navigator (located in the Isle of Man, Navigator's place of incorporation) were "completely and utterly worthless" [2007] 1 AC 508, para 9. The transfer to Navigator's creditors of Cambridge Gas's shares in Navigator had the like effect to a transfer of Navigator's assets, since Navigator was "an insolvent company, in which the shareholders ha[d] no interest of any value": para 26. Cambridge Gas's shares in Navigator were vulnerable in the Isle of Man, under section 152 of the Companies Act 1931, to a similar scheme of arrangement to that which the New York Court intended by its Chapter 11 order. More generally, as I noted in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, paras 236–238, in insolvency shareholders' interests yield to those of creditors.

A **184** It was in this limited context that the Board concluded that the New York and Manx courts' orders could be regarded as doing no more than facilitating or enabling collective execution against Navigator's property.

185 The Court of Appeal believed on the contrary that the answer to the present cases lay in the Board's general statements in *Cambridge Gas* [2007] 1 AC 508, paras 19–21 regarding the nature of insolvency proceedings. It is B true that proceedings to avoid pre-insolvency transactions can be related to the process of collection of assets. That is, their general purpose and effect is to ensure a fair allocation of assets between all who are and were within some specified pre-insolvency period creditors. A dictum of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 19, quoted by Lord Collins in paras 15 and 52, is to that effect, though C again uttered in a different context to the present.

186 However, the Board did not see these considerations as answering or eliminating all questions regarding the existence of jurisdiction or at least its exercise in *Cambridge Gas*. On the contrary, it went on to examine in close detail in paras 22–26 the limits of the assistance that a court could properly give. In rejecting the argument that the interference with the shareholding held in Cambridge Gas's name was beyond the Manx court's D jurisdiction (para 26), the only reason it gave related to the nature of shares in an insolvent company. This meant, according to its advice, that Cambridge Gas had no interest of any value to protect and that registration of the shares in Navigator's creditors' name was no more than a mechanism for giving creditors access to Navigator's assets.

187 On this basis, the decision in *Cambridge Gas* is, as Professor Adrian E Briggs noted in a penetrating case-note in *The British Year Book of International Law* (2006), pp 575–581, less remarkable (although, as Professor Briggs also notes, it perhaps still poses problems of reconciliation with the House's decision in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] AC 260). But, because the actual decision in *Cambridge Gas* was so narrowly focused on the nature of a shareholder's rights in an insolvent company and was not directly F challenged, I prefer to leave open its correctness.

188 Whatever view may be taken as to the validity of the Board's reasoning in *Cambridge Gas*, it is clear that it does not cover or control the present appeal. The present cases are not concerned with shares, with situations in which shares are, or are treated by the court as, no more than a key to the insolvent company's assets or even with situations in which it is G clear that those objecting to recognition and enforcement of the foreign courts' orders have no interests to protect. There are, on the contrary, substantial issues as to whether there were fraudulent preferences giving rise to in personam liability in large amounts. The persons allegedly benefitting by fraudulent preferences did not appear in the relevant foreign insolvency proceedings in which judgment was given against them. They were (leaving aside any question of submission) outside the international jurisdiction of H the relevant foreign courts.

189 Lord Clarke of Stone-cum-Ebony JSC takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having "jurisdiction to entertain" bankruptcy proceedings or, if one were

(wrongly in my view) to treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings: see paras 193, 200 and 201 of Lord Clarke JSC's judgment. The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in *Dicey* (in para 31-064 in the 14th and 15th editions) as a "vexed and controversial" question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction. On Lord Clarke JSC's analysis, in such a case (of which *Rubin v Eurofinance* is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law.

190 In the light of the above, the Court of Appeal was, in my view, in error in seeing the solution to the present appeals as lying in the advice given by the Board in *Cambridge Gas*. Even on an assumption that the actual decision in *Cambridge Gas* can be supported, it cannot and should not be treated as supporting the respondents' case that fraudulent preference claims and avoidance orders in insolvency proceedings generally escape the common law rules requiring personal or in rem jurisdiction.

LORD CLARKE OF STONE-CUM-EBONY JSC

191 I would like to pay tribute to the learning in Lord Collins of Mapesbury's comprehensive judgment. However, left to myself, I would dismiss the appeal in the *Rubin* case. Since I am in a minority of one, little is to be gained by my writing a long dissent. I will therefore try to explain my reasons shortly. In doing so, I adopt the terminology and abbreviations used by Lord Collins.

192 I agree with Lord Collins and Lord Mance JSC that the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 is distinguishable. The facts there were quite different from those here. However, in so far as it is suggested that *Cambridge Gas* was wrongly decided, I do not agree. Moreover, I do not think that it would be appropriate so to hold because it was not submitted to be wrong in the course of the argument. To my mind the approach which should be adopted is presaged in the speech of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and in his judgment in *Cambridge Gas*.

193 As I see it, the issue is simply whether an avoidance order made by a foreign bankruptcy court made in the course of the bankruptcy proceedings, whether personal or corporate, which the court has jurisdiction to entertain, is unenforceable if it can fairly be said to be an order made either in personam or in rem. I would answer that question in the negative. Put another way, the question is whether the English court has jurisdiction under English rules of private international law to enforce an avoidance order made in foreign bankruptcy proceedings in circumstances where, under those rules, the foreign court has jurisdiction to entertain the bankruptcy proceedings themselves. I would answer that question in the affirmative. It

A is not, as I understand it, suggested here that the US court did not have jurisdiction to entertain the bankruptcy proceedings themselves.

194 The relevant paragraphs of Lord Hoffmann's judgment in *Cambridge Gas* are in these terms (as quoted by Lord Collins at para 43 above):

> "13. . . . Judgments in rem and in personam are judicial
> B determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> C "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established . . .
>
> "15. . . . bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may
> D incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action.
> E But these again are incidental procedural matters and not central to the purpose of the proceedings."

195 The critical paragraph is para 15, which seems to me to make it clear that it is possible to have an order which is both in personam or in rem and an order of the kind referred to by Lord Hoffmann in para 14. Thus it may be incidentally necessary to establish substantive rights in the course of
F the bankruptcy proceedings as part of a collective proceeding to enforce rights. In such a case the order will be doing two things. It will be both establishing the right and enforcing it. This can be seen from the examples given in para 15. Proofs of debt may be rejected, which is a process which may involve determining, for example, the substantive rights of the creditor against the debtor. Or it may be necessary to determine whether or not a
G particular item of property belongs to the debtor and is available for distribution. As para 15 contemplates, such procedures may be tried either summarily within the bankruptcy proceedings or by ordinary action. In either such case Lord Hoffmann describes them as incidental procedures which are not central to the purpose of the bankruptcy proceedings. As I see it, in such a case, an avoidance order may be both an order in personam or in rem and an order in the bankruptcy proceedings.

H **196** I agree with Lord Collins at para 103 that it is not easy to see why the order of the US Bankruptcy Court in *Cambridge Gas* was not an order in rem. However, that does not to my mind show that *Cambridge Gas* was wrongly decided but demonstrates that it is possible to have an in rem order which is made as incidental to bankruptcy proceedings but which is

enforceable at common law, provided that the bankruptcy court has jurisdiction in the bankruptcy.

197 The approach is explained by Lord Hoffmann in *HIH* [2008] 1 WLR 852, para 30 and in *Cambridge Gas* [2007] 1 AC 508, para 16, both of which are quoted by Lord Collins at para 19 above. In *HIH* he said:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

In *Cambridge Gas* he said:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

198 At paras 94–98 above Lord Collins discusses the nature of avoidance proceedings. I entirely agree with his analysis. Avoidance provisions requiring the adjustment of prior transactions and the recovery of previous dispositions of property so as to constitute the estate available for distribution are necessary in order to maintain the principle of equality among creditors. At para 15 Lord Collins notes that Lord Hoffmann said at para 19 of *HIH* that "the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme." In short, avoidance proceedings, and therefore avoidance orders, are central to the bankruptcy proceedings. As Lord Collins puts it at para 99, avoidance proceedings are peculiarly the subject of insolvency law.

199 I accept that to permit the enforcement of an avoidance order in circumstances of this kind would be a development of the common law. However, it seems to me that it would be a principled development. It would in essence be an application of the principle identified by Lord Hoffmann in the passage quoted above from para 30 of *HIH* that the principle of modified universalism requires that English courts should, so far as is consistent with justice and United Kingdom public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

200 The position of the judgment debtor in such a case would be protected by the principle that the English court would only enforce a judgment in a case like this where to do so was consistent with justice and United Kingdom public policy. All would depend upon the facts of the particular case. In the case of *Rubin*, there would be no injustice in enforcing the judgment against the appellants.

A **201** Lord Mance JSC notes at para 189 that I do not define either the circumstances in which a foreign court should be recognised as having jurisdiction to entertain bankruptcy proceedings or the factors which would make it unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings. As I see it, these are matters which would be worked out on a case by case basis in (as Lord Hoffmann put it in *HIH* [2008] 1 WLR 852, para 30) co-operating with the courts in the country of B the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. It would not be irrelevant that the debtor under the avoidance order had not submitted. All would depend upon the particular circumstances of the case, including the reasons why the debtor had not submitted.

202 In essence, on the critical question, I prefer the reasoning of the C Court of Appeal, which is contained in the judgment of Ward LJ [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61–62, 64, with whom Wilson LJ and Henderson J agreed. Lord Collins has concisely summarised their reasoning in paras 88–90, substantially as follows: (a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam; (b) it was common ground that the judgment debtors were not present when the proceedings were instituted, and did not D submit to the jurisdiction, and so at first blush had an impregnable defence; (c) *Cambridge Gas* decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2007] 2 AC 85, para 23; (d) bankruptcy was a collective proceeding to E enforce rights and not to establish them: *Cambridge Gas* [2007] 1 AC 508, para 15; (e) the issue was whether avoidance proceedings which could only be brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, i e part of the collective proceeding to enforce rights and not to establish them; (f) the adversary proceedings were part and parcel of the Chapter 11 proceedings; (g) the ordinary rules for F enforcing foreign judgments in personam did not apply to bankruptcy proceedings; (h) avoidance mechanisms were integral to and central to the collective nature of bankruptcy and were not merely incidental procedural matters; (i) the process of collection of assets will include the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] 1 WLR 852, para 19; (j) the judgment of the US Bankruptcy Court was a judgment in, and for the G purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law rules relating to insolvency; (k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context; (l) there was a principle of private international law that bankruptcy should be unitary and universal, and there H should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets; (m) there was a further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic

insolvency; (n) there was no unfairness to the appellants in upholding the judgment because they were fully aware of the proceedings, and after taking advice chose not to participate: see. A

203 That seems to me to be a correct summary of the views of the Court of Appeal. I agree with those views subject to this comment on point (c). I am not sure that in *Cambridge Gas* the Privy Council decided that the bankruptcy order with which it was concerned was neither in personam nor in rem. It held that the purpose of the order was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established. As discussed above, it may well have appreciated that it was also an order in rem. However that may be, I agree with Lord Collins at para 90 that, in short, the Court of Appeal accepted that the judgment sought to be enforced in the instant cases was an in personam judgment, but decided that the *Dicey* rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules. I agree with the reasoning of the Court of Appeal. Put another way, the *Dicey* rule should in my opinion be modified to include a fifth case in which a foreign court has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it is given. That fifth case would be if the judgment was given in avoidance proceedings as part of foreign bankruptcy proceedings which the foreign court had jurisdiction to entertain. B C D

204 I recognise that there are other ways of achieving such a result, as for example by an equivalent provision to the EC Insolvency Regulation: per Lord Collins at paras 99–101. I also recognise that it would be possible to adopt a more radical approach not limited to avoidance proceedings. However, so limited, I respectfully disagree with the view expressed by Lord Collins at para 128 that this development would not be an incremental development of existing principles but a radical departure from substantially settled law. For the reasons given in para 199, it would in essence be an application of the principle of modified universalism. It seems to me that in these days of global commerce, the step taken by the Court of Appeal was but a small step forward. Judgment debtors are protected by the principle that no order would be made if it were contrary to justice or United Kingdom public policy. Moreover, on the facts here, I can see no basis upon which the order made by the Court of Appeal would be either unjust or contrary to public policy. Finally, I do not think that that conclusion is undermined by any absence of reciprocity. E F

205 For these reasons, I would dismiss the appeal in the *Rubin* case on the common law point. On all other issues I agree with the judgment of Lord Collins. G

Appeal in first case allowed.
Appeal in second case dismissed.

COLIN BERESFORD, Barrister H

HCMP 963/2021
[2021] HKCFI 2151

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 963 OF 2021

IN THE MATTER OF Samson Paper Company Limited (In Creditors' Voluntary Liquidation)

and

IN THE MATTER OF the Inherent Jurisdiction of the Court

BY

LAI KAR YAN (DEREK) AND HO KWOK LEUNG GLEN Applicants
AS THE JOINT AND SEVERAL LIQUIDATORS OF
SAMSON PAPER COMPANY LIMITED
(IN CREDITORS'VOLUNTARY LIQUIDATION)
("**COMPANY**")

Before: Hon Harris J in Chambers

Date of Hearing: 20 July 2021

Date of Decision: 20 July 2021

D E C I S I O N

The Application

1. On 14 May 2021 the Supreme People's Court and the Secretary for Justice signed what I shall refer to as 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. The Cooperation Mechanism consists of two documents, which in English are called the "*Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region*" and the Supreme People's Court's "*Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region*" ("**SPC Opinion**"). Prior to May 2021 there had been two cases [1] in which I had made orders for recognition and assistance on the application of administrators (管理人)[2] in the Mainland with the support of letters of request from the relevant Intermediate People's Courts. On 8 July 2021 Derek Lai Kar Yan and Glen Ho Kwok Leung of Deloitte issued an *ex parte* originating summons requesting an order that "*A simplified Chinese version of the letter of request in the form annexed hereto to be issued to the Bankruptcy Court of the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and the Liquidators*." This is the first application made in accordance with the Cooperation Mechanism in either

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1 *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676; *Re the Liquidator of Shenzhen Everrich Supply Chain Co Ltd* [2020] HKCLC 891.

2 The equivalent office holder in the Mainland to that called liquidator (清盘人) in Hong Kong.

Hong Kong or the Mainland. Formal recognition by the Shenzhen Intermediate People's Court ("**Shenzhen Court**") would be the first occasion on which a court in the Mainland has formally recognised and assisted a liquidator appointed by the Hong Kong High Court. As I explain in [27]–[32] of my decision in *Re CEFC Shanghai International Group Ltd* [3] a liquidator appointed by the High Court of Hong Kong, or a Court outside the People's Republic of China, has never been formally recognised by a Mainland Court. This application is, therefore, of some significance in the development of cooperation between Hong Kong and the Mainland in the sphere of corporate insolvency.

The Reasons for the Application

2. Samson Paper Company Limited ("**Company**") is incorporated in Hong Kong. It is part of a corporate Group headed by Samson Paper Holdings Limited ("**Holdings**"), which is incorporated in Bermuda and listed on the Stock Exchange of Hong Kong. Mr Lai and Mr Ho were appointed as provisional liquidators of Holdings by the Supreme Court of Bermuda on 24 July 2020 on a soft-touch basis. This appointment I recognised on 13 August 2020. On 14 August 2020 the intermediate group subsidiary, which held the voting shares in the Company resolved to wind up the Company on the grounds of insolvency and appointed Mr Lai and Mr Ho as liquidators ("**Liquidators**"). Their appointment was confirmed at a meeting of creditors on 25 August 2020.

3. The Liquidators have formed the view that they need to obtain recognition and assistance in order to deal with the Company's substantial

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[3] *Ibid*.

assets in the Mainland, which are principally located in Shenzhen. The assets fall into three categories:

(1) Wholly-owned subsidiaries ("**Subsidiaries**") including a wholly-owned subsidiary in Shenzhen, namely Samson Paper (Shenzhen) Company Limited ("**Samson Shenzhen**") （森信纸业（深圳）有限公司）, which in turns holds two wholly-owned branches in Nanning and Xiamen; and a wholly-owned subsidiary in Shanghai, namely NJ Trading (Shanghai) Company Limited ("**Samson Shanghai**") （能京商贸（上海）有限公司）;

(2) receivables (as of 14 August 2020) in the aggregate sum of approximately HK$422 million due from affiliated companies incorporated in the Mainland, which I summarise in the following table:

Name of company	**HKD**
Universal Pulp & Paper (Shangdong) Co. Ltd （远通纸业（山东）有限公司）	208,567,255
Samson Shenzhen	93,015,577
Samson Shanghai	60,689,874
Sino Development (Tianjin) International Trading Co. Ltd （建成（天津）国际贸易有限公司）	32,544,776
SJ (China) Company Limited (Formerly known as Universal Pulp & Paper (Jiangsu) Co. Ltd) （诚仁（中国）有限公司（前称「远通纸业（江苏）有限公司」））	19,219,773
Shanghai Samson (Culture) Company Ltd （上海森信文化用品有限公司）	7,799,018

(3) an apartment in Beijing.

4. I am satisfied that it is desirable that the Liquidators' appointment is recognised and assistance provided in Shenzhen by the Shenzhen Court in order that the Liquidators can collect in the assets within the jurisdiction of the Shenzhen Court.

Jurisdiction

5. Article 4 of the SPC Opinion states:

> "　　四、　本意見適用於香港特別行政區系債務人主要利益中心所在地的香港破產程序。
>
> 本意見所稱"主要利益中心"，一般是指債務人的註冊地。同時，人民法院應當綜合考慮債務人主要辦事機構所在地、主要營業地、主要財產所在地等因素認定。
>
> 在香港管理人申請認可和協助時，債務人主要利益中心應當已經在香港特別行政區連續存在 6 個月以上。
>
> 4. This Opinion applies to Hong Kong Insolvency Proceedings where the Hong Kong Special Administrative Region is the centre of main interests of the debtor.
>
> 'Centre of main interests' referred to in this Opinion generally means the place of incorporation of the debtor. At the same time, the people's court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor.
>
> When a Hong Kong Administrator applies for recognition and assistance, the centre of main interests of the debtor shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months."

6. As the Company is incorporated in Hong Kong it follows that unless there are matters, which demonstrate that its centre of main interests are located elsewhere the SPC Opinion applies to the Company and its Liquidators and this is a proper case in which to seek recognition and assistance. On the basis of the evidence before me in my view it would

appear 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 [4].

The principles governing the grant of a letter of request

7. The technique of issuing letters of request to foreign courts to facilitate the task of the liquidator who seeks assistance from a foreign court appears to be a creature of the common law. Letters of request are a private international law response to ancient public international law notions of territorial sovereignty, according to which the jurisdiction of the courts of one sovereign state does not run beyond that sovereign state's own territorial limits [5].

8. The law is well-settled that the Court has an inherent jurisdiction to grant a letter of request in order to permit Hong Kong liquidators to seek recognition and assistance in another jurisdiction [6]. In considering whether to grant a letter of request, the Court has to consider which jurisdiction is the most appropriate or convenient forum for the determination of the issue in question applying generally applicable jurisdictional principles [7].

9. The granting of a letter of request in the present case would be consistent with these principles. 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 [8]. In order to carry

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4 See for a recent explanation of the criteria for determining the location of the centre of main interests, *Re Melars Group Ltd* [2021] EWHC 1523 (Ch) [56]–[62].
5 *Re Sea Containers Ltd* [2012] SC (Bda) 26 Com at [13].
6 *Re China Agrotech Holdings Ltd* [2017] HKCLC 365.
7 *Ibid*, footnote 4 at [17].
8 *Re Southern Pacific Personal Loans Ltd* [2014] Ch 426 at [31], [36]–[37].

out this function the Liquidators have an express statutory power in Hong Kong to commence legal proceedings to recover assets and this includes commencing proceedings outside Hong Kong [9].

Procedure for recognition specified in SPC Opinion

10. Article 6 of the SPC Opinion sets out the procedure for an application by a Hong Kong liquidator（清盘人）:

> “ 六、申請認可和協助香港破產程序的，香港管理人應當提交下列材料：
>
> （一） 申請書；
>
> （二） 香港特別行政區高等法院請求認可和協助的函；
>
> （三） 啟動香港破產程序以及委任香港管理人的有關文件；
>
> （四） 債務人主要利益中心位於香港特別行政區的證明材料，證明材料在內地以外形成的，還應當依據內地法律規定辦理證明手續；
>
> （五） 申請予以認可和協助的裁判文書副本；
>
> （六） 香港管理人身份證件的複印件，身份證件在內地以外形成的，還應當依據內地法律規定辦理證明手續；
>
> （七） 債務人在內地的主要財產位於試點地區、在試點地區存在營業地或者在試點地區設有代表機構的相關證據。向人民法院提交的文件沒有中文文本的，應當提交中文譯本。
>
> 6. The Hong Kong Administrator applying for recognition of and assistance to Hong Kong Insolvency Proceedings shall submit the following materials:
>
> (1) an application;

[9] *Section 251(1) and Schedule 25 Part 2* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32; *Akira Sugiyama v Kosei Securities Co (Asia) Ltd* [1992] 1 HKC 261, 263.

(2) a letter of request for recognition and assistance issued by the High Court of the Hong Kong Special Administrative Region;

(3) the relevant documents on the commencement of the Hong Kong Insolvency Proceedings and in relation to the appointment of the Hong Kong Administrator;

(4) materials showing that the debtor's centre of main interests is in the Hong Kong Special Administrative Region, and if any of such materials was issued outside the Mainland, it shall be certified in accordance with the law of the Mainland;

(5) a copy of the judgment in respect of which the application for recognition and assistance is made;

(6) a copy of the identity document of the Hong Kong Administrator, and if such identity document was issued outside the Mainland, it shall be certified in accordance with the law of the Mainland;

(7) evidence showing that the debtor's principal assets in the Mainland are in a pilot area, or that it has a place of business or a representative office in a pilot area.

Where a document to be submitted to a people's court of the Mainland is not in the Chinese language, a Chinese translation shall be submitted."

11. As can be seen from [6(2)] and [6(5)] in order for an application for recognition to be granted it is necessary for the Hong Kong Court to provide two documents. The first is a letter of request. The second is a judgment determining that a letter of request should be issued.

12. I have found in [4] above that it is desirable that the Liquidators' appointment should be recognised and assisted in Shenzhen and in [10] that the criteria for issuing a letter of request are satisfied in the

present case, it follows that in my opinion this is a proper case for a letter of request to be issued by the Hong Kong Court to the Shenzhen Court requesting that the Shenzhen Court make an order recognising the Liquidators and providing assistance to them.

Liquidators' function and powers

13. For the benefit of the Judge of the Shenzhen Court who will deal with the Liquidators' application for recognition and assistance it will be helpful if I summarise the Liquidators' powers and function under Hong Kong law. Under Hong Kong law and, in particular *section 251* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, the Liquidators are authorised jointly and severally to exercise the following functions and powers:

(1) take into their custody, or under their control, all the property and things in action to which the Company is or appears to be entitled;

(2) sell the real and personal property and things in action of the Company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(3) do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal; and

(4) do all other things as may be necessary for winding up the affairs of the Company and distributing its assets.

14. It is desirable that the Liquidators are able to exercise the same functions and powers in Shenzhen as in Hong Kong to the extent that the

laws of the Mainland provide that an administrator in the Mainland has the same or substantially similar functions and powers. The Hong Kong Court would, as the decisions in *CEFC Shanghai* [10] and *Shenzhen Everrich* [11] demonstrate, in similar circumstances recognise a letter of request from the Shenzhen Court and provide such recognition and assistance as may be requested subject to compliance with the procedure stipulated in the SPC Opinion and any applicable limitations under Hong Kong law.

15. As I have explained in [1] the Liquidators seek an order for issue of a letter of request in simplified Chinese to the Bankruptcy Court of the Shenzhen Court. As I understand the position the Bankruptcy Court although physically separate to the rest of the Shenzhen Court is an administrative section of the Shenzhen Court rather than a separate entity and I, therefore, think it more appropriate to direct the letter of request simply to the Shenzhen Intermediate People's Court. As the letter of request is directed to a court in the Mainland I agree that it is appropriate that the letter of request is issued in simplified Chinese, although I think it will be helpful if an English version is appended to this decision along with the Chinese version for readers who are not conversant with Chinese.

16. I will make the following order:

(1) A letter of request in the form appended hereto in simplified Chinese be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and its liquidators.

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[10] *Ibid*, footnote 1.
[11] *Supra*.

(2) The Liquidators' costs of this application be paid out of the assets of the Company as an expense of the Company's liquidation.

(Jonathan Harris/夏利士)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Jones Day, for the applicants

根据认可和协助香港特别行政区破产程序试点方案发出的司法协助请求函

致：深圳市中级人民法院破产法庭（“深圳市破产法庭”）

鉴于：

1. 本法庭是对香港特别行政区（“**香港**”）的公司法和破产法行使管辖权的法庭。

2. 森信纸业有限公司（“**公司**”）是一家于 1981 年 3 月 24 日根据香港法律注册成立的公司。

3. 公司在香港从事纸制品贸易已有 40 多年。

4. 于 2020 年 8 月 14 日，公司 A 类股股东通过书面决议，自愿将公司清盘，并委任位于香港金钟道 88 号太古广场一座 35 楼德勤. 关黄陈方会计师行的黎嘉恩先生和何国梁先生共同和各别担任公司的清盘人（“**清盘人**”）。因此，公司自 2020 年 8 月 14 日起已在香港进行债权人自愿清盘（“**清盘程序**”）。

5. 于 2020 年 8 月 25 日，公司债权人通过决议，确认清盘人的委任。

6. 根据香港法律（包括《公司（清盘及杂项条文）条例》（香港法例第 32 章）第 251 条），授权清盘人共同及各别采取（其中包括）以下行动：

   (a) 将公司有权享有或看似有权享有的所有财产及据法权产，收归该清盘人保管或控制；

   (b) 借公开拍卖或私人合约，出售公司的不动产、动产及据法权产，并有权将该等财产及权产全盘转让予任何人或任何公司，或将它们分拆出售；

(c) 以公司名义和代表公司作出所有作为及签立所有契据、收据及其他文件，并可为该目的而在有需要时，使用公司印章；及

(d) 作出为公司事务清盘及公司资产分配而需要作出的所有其他事情。

7. 清盘人认为，鉴于（其中包括）以下事实，若要根据香港法律有效行使他们的权力，需要深圳破产法庭认可他们的委任：

(a) 公司在内地的资产包括：

(i) 一家位于深圳的全资附属公司，即森信纸业（深圳）有限公司*，该公司又在南宁和厦门持有两家分公司；

(ii) 一家位于上海的全资附属公司，即能京商贸(上海)有限公司*；

*仅供识别

(iii) 应收下列在内地注册成立的集团公司的款项（截至 2020 年 8 月 14 日）合共约 4.22 亿港元：

Name of company	**HKD**
Universal Pulp & Paper (Shangdong) Co. Ltd* （远通纸业（山东）有限公司）	208,567,255
Samson Paper (Shenzhen) Company Limited* （森信纸业（深圳）有限公司）	93,015,577
NJ Trading (Shanghai) Company Limited* （能京商贸（上海）有限公司）	60,689,874
Sino Development (Tianjin) International Trading Co. Ltd* （建成（天津）国际贸易有限公司）	32,544,776
SJ (China) Company Limited (Formerly known as Universal Pulp & Paper (Jiangsu) Co. Ltd) * （诚仁（中国）有限公司（前称「远通纸业（江苏）有限公司」））	19,219,773
Shanghai Samson (Culture) Company Ltd* （上海森信文化用品有限公司）	7,799,018

*仅供识别

(iv) 位于北京的一套公寓。

8. 因此，清盘人认为，根据香港法律，向深圳破产法庭寻求济助属适当行为，以便（特别及最重要的是）该法庭能认可清盘人及其权力。

9. 本案所提供的证据证明并令本法庭信纳，在其认为适当的范围内，向深圳破产法庭提出协助请求符合正义。为使清盘人能够履行其职责，谨请深圳破产法庭协助本法庭，授权清盘人根据适用的内地法律在内地行使香港法律赋予他们的所有权力、职责和酌情权。

10. 本法庭谨请深圳破产法庭为清盘程序及清盘人提供协助，签发命令并指示：

(a) 清盘程序和清盘人的委任均得深圳破产法庭的认可；及

(b) 清盘人拥有并可行使香港法律赋予他们的权力（如上文所载），并可在内地法律允许的最大范围内行使。

11. 本法庭确认，已根据香港的程序和法律发出本请求函及作出相关申请。

12. 为免产生疑问，寻求该协助旨在获得与本法庭因公司资产专属于本法庭的管辖范围内所授予的济助大致相符的济助。

13. 本法庭进一步确认，香港法院将在类似情况下，并在行使其固有管辖权时，认可深圳破产法庭的请求函，并就该请求函提供可能需要的协助 （受香港法律的适用限制约束）。

LETTER OF REQUEST FOR JUDICIAL ASSISTANCE UNDER THE PILOT MEASURE IN RELATION TO THE RECOGNITION OF AND ASSISTANCE TO INSOLVENCY PROCEEDINGS IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

To: Bankruptcy Court of the Shenzhen Intermediate People's Court ("**Shenzhen Bankruptcy Court**")

WHEREAS:

1. This Court is a court exercising jurisdiction in relation to company and insolvency law in the Hong Kong Special Administrative Region ("**Hong Kong**").

2. Samson Paper Company Limited ("**Company**") is a company incorporated under the laws of Hong Kong on 24 March 1981.

3. The Company engaged in the trading of paper products in Hong Kong for more than 40 years.

4. On 14 August 2020, the shareholder of class A shares of the Company passed a written resolution to wind up the Company voluntarily and appointed Mr Lai Kar Yan (Derek) and Mr Ho Kwok Leung Glen of Deloitte Touche Tohmatsu, 35/F, One Pacific Place, 88 Queensway, Hong Kong, as liquidators of the Company jointly and severally ("**Liquidators**"). Accordingly, the Company has been in creditors' voluntary liquidation in Hong Kong since 14 August 2020 ("**Liquidation Proceedings**").

5. On 25 August 2020, the creditors of the Company passed a resolution confirming the appointment of the Liquidators.

6. Under Hong Kong law (including section 251 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)), the Liquidators are authorised jointly and severally to, among others:

   (a) take into their custody, or under their control, all the property and things in action to which the Company is or appears to be entitled;

(b) sell the real and personal property and things in action of the Company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(c) do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal; and

(d) do all other things as may be necessary for winding up the affairs of the Company and distributing its assets.

7. The Liquidators consider that the effective exercise of their powers under Hong Kong law requires that their appointment be recognised by the Shenzhen Bankruptcy Court because of, *inter alia,* the following facts:

(a) The Company's assets in the Mainland include:

(i) a wholly-owned subsidiary in Shenzhen, namely Samson Paper (Shenzhen) Company Limited* (森信纸业（深圳）有限公司), which in turns holds two wholly-owned branches in Nanning and Xiamen;

(ii) a wholly-owned subsidiary in Shanghai, namely NJ Trading (Shanghai) Company Limited* (能京商贸（上海）有限公司);

* for identification purpose only

(iii) receivables (as of 14 August 2020) in the aggregate sum of approximately HKD422 million due from the following group companies incorporated in the Mainland:

Name of company	**HKD**
Universal Pulp & Paper (Shangdong) Co. Ltd* （远通纸业（山东）有限公司）	208,567,255
Samson Paper (Shenzhen) Company Limited* （森信纸业（深圳）有限公司）	93,015,577
NJ Trading (Shanghai) Company Limited* （能京商贸（上海）有限公司）	60,689,874

Sino Development (Tianjin) International Trading Co. Ltd* （建成（天津）国际贸易有限公司）	32,544,776
SJ (China) Company Limited (Formerly known as Universal Pulp & Paper (Jiangsu) Co. Ltd) * （诚仁（中国）有限公司（前称「远通纸业（江苏）有限公司」））	19,219,773
Shanghai Samson (Culture) Company Ltd* （上海森信文化用品有限公司）	7,799,018

* for identification purpose only

(iv) an apartment in Beijing.

8. Accordingly, the Liquidators consider it appropriate, as a matter of Hong Kong law, to seek relief from the Shenzhen Bankruptcy Court, most specifically and importantly for the recognition of the Liquidators and their powers.

9. The evidence filed in these proceedings has demonstrated to the satisfaction of this Court that, in order for the Liquidators to discharge their duties, it is in the interests of justice to respectfully request the Shenzhen Bankruptcy Court, to the extent it deems it appropriate to do so, to assist this Court by empowering the Liquidators to exercise all the powers, duties and discretions afforded to them under Hong Kong law within the Mainland in accordance with applicable Mainland law.

10. This Court hereby respectfully requests the Shenzhen Bankruptcy Court to act in aid of the Liquidation Proceedings and in aid of the Liquidators by ordering and directing that:

(a) the Liquidation Proceedings and the appointment of the Liquidators be recognised by the Shenzhen Bankruptcy Court; and

(b) the Liquidators have and may exercise such powers as are available to them under Hong Kong law (as set out above), and to the fullest extent permitted by Mainland law.

11. This Court confirms that this Letter of Request has been issued, and the associated application has been made, in accordance with the procedures and laws of Hong Kong.

12. For the avoidance of doubt, this assistance is sought to obtain relief broadly corresponding to the relief which would be granted by this Court if the Company's assets were located exclusively within the jurisdiction of this Court.

13. This Court further confirms that the Hong Kong Court would in similar circumstances, and in the exercise of its inherent jurisdiction, recognise a letter of request from the Shenzhen Bankruptcy Court and provide such assistance as may be requested in respect of that letter of request (subject to applicable limitations under Hong Kong law).

HCMP 9/2022
[2022] HKCFI 363

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 9 OF 2022

IN THE MATTER of Ozner Water International Holding Limited （浩澤淨水國際控股有限公司） (In Liquidation)

and

IN THE MATTER of the inherent jurisdiction of the Court

JOINT AND SEVERAL LIQUIDATORS OF OZNER WATER INTERNATIONAL HOLDING LIMITED （浩澤淨水國際控股有限公司） (IN LIQUIDATION) ("**COMPANY**") — Applicants

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Before: Hon Harris J in Chambers (Not Open to the Public)

Date of Hearing: 27 January 2022

Date of Decision: 27 January 2022

D E C I S I O N

Introduction

1. I have before me the third application for issue by this court of a letter of request directed to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's

liquidation and liquidators. The application is made pursuant to what is now commonly referred to as the "Cooperation Mechanism" that was entered into on 14 May 2021 by the Supreme People's Court and Hong Kong's Secretary for Justice. The first application was made on 20 July 2021. It concerned *Samson Paper Co Ltd*[1]. It is not necessary for me to repeat the explanation contained in that decision of the genesis and purpose of the Cooperation Mechanism and its terms. For present purposes what is relevant are **(1)** that the Cooperation Mechanism applies as between the Hong Kong High Court and the Shenzhen Intermediate People's Court and **(2)** the criteria that need to be satisfied before the Shenzhen Intermediate People's Court will recognise the Liquidators and grant them assistance.

2. This application is, however, different from the two previous applications in one material respect. The Company is not incorporated in Hong Kong. It is incorporated in the Cayman Islands.

Background

3. The Company was incorporated in the Cayman Islands on 15 November 2013, and has been registered in Hong Kong under *Part 16* of the *Companies Ordinance* (Cap. 622) as a registered non-Hong Kong company since 6 January 2014, with its principal place of business in Hong Kong. The Company's shares have been listed on the Main Board of the Stock Exchange of Hong Kong since June 2014, with stock code 2014. Trading in the Company's shares has been suspended since 18 March 2021. The Company is an investment holding company, with its principal operating subsidiaries in the Mainland (together, "**Group**"). The Group's business is in three principal areas, namely:

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1 [2021] 3 HKLRD 727.

(1) water purification services;

(2) air sanitisation services; and

(3) supply chain services.

4. The background to the Company's insolvency proceedings may be summarised as follows:

(1) In 2020, the Group encountered financial difficulties.

(2) The Company is balance-sheet insolvent.

(3) On 14 December 2020, DBS Bank Ltd, Hong Kong branch ("**Petitioner**") issued a winding-up petition against the Company because the Company owed the Petitioner some US$25 million.

(4) On 17 March 2021, Master Lai made a winding-up order on the Petitioner's petition.

(5) On 16 April 2021, upon the Official Receiver's application, I granted a regulating order appointing the Liquidators.

5. Since their appointment, the Liquidators have been investigating the Company's affairs and preserving the Company's assets.

6. 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 which are located in Shenzhen, consisting of:

(1) a judgment debt in the sum of HK$20 million plus interest ("**Judgment Debt**") owed by a financial services company incorporated in Shenzhen, namely 深圳市威廉金融控股有限公司 ("**Shenzhen William**"), arising from a judgment

granted by the People's Court of Qianhai Cooperation Zone, Shenzhen on 8 September 2020; and

(2) debt claims exceeding HK$142 million due from Shenzhen William ("**Receivables**").

Need for Recognition and Assistance

7. In *Re Samson Paper Co Ltd*[2], I explained the principles governing the issue of a letter of request by the Hong Kong court to a Mainland court in connection with the Cooperation Mechanism. Granting the Letter of Request would be consistent with the established principles for these reasons. First, the assets the Liquidators seek to control via the Mainland recognition are assets in the Mainland. Thus the Mainland court is the most appropriate forum for the determination of the Liquidators' powers over the Mainland assets.

8. Second, the Letter of Request would be consistent with the Cooperation Mechanism because the following features of the present case fall squarely within the Cooperation Mechanism:

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

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

(3) The Liquidators have a duty to get in the Company's assets. The assistance the Liquidators need in the Mainland concerns classic asset collection efforts.

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[2] *Ibid*, at [7]–[9].

9. Third, the Liquidators have under Hong Kong law statutory power to commence proceedings outside Hong Kong to perform their functions.

10. Granting the letter of request here would be a fruitful exercise of the Court's discretion because the evidence demonstrates that without recognition and assistance in the Mainland, the Liquidators would not be able to collect on the Judgment Debt and Receivables. This is in my opinion a proper case to issue a Letter of Request to take advantage of the Cooperation Mechanism in order to assist in the Liquidators' asset collection efforts. Indeed, recently the Shenzhen court granted the relevant recognition and assistance to the liquidators in *Samson Paper*[3] to achieve a similar purpose.

Jurisdiction

11. Article 4 of the SPC Opinion states:

> "　四、　本意見適用於香港特別行政區系債務人主要利益中心所在地的香港破產程序。
>
> 本意見所稱'主要利益中心'，一般是指債務人的註冊地。同時，人民法院應當綜合考慮債務人主要辦事機構所在地、主要營業地、主要財產所在地等因素認定。
>
> 在香港管理人申請認可和協助時，債務人主要利益中心應當已經在香港特別行政區連續存在 6 個月以上。
>
> 4. This Opinion applies to Hong Kong Insolvency Proceedings where the Hong Kong Special Administrative Region is the centre of main interests of the debtor.
>
> 'Centre of main interests' referred to in this Opinion generally means the place of incorporation of the debtor. At the same time, the people's court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor.

[3] *Re Samson Paper Company Limited* (2021) 粵 03 认港破 1 号 (15 December 2021).

> When a Hong Kong Administrator applies for recognition and assistance, the centre of main interests of the debtor shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months."

12. As the Company is not incorporated in Hong Kong it is necessary for the court in Hong Kong and the Mainland to be satisfied that its centre of main interests is located in Hong Kong and this is a proper case in which to seek recognition and assistance. On the basis of the evidence before me in my view it would appear 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 [4].

Determination

13. I have found in [10] above that it is desirable that the Liquidators' appointment should be recognised and assisted in Shenzhen and in [12] that the Company's centre of main interests is in Hong Kong. It follows that in my opinion this is a proper case for a letter of request to be issued by the Hong Kong Court to the Shenzhen Intermediate People's Court requesting that the Shenzhen Intermediate People's Court make an order recognising the Liquidators and providing assistance to them.

14. I will make the following order:

(1) A letter of request in the form appended hereto in simplified Chinese be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and its liquidators.

[4] See for a recent explanation of the criteria for determining the location of the centre of main interests, *Re Melars Group Ltd* [2021] EWHC 1523 (Ch) [56]–[62].

(2) The Liquidators' costs of this application be paid out of the assets of the Company as an expense of the Company's liquidation.

(3) Liberty to apply.

(Jonathan Harris/夏利士)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by King & Wood Mallesons, for the applicants

HCMP 300/2022
[2022] HKCFI 924

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 300 OF 2022

IN THE MATTER of Hong Kong Fresh Water International Group Limited （香港浩澤國際集團有限公司）(In Liquidation)

and

IN THE MATTER of the inherent jurisdiction of the Court

BY

THE JOINT AND SEVERAL LIQUIDATORS OF HONG KONG FRESH WATER INTERNATIONAL GROUP LIMITED （香港浩澤國際集團有限公司）(IN LIQUIDATION) ("**COMPANY**") Applicants

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Before: Hon Harris J in Chambers

Date of Written Submission: 18 March 2022

Date of Decision: 6 April 2022

D E C I S I O N

The Application

1. The Liquidators of Hong Kong Fresh Water International Group Limited ("**Company**") have issued an application for a letter of

request to be issued to the Shanghai No.3 Intermediate People's Court ("**Shanghai Court**") pursuant to what I shall refer to as 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. The Cooperation Mechanism consists of two documents, which in English are called the "*Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region*" and the Supreme People's Court's "*Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region*" ("**SPC Opinion**").

2. This is the first application pursuant to the Cooperation Mechanism for a letter of request to be issued to the Shanghai Court. There have been three letters of request issued to the Shenzhen Intermediate People's Court[1] pursuant to the Cooperation Mechanism and in *Re CEFC Shanghai International Group Ltd*[2] I granted recognition of liquidators appointed in Shanghai at the request of the Shanghai Court (that application being made before the Cooperation Mechanism was introduced).

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1 *Re Samson Paper Co. Ltd* [2021] HKCFI 2151; [2021] HKCLC 1053; *Re Zhaoheng Hydropower (Hong Kong) Ltd* [2022] HKCFI 248; *Re Ozner Water International Holding Limited* [2022] HKCFI 363; [2022] HKEC 784.

2 [2020] HKCLC 1; [2020] HKCFI 167.

The Company, its financial problems and the need for recognition and assistance in Shanghai

3. The Company was incorporated in Hong Kong on 31 August 2010. The Company is part of a corporate group ("**Group**") headed by Ozner Water International Holding Limited ("**Parent**") which is a Cayman-incorporated entity listed in Hong Kong. The Group's business is or was in three principal areas, namely:

(1) water purification services;

(2) air sanitisation services; and

(3) supply chain services.

4. The Company serves as an intermediate holding company within the Group. The Company's main assets in the Mainland are its shareholding in wholly-owned subsidiaries incorporated in Shanghai ("**Shanghai Subsidiaries**"), namely:

(1) Shanghai Haoze Environmental Technology Co., Ltd（上海浩泽环保科技有限公司）;

(2) Shanghai Haoze Water Purification Technology Development Co., Ltd（上海浩泽净水科技发展有限公司）;

(3) Haoze (Shanghai) Environment and Science Co., Ltd（浩泽（上海）环境科技有限公司）and

(4) Small Dragon (Shanghai) Lease & Finance Co., Ltd（小龙虾（上海）融资租赁有限公司）.

5. The Company also has a key subsidiary in the Shaanxi province, namely, Shaanxi Haoze Environmental Technology Group Co., Ltd)（陕西浩泽环保科技集团有限公司）.

6. The Shanghai Subsidiaries' principal businesses are or were:

(1) water purification services;

(2) air sanitisation services;

(3) environmental science and technology; and

(4) finance leasing, factoring and lending business.

7. Because of lack of cooperation from the Company's former management and the Shanghai Subsidiaries' management, the Liquidators have only limited information about the financial health of the Shanghai Subsidiaries. However, based on the Group's interim report for the six months ended 30 June 2020, the Shanghai Subsidiaries were, as at 30 June 2020, balance sheet solvent.

8. Both the Parent and the Company are in liquidation in Hong Kong. In 2020, the Group encountered financial difficulties.

(1) In respect of the Parent:

(a) On 17 March 2021, upon the petition of DBS Bank Ltd, Hong Kong branch ("**DBS**"), Master Lai made a winding-up order against the Parent on grounds of the Parent's insolvency.

(b) On 16 April 2021, I granted a regulating order appointing the Liquidators as liquidators of the Parent.

(2) In respect of the Company:

(a) The Company was at least as at 30 June 2020 balance-sheet solvent, and is cashflow insolvent.

(b) On 14 December 2020, DBS issued a winding-up petition against the Company because the Company owed DBS some US$25 million.

(c) On 17 March 2021, Master Lai made a winding-up order against the Company.

(d) On 27 July 2021, Master Lai appointed the Liquidators.

9. Since their appointment, the Liquidators have been investigating the Company's affairs and preserving the Company's assets. 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.

10. The Liquidators' need to control the Shanghai Subsidiaries has become pressing 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.

11. I recently granted a letter of request to the Liquidators in respect of their capacity as the liquidators of the Parent in order to facilitate their efforts to take control of the Parent's assets in Shenzhen: *Re Ozner Water International Holding Ltd*[3].

[3] *Supra*.

The principles governing the grant of a letter of request

12. These I explain in [7]–[9] of my decision in *Re Samson Paper Co Ltd*[4].

> "7. The technique of issuing letters of request to foreign courts to facilitate the task of the liquidator who seeks assistance from a foreign court appears to be a creature of the common law. Letters of request are a private international law response to ancient public international law notions of territorial sovereignty, according to which the jurisdiction of the courts of one sovereign state does not run beyond that sovereign state's own territorial limits [5].
>
> 8. The law is well-settled that the Court has an inherent jurisdiction to grant a letter of request in order to permit Hong Kong liquidators to seek recognition and assistance in another jurisdiction [6]. In considering whether to grant a letter of request, the Court has to consider which jurisdiction is the most appropriate or convenient forum for the determination of the issue in question applying generally applicable jurisdictional principles [7].
>
> 9. The granting of a letter of request in the present case would be consistent with these principles. 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 [8]. In order to carry out this function the Liquidators have an express statutory power in Hong Kong to commence legal proceedings to recover assets and this includes commencing proceedings outside Hong Kong [9]."

Procedure for recognition specified in the SPC Opinion

13. These I explain in [10] of my decision in *Re Samson Paper Co Ltd*[10].

> "10. Article 6 of the SPC Opinion sets out the procedure for an application by a Hong Kong liquidator (清盘人):

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4 *Supra*.
5 *Re Sea Containers Ltd* [2012] SC (Bda) 26 Com at [13].
6 *Re China Agrotech Holdings Ltd* [2017] HKCLC 365.
7 *Re Melars Group Limited* [2021] EWHC 1523 (Ch) at [17].
8 *Re Southern Pacific Personal Loans Ltd* [2014] Ch 426 at [31], [36]–[37].
9 *Section 251(1) and Schedule 25 Part 2* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32; *Akira Sugiyama v Kosei Securities Co (Asia) Ltd* [1992] 1 HKC 261, 263.
10 *Ibid*.

‘ 六、申請認可和協助香港破產程序的，香港管理人應當提交下列材料：

（一） 申請書；

（二） 香港特別行政區高等法院請求認可和協助的函；

（三） 啟動香港破產程序以及委任香港管理人的有關文件；

（四） 債務人主要利益中心位於香港特別行政區的證明材料，證明材料在內地以外形成的，還應當依據內地法律規定辦理證明手續；

（五） 申請予以認可和協助的裁判文書副本；

（六） 香港管理人身份證件的複印件，身份證件在內地以外形成的，還應當依據內地法律規定辦理證明手續；

（七） 債務人在內地的主要財產位於試點地區、在試點地區存在營業地或者在試點地區設有代表機構的相關證據。向人民法院提交的文件沒有中文文本的，應當提交中文譯本。

6. The Hong Kong Administrator applying for recognition of and assistance to Hong Kong Insolvency Proceedings shall submit the following materials:

(1) an application;

(2) a letter of request for recognition and assistance issued by the High Court of the Hong Kong Special Administrative Region;

(3) the relevant documents on the commencement of the Hong Kong Insolvency Proceedings and in relation to the appointment of the Hong Kong Administrator;

(4) materials showing that the debtor’s centre of main interests is in the Hong Kong Special Administrative Region, and if any of such materials was issued outside the Mainland, it

shall be certified in accordance with the law of the Mainland;

(5) a copy of the judgment in respect of which the application for recognition and assistance is made;

(6) a copy of the identity document of the Hong Kong Administrator, and if such identity document was issued outside the Mainland, it shall be certified in accordance with the law of the Mainland;

(7) evidence showing that the debtor's principal assets in the Mainland are in a pilot area, or that it has a place of business or a representative office in a pilot area.

Where a document to be submitted to a people's court of the Mainland is not in the Chinese language, a Chinese translation shall be submitted."'

Liquidators' function and powers

14. For the benefit of the Judges of the Shanghai Court who will deal with the Liquidators' application for recognition and assistance it will be helpful if I summarise the Liquidators' powers and function under Hong Kong law. Under Hong Kong law and, in particular *section 251* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, the Liquidators are authorised jointly and severally to exercise the following functions and powers:

(1) take into their custody, or under their control, all the property and things in action to which the Company is or appears to be entitled;

(2) sell the real and personal property and things in action of the Company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(3) do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal; and

(4) do all other things as may be necessary for winding up the affairs of the Company and distributing its assets.

Determination

15. I am satisfied for the reasons explained in [3]–[10] above that it is desirable that the Liquidators' appointment is recognised and assisted in Shanghai. I am also satisfied, as I was in the case of the Parent, that although not incorporated in Hong Kong, the Company's centre of main interests ("**COMI**") was in Hong Kong where the Parent was listed. In the case of the Company 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 requires the COMI to have been in Hong Kong for six months prior to the application being made.

16. I will, therefore, make an order in the terms of the application and issue the letter of request.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Written submissions by Look Chan Ho, instructed by King & Wood Mallesons, for the applicants

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

Claim No: BVIHC (COM) 0032 of 2018

BETWEEN:

INDUSTRIAL BANK FINANCIAL LEASING CO LTD

Claimant

and

XING LIBIN

Defendant

Appearances:
Mr. Iain Tucker of Walkers for the claimant
Ms. Laure-Astrid Wigglesworth of Appleby for the defendant

2020 January 15; 22;
January 28.

JUDGMENT

[1] **JACK, J [Ag.]**: This matter concerns a BVI company called Firstwealth Holdings Ltd ("Firstwealth"). By an application made on 22nd November 2019, the claimant ("the bank") sought the appointment of equitable receivers "over all issued shares in [Firstwealth], its business and undertaking and any and all rights the company may have whatsoever and howsoever found." Firstwealth is owned 100 per cent by the defendant ("Mr. Xing"). Directions for expert evidence of Hong Kong law were also sought.

[2] The bank is incorporated in the People's Republic of China ("PRC"). By three judgments of Supreme People's Court of the PRC (two delivered on 13th December 2015, one on 27th December 2016), the bank recovered a total of 325,374,626.58 renminbi, the equivalent of about US$48.45 million, against Mr. Xing. To that interest at 44,571.87 renminbi (or about US$6,600) per day and costs need to be added. By orders of the High Court of Hong Kong dated 29th October 2016 and 10th April 2018, the PRC judgments were registered there with full force and effect. The Hong Kong court also issued pre- and post-judgment freezing orders against Mr. Xing. These effectively prevent Firstwealth dissipating its assets.

[3] On 26th February 2019, on the bank's application Green J ordered that the three judgments be recognized in this Territory. On 11th July 2019 by order of Adderley J the bank was granted a provisional charging order over the shares in Firstwealth. The charging order was made final by order of Farrara J on 18th September 2019.

[4] The assets of Firstwealth fall into three categories. The first are 93,693,306 shares in Shougang Fushan Resources Group Ltd (formerly known as Fushan International Energy Group Ltd) ("Fushan"). Fushan is listed on the Hong Kong Stock Exchange, where in October 2019 it was trading at HK$1.61 per share. Firstwealth's holding of Fushan shares is on this basis worth about US$19.2 million. The second comprises two bank accounts, one with HSBC Hong Kong, the other with BNP Paribas Hong Kong. The amounts in the accounts are not known, but may be very small.

[5] The third relates to a house ("the Peak property") at 3 Gough Hill Road on the Peak in Hong Kong. The registered owner of the Peak property is Xing Jian, Mr. Xing's son, however, there is evidence to suggest that Firstwealth made a number of payments to Xing Jian for the purpose of repaying part of the mortgage on the Peak property. There may thus be a claim by Firstwealth for ownership of, or at least a beneficial share in, the Peak property. This is a more speculative asset than the first two.

[6] Before considering the bank's application, I should say a little about Mr. Xing. He was arrested in the PRC in March 2014 and was subject to what are, perhaps euphemistically, called "compulsory measures". He was held incommunicado, including from his wife and his lawyer, for an extended period. He was finally released from custody on 26th July 2019. His case in the PRC is that, due to his incarceration, he was unable to defend himself in the PRC proceedings which lead to the three civil judgments. There is currently no application in this Territory to set aside Green J's order for the recognition in this jurisdiction of the PRC judgments.

[7] On 11th September 2019 Mr. Xing filed a "situation reflection" with the Supreme People's Court requesting the court of its own motion to initiate a retrial in relation the three PRC judgments. The statutory time limit for an ordinary application for a retrial had expired, hence his resort to the Chinese equivalent of what in Scotland might be called the *nobile officium*. The following day, he applied to the Tianjin Intermediary People's Court (No 2) for a stay of execution of the PRC judgments. To date, the Supreme People's Court has not initiated a retrial and the Intermediary People's Court has not granted a stay. On 17th September 2019 Mr. Xing applied to this Court for a stay of execution pending the outcome of the applications in the PRC, however, this application was not listed at the hearing of 18th September 2019 at which the final charging order was sought. At that hearing, Farara J rejected Mr. Xing's request for an adjournment and granted the final charging order. Mr. Xing has not since then sought to move the application for a stay of execution.

[8] In the absence of such an application being before the Court, the bank is in my judgment entitled to proceed to enforce its judgment. An application for a stay would require detailed evidence from Mr. Xing as regards the prospects of his applications to the PRC courts succeeding. It would need to balance the prejudice to the bank and to Mr. Xing from respectively granting or refusing a stay of execution. Again such consideration would need detailed evidence.

[9] There are two forms of order which the Court makes for the appointment of an equitable receiver. As I discussed in **VTB Bank (Public Joint Stock Company) v Miccros Group Ltd and another**[1] ("**Miccros**"):

> "[24] There is an important difference between an interim order for the appointment of a receiver and a final order for such an appointment. The former is made in order to preserve assets for execution. It is similar to a freezing order. The latter is a form of execution in itself. To obtain the final order, a judgment creditor must prove on balance of probabilities that the asset in respect of which the receiver is appointed is owned legally or beneficially by the judgment debtor.
>
> [25] By contrast, the Court is willing on an interim application to appoint a receiver over assets which fall within the much wider definition of assets in the standard English freezing order. This form of order applies to:
>
> > 'all the Respondent's assets whether or not they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent's assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions.'
>
> This makes an interim order potentially more onerous than a final order."

[10] Applying that difference to the current case, the position is that the assets of Firstwealth are under the *de facto* control of Mr. Xing, so that the appointment on an interim basis of an equitable receiver over those assets would be (at least potentially) legally permissible. (In practice, this will be rare, because a freezing order will generally be sufficient: see the result in **Miccros** itself, which was a case of an interim order.) The assets of Firstwealth are, however, not within the *de jure* ownership of Mr. Xing. It is trite law that the assets of a company are not the assets of even a 100 per cent shareholder. (There is an exception if the corporate

[1] BVIHC (COM) 2018/0067 (delivered 23rd January 2020). This judgment had not been handed down when argument was first made to me on 15th January 2020, so I adjourned the application and made a copy of the approved version of the judgment available to the parties for further argument on 22nd January 2002. This again pre-dated the hand-down of the Miccros judgment by a day.

veil stands to be pierced, but this will now-a-days be vanishingly rare in the light of **Prest v Petrodel Resources Ltd**.[2] No question of piercing the corporate veil arises in the current case.) Insofar as the bank seeks a final order for the appointment of a receiver over "any and all rights the company may have whatsoever and howsoever found", this is misconceived in my judgment. The rights of the company are not the assets of the sole shareholder, so there is no jurisdiction to make a final order appointing a receiver over those assets.

[11] Where a final order is made, what is legally permissible is in my judgment this. An equitable receiver can be appointed over the shares. He can then use his powers as receiver to replace the existing director with a new director, usually himself. He can then use his power as a director to convert the assets of the company into money. Alternatively, he can put the company into voluntary liquidation. In either case he has to have regard to the interests of third party creditors of the company.

[12] An equitable receiver can be appointed over legal rights which the judgment debtor has. This is especially so, if these are rights against which other means of execution are not available. The Privy Council (on appeal from Cayman) in **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd**[3] approved the appointment of receivers over the judgment debtor's power to revoke a Cayman trust. The exercise of the power of revocation would release assets against which the judgment creditor could execute.

[13] The principles for making an interim order are wider than those for making a final order, in that an interim order can cover more assets than a final order (*de facto* control versus *de jure* control), but narrower in that the grant of an interim order is subject to a more restrictive exercise of the Court's discretion. An interim appointment is a super-turbo-charged *Mareva*. It will only be granted where an ordinary freezing order will not do. By contrast, a final order will be made — always subject of course to the Court's discretion — whenever ordinary means of

[2] [2013] UKSC 34, [2013] 2 AC 415.
[3] [2011] UKPC 17, [2012] 1 WLR 1721.

execution fail or there is some "hindrance or difficulty" in such execution (see below). This is wider than the narrow discretion applicable to making an interim order.

[14] The ordinary method of enforcement against shares held by a judgment debtor is by way of charging order, first interim, then final. If the charging order fails to force the debtor voluntarily to pay, then the shares stand to be sold. The difficulty in the current case is that very much less than the full value of Firstwealth is likely to obtained by way of a sale of the shares in the open market. A third party purchaser is unlikely to put any substantial value on the claim in respect of the Peak property. The purchaser would be buying a claim to litigation against Mr. Xing's son of a speculative nature. Likewise, it is impossible to value the bank accounts without knowing what is in them. Further it is likely that a purchaser would discount the value of the Fushan shares. Why buy through Firstwealth, where litigation is, to use the German expression, *vorprogrammiert*, when one can simply buy the Fushan shares on the stock market? Any open market sale of the shares in Firstwealth is likely to be at a discount, and probably a large discount, to the true value of Firstwealth's assets.

[15] Now, it would be possible to give directions for sale of the Firstwealth shares on the open market (either by auction or tender), with a provision allowing the bank to bid or tender for the shares. This would, however, potentially give the bank a windfall. It could offset part of its judgment debt against the discounted open-market price of Firstwealth shares (so it did not need to part with any cash at all) and then realise the full value of Firstwealth's assets. By this means it would make a substantial turn on the initial purchase price with no duty to account to Mr. Xing for the profit on the subsequent liquidation of Firstwealth's assets. In fact, the bank says that there are regulatory problems with its owning a BVI company, so it does not want to pursue this possibility. I therefore do not need to consider it further.

[16] It should be noted that appointing a receiver to take control of Firstwealth and then realise the full value of the company in fact aids Mr. Xing. The more his assets realise, the greater the reduction in his judgment debt. Moreover, in the event that he sets aside the PRC judgments, the bank will be obliged to repay him the monies the bank has recovered. The more the bank recovers, the more it has to disgorge if Mr. Xing has a viable defence to the PRC claims. If (as Ms. Wigglesworth submits) the Firstwealth shares should be sold by auction or tender, and if the PRC judgments are subsequently set aside, then all the bank would be obliged to repay to Mr. Xing would be the discounted price that the shares in Firstwealth had obtained on the open market, not any turn made by the purchaser on the sale of the underlying assets.

[17] The test for the appointment of equitable receivers by way of execution was set out by Males J (as he then was) in **Cruz City I Mauritius Holdings v Unitech Ltd**[4]:

> "The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by *dicta* which speak of the need for 'special circumstances': see… **Masri (No 2)**[5] and also the decision of Arnold J in **UCB Home Loans Corporation Limited v Grace**[6], holding that there were sufficient 'special circumstances' rendering it just and convenient to appoint a receiver by way of equitable execution when it would be 'difficult for the claimant to enforce its judgment by other means' and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term."

[18] In the current case, a sale of the shares by auction or tender would prejudice both the bank and Mr. Xing because only a discounted recovery would be made. This

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[4] [2014] EWHC 3131 (Comm), [2015] 1 All ER (Comm) 336 at para [47(c)], permission to appeal refused [2015] EWCA Civ 33.
[5] Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303, [2009] QB 450.
[6] [2011] EWHC 851 (Ch).

is in my judgment a "hindrance or difficulty", which makes it expedient to appoint receivers by way of a final order.

[19] I am reinforced in my conclusion on this, by the decision of Bannister J in **Dalemont Ltd v Senatorov et al**.[7] The shares of three companies were held on bare trusts established under Cypriot law for the judgment debtor. The judge appointed receivers on the basis that they would "replace the current directors of the companies with their own nominees… cause the new directors to replace the current nominees of [a foundation which held assets which could be appointed to the judgment debtor]" and take various other actions which would assist asset recovery. Although there is little discussion in the judgment of the legal principles, the **Tasarref** case was cited to him and he applied the considerations which I have outlined above.

[20] Part of the application before me is to give directions for expert evidence of Hong Kong law. The proposed issue is: would the Hong Kong court recognize the powers of an equitable receiver appointed by this Court? It seems to me that this question arises only if this Court were to appoint a receiver over "any and all rights the company may have whatsoever and howsoever found". I can well see that the Hong Kong court might raise its eye-brows at an order of a foreign court giving powers to a person who was not an officer of the company to deal with the company's assets situate in Hong Kong. That would indeed be an exorbitant exercise of a foreign court's long-arm jurisdiction. However, I have refused to make such an order.

[21] Under the order which I do make for the appointment of receiver, the receiver will appoint a new director. The new director will take steps to administer Firstwealth so as to maximalise value. It is very unlikely that an English-law based jurisdiction such as Hong Kong would refuse to recognize the appointment of a director which has the approval of the Court of the place of incorporation of the company. Accordingly, I do not consider there is any need for expert evidence of Hong Kong

[7] BVIHC (COM) 149 of 2011 (delivered 4th July 2013).

law at present. The Court being sadly deficient in powers of vaticination (or at any rate accurate vaticination), I cannot rule out the need for such evidence in the future, but at present there is in my judgment no need for expert evidence.

Conclusion

[22] Accordingly, I conclude:

(a) It is appropriate to appoint equitable receivers over the shares in Firstwealth, but not over any and all rights Firstwealth may have whatsoever and howsoever found; but

(b) there is no need for expert evidence of Hong Kong law.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar