[2019 (2) CILR 302]

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED (in liquidation)

GRAND CT. (Segal, J.) July 16th, 2019

Companies — arrangements and reconstructions — approval by shareholders — opposition vote by shareholder discounted by chairman of EGM following allegations that shareholder sought ransom payment to vote in favour — chairman's decision final and conclusive unless made in bad faith

A company sought a declaration that resolutions passed at an EGM were validly passed.

Liquidators had been appointed in Hong Kong for the company, which was incorporated in the Cayman Islands and had its shares listed on the Hong Kong Stock Exchange. As part of a post-liquidation restructuring of the company, the liquidators had negotiated a series of agreements and arrangements that, if implemented, would result in the company being able to continue as a going concern and result in the termination of the winding-up proceedings. The company and the liquidators had promoted schemes of arrangement with the company's creditors in the Cayman Islands and in Hong Kong.

The restructuring would involve the company acquiring the shares in another company, obtaining an injection of new capital in return for the issue of new shares to the capital providers and discharging the claims of all creditors by a part payment of the sums owed to them. The restructuring involved a number of steps. The company would reduce the nominal value of its shares (to eliminate accumulated losses and permit the issue of new shares), which required a special resolution and approval of the court; increase its authorized share capital, which required shareholder approval; enter into subscription agreements with the new capital providers; arrange a public offer of further shares; issue new shares to the capital providers and those who participated in the public offer; and promote a scheme of arrangement with its creditors. The schemes required the approval of the Grand Court (as regarded the Cayman scheme) and the Hong Kong court (as regarded the Hong Kong scheme).

The restructuring would have a significant impact on the company's existing shareholders. They would retain their shares but their interest in the company would be significantly diluted.

Perfect Gate Holdings Ltd. ("Perfect Gate") held 23% of the company's share capital. After completion of the capital reorganization and the subscriptions, Perfect Gate's shareholding would be reduced to 2.6%. In "Scenario I" (*i.e.* if Perfect Gate and the other existing shareholders failed to subscribe for and take up their entitlement in the preferred offering) its shareholding would be reduced to 2%; in "Scenario II" (*i.e.* if all existing shareholders entitled to participate in the preferential offering did so), its holding would be reduced to 5%. Perfect Gate opposed the restructuring as it considered the dilution of its interest to be too high and out of line with the dilution suffered by shareholders in similar restructurings.

The liquidators' view was that the company was insolvent (the restructuring involved schemes with creditors who were only receiving a part payment of their claims out of the funds raised by share subscriptions and the public offer); that the proposed capital reorganization treated existing shareholders and all stakeholders fairly; and that if the proposed reorganization was not implemented the existing shareholders would receive nothing.

It was alleged by the liquidators that Perfect Gate had improperly sought to obtain ransom payments in return for voting in support of the reorganization, which Perfect Gate denied.

The company issued a circular to shareholders in connection with the capital reorganization which included a notice convening an EGM. Perfect Gate gave a proxy form to HKSCC Nominees in which Perfect Gate voted against all resolutions at the EGM. The chairman of the EGM was Mr. Yen. He confirmed that in respect of the special resolution relating to the approval of the capital reduction, of the shareholders present and voting in person or by proxy, 14,621,440 votes (representing approximately 1.46% of the company's total issued shares) were cast for the special resolution and 230,000,000 votes (representing approximately 23% of the company's total issued shares) against. Mr. Yen gave evidence that he had also been informed that representatives of Perfect Gate had requested ransom payments to vote in favour of the proposed resolutions. A shareholder objected to the votes that were being cast on behalf of Perfect Gate on the basis that it was irrational for a shareholder to vote against the proposed restructuring. Mr. Yen rejected the votes of the 230,000,000 shares pursuant to art. 77 of the company's articles of association, which provided:

"If:

(a) Any objection shall be raised to the qualification of any vote; or

(b) Any votes have been counted which ought not to have been counted or which might have been rejected; or

(c) Any votes are not counted which ought to have been counted;

the objection or error shall not vitiate the decision of the meeting or adjourned meeting on any resolution unless the same is raised or pointed out at the meeting or, as the case may be, the adjourned meeting at which the vote objected to is given or tendered or at

which the error occurs. Any objection or error shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the chairman decided that the same may have affected the decision of the meeting. The decision of the chairman on such matters shall be final and conclusive."

Mr. Yen considered that Perfect Gate's votes against the proposed restructuring could have damaged the company's economic position and the economic value of its shares to the detriment of the shareholders and creditors. The proposed restructuring on the other hand would return value for the company's shareholders and creditors. The ransom payment sought by Perfect Gate was unethical and illegal.

On that basis, the special resolutions were declared by Mr. Yen to have been passed in accordance with the articles of association. After the result was announced, Perfect Gate indicated that it would challenge the decision of Mr. Yen as chairman of the EGM to discount its votes. The company responded that the EGM had been properly conducted and that the chairman had sought legal advice and acted impartially.

The company issued a summons seeking declarations (a) that the resolutions proposed at the EGM were validly passed as declared by Mr. Yen as chairman of the EGM; and/or in the alternative (b) that the votes of Perfect Gate cast at the EGM in respect of the proposed capital reduction of the company be set aside and disregarded in determining whether the resolutions considered at the EGM were passed.

Perfect Gate issued a summons in the Hong Kong court seeking a declaration that the decision of the chairman at the EGM was unlawful, void and of no effect and that its votes should be counted so that the resolutions proposed at the EGM be treated as having been rejected. Perfect Gate sought a stay of the Cayman proceedings.

The company submitted that (a) there should be no stay pending the decision of the Hong Kong court as the company had presented the confirmation petition in the Cayman Islands; the approval of the capital reduction was a matter for this court and did not arise in the Hong Kong proceedings; further, the issue needed to be decided urgently and it was not clear how long the Hong Kong proceedings would take; and there was no serious risk of inconsistent judgments as Perfect Gate would be bound by the Cayman proceedings given its active participation in those proceedings; (b) the chairman of the EGM, Mr. Yen, was entitled (by reason of art. 77 of the company's articles of association) to rule on the question of whether it would be wrong to count and admit Perfect Gate's votes and to decide whether to disallow the votes, and his ruling disallowing and rejecting Perfect Gate's votes was made properly and in good faith, was final and binding and could not in the present circumstances be challenged and set aside; (c) Perfect Gate's conduct was dishonest and its votes were tainted by illegality and were void or capable of being ignored; and (d) the court was invited to make factual findings that the meetings had taken place with the representatives of Perfect Gate in which a ransom payment was sought, as described by the director of the company.

Two issues arose in respect of art. 77 of the company's articles of association: first, whether as a matter of proper construction art. 77 gave the chairman the power to decide whether votes should be allowed or rejected or merely permitted him to ignore challenges where he concluded that the votes in question did not affect the outcome of the meeting; and, secondly, if the chairman had the power to decide to admit or reject votes, whether his decision could be reviewed and set aside by the court and, if so, in what circumstances. The company submitted that pursuant to art. 77 Mr. Yen as chairman was entitled to decide whether the votes of a shareholder at the EGM should be admitted or excluded for the purpose of determining whether a resolution had been passed; that he had properly exercised that power; that his decision was final and conclusive and could only be reviewed for bad faith; and that since his decision was made properly in good faith it must be treated as binding.

Perfect Gate submitted that (a) Hong Kong was the proper forum for the resolution of the dispute as the company's shares were listed on the Hong Kong Stock Exchange, the company's principal place of business was in Hong Kong, the alleged meetings took place in Hong Kong, and the EGM took place in Hong Kong; (b) the dilution effect of the proposed restructuring was drastic and unacceptable; (c) it did not agree with the account of the meeting with its representatives; and (d) Perfect Gate did not challenge Mr. Yen's power to decide on the validity of and to reject votes cast at the EGM but submitted that the decision could be challenged on the basis of bad faith and *Wednesbury* unreasonableness.

Held, ruling as follows:

(1) Perfect Gate's application for an adjournment or stay pending the determination by the Hong Kong court would be dismissed. An adjournment or stay would not be appropriate or justified for the following reasons. (a) Particular weight was to be given to the fact that the dispute related to the conduct of a meeting of shareholders of a Cayman company. The rights and responsibilities of shareholders and the chairman of the EGM were subject to and governed by the company's constitution and by Cayman law. The Grand Court was usually the most appropriate forum for dealing with such disputes. (b) Also of particular weight was the connection between the dispute and the confirmation petition which was pending in this court. The summons should be viewed as part of or arising out of the confirmation petition. (c) Weight was also given to the fact that the purpose of the proceedings in this jurisdiction was to provide assistance to the Hong Kong liquidators and it was they who had presented the confirmation petition, issued the summons and sought to have the dispute determined in this court. (d) There were strong grounds for believing that the risk of inconsistent judgments was low. To avoid any discourtesy to or conflict with the Hong Kong court, had the Hong Kong court expressed the wish to do so, the Grand Court would have been prepared to defer giving judgment pending further discussions between the parties and the courts regarding the need for steps to be taken to coordinate the Cayman

and Hong Kong proceedings. However, no such request had been made. (e) Perfect Gate could have applied for the cross-examination of witnesses but it did not do so, and in any event the summons could properly be disposed of without the need for cross-examination (para. 11; para. 68).

(2) As regarded the first issue, art. 77 authorized the chairman to decide the objection not just the possible impact the objection might have on the numbers cast in respect of the resolution. Article 77 applied in three situations: where there had been an objection to a shareholders' qualification to vote; where an error had been (or would be) made by counting votes which ought not to be counted (or which could have been rejected); and where an error had been (or would be) made by rejecting votes that ought to have been counted. The operation of the article was also subject to a procedural condition, namely that the objection or error must have been brought to the attention of the meeting and the chairman at the meeting. The article envisaged that the objection could vitiate and invalidate the result of the meeting. That only occurred if the votes that had been or would have been wrongly admitted or rejected would change the outcome of the meeting. For vitiation to occur there had to be a decision on whether there had been (or would be) an error or proper objection. It was only if there had been (or would be) such an error or proper objection that the outcome of the meeting could be affected at all. Therefore it was implicit that the chairman must decide whether there had been (or would be) an error or proper objection (para. 11; para. 14; para. 75; para. 78).

(3) As regarded the second issue, the decision of Mr. Yen as chairman of the EGM was to be treated as final and conclusive. Perfect Gate had not established adequate grounds for challenging or setting aside the chairman's decision. A decision taken by the chairman of an EGM in bad faith could be set aside. The burden of proof was on the person asserting bad faith (in the present case, Perfect Gate) and the court would require cogent evidence of fraud or bad faith before it would be prepared to set aside the chairman's ruling. On the evidence, Perfect Gate had not established bad faith on the part of Mr. Yen. Perfect Gate asserted that Mr. Yen's decision was made in bad faith but did not explain how. It had not been shown that Mr. Yen knew or must be taken to have known that he had no proper grounds for disallowing Perfect Gate's votes or how they undermined his evidence of an honest belief based on legal advice that he was entitled to do so. Mr. Yen had sworn an affidavit to confirm that he had acted properly based on credible evidence of impropriety and wrongdoing by Perfect Gate (*i.e.* demands for ransom payments which were considered to be unethical and illegal). There was no evidence to challenge Mr. Yen's evidence as to why he decided to exclude Perfect Gate's vote. There was evidence that Mr. Yen took legal advice before reaching his decision which supported the conclusion that he adopted a proper process. As regarded the liquidators' failure to approach Perfect Gate, it was certainly surprising that such a large shareholder was not

approached and its support sought at an early stage in the restructuring process. However, Perfect Gate did not set out its position in writing for some time, and as soon as it did so it was approached to discuss its position. It was unnecessary to make all of the findings of fact which the company invited the court to make. The key issue was whether there was any or sufficient evidence to support a finding of bad faith on the part of Mr. Yen and whether Perfect Gate had made good its assertion of bad faith. The court was satisfied that it had not. It seemed to the court that the dishonest and illegal conduct of the kind alleged against Perfect Gate was capable of justifying the exclusion of its shareholders' vote. Perfect Gate had not established that *Wednesbury* unreasonableness was a basis for setting aside Mr. Yen's decision (para. 11; para. 14; para. 77; para. 79).

Cases cited:

(1) *Begbie* v. *Phosphate Sewage Co.* (1875), L.R. 1 Q.B. 491, referred to.
(2) *Braganza* v. *BP Shipping Ltd.*, [2015] UKSC 17; [2015] 1 W.L.R. 1661; [2015] 4 All E.R 639; [2015] ICR 449; [2015] IRLR 487; [2015] Pens. L.R. 431; [2015] 2 Lloyd's Rep. 240, considered.
(3) *Caratal (New) Mines Ltd.*, *Re*, [1902] 2 Ch. 498, considered.
(4) *Clarke* v. *Chadburn*, [1985] 1 W.L.R. 78, considered.
(5) *Cordiant Comms. (Australia) Pty. Ltd.* v. *Communication Group Holdings Pty. Ltd.* (2005), 55 ACSR 185, referred to.
(6) *Graham's Morocco Co. Ltd.*, *Re*, 1932 S.C. 269; 1932 S.L.T. 210, referred to.
(7) *International Gen. Elec. Co. of New York* v. *Customs & Excise*, [1962] Ch. 784, referred to.
(8) *Ivey* v. *Genting Casinos (UK) Ltd. (t/a Crockfords)*, [2017] UKSC 67; [2018] A.C. 391; [2017] 3 W.L.R. 1212; [2018] 2 All E.R. 406; [2018] Crim. L.R. 395; [2018] 1 Cr. App. R. 12, referred to.
(9) *Kwok Hiu Kwan* v. *Johnny Chen*, [2018] 6 HKC 394; [2018] HKFCI 2112, applied.
(10) *Les Laboratoires Servier* v. *Apotex Inc.*, [2014] UKSC 55; [2015] A.C. 430; [2014] 3 W.L.R. 1257; [2015] 1 All E.R. 671; [2014] Bus. L.R. 1217; [2015] R.P.C. 10, *dicta* of Lord Sumption considered.
(11) *Seapower Resources Intl. Ltd., In re*, 2004–05 CILR *N* [2], considered.
(12) *Sidebottom* v. *Kershaw*, [1920] 1 Ch. 154, referred to.
(13) *Sunlink Intl. Holdings* v. *Wong Shu Wing*, [2010] 5 HKLRD 653, considered.
(14) *Tempo Group Ltd.* v. *Fortuna Dev. Corp.*, March 31st, 2015, unreported, followed.
(15) *Wall* v. *Exchange Inv. Corp. Ltd.*, [1926] Ch. 143; [1925] All E.R. 318, considered.

(16) *Wall* v. *London & Northern Assets Corp. (No. 2)*, [1899] 1 Ch. 550, considered.

Legislation construed:
Grand Court Rules, O.11, r.1(1)(ff):

> "[T]he claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of the Islands and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto . . ."

T. Lowe, *Q.C.* for the company and the liquidators.

1 **SEGAL, J.:**

Introduction

China Agrotech Holdings Ltd. (in liquidation) ("the company") has applied, by a summons dated June 12th, 2019 ("the summons"), for a declaration that resolutions passed at an extraordinary general meeting of the company held on May 22nd, 2019 ("the EGM") were validly passed. The validity of the resolutions has been challenged by a shareholder, Perfect Gate Holdings Ltd. ("Perfect Gate"), who voted against the resolutions.

2 The company, which is incorporated in the Cayman Islands, is in liquidation in Hong Kong. The company's liquidators are Stephen Liu Yiu Keung and David Yen Ching Wai ("Mr. Yen") of Ernst & Young Transactions Ltd. The application is made by the company acting by its Hong Kong liquidators. The application arises in the context of a post-liquidation restructuring of the company. The liquidators have negotiated a series of agreements and arrangements that if implemented will result in the company being able to continue as a going concern (and retain and realise the value of its Hong Kong listing) and the termination of the winding up proceedings. The company and the liquidators have promoted schemes of arrangement with the company's creditors in this court and in Hong Kong and are seeking this court's confirmation of the reduction of capital which is part of the post-liquidation restructuring.

3 The summons was heard on July 5th, 2019. Mr. Tom Lowe, Q.C. (instructed by Harney Westwood & Riegels ("Harneys")) appeared for the company and the liquidators. Perfect Gate participated in the proceedings (by filing written submissions and evidence) but was not represented by Cayman Islands attorneys at the hearing. Prior to the hearing of the summons, as I shall explain, Perfect Gate informed the court that it had issued (on June 26th) a summons in the Hong Kong court raising the same

issues as those dealt with in the summons. Perfect Gate said that it sought a stay of the Cayman proceedings relating to the summons pending the decision of the Hong Kong court on its summons and, if the court refused the stay, it sought a dismissal of the summons.

4 At the end of the hearing, I reserved judgment and indicated that I intended to hand down my judgment during the following week. However, after the hearing, on July 8th, 2019, Harneys wrote (by email) to the court to explain that they had been unaware at the hearing of certain matters that resulted in the need for an urgent decision by the court.

5 They informed the court that under the terms imposed by the Stock Exchange of Hong Kong and the Hong Kong Securities and Futures Commission, the company's public offering (details of which are set out below) will lapse and subscription moneys paid over will need to be refunded to subscribers in three specific circumstances: (i) if the summons is dismissed; (ii) if the relief sought in the summons is granted but Perfect Gate lodges an appeal; or (iii) the company is successful on the summons but the order is made after July 9th, 2019 (Hong Kong time) unless Perfect Gate irrevocably undertook (before that time) not to lodge an appeal.

6 Harneys said that given that it was unlikely that Perfect Gate would agree not to appeal an order for declaratory relief, even if the company was successful on the summons it would effectively lose the case and the restructuring would fail if the order was not made on or before July 9th, 2019 (Hong Kong time). There was additional time pressure for the company because registration of the court's order (if made) and the minute of the capital reduction must be lodged with the Registrar of Companies by July 12th, 2019, in order for the capital reduction to take effect on or before Monday, July 15th, 2019, Hong Kong time, as required under the terms of the prospectus for the public offer.

7 In these circumstances, the company invited me to form a view on the result of the summons and issue an order on or before 11 a.m., Cayman time on Tuesday July 9th, 2019 with reasons to follow on July 12th.

8 Following receipt of Harneys' email, I informed Harneys and Perfect Gate on July 8th, 2019 that, in these unusual circumstances (affecting not just the parties to the summons but also the company's other shareholders, creditors and stakeholders), I would aim to fit in with this timetable.

9 On July 9th, 2019, I received an email from Mr. Justice Harris in the Hong Kong court (sent with the consent of both parties) attaching a short decision that he had just handed down following a hearing of the company's application to the Hong Kong court for an order sanctioning the Hong Kong scheme and staying the winding up. Mr. Justice Harris adjourned both applications to July 22nd, 2019 to be heard by another

judge (since he was required to recuse himself because his wife is a partner in Ernst & Young). In his judgment, Mr. Justice Harris stated that:

> "7 It is Perfect Gate's evidence, in the form of an affirmation filed by a director Lee On Wai ('Mr Lee'), that it has tried to engage the Liquidators unsuccessfully in discussions about the substance of the scheme. Mr Lee says that Perfect Gate is concerned about its dilution effect and believes that there are better alternatives. As a consequence of its concerns it gave proxy forms to Hong Kong Securities Clearing Company Limited ('HKSCC') to vote against the special resolution necessary to reduce the capital of the Company at an extraordinary general meeting ('EGM') on 22 May 2019. The capital reduction is an integral and necessary part of the implementation of the scheme. Without its approval the scheme in its present form will be abandoned.
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> 8 If Perfect Gate's shares had been counted the special resolution would have failed by a large margin. It would appear that a shareholder present at the meeting objected to Perfect Gate's shares being counted on the ground that to vote against the resolution would be irrational. The Chairman of the EGM, Mr David Yen, disallowed the votes and recorded the special resolution as passed.
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> 9 Perfect Gate found out that the resolution had been passed as a result of the public announcement published on 29 May 2019. Proceedings were subsequently issued, I understand, in the Cayman Islands by the Liquidators seeking a declaration that the special resolution was validly passed. Perfect Gate were informed of this by a letter from the Company's solicitors in the Cayman Islands dated 12 June 2019. A hearing was fixed before Segal J on 5 July 2019. Perfect Gate did not attend the hearing. Segal J has reserved judgment. When the Petition came on before Segal J on 8 July 2019 it was adjourned to Tuesday 16 July 2019.
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> 10 On 26 June 2019 Perfect Gate issued proceedings in Hong Kong seeking a declaration that the decision to exclude its votes was unlawful and the purported special resolution is unlawful.
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> 11 Unfortunately, the Company did not inform me of these developments until last Friday 5 July 2019. At that stage all that I received was a letter. It would appear that Perfect Gate did not become aware of the date of the hearing of the Petition until the end of last week. I received its evidence on 8 July 2019.
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> 12 Generally, shareholders can vote their shares as they wish. In Sunlink International Holdings Limited [2010] 5 HKLRD 653 I held after considering the relevant authorities, and I quote from [35], '. . . the authorities do demonstrate that the court will intervene to prevent

a shareholder voting in a way which will result in the destruction of the economic value of other shareholders' shares for no rational reason.' Perfect Gate says that its decision was rational and that as a distressed debt fund it is inherently unlikely that it would act casually to destroy the value of its investment. I do not need to consider the merits of this argument. It is sufficient to say, first, that if the law in the Cayman Islands is the same as the law in Hong Kong there is something to argue about, and, secondly, that as Perfect Gate has expressly called into question Mr Yen's bona fides in excluding its votes, it undesirable that I adjudicate the issue. Mr Ko on behalf of Perfect Gate having been alerted to the conflict issue invited me to recuse myself."

10 Shortly after receiving Mr. Justice Harris' email, I received a letter dated July 9th, 2019 (the July 9th letter) from Perfect Gate to inform me of what had happened at the hearing before Mr. Justice Harris. Perfect Gate attached copies of certain Hong Kong court judgments to which they referred in the July 9th letter and said that Mr. Justice Harris had indicated, among other things, the following:

"1 The law in this area is controversial, but at least in Hong Kong, the Court will intervene to prevent a shareholder voting in [a] way which would result in destruction of economic value of other shareholders' shares for no rational reason; Sunlink International Holdings Limited v Wong Shu Wing [2010] 5 HKLRD 653 at para 33. Nonetheless, in the present case, it is arguable that Perfect Gate invests in distress assets and commonsense dictates that Perfect Gate will not vote irrationally to destroy its own investments.

2 An allegation was made against [Mr. Yen] that his decision was made in bad faith. Subject to the Honourable Justice Segal's view, a chairman's decision is subject to the review of the Court if made in bad faith: Kwok Hui Kwan v Johnny Chan & Ors [2018] HKCFI 2112 . . . at paragraph 53. In the present case, it is arguable that [Mr. Yen's] decision was made in bad faith in light of Perfect Gate's claim that the Liquidators have never responded to the concerns of Perfect Gate prior to the EGM.

3 In respect of the scheme of arrangement . . . the Court also expressed concern over the amount of costs incurred. [Mr. Yen] and Messrs. Ernst & Young have a direct financial interest for the Scheme to go through. The costs issue will be relevant to the issue of credibility of [Mr. Yen]. In particular, [Mr. Yen] had been criticised in another judgment in Hong Kong. (The said judgment referred to is Allied Ever Holdings Limited v Li Shu Chung & Ors HCCW 497/2009 (unreported), at paragraph 102.)"

11 Later in the day on July 9th, 2019, I sent (via my assistant) the following email to the parties:

"I refer to my email of yesterday in which I raised a number of issues and set out how I intended to proceed.

I have subsequently received:

(a) a response from Harneys—received yesterday, within the timeframe I had set, confirming the Company's position and submissions on the points I had identified and confirming that the Petitioner's Note had recently been sent to Perfect Gate.

(b) a copy of the transcript of the hearing on 5 July—received late yesterday evening London time. I assume that a copy was also sent to Perfect Gate last night.

(c) a copy of a written decision of Mr Justice Harris in the Hong Kong Court, sent by Mr Justice Harris with the consent of the Company and Perfect Gate (a copy of which I attach for ease of reference). I am most grateful to Mr Justice Harris for this.

(d) an email from Mr Lee On Wai on behalf of Perfect Gate attaching a letter to the Court together with copies of certain authorities referred to therein.

I have not received submissions from Perfect Gate in response to the Petitioner's Note (I gave Perfect Gate until 8am Cayman time today to file such further submissions if they wished to do so, and none having been received I take it that they do not wish to provide any further submissions).

I have carefully considered the submissions and evidence that have been filed (both before, during and after the hearing last Friday) by both parties and the recent developments in the Hong Kong Court.

In relation to the Company's Summons (dated 12 June) I decide as follows:

(1) I shall dismiss Perfect Gate's application for a stay on forum non conveniens and other grounds. In view of Perfect Gate's active participation in the proceedings before me and the current circumstances where an urgent decision appears to be of considerable commercial significance for the parties and other shareholders and creditors, it is right and appropriate to rule and deliver my decision on the Summons without further delay and in particular without awaiting further developments in the Hong Kong proceedings. I am anxious to emphasise that I intend no disrespect to the Hong Kong

Court and that I acknowledge the need for and importance of coordination between related proceedings in Hong Kong and Cayman wherever possible and appropriate.

(2) I shall grant the Company's application in part—I shall make an order in the form of paragraph 1 of the Summons and reserve a decision on costs pending further submissions by the parties. I have decided that the decision of Mr Yen as chairman at the EGM is to be treated as final and conclusive (binding) and that Perfect Gate has not established adequate grounds for challenging or setting aside the chairman's decision.

I shall, as requested by the Company and as previously indicated, deliver a judgment setting out the reasons for my decision on Friday (12th July)."

12 This is my judgment setting out the reasons for orders I have made on the summons.

The issues that arise and my decision in outline

13 The following issues arise on the summons:

(a) the nature of the application;

(b) Perfect Gate's application for a stay;

(c) Perfect Gate's challenge to Mr. Yen's decision (as chairman) at the EGM:

(i) the construction and effect of art. 77 of the company's articles of association;

(ii) the grounds on which the decision of a chairman may be challenged;

(iii) the grounds on which Mr. Yen's decision is challenged in this case and the evidence filed by Perfect Gate and the company (and its liquidators); and

(iv) conclusion on Perfect Gate's challenge to and the effectiveness of Mr. Yen's decision.

14 I do not consider that it is appropriate to order an adjournment or stay of the summons pending the determination by the Hong Kong court of Perfect Gate's application on the same issue. In my view, art. 77 applied and permitted Mr. Yen to decide whether to permit Perfect Gate to vote (or to allow Perfect Gate's votes to be counted) and stipulated that his decision was final and conclusive. His decision must stand if he made it in good faith and properly. The evidence supports the conclusion that he did

so and Perfect Gate has failed to make out its allegation of bad faith and to establish grounds justifying the setting aside of Mr. Yen's decision. His decision must stand and the EGM resolutions are to be treated as validly passed. Nor has Perfect Gate established that decisions of a chairman at a shareholders meeting to which art. 77 applies can be set aside on the basis of *Wednesbury* unreasonableness. Nor has any other ground for setting aside Mr. Yen's decision been made out.

15 Before discussing these issues, I need to explain the background to the application, the relief sought in the summons and the evidence relating to what happened before, at and after the EGM and in relation to Perfect Gate's conduct.

The background

16 The liquidators were appointed by the Hong Kong court on August 17th, 2015. The company's shares were listed on the main board of the Hong Kong Stock Exchange (but trading in the shares has been suspended since September 18th, 2014).

17 The liquidators, as I have mentioned, have put in place and negotiated a post-liquidation restructuring of the company. The company will acquire the shares in another company (thereby acquiring an interest in an ongoing business); will obtain an injection of new capital in return for the issue of new shares to the capital providers; and will discharge the claims of all creditors by a part payment of the sums owed to them (with the payment being funded out of the subscription payments made by the capital providers). The history of the liquidators' negotiations and circumstances in which the current restructuring proposal emerged are set out by Mr. Yen in his first affidavit dated April 15th, 2019.

18 This restructuring involves a number of steps and procedures. The company must reduce the nominal value of its shares (to eliminate accumulated losses and permit the issue of new shares), which requires a special resolution and approval of this court (this is referred to as the capital reduction); increase its authorized share capital, which requires shareholder approval by way of a special resolution; enter into subscription agreements with the new capital providers (and obtain shareholder approval); arrange for a public offer of further shares; issue new shares to the capital providers and those who participate in the public offer (the changes to the capital structure are referred to as the capital reorganization) and promote a scheme of arrangement with its creditors (in fact the company needs to promote two schemes, one in Hong Kong and one in this jurisdiction, on identical terms). The schemes require the approval of this court (as regards the Cayman scheme) and the Hong Kong court (as regards the Hong Kong scheme). It is also necessary to obtain an order from the Hong Kong court to terminate (stay) the winding up and

approvals from the Hong Kong Stock Exchange and the Hong Kong Securities and Futures Commission.

19 The restructuring will have a significant impact on the company's existing shareholders. They will retain their shares but their interest in the company will be significantly diluted because of the injection of substantial new capital by the new capital providers. Existing shareholders are given certain additional rights under the capital reorganization as there will be a preferential offering available to existing shareholders to enable them to participate in the public offering by subscribing for reserved shares on a preferential basis as to allocation. But even if they participate in the preferential offering they will still suffer a significant dilution. This is the background to the dispute between Perfect Gate and the liquidators. Perfect Gate says that it considers the dilution to be too high and out of line with the dilution suffered by shareholders in similar restructurings (resumption proposals). The liquidators take the view that the company is insolvent (the restructuring involves schemes with creditors who are only receiving a part payment of their claims out of the funds raised by share subscriptions and the public offer); that the proposed capital reorganization treats existing shareholders and all stakeholders fairly; and that if the proposed restructuring is not implemented then the existing shareholders will receive nothing.

20 Furthermore, and importantly, the liquidators consider that in order to improve its position Perfect Gate improperly sought to obtain sums (ransom payments) for itself by the use of its voting rights as a shareholder. The liquidators were provided with evidence that Perfect Gate had demanded ransom payments in return for its agreement to support the capital reorganization. When the payments were refused, Perfect Gate went ahead and voted against the resolutions (in fact, it failed to withdraw or amend a proxy previously submitted by it). Mr. Yen, as chairman at the EGM, had been presented with evidence of Perfect Gate's conduct (the conduct of individuals who it is asserted were representing Perfect Gate) and concluded, based on legal advice, that he should exercise his powers as chairman to exclude and disallow Perfect Gate's votes.

Previous orders made by the court

21 The liquidators had previously obtained this court's authority to act for the company to promote the Cayman scheme and the capital reduction. On August 25th, 2017, I made an order authorizing the liquidators to act for and on behalf of the company for the purpose, *inter alia* (a) of presenting a petition for a scheme of arrangement in this jurisdiction and a petition for an order confirming a resolution for reducing the company's share capital; and (b) to prosecute such petitions including the taking of all steps necessary and/or required to progress the scheme and to secure the alteration or otherwise deal with the company's capital structure in

furtherance of the scheme (see my judgment dated September 19th, 2017 in which I explained the basis on which I was prepared to grant assistance to the liquidators).

22 Subsequently, the liquidators negotiated and put in place the agreements and arrangements for the capital reorganization and restructuring to which I have referred. They have also taken steps to obtain the requisite approvals from shareholders, creditors and the courts here and in Hong Kong.

23 The liquidators obtained an order from me in this court and from Mr. Justice Harris in Hong Kong for the convening of a single meeting of creditors in Hong Kong (to vote on the schemes) and the meeting has I believe now been held. As I have explained, the application to the Hong Kong court to sanction the Hong Kong scheme is now listed to be heard on July 22nd, 2019. The application to sanction the Cayman scheme is currently listed to be heard on July 16th, 2019. The liquidators' application to this court for an order confirming the capital reduction is also currently listed to be heard on July 16th. However, because the issue of the validity of the resolutions voted on at the EGM must be decided before the court can confirm the capital reduction (there needs to be a valid resolution passed by the shareholders in order for the court to have jurisdiction to confirm the capital reduction), the liquidators issued the summons and the summons has been heard before the other applications.

The summons

24 On April 16th, 2019, the company issued a petition in this court seeking an order sanctioning the Cayman scheme and an order confirming the proposed capital reduction. On the same day, the company issued a summons for directions in relation to the petition seeking various orders in relation to the Cayman scheme (including an order directing that a meeting of the company's creditors be convened to vote on the scheme) and the capital reduction.

25 The summons was heard on April 30th, 2019. I gave various directions in relation to the scheme but adjourned the applications for directions with respect to the capital reduction until after the EGM. Subsequently, the company restored the application for directions in relation to the capital reduction, which application was heard on June 4th, 2019. At that hearing, the company was represented by Harneys (who had only recently been appointed as the company's and liquidators' new Cayman attorneys) and I was informed of the outcome of the EGM: the decision of the chairman of the EGM to reject and disallow Perfect Gate's votes and correspondence from Perfect Gate in which they objected to and challenged the chairman's decision. I indicated that the company and the

liquidators would need to decide whether a further application or proceedings were needed in this court in order to allow the issue concerning the validity of the vote at the EGM to be properly decided and if so how to deal with the required witness evidence. I also said that Perfect Gate must be given notice of any such application or proceedings and a proper period in which to file evidence and participate if they wished to do so.

26 Following the hearing, the company issued the summons and a hearing of the summons was listed on July 5th.

27 In the summons, the company sought the following declarations:

(a) that the resolutions proposed at [the EGM] were validly passed as declared by [Mr. Yen] in his capacity as chairman of the EGM; and/or in the alternative,

(b) that the votes of [Perfect Gate] cast at the EGM in respect of the proposed capital reduction of the company be set aside and disregarded in determining whether the resolutions considered at the EGM were passed.

28 Directions were given for service on Perfect Gate of the summons, the company's evidence in support and a note summarizing the reasons why the company considered that the resolution voted on at the EGM was to be treated as valid and Perfect Gate was given 14 days after receipt of these documents in which to give notice of its intention to appear at the hearing (if it wished to do so) and to file its evidence.

29 The company's evidence in support of the summons was the fourth affidavit of Mr. Yen dated June 3rd, 2019, and the affidavit of Lee Wa Lun Warren ("Mr. Warren Lee") dated May 24th, 2019. Mr. Warren Lee is an important participant in the proposed restructuring. He is a director of the company whose shares are to be acquired by, and will subscribe for new shares in, the company. His evidence is that he had meetings with individuals who he believed were (and were held out by Perfect Gate's solicitors as being) representatives of Perfect Gate and that these individuals demanded that improper and unlawful payments be made to Perfect Gate in return for Perfect Gate agreeing to vote in favour of the resolutions.

30 On July 2nd, the court received an undated letter ("the July 2nd letter") sent by email. The July 2nd letter was signed by Lee On Wai ("Mr. Lee On Wai") as the sole director and sent on behalf of Perfect Gate. Perfect Gate stated that it would oppose the summons and set out its grounds of opposition. I deal with and explain these below. Perfect Gate also informed the court, as I have already mentioned, that it had issued a summons in the Hong Kong court seeking a declaration that the decision of the chairman at the EGM was unlawful, void and of no effect and that Perfect Gate's votes should be counted so that the resolutions proposed at the EGM be treated as having been rejected. Perfect Gate submitted that

Hong Kong was the proper forum for deciding the dispute concerning the validity of the resolutions proposed and the decision of the chairman at the EGM and requested an adjournment of the hearing of the summons.

31 Subsequently, on July 4th, Perfect Gate wrote again to the court and filed an affirmation ("the affirmation") of Mr. Lee On Wai, and said that the July 2nd letter was to be treated as its submissions in opposition to the summons.

32 On July 4th, the court sent an email to Perfect Gate informing it of the need to consider whether to instruct Cayman counsel to represent it at the hearing and to liaise with Harneys (regarding the July 5th hearing and the need for and benefits of coordination of the proceedings in this court and Hong Kong). Perfect Gate again wrote to the court, on July 5th, 2019, the morning of the hearing ("the July 5th letter"). Perfect Gate confirmed that it opposed the summons, that it would not be represented at the hearing, that it relied on the reasons set out in the affirmation, that it wished to rely on an additional ground for challenging the decision of the chairman at the EGM and that it supported the use of court-to-court communications to coordinate the Hong Kong and Cayman proceedings.

The capital reorganization

33 The main steps required to give effect to the reorganization are as follows:

(a) the company has agreed to acquire ("the acquisition") for a cash consideration all the shares in Yu Ming Investment Management Ltd. ("Yu Ming");

(b) there will be a reduction of the company's share capital (involving the reduction of the nominal value of each share in the company from HK$0.10 to HK$0.01 by cancelling HK$0.09 from the paid up capital of each share) and the resulting credit will be transferred to the company's contributed surplus account to be applied to eliminate an equivalent amount of accumulated losses;

(c) the capital reduction will be followed by a share consolidation (so that every ten reorganized shares of HK$0.01 each will be consolidated into one new share of HK$0.10 each);

(d) the company's authorized share capital will be increased;

(e) there will be a subscription by Ms. Chong Sok Un ("Ms. Chong") for new shares (or in the event of the lapse of Ms. Chong's subscription agreement, a placing to independent placees of new shares) which will generate funds to be used to pay part of the cash consideration payable on the acquisition and to part pay the amounts payable to creditors under the scheme;

(f) there will be a further subscription for new shares by Mr. Warren Lee who was a founding director of Yu Ming and also by employees of Yu Ming, which will also generate funds to be used to pay part of the cash consideration payable on the acquisition and to pay the amounts payable to creditors under the scheme;

(g) there will be a public offer of further shares to raise funds to be used to pay part of the cash consideration payable on the acquisition, to repay loans made to the company by the seller of the shares in Yu Ming, to pay professional fees incurred by the company, to provide the company with working capital and to pay the amounts payable to creditors under the schemes; and

(h) there will be a preferential offering available to existing shareholders of the company to enable them to participate in the public offering by subscribing for reserved shares on a preferential basis as to allocation.

34 Each of these steps is inter-conditional. If each step obtains the requisite approvals (including approvals from the company's shareholders, the Hong Kong Stock Exchange, this court and the Hong Kong court) the various components of the reorganization become effective (so that, for example, the capital reduction will take place subject to the company being restored to solvency via the creditor schemes and therefore at a time when the company is solvent).

The effect of the capital reorganization on existing shareholders

35 On December 28th, 2018, the company published an announcement (under r.3.5 of the Hong Kong Stock Exchange Listing Rules) which disclosed the dilution effect of the existing shareholders' shares resulting from the proposed capital reorganization. The analysis of the dilution effect considered the impact of the capital reduction and reorganization, the impact of the subscriptions for new shares and the public offer (taking into account the position where none of the existing shareholders entitled to participate in the preferential offering take up their entitlement—scenario I—and the position where all of them did so—scenario II).

36 The company stated that upon completion of the proposed restructuring it was anticipated that Ms. Chong would hold 45% of the issued share capital of the company; Mr. Warren Lee and others associated with Yu Ming would hold approximately 25% of the issued share capital, and more than 25% of the issued share capital would be held by public shareholders.

37 The announcement referred to the position of Perfect Gate. Perfect Gate holds 23% of the company's share capital and acquired the shares after the commencement of the company's liquidation, with the sanction of the Hong Kong court. The announcement noted that after the completion of the capital reorganization Perfect Gate would retain its 23%

shareholding; immediately after completion of the capital reorganization and the subscriptions, Perfect Gate's shareholding would be reduced to 2.6%; that in scenario I (if it and the other existing shareholders failed to subscribe for and take up their entitlement in the preferred offering) its shareholding would be reduced to 2% (which would be worth approximately HK$10m.) but in scenario II its holding would be reduced only to 5%.

38 As regards the company's existing shareholders, the announcement noted that:—

> ". . . immediately after completion of the [capital reorganization, the new subscriptions and the public offer] the shareholding interest of the existing Public Shareholders will be diluted from approximately 77% as at the date of this announcement to approximately 6.6% under Scenario I; and (ii) approximately 17% under Scenario II. The possible maximum dilution to the shareholdings of existing [shareholders entitled to participate in the preferential offering] if they elect not to subscribe for [reserved shares] under the Preferential Offering will be approximately 91.2%. Nonetheless, in considering (i) the Company is placed into the third delisting stage and Resumption will only happen if the Proposed Restructuring is implemented; (ii) the [subscriptions and the public offer] form part of the Proposed Restructuring . . . the implementation of which are necessary for the Resumption; and (iii) the Preferential Offering allows the [shareholders entitled to participate in the preferential offering] to continue to participate in the future development of the [company] upon completion of all the transactions contemplated under the Proposed Restructuring at their own wish, the Liquidators consider the possible dilution impact to the Shareholders as a result of the [various subscriptions] and the public offer to be acceptable."

Notice of the EGM

39 To be effective, the capital reduction must (pursuant to ss. 14 and 15 of the Companies Law (2018 Revision) ("the Companies Law")) be approved by the company's shareholders by special resolution and an order of this court confirming the reduction.

40 On April 27th, 2019, the company issued a circular to shareholders in connection with the capital reorganization, which included a notice convening the EGM on May 22nd, 2019 and details of the special and ordinary resolutions to be proposed at the EGM. The special resolutions were (a) to approve the capital reduction and the increase in the company's authorized share capital; (b) to approve an amended and restated memorandum and articles of association; and (c) to change the company's

name. The ordinary resolutions were to approve the schemes, the agreement relating to the acquisition, the agreements relating to the share subscriptions, the public offer of shares and the appointment of new directors (including Mr. Lee).

Perfect Gate's objections prior to the EGM

41 On May 16th, 2019, Perfect Gate's former solicitors (WT Law Offices—"WTL") wrote to the Hong Kong solicitors for the company and the liquidators (Michael Li & Co.—"Michael Li"). They referred to the circular and details of the proposed dilution of existing shareholders. WTL stated that Perfect Gate found the dilution of its equity interest too severe and unacceptable and therefore urged the liquidators to revise the terms of the proposed restructuring to minimize the dilution to existing shareholders. WTL said that unless the proposed restructuring was revised so as to make it acceptable to Perfect Gate, Perfect Gate would have no alternative but to vote against the proposed restructuring at the EGM.

Alleged meeting between Mr. Warren Lee and representatives of Perfect Gate

42 Mr. Warren Lee says that following receipt by Michael Li of WTL's letter of May 16th, he considered it necessary to meet with representatives of Perfect Gate to explain the benefits of the proposed capital reorganization. He noted that the proposed restructuring had been recommended by the liquidators and the company's independent financial adviser (Pelican Financial Ltd.) as being fair and reasonable to shareholders and that he understood that in the past the court's view had been that the return to shareholders in a restructuring should be token compared to the return to creditors. He therefore viewed the request from Perfect Gate as irrational and unreasonable.

43 Mr. Warren Lee referred to a meeting he had on May 17th with Mr. Yen and Mr. Wong of Michael Li during which Mr. Yen received a call from WTL in which they indicated that the dilution of Perfect Gate's holding to a single digit (2%) percentage was unacceptable. He understood that to mean that Perfect Gate required a minimum of a double digit shareholding after dilution, and this would mean at least a 5× improvement on the dilution effect under the proposed restructuring.

44 Mr. Warren Lee says that following that call, pursuant to an arrangement made between Mr. Wong and WTL, he met two representatives of Perfect Gate at 9 p.m. on May 20th at the coffee shop of the Empire Hotel at 62 Kimberley Road, Tsim Sha Tsui, Hong Kong ("the May 20th meeting"). The two representatives were Mr. Ben Lau ("Mr. Lau") and Mr. Ricky Kwan ("Mr. Kwan").

45 Mr. Warren Lee says that the following occurred during the May 20th meeting:

> "(a) I explained to them that the EGM and the Proposed Restructuring represented a binary outcome for shareholders: either the shareholders voted for it, and they would receive approximately HK$50 million worth of shares; or the shareholders voted against it, and they would receive nothing;
>
> (b) Mr. Lau of Perfect Gate asked for irregular benefits in return [for] Perfect Gate's vote at the EGM in favour of the Proposed Restructuring. Mr. Lau appeared to be asking for a payment that would be made in secret to Perfect Gate and/or himself personally without making the same payment to the other shareholders;
>
> (c) I said that I noted that Perfect Gate had already voted all its 230,000,000 shares against the resolutions, the voting deadline had already closed, and that the outcome of the EGM could not be reversed. Mr. Lau's response was that I should know a way to deal with this (I understood this to mean that I should cause the EGM to be adjourned so that the votes of Perfect Gate could be cast again to a new deadline);
>
> (d) I said that the regulators keep a close eye on misconduct and that no one can obtain any irregular benefit via the Proposed Restructuring. In response, Mr. Lau said it would be possible to orchestrate several legitimate ways to receive such a benefit: he said that they have a corporate finance team(s) and an investor relation team(s), and that they could structure the benefits in many ways, such as charging hefty corporate finance and investor relation fees; or that they could run the placement of Company shares, corner the stock, and make money in this manner. Mr. Lau also stressed that it was important to have an upfront payment as well, and not only a future promise of benefit;
>
> (e) no conclusion was reached, they said that they would make some suggestions to MLI, and asked me to check with [Michael Li's] team the next day; and
>
> (f) at about 9:30pm, Mr. Lau and Mr. Kwan left the coffee shop."

46 Mr. Warren Lee arranged a meeting for the following day with Mr. Wong and others from Michael Li. He told Michael Li that he had decided not to do anything about Perfect Gate's demands and would let the resolutions at the EGM be voted down. He says that during the meeting Mr. Wong—

> "received a call from a representative of Perfect Gate and left the conference room to take the call . . . Mr Henry Wong came back to

> the conference room and informed us that a representative of Perfect Gate (I did not ask their identity) had made a ridiculous demand of HK$140 million. The inference being that this HK$140 million would be paid in return for Perfect Gate voting their shares in favour of the Proposed Restructuring . . ."

47 After leaving that meeting, Mr. Warren Lee received a call from Mr. Wong. Mr. Wong told him that the representatives of Perfect Gate (presumably Mr. Lau and Mr. Kwan) wanted to meet again and so he arranged a meeting with them at 7 p.m. at Isola Restaurant & Bar at the International Finance Centre in Central, Hong Kong. Mr. Warren Lee's evidence regarding what happened at the meeting is as follows:

> "I arrived at Isola Restaurant & Bar at 7:00pm, only Mr. Kwan, representing Perfect Gate, was present. He said that the HK$140 million demand was 'stupid' (by which I understood he meant it was too high a figure to have been requested), and he asked me whether I was sincere in striking a deal of some kind. I said that I would rather let the Proposed Restructuring lapse than commit to anything improper. I left Isola Restaurant & Bar at 7:30pm . . ."

The EGM

48 On May 17th, 2019 at 8.35 p.m., Mr. Yen received the proxy form (submitted by HKSCC Nominees Ltd.) listing the proxies received in connection with the EGM. The proxy form showed that 230,000,000 votes were cast against all the resolutions at the EGM and 13,776,800, were cast in favour of all the proposed resolutions.

49 The EGM was held on May 22nd, 2019. The chairman was Mr. Yen. Mr. Yen has confirmed that in respect of the special resolution relating to the approval of the capital reduction, of the shareholders present and voting in person or by proxy 14,621,440 votes (representing approximately 1.46% of the company's total issued shares) were cast for the special resolution and 230,000,000 votes (representing approximately 23% of the company's total issued shares) against.

50 Mr. Yen, in his evidence, has given the following account of what happened immediately prior to and during the EGM:

> "16 . . .
>
> (iv) At around 8am on 22 May 2019, the day of the EGM, I received a call from Mr. Warren Lee, the managing director of [Yu Ming]. Yu Ming is the target company for acquisition under the Resumption Proposal. [Mr. Warren Lee] informed me that he had met with representatives from Perfect Gate who had told him that Perfect Gate would vote against the Proposed Restructuring unless the [proposed dilution of existing shareholders] was revised. *He also*

told me that Perfect Gate had made a request for payment of a substantial ransom in order to vote in favour of the proposed resolutions.

(v) During the EGM, after the votes were cast, I notified all shareholders present that 230,000,000 shares had purportedly voted against all the resolutions. A shareholder who was present at the meeting then stated that it was irrational for a shareholder to vote against the Proposed Restructuring and to prevent all other shareholders from making a recovery under the Proposed Restructuring.

(vi) After hearing the shareholder's comments on the irrationality of the votes against the resolutions, [Mr. Warren Lee], who was present at the EGM, asked me to allow him to report to the EGM on the requests for payment of a substantial ransom that he received from Perfect Gate including its requests that the [proposed dilution] be revised. Mr. Warren Lee proceeded to give an account of serious irregularities as to when and how he recently communicated and met with a representative of Perfect Gate and was asked by Perfect Gate to pay a substantial amount of ransom to them for the purpose of supporting the Proposed Restructuring.

(vii) Consequently, having heard Mr. Lee's account of events, the shareholder I have referred to at paragraph (v) above, objected to the votes that were being cast on behalf of Perfect Gate on the grounds that they were improper.

17 After giving due consideration to the representations that were made at the EGM by Mr. Lee and the shareholder, I rejected the votes of the 230,000,000 shares pursuant to article 77 of the Company's Articles of Association which provides that:

'77 If:

(a) Any objection shall be raised to the qualification of any vote; or

(b) Any votes have been counted which ought not to have been counted or which might have been rejected; or

(c) Any votes are not counted which ought to have been counted;

the objection or error shall not vitiate the decision of the meeting or adjourned meeting on any resolution unless the same is raised or pointed out at the meeting or, as the case may be, the adjourned meeting at which the vote objected to is given or tendered or at which the error occurs. Any objection or error shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the

chairman decided that the same may have affected the decision of the meeting. The decision of the chairman on such matters shall be final and conclusive.'

18 In particular, I considered that:

(a) the Company has disclosed the [proposed dilution] as early as December 2018. The [dilution] was further disclosed in the RTO Circular which . . . was dispatched on 27 April 2019 to all registered shareholders. However, no objections were raised to the [dilution] until [WTL's] letter was received on 16 May 2019.

(b) The Company was placed into the third delisting stage and the HKSE only allows the Company to submit new listing applications in relation to the submitted proposals (i.e. the proposal relating to the Proposed Restructuring) but not any other proposals and if the proposal fails to proceed, the HKSE will cancel the Company's listing to the detriment of its shareholders and creditors.

(c) I took into account that the only votes that were being cast against the resolutions were those of Perfect Gate.

(d) I also believed that Perfect Gate's votes against the Proposed Restructuring could have damaged the Company's economic position and the economic value of its shares to the detriment of the shareholders and creditors in the Company. The Proposed Restructuring on the other hand, will return value for the Company's shareholders and creditors.

(e) Given that the Company is seriously insolvent, the creditors' interests should be protected.

(f) *The ransom asked for by Perfect Gate is considered unethical and illegal.*

19 I note that the required number of votes (being a majority of not less than three-fourths of the votes cast by the Shareholders present and voting in person or by proxy at the EGM) had been cast in favour of the Special Resolutions. I therefore declared that the Special Resolutions has been passed in accordance with article 6 of the Articles of Association and section 14 of the [Companies Law]." [Emphasis added.]

51 Mr. Yen exhibited to his fourth affidavit a copy of the minutes of the EGM which recorded, after referring to art. 77 that:

"*It was noted that at the EGM an objection (the Objection) was raised by a Shareholder regarding some impropriety of the votes*

which were identified as having cast votes against all resolutions to be proposed and resolved in the EGM.

It was noted that following due consideration to the Objection, the Chairman declared that the votes of the 230,000,000 Shares should not be counted towards all resolutions in the EGM (the Chairman's Decision).

It was further noted that the Shareholder(s) whose votes were rejected may challenge the decision of the Chairman.

It was further noted that after the Chairman exercised his rights at the EGM under Article 77 and based on the Chairman's Decision, the results of [voting on] the resolutions [was that the resolutions were carried]." [Emphasis added.]

52 On May 29th, the company announced (in a circular issued via the Hong Kong Stock Exchange) the results of the EGM. The announcement recorded that:

"At the EGM, *an objection was raised by a Shareholder regarding the impropriety of 230,000,000 Shares which were identified as having casted [sic] votes against all the resolutions* to be proposed and resolved at the EGM. Following due consideration and pursuant to Article 77 of the Articles of Association, any objection or error shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the chairman decides that the same may have affected the decision of the meeting, the chairman of the EGM declared that the vote of 230,000,000 Shares should not be counted. The [Executive of the Hong Kong Stock Exchange] has requested the financial adviser to the Company to make submissions to the Executive in this connection and will consider whether there would be any effect to the consents [given by the Executive] and any other implications under the Takeover Code." [Emphasis added.]

Perfect Gate's objections after the EGM

53 On May 23rd, WTL wrote to Michael Li to inquire about the outcome of the EGM. On the same day Michael Li responded to say that Perfect Gate must await the public announcement of the result. On the same day that the announcement was made (May 29th), WTL wrote again to Michael Li noting that the announcement had stated that Perfect Gate's votes had not been counted and challenging the decision of the chairman to that effect. WTL said that if the situation was not remedied within seven days Perfect Gate would take action. On May 30th, WTL also wrote to the Hong Kong Securities and Exchange Commission complaining about the chairman's decision and asking for details of the reasons for that decision

insofar as the Commission was aware of them. On June 3rd, WTL wrote to Hong Kong Registrars and HKSCC Nominees Ltd. making the same points.

54 On June 4th, 2019, Michael Li responded to WTL's letter dated May 29th. They explained that the EGM was properly conducted and that the chairman had sought legal advice during the EGM and acted impartially. They referred to the objection raised at the EGM and said that the chairman had noted that Perfect Gate had been the only shareholder to vote against the resolutions and that Perfect Gate's votes would destroy the economic value of the company since the proposed restructuring would return value to shareholders and creditors while the alternative would result in shareholders receiving nothing. They went on as follows:

> "At the EGM Mr Warren Lee . . . reported that he had met twice with Perfect Gate's representatives prior to the . . . EGM and Perfect Gate's representatives had asked for huge benefits that were only to be received by Perfect Gate, and not all shareholders of the Company as a whole in return for Perfect Gate to vote at the EGM in favour of the Proposed Restructuring. Mr Warren Lee also reported that he declined the proposal made by Perfect Gate's representatives, as Perfect Gate's demand would constitute improper commitment.
>
> Having received the Objection and considered the irrationality of Perfect Gate's votes and the representation made by Mr Warren Lee *and after seeking legal advice as to his power and authority in dealing with objection of votes from shareholder as well as previous decisions of the Hong Kong Court* the Chairman duly exercised his right pursuant to the power contained in Article 77 . . . and declared in the EGM that the votes of Perfect Gate were not to be counted." [Emphasis added.]

55 Michael Li wrote to WTL on June 1st to notify Perfect Gate that a hearing of the company's application for directions in relation to its petition for an order confirming the capital reduction was listed in this court on June 4th. WTL apparently wrote to Michael Li on June 3rd. A letter of that date from WTL is referred to in a second letter to WTL from Michael Li dated June 4th, 2019. WTL appear to have complained that the notice they had been given of the hearing was too short. Michael Li denied that the notice had been too short and disclosed that Mr. Yen had been the chairman at the EGM.

56 It appears that WTL did not respond to Michael Li's first letter of June 4th and the allegations regarding the conduct of Perfect Gate's representatives made therein. Mr. Lee On Wai, in his affirmation, does not refer to or exhibit any such response.

Perfect Gate's position and evidence as to the alleged meeting between Mr. Warren Lee and its representatives

57 As I have already noted, on July 2nd, the court received by email the July 2nd letter sent by Mr. Lee On Wai on behalf of Perfect Gate. He referred to the summons and then set out Perfect Gate's position:

(a) He referred to the dilution effect of the proposed restructuring on Perfect Gate's shareholding and stated that if the restructuring was implemented the damage caused to Perfect Gate would be irreparable.

(b) He explained that Perfect Gate considered the dilution of its equity to be too drastic and unacceptable. He referred to WTL's letter of May 16th, which set out Perfect Gate's position.

(c) He noted that prior to the EGM Perfect Gate had not received any positive response from Michael Li or the liquidators, which is why it delivered its proxy form to HKSCC Nominees in which Perfect Gate voted against all resolutions at the EGM.

(d) He also notes that Perfect Gate only became aware after reading the company's May 29th announcement that Mr. Yen had purportedly exercised his powers under art. 77 to disallow and not count Perfect Gate's votes. Had Perfect Gate's votes been counted, all resolutions would have been rejected.

(e) He referred to Mr. Yen's fourth affidavit and Mr. Yen's account of what happened at the EGM including Mr. Warren Lee's account of his meeting with representatives of Perfect Gate. He says that Perfect Gate does not agree with the liquidators' claims and the account of events given at the EGM.

(f) As regards the alleged meeting referred to by Mr. Warren Lee, he says (in para. (7)) the following:

> "Perfect Gate strenuously deny that prior to the EGM Perfect Gate had authorised any person to meet with Mr Warren Lee and to make any monetary demands as alleged. Subsequent to [WTL's] letter dated 16 May 2019, there was a short without prejudice conversation between [WTL] and the liquidators. Apart from [that] conversation there was not any other contact between [WTL]/Perfect Gate on the one part and the Company/the Company's creditors/other parties to the restructuring proposal on the other part (in particular Mr Warren Lee) prior to the EGM. For the avoidance of doubt, Perfect Gate has not had and has not been informed of any contact with the Company/the Company's creditors/any party to the restructuring proposal (in particular Mr Warren Lee) prior to the EGM.
>
> Rather the truth is that subsequent to [WTL's] letter dated 16 May 2019, [WTL] or Perfect Gate did not receive any reply from [WTL]

or the liquidators at all. Hence, Perfect Gate had no choice but to vote against the restructuring proposal at the EGM.

In fact, quite to our surprise, despite the very serious allegations of Mr Warren Lee against Perfect Gate, Mr Yen did not enquire with Perfect Gate about what happened or gave [sic] Perfect Gate any opportunity to make representation [sic] to answer Mr Lee's allegations."

(g) He said that Perfect Gate believed that Mr. Yen had a duty to allow different opinions to be fully and fairly presented and debated at the EGM. Mr. Yen had failed to discharge that duty by accepting Mr. Warren Lee's bare allegations as true.

(h) Perfect Gate considered that Mr. Yen's decision at the EGM was unlawful, void and of no effect and was made in bad faith or "was unreasonable in the Wednesbury sense or something similar."

(i) He then referred to the summons issued by Perfect Gate in Hong Kong and submitted that Hong Kong was the proper forum for dealing with the dispute since the company's shares were listed on the Hong Kong Stock Exchange; the company had its principal place of business in Hong Kong; all notices circulars and announcements were issued in Hong Kong; the alleged meetings which form the subject matter of the dispute took place in Hong Kong and the EGM also took place in Hong Kong.

(j) He requested that this court should adjourn the July 5th hearing of the summons pending the outcome of the Hong Kong proceedings.

58 In the affirmation, filed on July 4th, Mr. Lee On Wai largely repeated the points made in the July 2nd letter. He expanded on Perfect Gate's reasons for voting against the resolutions at the EGM, and explained why he considered that Perfect Gate's position was rational and reasonable in the circumstances. He said that:

"24 Since Perfect Gate became a shareholder of the Company, I on behalf of Perfect Gate, had made several attempts to contact the Liquidators by phone. At the time, I had several rescue plans in hand (which included (i) raising sufficient amount of capital from shareholders/banks/other financial institutions to repay the Company's creditors and (ii) referring food & beverage business and carpet wall paper and furniture business with substantial revenue and profit in the Mainland China so as to meet the requirement of HKEx in order to maintain the listing status) and wanted to discuss with the Liquidators about them. However, the Liquidators were not available to answer my calls. I left my phone number with them but they never returned my calls. They just ignored me, and were not interested in listening to the view and proposals of Perfect Gate at all.

25 Perfect Gate decided to vote against all the resolutions proposed at the EGM because if the proposed restructuring were implemented Perfect Gate's equity interest in the Company would be substantially reduced from 23.0% to 2% in Scenario I (i.e. more than 90% reduction) and to 5% in Scenario II (i.e. more than 78% reduction). Prior to the EGM Perfect Gate had conducted some researches of similar restructuring schemes in the market and found that the degree of dilution of the existing shareholders' equity interest were [*sic*] much less drastic in those similar schemes. It was Perfect Gate's genuine belief that a better restructuring scheme could be reached with less drastic degree of dilution, and as a result Perfect Gate and other existing shareholders' economic interest can be improved and advanced.

26 Further, while it is true that the Company is in debt, it does not mean that the Company is of no value to investors and its shareholders should accept whatever restructuring proposal [is] put forth by the Liquidators. The Company is listed on the Main Board of the HKEx. It is a well-known fact that investors interest in listed companies that fail, where investors can take advantage of the listing status of listed companies to facilitate a listing of the investors. In fact the restructuring proposal of the Company is such a scheme involving a reverse takeover of the Company by investors. The Liquidators structured the current restructuring proposal for this exact reason. In fact, the current restructuring proposal is not the only viable resumption plan available. Apart from what I stated hereinabove, as can be seen from [the first affidavit of Mr. Yen dated April 15th, 2019 filed in this court] there were other available resumption plans and the Liquidators only considered 'on balance' that the current restructuring proposal was the best. Nonetheless, from the standpoint of Perfect Gate, the dilution effect in the current restructuring proposal was far from reasonable. As admitted by the Liquidators that 'any value enhancement of the New Shares as a result of the Acquisition may not necessarily offset the dilution effect to the Existing Shareholders.'

27 It is against this backgrounds [*sic*] that Perfect Gate decided to vote against the current restructuring proposal. I strenuously deny that Perfect Gate was irrational in voting at the EGM at all. In fact, Perfect Gate acquired the Company's shares as part of its investment in distress assets, and it would be egregious to suggest that Perfect Gate had acted irrationally in destroying the value of its own investment. The truth is that the Liquidators had consistently ignored Perfect Gate's views and pressed ahead with the proposal they preferred for whatever reason. This has left Perfect Gate with no choice but to reject the restructuring."

The nature of the application

59 In the petitioner's skeleton argument, Mr. Lowe pointed out that the validity of the chairman's decision at the EGM was a central issue on the company's application for confirmation of the capital reduction. The court could decide the issue in the proceedings commenced by and at the hearing of the company's petition seeking a confirmation order (in the course of determining whether the conditions for approval had been met). Alternatively, the court can decide this issue in advance of hearing the petition and, to allow this, the company had issued the summons. Mr. Lowe explained that in the current circumstances the company and the liquidators considered it important to deal with the challenge to the EGM resolutions immediately and before the hearing of the confirmation petition.

60 He submitted that since the chairman had disallowed the vote of Perfect Gate it was only necessary for the court to determine whether his decision was valid. If the decision was upheld by the court, it would not be necessary for the company to seek the further relief sought in the second paragraph of the summons, for an order setting aside Perfect Gate's vote. Mr. Lowe pointed out that the decision of Levers, J. in *In re Seapower Resources Intl. Ltd.* (11) suggested that the court would be prepared to make an order on the hearing of the confirmation petition setting aside votes cast by shareholders at the relevant meeting without the need for a separate application, although the fact that the decision was only reported in the form of a short note meant that little weight could be placed on it.

61 In any event, Mr. Lowe submitted that insofar as the petitioner sought declaratory relief, this would be final and not interlocutory relief granted *pro tem* (as to which see *International Gen. Elec. Co. of New York* v. *Customs & Excise* (7) ([1962] Ch. at 789)). There could not be any doubt that the court had jurisdiction to grant a declaration without having a full trial.

62 I have had some concerns as to the manner in which the dispute concerning the voting at the EGM has been brought before the court. The case has had to be dealt with urgently, without the benefit of counsel for Perfect Gate (its choice) and with limited submissions on certain points. Furthermore, the case involves conflicting factual evidence and allegations of dishonesty, which in the ordinary course need to be tested by cross-examination. However, I am satisfied that I can properly deal with the company's application for a declaration regarding the chairman's decision at the EGM in the current circumstances. The issue arises in connection, and is closely connected, with the confirmation petition and it must be right that the court can deal with it within the proceedings on or by way of an application arising out of the petition. Detailed witness evidence has been filed by both parties and is sufficient for the disposal of the

application. Neither party has asked the court to order a full trial or cross-examination of the witnesses and it seems to me that this is not essential in this case.

63 I do remind myself, of course, of the normal rule that where a conflict of evidence on affidavit arises the court is not in a position to choose between the competing versions of the facts unless cross-examination on the affidavits takes place or there is sufficient uncontradicted credible evidence upon which the court can reach a decision. In circumstances where cross-examination does not take place, a court is not obliged to accept evidence given on affidavit if there is conflicting evidence given on affidavit (or orally) that the court accepts.

Perfect Gate's application for a stay

64 Perfect Gate argued that Hong Kong was the proper forum for the resolution of the dispute concerning the chairman's decision at the EGM.

65 In the July 2nd letter, Perfect Gate submitted that Hong Kong was the proper forum because (i) the company's shares were listed on the Hong Kong Stock Exchange; (ii) the company's principal place of business is in Hong Kong; (iii) all notices, circulars and announcements were issued in Hong Kong; (iv) the alleged meetings which form the subject matter of the dispute took place in Hong Kong; and (v) the EGM took place in Hong Kong. Perfect Gate asked the court to adjourn the July 5th hearing pending the outcome of the proceedings on the Hong Kong summons.

66 In the affirmation (para. 29), Mr. Lee On Wai stated that he did not think that Cayman would be a proper forum because:

(a) The only connection between the company and Cayman is the fact that the company was incorporated here. On the other hand, the company has a close connection with Hong Kong for the reasons he set out in the July 2nd letter. He also mentioned that all the witnesses and relevant parties were located in Hong Kong.

(b) The July 5th hearing in this court would be conducted without calling any witnesses to testify.

(c) If the declaration sought by the company in this court were granted and the restructuring were implemented Perfect Gate would suffer irreparable damage if the Hong Kong court subsequently reached a different view (I take this to be a reference to the risk of and need to avoid inconsistent judgments).

67 Mr. Lowe opposed any adjournment or stay. He submitted that the most important factor to take into account was that the company (and liquidators) had presented the confirmation petition, which was properly before this court. The approval of the capital reduction was a matter for

this court and was not before and did not arise in the Hong Kong proceedings. The question of the validity of the decision of the chairman, and resolutions voted on, at the EGM had to be decided before the court could confirm the capital reduction and was therefore a part of or very closely connected with the proceedings in this jurisdiction relating to the capital reduction. It would therefore be most convenient and appropriate for the issue to be decided in this court. Furthermore, this issue needed to be decided urgently and it was not clear how long the proceedings in Hong Kong would take. As regards the risk of inconsistent judgments, he submitted that there was no serious risk because the judgment of this court on the summons would be binding on Perfect Gate, by reason of its active participation in these proceedings, and give rise to an issue estoppel.

68 I carefully considered these submissions and the connections with Hong Kong to which Mr. Lee On Wai referred but concluded that an adjournment or stay pending the determination by the Hong Kong court was not appropriate or justified for the following reasons:

(a) Particular weight is to be given to the fact that the dispute relates to the conduct of a meeting of shareholders of a Cayman company. The rights and responsibilities of shareholders and the chairman of the EGM are subject to and governed by the company's constitution and are governed by Cayman law. This court is usually the most appropriate forum for dealing with such disputes (see, for example, Grand Court Rules, O.11, r.1(1)(ff) which permits service out of the jurisdiction of claims brought against members of a Cayman company where the subject matter of the claim relates in any way to the company). I appreciate that the Hong Kong court is able to deal with disputes relating to such issues (see a number of the decisions of Mr. Justice Harris to which reference is made below) but where a forum dispute arises I consider that this court is entitled to pay particular regard to this point.

(b) Also of particular weight is the connection between the dispute and the confirmation petition which is pending in this court. I accept Mr. Lowe's submissions on this point. As I explained above, the summons should be viewed as part or arising out of the confirmation petition.

(c) I also give weight to the fact that the purpose of the proceedings in this jurisdiction is to provide assistance to the Hong Kong liquidators and it is they who have presented the confirmation petition, issued the summons and sought to have the dispute determined in this court.

(d) It also seems to me to be right, for the reasons given by Mr. Lowe, that there are strong grounds for believing that the risk of inconsistent judgments is low. I am anxious, however, to avoid any discourtesy to or conflict with the Hong Kong court and would, had the Hong Kong court expressed the wish to do so, have been prepared to defer giving judgment pending further discussions between the parties and the courts regarding

the need for steps to be taken to coordinate the Cayman and Hong Kong proceedings (I have for some time suggested to the liquidators that consideration be given to court to court communications for this purpose if the need arose). However, no such request has been made and I note that Mr. Justice Harris was made aware at the hearing before him on July 9th, that the summons had been heard and that I had reserved judgment.

(e) I note Mr. Lee On Wai's reference to the absence of witness testimony at the July 5th hearing. I accept that this could be a serious issue, for the reasons explained above. However, it was open to Perfect Gate to apply for the cross-examination of witnesses in the proceedings on the summons but it did not do so. Furthermore, Mr. Lee On Wai has not explained the circumstances in which witness testimony and cross-examination would be given in the proceedings in Hong Kong. In any event, for the reasons I explain in this judgment, I am satisfied that the summons can properly be disposed of without the need for cross-examination.

The petitioner's submissions on the challenge to the chairman's decision

69 Prior to the hearing of the summons, the company filed a skeleton argument. During oral argument at the hearing, Mr. Lowe developed and amended his submissions and at my request filed further written submissions ("the petitioner's note") following the hearing to set out and clarify the company's position. The company's position was also confirmed in email correspondence between Harneys and the court following receipt of the petitioner's note. Perfect Gate were copied in on the email correspondence and were sent a copy of the petitioner's note (together with a transcript of the hearing) and invited to file further submissions in response but chose not to do so.

70 The company:

(a) Asks the court to make certain findings of fact.

(b) Submits, based on those findings of fact, that Mr. Yen as chairman of the EGM was entitled (by reason of art. 77 of the company's articles of association) to rule on the question of whether it would be wrong to count and admit Perfect Gate's votes and to decide whether to disallow the votes; that Mr. Yen did make a ruling disallowing and rejecting Perfect Gate's votes and that his ruling was made properly and in good faith and was final and binding and could not in the present circumstances be challenged and set aside ("the art. 77 point").

(c) Submits, based on those findings of fact, that Perfect Gate's conduct was dishonest and its votes were tainted by illegality and void or capable

of being ignored. In the petitioner's note the company submitted as follows:

(i) the attempt to seek an improper financial benefit in return for a vote on a company that is otherwise liable to face liquidation was a dishonest use of a threat ("menaces") to get money which Perfect Gate had no right to receive in return for voting for the resolution (colloquially extortion);

(ii) dishonesty is an objective question and is the same in civil and criminal law (see *Ivey* v. *Genting Casinos UK Ltd.* (8)). Most reasonable right-thinking businessmen would regard Perfect Gate's behaviour as unacceptable;

(iii) since this took place in Hong Kong statutory illegality would be a matter of Hong Kong law. It is sufficient that the conduct is dishonest. Dishonesty even without statutory criminality is sufficient "illegality" (see *Les Laboratoires Servier* v. *Apotex Inc.* (10) ([2015] A.C. 430, at para. 25, *per* Lord Sumption));

(iv) in *Clarke* v. *Chadburn* (4) ([1985] 1 W.L.R. at 80), Megarry, V.C. held that resolutions which were in contempt of court were void for illegality;

(vi) a resolution carried by such a vote would be tainted by illegality and could properly be disallowed consistently with *Clarke* v. *Chadburn* and, pursuant to art. 77, the chairman could decide that the decision was vitiated by that vote and disregard it.

71 The company invites the court to make the following findings based on the evidence contained in the affidavit of Mr. Warren Lee and the fourth affidavit of Mr. Yen:

(a) WTL contacted the company by letter on May 16th, 2019 on behalf of Perfect Gate.

(b) On the same day a telephone call took place between WTL and Mr. Yen when WTL repeated that the proposed dilution was unacceptable to Perfect Gate.

(c) As a result of the WTL letter Mr. Warren Lee contacted Mr. Wong of Michael Li and Mr. Yen on May 17th, 2019. On May 20th, 2019, by arrangement between WTL and Michael Li, Mr. Warren Lee met Ben Lau and Ricky Kwan at the Empire Hotel.

(d) Since WTL had clearly been acting for Perfect Gate in the matter and had arranged the meeting Ben Lau and Ricky Kwan, it is to be inferred that they had authority to act for Perfect Gate.

(e) Perfect Gate disputes any meeting or any discussion took place. This is inherently improbable, as Mr. Warren Lee would have wanted any opportunity to dissuade Perfect Gate from voting against the resolutions. Perfect Gate has not produced evidence from Ben Lau or Ricky Kwan or WTL and has chosen not to deal with the evidence of Mr. Warren Lee.

(f) The court is invited to accept as truthful Mr. Warren Lee's account of the conversations with Perfect Gate's representatives set out in paras. 21, 24(c) and 26 of Mr. Warren Lee's affidavit.

(g) The vote that had been given to HKSCC by Perfect Gate on May 16th, 2019 was part of an attempt by Perfect Gate to seek secret, improper financial benefits for itself as a price for supporting the restructuring (*i.e.* from Mr. Warren Lee, Yu Ming Investment Management Ltd. and/or the company).

The art. 77 point

72 Mr. Lowe identified two issues that needed to be considered. First, whether, as a matter of the proper construction of art. 77, it gave the chairman the power to decide whether votes should be allowed or rejected or merely permitted him to ignore challenges where he concluded that the votes in question did not affect the outcome of the meeting ("the first issue"). Secondly, if the chairman has the power to decide to admit or reject votes, whether his decision could be reviewed and set aside by the court and if so in what circumstances ("the second issue").

73 The company submits that, pursuant to art. 77, Mr. Yen as chairman was entitled to decide whether the votes of a shareholder at the EGM should be admitted or excluded for the purpose of determining whether a resolution had been passed; that he properly exercised that power; that his decision is final and conclusive and can only be reviewed for bad faith and that since Mr. Yen's decision was made properly in good faith it must be treated as binding.

74 Article 77 is quoted in the extract above from Mr. Yen's fourth affidavit but it is convenient to set it out again here (with some reformatting by me for ease of understanding):

"If:

(a) Any objection shall be raised to the qualification of any vote; or

(b) Any votes have been counted which ought not to have been counted or which might have been rejected; or

(c) Any votes are not counted which ought to have been counted;

the objection or error shall not vitiate the decision of the meeting or

adjourned meeting on any resolution unless the same is raised or pointed out at the meeting or, as the case may be, the adjourned meeting at which the vote objected to is given or tendered or at which the error occurs.

Any objection or error shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the chairman decides that the same may have affected the decision of the meeting.

The decision of the chairman on such matters shall be final and conclusive."

75 In relation to the first issue, Mr. Lowe relied on the decision of Mr. Justice Harris in Hong Kong in *Kwok Hiu Kwan* v. *Johnny Chen* (9) ("*Convoy Global*"):

(a) In this case, Harris, J. considered an article in the articles of a Cayman company that was in the same terms as art. 77 (in *Convoy Global* the relevant provision was art. 74).

(b) At an EGM, an objection was raised as to whether a shareholder at the meeting was qualified and entitled to vote. It was said that they did not own the voting rights. The chairman at the EGM after receiving legal advice informed the meeting that based on art. 74 it was his responsibility to decide on any objections raised and that "If any of the shares are deemed questionable I have to void these shares for allowing to vote for the rest of the resolutions. And with this decision I deem that to be final and conclusive."

(c) Harris, J. considered (after having heard expert evidence on Cayman law from both Mr. Lowe, Q.C. and the eminent retired justice of this court, Mr. Justice Henderson) that the correct approach to the construction of a provision in the articles (being a term in the statutory contract between members and the company, which was a commercial contract) was to ask what the language used, viewed objectively, would mean to a reasonable member of the company, applying the standard of the reasonable commercial person (who was to be treated as hostile to technical interpretations and undue emphasis on niceties of language).

(d) The shareholder whose vote had been challenged argued that art. 74 should be construed narrowly. He argued that the article only authorized the chairman to determine whether if an objection was upheld it would alter the result of a vote on a resolution. It was accepted by this shareholder that at common law the chairman has the authority to determine the substantive issue of whether or not an objection justifies excluding a shareholder's votes but that such a decision is reviewable by the court.

(e) Harris, J. held ([2018] HKCFI 2112, at para. 22) that properly interpreted art. 74 authorized "the chairman to decide the objection not just the possible impact the objection might have on the numbers cast in respect of a resolution." He said as follows:

> "The penultimate sentence [of article 74] reads: 'Any objection . . . shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if *the chairman decides that the same may have affected the decision* of the meeting.' Any objection will only vitiate a resolution if (1) it is upheld and (2) having been upheld results in a resolution that would otherwise have been passed being rejected or vice versa. Consequently, article 74 is to read as authorising the chairman to decide the objection not just the possible impact the objection might have on the numbers cast in respect of a resolution. It seems to me that this is clear and that it is the interpretation the hypothetical reasonable business person would be likely to put on article 74."

(f) In response to the argument that art. 74 should be construed narrowly Harris, J. said (*ibid.*, at para. 27):

> "In my view the [narrow] construction of article 74 advanced on behalf of Mr Kwok would deprive article 74 of utility. I find it difficult to see how it can sensibly be suggested that that the hypothetical commercial person would think the construction advanced on behalf of Mr Kwok is a credible reading of the article. On the contrary it invites the question: why if the drafter thought it necessary to include an article dealing with the narrow and straightforward question of numbers would he not have dealt with the more substantial question of the determination of the objection itself? Self-evidently in my view one would expect the articles to contain a mechanism that allowed the chairman to decide at a meeting the substantive objection and introduce certainty into the status of a resolution, which Mr Sussex accepted in argument was an important consideration. It seems to me that the natural reading of article 74, mindful of this consideration and the fact that all parties agree that the drafter provided a provision to address the impact of objections on the numbers of votes cast, is that the chairman can decide both the substantive objection and its possible impact on the voting in respect of a resolution. In practice, one would expect the chairman to consider whether the numbers involved are sufficient to make any difference to the result of a vote. If they do not he might decide not to spend time and invite controversy by deciding the substantive issue; but if it does make a difference article 74 empowers him to do so."

76 In relation to the second issue:

(a) Mr. Lowe referred to the discussion of the second issue by Harris, J. in *Convoy Global* (9). It was common ground before Mr. Justice Harris that if the chairman's decision was reached in bad faith the court could intervene and set the decision aside. After a careful review of the English and Australian authorities, he concluded that:

> "50 It is common ground that the Chairman's decision can be challenged on the grounds of bad faith. What I have not been asked to decide, and I invited Mr Sussex to consider arguing at the next hearing, is whether the finality of the decision prevents a challenge *on the grounds that is unreasonable in the Wednesbury sense or something similar. It seems to me that a qualification to finality on the grounds that it cannot have been intended to extend to serious error is a more principled and coherent explanation for restricting finality* . . .
>
> 53 [The chairman's] . . . decision . . . was final and conclusive unless [it could be shown] either that it was reached in bad faith or it is demonstrated that the court should intervene for the reasons referred to in [50]." [Emphasis added.]

(b) But Mr. Lowe was unable to say what had been decided in the subsequent hearing to which Mr. Justice Harris referred.

(c) Mr. Lowe relied on the English authorities that he submitted established that once the decision was made by the chairman, it was unchallengeable except on the grounds of *mala fides*: it was irrelevant that the decision may be erroneous or irrational. In particular, *Wall* v. *London & Northern Assets Corp. Ltd.* (16) and *Wall* v. *Exchange Inv. Corp.* (15). Mr. Lowe submitted that the English approach to the finality of a chairman's decision made in good faith appeared to have been followed in this jurisdiction by Henderson, J. in *Tempo Group Ltd.* v. *Fortuna Dev. Corp.* (14) (unreported, at paras. 200–205).

(d) In the first English case, North, J. had considered a differently worded article that stated ([1899] 1 Ch. at 551) that "No objection shall be made to the validity of any vote except at the meeting at which such vote shall be tendered . . . and every vote . . . not disallowed at [the meeting] shall be deemed valid for all purposes whatsoever." North, J. concluded:

> "In my opinion, the meaning of the article is that all objections to votes at a meeting must actually be taken and dealt with at the meeting and the decision as to their validity by the person who presides is to be final on that point. The only difficulty I felt was as to whether the article could not be construed to mean merely that all proceedings founded on the chairman's ruling as to votes are to be deemed valid when they are not challenged by legal proceedings. But

I do not think I can come to the conclusion on the actual words of the article that the meaning be so limited."

(e) In the second English case, the Court of Appeal considered the same article. Pollock, M.R., after quoting the first sentence of the judgment of North, J., which I have set out above, said ([1926] Ch. at 146):

"I agree with North J. I do not see the purpose of [the article] unless the effect which he has summarized [in that sentence] is to be given to it. The chairman is to exercise his power and come to a decision whether votes which are in question shall be disallowed or not. *If he comes to that decision regularly and . . . fraud is not suggested—it appears that the action of the chairman cannot after be questioned. He acts in effect as if he were an arbitrator chosen by the parties concerned and whose decision is to bind the parties on the question whether these votes are to be treated as valid votes or not. No suggestion is made here against [the chairman] that he was guilty of any misconduct, and certainly no suggestion that he was guilty of such conduct as in the case of an arbitrator would invalidate his award . . . in the absence of any charge of fraud or misconduct which would be sufficient to invalidate the award of an arbitrator, [the chairman] was entrusted with the power under [the article], and, for the purpose of getting through the business of the meeting, was entrusted with powers which required him to decide whether or not the votes should be disallowed.*" [Emphasis added.]

(f) Warrington, L.J. said that he agreed with Pollock, M.R. (and North, J.). Sargant, L.J. also agreed with Pollock, M.R. and North, J. He concluded that (*ibid.*, at 148):

"*It is obviously desirable that questions of this sort should be determined in a summary way and without the necessity of coming to the Courts.* [It was argued that on a proper construction of the article] if the chairman had disallowed a vote, his decision was not conclusive. *It may well be that in the case where a vote has been disallowed, the shareholder whose right has been impeached to that extent should have a right to apply to the Courts. Here, all that is done is to take away from a shareholder a right of appeal against a decision disallowing an objection by him against the votes of some other shareholder, and it seems to me quite reasonable that such a question should be allowed to be decided summarily and finally by the chairman, although there should not be the same summary and final effect given to a decision against the right of a shareholder to vote.*" [Emphasis added.]

(g) Mr. Lowe noted that Harris, J. in *Convoy Global* had considered the suggestion in the second italicized sentence above that there might be a distinction between (i) a shareholder's right to challenge in court the

decision of the chairman to reject that shareholder's objection to the votes of another shareholder, and (ii) a shareholder's right to challenge in court the decision of the chairman to reject that shareholder's votes. Harris, J. had concluded that such a distinction was "erroneous."

(h) Mr. Lowe also drew to my attention and relied on the analysis in Kosmin & Roberts, *Company Meetings & Resolutions*, 2nd ed., at para. 9.81 (2013) which states as follows:

> "The authorities . . . from Australian and New Zealand do appear to provide a sensible and reasoned approach to the problem, justifying the intervention of the court when a strict and literal application of the articles would lead to the chairman's erroneous decision being upheld, perhaps to the acute disadvantage of the shareholders and the denial of their legal and statutory rights. However, in view of the current trend in English law favouring methods of alternative dispute resolution which restrict access to the courts, it may be doubtful that these authorities although persuasive on their reasoning, would be followed by an English court. It is suggested that the court in England following the precedent set by the Wall cases is likely to rule that a chairman's decision on the validity of votes when taken in good faith and at the correct time is final and binding. *Accordingly, it remains the position that an English court will require cogent evidence of fraud or bad faith before it will be prepared to set aside the chairman's ruling.*" [Emphasis added.]

(i) Mr. Lowe had in the petitioner's skeleton argument drawn to my attention certain Australian and New Zealand authorities which appeared to take a different view, as explained in *Kosmin & Roberts.* He referred to *Cordiant Comms. (Australia) Pty. Ltd.* v. *Communication Group Holdings Pty. Ltd.* (5) (55 ACSR at 200–205) but noted that Mr. Justice Harris had said (in *Convoy Global* (10) ([2018] HKCFI 2112, at para. 51)) that a different approach from that taken in the Australian authorities was justifiable because of the weight to be given to the principle of party autonomy. Harris, J. quoted the passage from *Kosmin & Roberts* relied on by Mr. Lowe and set out above. He then said (*ibid.*, at para. 52):

> "I have no evidence of the weight given by the courts of the Cayman Islands to party autonomy. It seems to me, unsurprisingly perhaps given Hong Kong law, that this is a material consideration and one to which no consideration seems to have been given in the Australian authorities. In my view it weighs in favour of upholding the finality of a Chairman's decision."

(j) Mr. Lowe also referred to the following passage in *Shackleton on the Law & Practice of Meetings*, 14th ed., at para. 15–10 (2017):

> "At any meeting at which a special resolution is submitted to be passed on a show of hands, a declaration of the chairman that the resolution is, or is not, carried is, unless a poll is demanded, conclusive evidence of the fact without proof of the number or proportion of the votes recorded. *Once the declaration has been made by the chairman that a special resolution has been passed or not, the court will not interfere unless there is evidence of fraud or manifest error . . . The court will however intervene if it can be proved that the chairman has acted on a mistaken principle* . . ." [Emphasis added.]

The statement in the first sentence reflects the language of s.320 of the UK Companies Act 2006. The proposition in the second sentence is based on *Re Graham's Morocco Co. Ltd.* (6). The proposition in the third sentence appears to be based on *Re Caratal (New) Mines Ltd.* (3) ([1902] 2 Ch. at 500) in which Buckley, J. said:

> "I am asked to affirm the proposition that if the chairman makes a declaration, and in it actually gives the numbers of votes for and against the resolutions which he is bound to recognise, and adds that there are proxies (which in law he cannot regard), and then declares that the result is that the statutory majority has been obtained, although the numbers stated by him shew that it has not been obtained, the declaration is conclusive. In my judgment that proposition cannot be supported."

(k) Mr. Lowe therefore submitted that in order for Perfect Gate to succeed it must (and the burden of proof was on it to) establish that Mr. Yen made his decision in bad faith. It had failed to do so. Based on the findings of fact which the company invited the court to make (as set out above), the court could and should conclude that the objection to Perfect Gate's votes had been properly raised at the EGM and was properly dealt with by Mr. Yen. He had obtained legal advice on the legal effect of Perfect Gate's ransom demands and acted on that advice. There could be no suggestion that he had acted *mala fides*. His evidence on the reasons for and basis of his decision demonstrated that he genuinely believed that he was entitled to exercise his powers under art. 77 to disallow Perfect Gate's vote and Perfect Gate's evidence did not deny or challenge that conclusion.

(l) Furthermore, Mr. Lowe submitted that Mr. Yen had been right as a matter of law to disallow Perfect Gate's vote. In the petitioner's skeleton argument the company argued that Perfect Gate's vote was to be disallowed because it was not made *bona fide*. The *bona fides* of the vote was in issue for two reasons:

(i) First, because majority shareholders were not acting *bona fides* if they voted and *acted not for the benefit of the*

company at large but entirely for their own benefit and in their own interests (in reliance on *Sidebottom* v. *Kershaw* (12) ([1920] 1 Ch. at 167, *per* Lord Sterndale)). In the present case, a vote which was cast with a view to extorting funds from the company and which had no other discernable basis was not *bona fide.* Perfect Gate was acting with a view to extorting funds for their own benefit and to promote their own interests.

(ii) Secondly, a vote was not *bona fide* in the relevant sense if no reasonable person would consider the vote to the advantage of the company. In particular, the company relied on the judgment of Mr. Justice Harris in *Sunlink Intl. Holdings* v. *Wong Shu Wing* (13) ("*Sunlink*"). This was a case relating to a shareholder's vote on resolutions for a restructuring of a Cayman company. The learned judge had observed ([2010] HKCFI 982, at para. 33):

> ". . . the authorities do demonstrate that the court will intervene to prevent a shareholder voting in a way which will result in the destruction of the economic value of other shareholders' shares for no rational reason."

The company submitted that this approach was supported by authority in this court. In *Re Seapower Resources Intl. Ltd.*, (11) Levers, J. (see the citation above) dealt with a case in which the petitioner had sought an order confirming a capital reduction where the resolution to approve the capital reduction had failed due to the vote of one dissenting shareholder. The petitioner's case was that without the proposed restructuring, the petitioner would be insolvent and that, in casting its votes as it did, the dissenting shareholder must have acted in bad faith. This assertion appears to have been accepted by the court and the resolution treated as if passed.

The company concluded that:

> "In the present case, Perfect Gate's vote was irrational. No rational shareholder could consider that it was in anyone's interest (let alone those of shareholders) for the Company to go into insolvent liquidation. Absent a restructuring, there will be no returns to shareholders or creditors. The capital reduction itself causes no diminution in the shareholders' equity. If there is a restructuring, the position of shareholders and creditors will only be improved."

(m) However, during his oral submissions at the hearing, Mr. Lowe said that he was no longer relying on the irrationality ground. He said that the chairman was right to disallow Perfect Gate's vote on the basis that Perfect Gate had acted with a view to extorting funds and therefore illegally. The ransom demands (and impropriety) to which the chairman had referred in his evidence and to which the company had referred in its announcements was a sufficient justification and ground in law. In the petitioner's note filed after hearing the company's position was set out as follows:

> "(a) the attempt to seek an improper financial benefit in return for a vote on a company that is otherwise liable to face liquidation was a dishonest use of a threat ('menaces') to get money which Perfect Gate had no right to receive in return for voting for the resolution (colloquially extortion).
>
> (b) dishonesty is an objective question and is the same in civil and criminal law (see Ivey v Genting Casinos UK Ltd [2018] AC 391). Most reasonable right-thinking businessmen would regard Perfect Gate's behaviour as unacceptable.
>
> (c) since this took place in Hong Kong statutory illegality would be a matter of Hong Kong law. It is sufficient that the conduct is dishonest. Dishonesty even without statutory criminality is sufficient 'illegality' (see Les Laboratoires Servier v Apotex Inc [2015] AC 430 at p446 at [25] per Lord Sumption).
>
> (d) in Clarke v Chadburn [1985] 1 WLR 78 at 80 Megarry VC held that resolutions which were in contempt of court were void for illegality. In the time available it has not been possible to identify any authority precisely in point in which the vote of one member of a class was disallowed.
>
> (e) however, it is submitted that (i) a resolution carried by such a vote would be tainted by illegality and could properly be disallowed consistently with Clarke v Chadburn (ii) as per Regulation 77 of the Articles the Chairman could decide that the decision was vitiated by that vote and disregard it."

(n) Following the hearing, in order to ensure that the company's position was clear, I sent an email to Harneys (copied to Perfect Gate) to confirm this point. I said as follows:

> "The Petitioner's Skeleton Argument set out and relied on two grounds in support of its position that the Chairman at the EGM was entitled to reject and disallow Perfect Gate's vote and/or that the Petitioner is entitled to an order setting aside Perfect Gate's vote. First, that 'in the present case a vote which is cast with a view to

extorting funds from the Company and which has no other discernible basis is not bona fide' (the First Ground): see paragraphs 34–36 of the Petitioner's Skeleton Argument. Secondly, that 'a vote is not bona fide in the relevant sense if no reasonable person would consider the vote to advantage the Company . . . Perfect Gate's vote was irrational.' (the Second Ground): see paragraphs 37–40 of the Petitioner's Skeleton Argument.

As I understood Mr Lowe's oral submissions, and the Petitioner's Note, the Petitioner (i) is now not relying on the Second Ground; (ii) still relies on the First Ground (on the basis set out in paragraph 34 of the Petitioner's Skeleton Argument) by reason of the factual findings which it invites the Court to make in the Petitioner's Note and on the basis that dishonesty constitutes bad faith for this purpose and (iii) now also submits that Perfect Gate's vote was properly disallowed by reason of, and can as a matter of Cayman law (without expert evidence as to Hong Kong law), be treated as void for illegality (on the principle for which Clarke v Chadburn stands as authority)."

(o) Harneys confirmed that my statement of the company's position was correct.

77 Perfect Gate has not challenged Mr. Yen's power to decide on the validity of, and to reject, votes cast at the EGM under art. 77. It has made no submissions on the first point. It does, however, submit that the chairman's decision can be challenged not only on the basis of bad faith but also on the basis that it was *Wednesbury* unreasonable.

(a) In the July 2nd letter (para. 10) Perfect Gate state that:

"We verily believe that [Mr. Yen's] decision at the EGM that the votes in respect of Perfect Gate's Shares not be counted was unlawful, void and of no effect. We also believe that [Mr. Yen's] decision was made in bad faith or was unreasonable in the Wednesbury sense or something similar."

(b) In the affirmation, Mr. Lee On Wai repeated the statement made in the July 2nd letter and added:

"Further, I wish to stress that none of the reasons relied on by Mr Yen to discount Perfect Gate's votes was raised by Mr Yen before the EGM. This was so despite the fact that prior to the EGM, Mr Yen was allegedly aware that Perfect Gate would vote against all resolutions and was allegedly aware of the alleged meetings between Mr Warren Lee and Perfect Gate's representatives [referring to the evidence given by Mr Yen in his fourth affidavit]. As such, it is doubtful whether Mr Yen had duly taken into account all relevant matters before making the decision to discount Perfect Gate's votes."

(c) In the July 5th letter, Perfect Gate expanded on its submission that Mr. Yen's decision was *Wednesbury* unreasonable (and therefore ineffective) as follows:

> "(i) Perfect Gate is a bona fide investor who invested and acquired the shares in the Company after it had been wound up as its' [*sic*] investment in distress assets, and Perfect Gate would not vote irrationally to destroy its own investment.
>
> (ii) Despite having prior knowledge of Perfect Gate's stance on 16 May 2019, the Chairman had made no allegation of irrationality so that Perfect Gate did not have an opportunity to explain its decision before the Chairman's decision, and the Chairman had thus failed to take into account Perfect Gate's explanation, no doubt a relevant consideration.
>
> (iii) In similar vein, no opportunity was allowed for Perfect Gate to answer the allegation made by Mr Warren Lee. The Chairman had thus failed to take into account Perfect Gate's explanation and denial, no doubt a relevant consideration.
>
> (iv) Perfect Gate had tried to contact the Liquidators and offer alternative proposals of restructuring, but was ignored. The Chairman had failed to take those alternatives into account."

(d) The reference to "unreasonable in the Wednesbury sense or something similar" is a quotation from para. 50 of the judgment of Harris, J. in *Convoy Global* (9) (set out above). Mr. Justice Harris had said that he had not been asked to decide whether a challenge could properly be made on grounds other than good faith but he did invite counsel to consider arguing at the subsequent hearing whether "the finality of the decision prevents a challenge on the grounds that is unreasonable in the *Wednesbury* sense or something similar." So he did not consider this point and, as I have explained, no details of whether he made a decision on the point on the subsequent hearing have been provided on this application (Mr. Lowe says he has no information and Perfect Gate have not referred to any decision of Mr. Justice Harris). However, Harris, J. did go on to indicate that he was not immediately persuaded that a challenge on the basis of Wednesbury unreasonableness would be permitted. He said: "It seems to me that a qualification to finality on the grounds that it cannot have been intended to extend to serious error is a more principled and coherent explanation for restricting finality . . ."

(e) Mr. Lee On Wai does not explain what precisely he means by "Wednesbury unreasonableness." However, the term is well known and I take Mr. Lee On Wai to be referring to the grounds of review by the courts of administrative decisions and certain contractual discretions, which were

summarized by Lady Hale in *Braganza* v. *BP Shipping Ltd.* (2) ([2015] 1 W.L.R. 1661, at paras. 23–24):

> "23. . . . Lord Diplock when summarising the grounds of judicial review in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410:
>
> > 'By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" . . . It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'
>
> 24. The problem with this formulation, which is highlighted in this case, is that it is not a precise rendition of the test of the reasonableness of an administrative decision which was adopted by Lord Greene MR in *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233–234. His test has two limbs:
>
> > 'The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.'
>
> *The first limb focusses on the decision-making process—whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome—whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."* [Emphasis added.]

(f) Not only does Mr. Lee On Wai not explain the meaning of *Wednesbury* unreasonableness but he also fails to cite any authority, or principle, supporting its application to decision making by a chairman at a shareholders' meeting. I have sought to assist Mr. Lee On Wai and Perfect Gate by finding and citing authority which seems to me to explain the meaning of the legal principle on which it relies (because the term is in truth a term of art) but I do not consider that I can or should seek to fill the gaps in its case by speculating on the submissions that it might have made

had it addressed the issue fully and properly. Mr. Lee On Wai does, as I have explained, use without acknowledgement, a phrase lifted from a passage in Mr. Justice Harris's judgment in *Convoy Global* (9) in which he invited further argument on whether a chairman's decision could be challenged on the basis of *Wednesbury* unreasonableness but he did not discuss further or decide the point and in fact went on to indicate that he did not as then advised think that such a ground of challenge was available.

(g) I note that in the July 9th letter, Perfect Gate refer to the challenge to Mr. Yen's decision in Hong Kong being based on an allegation of bad faith based on Perfect Gate's claim that the liquidators failed to respond to the concerns of Perfect Gate prior to the EGM and that certain issues were raised as to Mr. Yen's credibility because of his firm's alleged financial interest in the post-liquidation restructuring being successfully completed and criticisms of him in a previous Hong Kong court case. However, I must decide this application based on the evidence filed and submissions made by Perfect Gate in this court and not on evidence or matters raised by it in the Hong Kong court.

78 Having reviewed the evidence and submissions as summarized above, my conclusion on the first issue is as follows. It seems to me that the construction of art. 77 adopted by Mr. Justice Harris in *Convoy Global* is right and I agree with his analysis and approach. Article 77 applies in three situations: where there has been an objection to a shareholders' qualification to vote; where an error has been (or would be) made by counting votes which ought not to be counted (or which could have been rejected); and where an error has been (or would be) made by rejecting votes that ought to have been counted. The operation of the article is also subject to a procedural condition, namely that the objection or error must be brought to the attention of the meeting and the chairman at the meeting. The article envisages that the objection can vitiate and invalidate the result of the meeting. This only occurs if the votes that have been or would be wrongly admitted or rejected would change the outcome of the meeting. But for vitiation to occur and be possible, there must be a decision on whether there has been (or would be) an error or proper objection. It is only if there has been (or would be) such an error or proper objection that the outcome of the meeting could be affected at all. Therefore, it is implicit that the chairman must decide whether there has been (or would be) an error or proper objection. I say has been or would be, because the article is addressing the position of the chairman after the casting of the votes and before the chairman has taken his decision. The chairman has to consider whether there would be an error or proper objection if the votes cast were admitted.

79 As regards the second issue:

(a) It seems to me that, as a matter of principle, Cayman law follows English law, and Hong Kong law, to the extent consistent with the English authorities. Henderson, J. applied the English authorities in *Tempo Group* (15) and assumed that decisions taken by the chairman of an EGM in bad faith were invalid (although he was considering a case in which the EGM itself was a nullity because of the dishonesty and fraud of those who convened and conducted the meeting).

(b) It is clear that the chairman's decision can be set aside on the basis of bad faith. The burden of proof is on the person asserting bad faith (Perfect Gate) and as *Kosmin & Roberts* point out, the "court will require cogent evidence of fraud or bad faith before it will be prepared to set aside the chairman's ruling."

(c) I do not consider that Perfect Gate has established on the evidence bad faith on the part of Mr. Yen.

(i) Perfect Gate appears to make two main points based in both cases on the liquidators' and Mr. Yen's failure to contact it to establish its position. First, it is said that Mr. Yen was wrong to conclude that Perfect Gate was behaving irrationally and had decided to vote against the resolutions without a proper justification. Had he approached and asked Perfect Gate he would have found out that Perfect Gate had understandable and commercially rational reasons for deciding to vote against the recapitalization proposals. Secondly, Mr. Yen was wrong to conclude that Perfect Gate was behaving improperly and to believe Mr. Warren Lee's assertions and evidence as to Perfect Gate's conduct. Had Mr. Yen approached and asked Perfect Gate he would have found out that Perfect Gate had not (or at least that it claimed not to have) authorized any person to make ransom demands or attend meetings with Mr. Warren Lee.

(ii) Perfect Gate asserts that Mr. Yen's decision was made in bad faith but does not explain how. Perfect Gate does not show how Mr. Yen's alleged failures go to his *bona fides*—show that he knew or must be taken to have known that he had no (proper) grounds for disallowing Perfect Gate's votes or how they undermine his evidence of an honest belief based on legal advice that he was entitled to do so.

(iii) Mr. Yen's alleged omissions seem more relevant to Perfect Gate's argument that his failure to approach it before taking his decision at the EGM resulted in him being unaware of certain relevant matters so that his decision was flawed on *Wednesbury* grounds. Perfect Gate says that Mr. Yen failed, when deciding to exclude its votes, to take into account

relevant matters, namely the answers it would have given had it been approached to explain why it was voting against the restructuring or Mr. Lee Warren's allegations and evidence. I will consider shortly whether that is a proper ground for challenging the chairman's decision.

(iv) I have considered whether it could be said that Mr. Yen's failure to ask Perfect Gate for a response to his concerns and to set out its position on Mr. Warren Lee's evidence (or the liquidators' failure to respond to Mr. Lee On Wai's calls) before the EGM could constitute evidence of bad faith on the basis that this conduct can be treated as evidence that Mr. Yen did not have an honest belief that the events to which Mr. Lee Warren referred had happened or that Mr. Warren Lee's evidence could not be relied on (or that Mr. Yen intended to disallow Perfect Gate's votes irrespective of Perfect Gate's real position and whatever the true position was).

(v) But I do not think that such an argument is available on the evidence. Perfect Gate has provided no evidence to support such a conclusion. Mr. Yen has sworn an affidavit to confirm that he acted properly based on credible evidence of impropriety and wrongdoing by Perfect Gate (he referred to Perfect Gate's demands for ransom payments which was considered to be unethical and illegal). There is no evidence that challenges Mr. Yen's evidence as to why he took the decision to exclude Perfect Gate's vote (that he made his decision taking into account and relying on the matters set out in his fourth affidavit including the alleged illegality and dishonest conduct of Perfect Gate) or to show that he did not believe (or could not have believed) Mr. Warren Lee's statements and evidence.

(vi) The evidence shows that Mr. Yen took legal advice before reaching his decision. This supports the conclusion that he adopted a proper process before deciding on how to deal with the objection raised. In their letter to WTL dated June 4th, 2019, Michael Li confirmed that Mr. Yen took legal advice before reaching his decision (I note that they refer to him having taken advice on Hong Kong and not Cayman law but since Cayman law on this issue is not materially different from the law of Hong Kong this is not in my view a serious or vitiating failure).

(vii) As regards the liquidators' failure to approach Perfect Gate, it is certainly surprising that such a large shareholder was

not approached and its support sought at an early stage in the restructuring process. One would have expected the liquidators to take a proactive approach. However, even if Mr. Lee On Wai did make a number of calls to the liquidators which were not answered, Perfect Gate failed to set out its position in writing until May 16th (having been aware since December 28th, 2018 of the proposed dilution to its position by reason of the announcement of that date which dealt specifically with Perfect Gate's position). As soon as Perfect Gate had put its position in writing, Mr. Warren Lee approached it to discuss its position. The evidence does not indicate or permit the inference that the failure to engage or the delay in engaging with Perfect Gate was done in bad faith.

(viii) Perfect Gate also say that Mr. Yen was wrong to conclude that it was behaving irrationally. Mr. Lee On Wai submits that his evidence demonstrates that Perfect Gate behaved rationally and came to a view as to how to vote based on a reasonable assessment of the impact on Perfect Gate and the fairness of the recapitalization proposal (in view of other similar resumption proposals that had been previously concluded). But irrationality was not one of the reasons relied on by Mr. Yen according to his evidence nor was this a reason given in the EGM minutes or the May 29th Hong Kong Stock Exchange announcement (although I do note that Michael Li do mention irrationality as one of the grounds of Mr. Yen's decision in their June 4th letter, with Mr. Lee Warren's allegations). But even if Mr. Yen was mistaken in his view as to Perfect Gate's apparent irrationality, this would not be evidence of or demonstrate bad faith. The fact that Perfect Gate had a commercially rational basis for its refusal to vote in favour of the recapitalization proposal would not prevent Mr. Yen honestly (and reasonably) believing that he was entitled to and should exclude its vote on the basis of conduct which appeared to him to have been taken by representatives of Perfect Gate and demonstrated illegality and impropriety.

(ix) It is true that Mr. Yen's evidence is that this conduct was only one of a number of the matters on which he relied. However, it was clearly one of the important factors. The significance of the allegations of unlawfulness and improper conduct are supported by the content of the EGM minutes and the May 29th Hong Kong Stock Exchange announcement (contemporaneous documents), both of

which refer to "impropriety" as being the basis for the challenge and objection to Perfect Gate's votes.

(x) I do not consider that I need to or should make all the findings of fact which the company invites me to make (see para. 71 above). As I explain below, it seems to me that Mr. Lee On Wai's evidence constitutes a denial that Mr. Lau and Mr. Kwan were properly authorized to represent Perfect Gate and of dishonesty on the part of anyone so authorized. Resolution of these conflicts in the affidavit evidence requires cross-examination. But these issues do not need to be resolved. The key issue is whether there is any or sufficient evidence to support a finding of bad faith on the part of Mr. Yen and whether Perfect Gate has made good its assertion of bad faith (Perfect Gate bears the burden of proof on this issue). I am satisfied that it has not.

(d) I have also considered whether Mr. Yen's decision could be set aside if the legal advice he had received was wrong so that it could be said that he had made, or his decision was based on, an error of law. This was not a point that Perfect Gate relied on although I did raise the issue with Mr. Lowe:

(i) No authorities have been cited to show that error of law is sufficient and proper citation of authority is needed to deal with the point properly.

(ii) I note that in the passage from *Shackleton* set out above it is said that in addition to bad faith the chairman's decision may be set aside if there is evidence of manifest error or that the chairman has acted on a mistaken principle. Manifest error requires the error to be clear and obvious. Mistaken principle appears to require a fundamental error affecting the counting or analysis of the votes (see the *Re Capital* decision cited by *Shackleton on the Law & Practice of Meetings*).

(iii) I also note Mr. Justice Harris's preliminary *dictum* in *Convoy Global* (10) that a serious error was likely to be sufficient. I also note that Pollock, M.R. in *Wall* v. *Exchange Inv. Corp.* (15) refers to "misconduct" in addition to fraud (he also sets out the principle that a challenge to a chairman's decision can be made on the same grounds as a challenge to a party appointed arbitrator—and perhaps expert—but I have received no submissions or authorities on the law governing or permissible scope of such a challenge).

(iv) For the purpose of the present application, since the error of law issue has not been raised by Perfect Gate, it cannot be

relied on to support its opposition to the summons. In any event, it has not been established either that error of law is sufficient or that there has been an error of law in the present case.

(v) I would say that, as presently advised and based on Mr. Lowe's submissions in the petitioner's note, it seems to me that the dishonest and illegal conduct of the kind alleged against Perfect Gate is capable of justifying the exclusion of its shareholders' vote (although I do not accept that dishonesty is solely an objective standard—it is necessary to consider the subjective state of mind of the defendant as well):

(A) The judgment in *Clarke* v. *Chadburn* (4) establishes that resolutions tainted by illegality (and which are passed to carry into effect an illegal purpose) may be treated as void.

(B) The *ex turpi causa* principle is capable of extending to dishonesty. As Lord Sumption said in *Les Laboratoires Servier* v. *Apotex Inc.* (10) ([2015] A.C. 430, at para. 25):

> "The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as 'quasi-criminal' because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered

by Flaux J in *Safeway Stores Ltd v Twigger* [2010] Bus LR 974."

(C) A demand for a secret ransom payment for an improper financial benefit (and an offer to conceal the manner in which the payment or benefit was provided) in order to prevent the shareholder from voting against a resolution is capable of constituting dishonesty and deception (I note that contracts whose object is the perpetration of a fraud on shareholders are treated as illegal—see *Begbie* v. *Phosphate Sewage Co.* (1) (L.R. 1. Q.B. 491).

(D) The fact that the ransom payment was eventually not paid is not of itself a sufficient defence. The voting on the resolution can be seen as a step taken to put into effect the dishonest scheme and the shareholder would need to provide clear evidence of repentance and disengagement from the dishonest scheme.

(vi) However, I do not consider that is permissible for me to make a finding of dishonesty against Perfect Gate without there being cross-examination of the witnesses. Mr. Lee On Wai has made a blanket denial that any authorized representatives attended meetings with Mr. Warren Lee or that anyone was authorized by Perfect Gate to make improper (ransom) demands and that seems to me to constitute a denial of dishonesty by Perfect Gate.

(vii) But I would add that I do not regard Mr. Lee On Wai or Perfect Gate as having given a comprehensive or satisfactory response to the allegations (which Perfect Gate has known about at least since Michael Li's letter to WTL of June 4th). Mr. Lee On Wai does not deal in his evidence specifically with Mr. Warren Lee's allegations and does not mention Mr. Lau or Mr. Kwan nor does he deny that they had a connection with Perfect Gate. Nor has Perfect Gate ever provided an explanation as to who these individuals are and why they held themselves out as authorized to act for Perfect Gate or why Perfect Gate's solicitors put them forward and nominated them as representatives of Perfect Gate (I accept that Mr. Warren Lee does not explain how Mr. Lau or Mr. Kwan were or said they were connected with Perfect Gate, although his evidence is that they were put forward as representatives of Perfect Gate by Perfect Gate's Hong Kong solicitors and that seems a credible basis for believing that they were authorized to act for Perfect Gate).

(e) Perfect Gate relies on *Wednesbury* unreasonableness as a basis for setting aside Mr. Yen's decision. However, Perfect Gate has not established that this is sufficient in law. There is no authority cited which supports this proposition and I am not able to accept that it is good law on this application (this is a point which requires full argument and citation of authority). Nor do I consider that *Wednesbury* unreasonableness can be treated as establishing bad faith or misconduct, which seems to me to connote deliberate wrongdoing.

(f) I would finally add that since the company and the liquidators have not relied on the irrationality ground for disallowing Perfect Gate's votes it has not been necessary for me to consider Mr. Justice Harris's judgment in *Sunlink* (14) and the question of whether it would be followed in this jurisdiction (although I did refer Mr. Lowe to the article by Mr. William Wong in the *Law Quarterly Review* arguing that irrationality was not the correct test—see (2011), 127 LQR 522). It seems to me that the principle justifying the rejection of a vote on the basis of irrationality (particularly a negative vote) by a shareholder (particularly a shareholder who has neither the votes to pass or veto the relevant resolution) requires further elucidation and analysis. I accept that the authorities indicate that bad faith may in some cases be inferred where a shareholder reaches a decision which no reasonable shareholder could properly reach but it is far from clear that a bad faith vote can be disallowed unless the shareholder is otherwise subject to a restriction which requires him to have regard to others' interests. It might be argued that the exercise by shareholders with a *de facto* blocking power of a statutory power to approve a capital reduction is subject to the same requirements that apply to majority shareholders exercising the statutory power to amend the articles (namely that they exercise the power *bona fide* and in the interests of the company—or all shareholders—as a whole)—even though court approval is required—or that this requirement applies whenever the issue being voted on centrally involves the interests of the company, as in the case of the restructuring of an insolvent company, but the analysis is far from straightforward and the justification for overriding the shareholder's freedom to decide far from clear.

Order accordingly.

Attorneys: *Harney Westwood & Riegels* for the company and the liquidators.

[2019 (2) CILR 356]

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED (in liquidation)

GRAND CT. (Segal, J.) July 22nd, 2019

Companies — reduction of share capital — confirmation by court — requirements for confirmation: (i) shareholders treated equitably; (ii) purpose and effect of capital reduction properly explained to shareholders; (iii) creditors' interests unaffected or properly safeguarded; (iv) capital reduction for discernible purpose and proper understanding of commercial rationale; and (v) special resolution reducing capital validly passed

Companies — arrangements and reconstructions — confirmation by court — court can make conditional order sanctioning scheme of arrangement, e.g. if parallel scheme process overseas

A company sought an order confirming a capital reduction and an order sanctioning a scheme of arrangement.

Liquidators had been appointed in Hong Kong for the company, which was incorporated in the Cayman Islands and had its shares listed on the Hong Kong Stock Exchange. As part of a post-liquidation restructuring of the company, the liquidators had negotiated a series of agreements and arrangements that, if implemented, would result in the company being able to continue as a going concern and result in the termination of the winding-up proceedings. The company and the liquidators had promoted schemes of arrangement with the company's creditors in the Cayman Islands and in Hong Kong.

The restructuring would involve the company acquiring the shares in another company, obtaining an injection of new capital in return for the issue of new shares to the capital providers and discharging the claims of all creditors by a part payment of the sums owed to them. The restructuring involved a number of steps. The company would reduce the nominal value of its shares (to eliminate accumulated losses and permit the issue of new shares), which required a special resolution and approval of the court; increase its authorized share capital, which required shareholder approval; enter into subscription agreements with the new capital providers; arrange a public offer of further shares; issue new shares to the capital providers and those who participated in the public offer; and promote a scheme of arrangement with its creditors. The schemes required the approval of the

Grand Court (as regarded the Cayman scheme) and the Hong Kong court (as regarded the Hong Kong scheme).

The restructuring would have a significant impact on the company's existing shareholders. They would retain their shares but their interest in the company would be significantly diluted. Perfect Gate Holdings Ltd. ("Perfect Gate") held 23% of the company's share capital. The proposed restructuring significantly diluted its interest in the company. At an EGM, a special resolution was passed approving the capital reduction. Perfect Gate's votes against the resolution had been disallowed by the chairman of the EGM. The company and the liquidators applied for a declaration that the resolutions proposed at the EGM had been validly passed. The Grand Court (Segal, J.) granted that declaration (that judgment is reported at 2019 (2) CILR 302).

The company, acting by its liquidators, applied for an order confirming the capital reduction under s.15 of the Companies Law (2018 Revision) and an order sanctioning the scheme of arrangement between the company and its creditors under s.86 of the Law. The company had also applied to the Hong Kong court to sanction the Hong Kong scheme. That application was opposed by Perfect Gate.

Section 14 of the Companies Law (2018 Revision) provided: "Subject to . . . confirmation by the Court, a company limited by shares . . . and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way . . ." Section 15(1) provided: "Where a company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction."

Section 16(1) of the Law provided:

"The Court, if satisfied with respect to every creditor of the company who under section 15 is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit."

At the scheme meeting held in Hong Kong, the resolution approving the scheme of arrangement was passed by 90.9% in number of the scheme creditors present in person or by proxy or authorized representative, holding 93.62% of the aggregate principal amount of the scheme claims represented by those scheme creditors present and voting. The parallel scheme in Hong Kong was approved by the same majorities. Approximately half of all known scheme creditors attended the scheme meeting. At the convening hearing before this court, approximately 82% of the scheme creditors by value had indicated their commitment to vote in favour of the scheme.

The company applied for the confirmation of the reduction of its share capital and for the sanctioning of the scheme of arrangement.

The company and the liquidators submitted that the requirements for confirmation of the capital reduction were satisfied: First, the previous judgment had determined the validity of the special resolution approving

the capital reduction and no appeal had yet been brought by Perfect Gate against that judgment; secondly, the capital reduction related only to ordinary shares and applied to each shareholder equally in proportion to the number of shares they held, so that shareholders were treated fairly, further, the capital reduction itself would not adversely impact shareholders; thirdly, a proper explanation of the capital reduction and the capital restructuring had been provided to the shareholders; fourthly, the capital reduction itself had no impact on creditors, the assets of the company would remain intact (with no return to shareholders). Indeed, the capital reduction was part of the post-liquidation reorganization which would benefit the creditors by ensuring that they received a higher recovery under the scheme than if the corporate reorganization did not proceed; and fifthly, the capital reduction was a necessary part of the overall post-liquidation reorganization which was for the benefit of the company's creditors and shareholders. With regard to the sanctioning of the scheme of arrangement, the company submitted that all the requirements for the sanction of the Cayman scheme had been satisfied.

Perfect Gate submitted that the capital reorganization was unfair to existing shareholders because it effected too large a dilution of their interest in the equity.

Held, ordering as follows:

(1) The requirements for confirmation of a capital reduction were (a) the resolution reducing capital must be a validly passed special resolution; (b) the shareholders (or different classes of shareholders) must be treated equitably; (c) the proposals must have been properly explained to the shareholders so that they could make an informed decision; (d) the interests of creditors must be unaffected or properly safeguarded, so that the proposals did not operate to their detriment; and (e) the reduction must be proposed for a discernible purpose (paras. 15–16).

(2) The court was satisfied that the requirements for confirmation of the capital reduction were satisfied in the present case and it was appropriate to confirm the reduction of capital. The evidence demonstrated that (a) the special resolution required by s.14 of the Companies Law had been duly passed; (b) all shareholders had been treated uniformly and equitably in relation to the capital reduction; (c) the circular sent to shareholders properly explained that part of the post-liquidation restructuring and capital reorganization relating to, and the terms and impact of, the capital reduction; (d) the discernible purpose of the capital reduction was clear in that it was a necessary step in the capital reorganization and was required to permit the critical capital raising process to proceed; and (e) the interests of the company's creditors were clearly protected and the position of creditors improved by the post-liquidation restructuring of which the capital reduction was a part. Perfect Gate complained that the capital reorganization was unfair to existing shareholders because it effected too large a dilution of their interest in the equity but this was not

an effect of the capital reduction with which the court was primarily concerned. Perfect Gate's complaint arose not from the capital reduction but from the decision to increase the company's share capital, enter into the subscription agreements and undertake the capital raising exercise on the terms agreed by the liquidators. Perfect Gate had not shown that there was a proper ground to challenge those decisions. Even if it was appropriate for the court to have regard to the treatment of shareholders under transactions closely connected with the capital reduction, the court was not satisfied that there was evidence of any relevant unfairness that would justify a refusal to confirm the capital reduction. The approach to the dilution of the existing shareholders appeared to be a reasonable one in the circumstances. Furthermore, Perfect Gate's failure to oppose the confirmation of the capital reduction meant that any issues arising out of its opposition to the summons were to be given considerably reduced weight. The validity of the special resolution passed at the EGM was a particularly important factor on the application to confirm the capital reduction as it was a precondition to the court's jurisdiction to confirm. The court should therefore be cautious about confirming the capital reduction while doubts as to the validity of the resolution existed. It had been open to Perfect Gate to notify the court that it intended to appeal the judgment confirming that the special resolution had been validly passed before the hearing or to seek a stay of the judgment or an adjournment to give it time to decide whether to lodge an appeal. It had taken none of those steps and remained silent. The judgment was therefore effective and determined that the special resolution was valid. It would be wrong in these circumstances and in view of the need for the confirmation order to be made urgently to permit the post-liquidation restructuring to proceed to delay making the confirmation order to see whether Perfect Gate wished to appeal the judgment (paras. 18–20).

(3) The court was satisfied that the terms of the convening order and the applicable statutory provisions had been complied with. The court was also satisfied that matters relating to the voting issue had been complied with. The scheme had comfortably obtained the necessary statutory majorities in favour and a significant number of creditors had attended the scheme meeting. The scheme creditors attending the meeting appeared to have been fairly representative of the class and the court had no reason to believe that the majority were acting in bad faith or that they were seeking to promote interests adverse to those of the class. The court was also satisfied that an intelligent and honest creditor of the company could reasonably consider the scheme to be in his best interests. The court was not required to be satisfied that the scheme was the only fair scheme or even the best scheme available. The scheme offered creditors a better return (albeit a modest return) than would probably be available if the liquidators were required to realise the company's assets and continue the liquidation. The court was not aware of any blot on the scheme. The sanction order should not, however, become effective unless and until the Hong Kong court sanctioned the Hong Kong scheme.

It was important for the court to retain control over the scheme process, in particular the time at which its scheme became effective. It would not be acceptable and in the interests of scheme creditors if the court were to sanction unconditionally the Cayman scheme and then there were to be a delay in the Hong Kong court's decision on the application to sanction the Hong Kong scheme. There was no risk of the Cayman scheme being implemented if the Hong Kong scheme were not sanctioned but there were other risks to be managed. The sanction of the Hong Kong scheme was a condition to implementation of the Cayman scheme and the application for sanction was subject to opposition, the precise grounds of which were unclear. There was a sufficient degree of uncertainty both as to the outcome and the timing of the Hong Kong court's decision to require caution. Therefore the court decided that the sanction order should not be sealed until the Hong Kong court had decided to sanction the Hong Kong scheme and that this court should retain the ability to make further orders if that did not happen within the near future (paras. 34–35).

Cases cited:

(1) *Fiberweb plc*, *Re*, [2013] EWHC 4653 (Ch), considered.
(2) *Lombard Medical Technologies plc*, *Re*, [2014] EWHC 2457 (Ch); [2015] 1 BCLC 656, applied.
(3) *Man Group plc*, *In re*, [2019] EWHC 1392 (Ch), applied.
(4) *Santiago Pipelines Co., In re*, 2012 (2) CILR 343, applied.
(5) *SPhinX Group, In re*, 2014 (2) CILR 152, applied.
(6) *Telewest Comms. plc (No. 1)*, *Re*, [2004] EWCA Civ 728; [2005] 1 BCLC 752; [2005] BCC 29, applied.

Legislation construed:

Companies Law (2018 Revision), s.14: The relevant terms of this section are set out at para. 13.
s.15(1): "Where a company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction."
s.16(1): The relevant terms of this sub-section are set out at para. 14.
s.86(2): "If a majority in number representing seventy-five per cent in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company."

Companies Act 2006 (c.46), s.899:
"A compromise or arrangement sanctioned by the court is binding . . ."
J. Wood for the company and the liquidators.

1 **SEGAL, J.:**

Introduction

On July 16th, 2019, I heard two applications (together, "the applications") made by China Agrotech Holdings Ltd. (in liquidation) (now Da Yu Financial Holdings Ltd.) ("the company") acting by its Hong Kong liquidators. The company's liquidators are Stephen Liu Yiu Keung and David Yen Ching Wai ("Mr. Yen") of Ernst & Young Transactions Ltd. The company and the liquidators were represented at the hearing by Mr. Jayson Wood of Harney Westwood & Riegels ("Harneys").

2 The first application was for an order confirming a capital reduction under s.15 of the Companies Law (2018 Revision) ("the Companies Law"). The second application was for an order sanctioning a scheme of arrangement between the company and its creditors under s.86 of the Companies Law.

3 The company is incorporated in the Cayman Islands and the liquidators were appointed by the Hong Kong court on August 17th, 2015. The company's shares were listed on the Main Board of the Hong Kong Stock Exchange (but trading in the shares has been suspended since September 18th, 2014).

4 The capital reduction and the scheme are part of a post-liquidation restructuring of the company. The liquidators have negotiated a series of agreements and arrangements that, if implemented, will result in the company being able to continue as a going concern (and retain and realise the value of its Hong Kong listing) and result in the termination of the winding-up proceedings. The company and the liquidators have promoted schemes of arrangement with the company's creditors in this court and in Hong Kong and are seeking this court's confirmation of the reduction of capital.

5 At the end of the hearing, I made orders confirming the capital reduction and sanctioning the scheme (but providing, in relation to the latter, that the order only be sealed in circumstances described below). I indicated that I would give my reasons in writing, which I now do.

The background

6 The background to the capital reduction and scheme is set out in my judgment dated July 16th, 2019 ("the judgment").

7 The judgment dealt with a dispute concerning the validity of the resolutions voted on at an extraordinary general meeting of the company held on May 22nd, 2019 ("the EGM"). One of the resolutions was a special resolution approving the capital reduction. The validity of the resolutions had been challenged by a shareholder of the company, Perfect Gate Holdings Ltd. ("Perfect Gate"), who voted against the resolutions. The company and the liquidators applied by summons dated June 12th, 2019 ("the summons"), for a declaration that the resolutions proposed at the EGM had been validly passed and that the decision of the chairman at the EGM (Mr. Yen) to disallow Perfect Gate's votes and to declare the resolutions as passed was binding and effective. I granted the company's application for a declaration and made an order that the resolutions proposed at the EGM were validly passed as declared by the chairman at the meeting.

8 The procedural history of the applications is also set out in the judgment. I would note that my order directing that a meeting of creditors be convened to consider and vote on the Cayman scheme was made on April 30th, 2019 ("the convening order").

The proceedings in Hong Kong

9 The company's (and the liquidators') application to the Hong Kong court to sanction the Hong Kong scheme is listed to be heard on July 22nd, 2019. That application is opposed by Perfect Gate. At the hearing, I asked Mr. Wood to explain the basis on which Perfect Gate considered that it had standing to oppose and the grounds on which Perfect Gate opposed the Hong Kong sanction application. He told me that he was unable to provide details to the court since Perfect Gate's case had yet to be fully particularized. Perfect Gate is not required to file its further skeleton argument until 4.30 p.m. Hong Kong time on July 18th, 2019. Although Perfect Gate has clearly already filed a skeleton argument and should have filed further evidence by July 12th, copies of these documents were not provided to the court or their contents explained. In any event, Mr. Wood confirmed that Perfect Gate had not notified the company and the liquidators that it opposed the application to sanction the Cayman scheme. Nor had it notified the company and the liquidators that it opposed the application to confirm the capital reduction. Perfect Gate had not given notice of its opposition or made an application to oppose the sanction of the Cayman scheme or the capital reduction.

10 There are three further applications before (or about to be issued in) the Hong Kong court. Details of these proceedings were provided by Mr. Greig of Harneys in his fourth affirmation dated July 15th, 2019. First, as I explained in the judgment, on June 26th, 2019 Perfect Gate issued an originating summons against the company and Mr. Yen, seeking a declaration that Mr. Yen's decision as chairman at the EGM to exclude its votes

was unlawful and that the purported special resolution proposed at the EGM was also unlawful ("Perfect Gate's application for declaratory relief"). Secondly, Mr. Yen intends to file a summons to strike out Perfect Gate's application for declaratory relief ("the strike-out summons") on the basis that it is bound to fail since Perfect Gate is bound by the judgment (which deals with the validity of the EGM resolutions) and because it is an abuse of process for Perfect Gate to seek to re-litigate matters which have been conclusively determined by this court. Thirdly, Perfect Gate has applied for retrospective leave to bring Perfect Gate's application for declaratory relief against the company. Directions are to be sought at the July 22nd hearing in relation to the further conduct of these three applications.

11 Various documents were exhibited to Mr. Greig's fourth affirmation. These included the company's announcement dated July 11th, 2019. In that announcement the company notified shareholders of the judgment and provided an update on the status of the Hong Kong proceedings together with a revised expected timetable for the proposed restructuring. The announcement also dealt with the possibility and impact of possible further applications by Perfect Gate in relation to the judgment. The announcement stated that:

> "In the event that Perfect Gate makes an application for leave to appeal the [judgment] or order [*sic*] for suspension of execution of the [judgment] by 23 July (Cayman Islands time), the Company will announce its withdrawal of the [public offer] by 25 July 2019. Refund cheques in respect of the [public offer] will be despatched to the applicants within five Business days from the announcement. In the[se] circumstances, the entire Proposed Restructuring will lapse and the Liquidators will proceed to conclude the liquidation and the Company will be dissolved."

12 At the hearing, I sought clarification of the timetable and the company's expectations regarding the closing of the post-liquidation restructuring. Mr. Wood informed the court that he understood that in order for the restructuring to be completed within the timetable laid down by the Hong Kong Stock Exchange and the Hong Kong Securities and Exchange Commission, it was necessary for the sanction of the Cayman scheme, the sanction of the Hong Kong scheme and the confirmation of the capital reduction to be given by July 24th, 2019. Mr. Wood said that if this was done, and Perfect Gate did not take the steps set out in the July 11th announcement, then the restructuring would be successfully completed. The company and the liquidators were proceeding on the basis that this would happen. Mr. Wood also explained that there had been discussions with the Hong Kong authorities regarding the process and timetable for issuing and listing the new shares in order to expedite the process and ensure that the very tight timetable for completing the necessary steps

could be met. It was important that the various preliminary steps that needed to be completed before the new shares could be issued, including the confirmation of the capital reduction, be taken without any delay. For that reason, it was important that the order confirming the capital reduction was made at the end of or as soon as possible following the hearing (and on an unconditional basis).

Confirmation of the capital reduction—the law

13 The statutory provision permitting a reduction of capital is contained in s.14 of the Companies Law which provides that:

> "Subject to . . . confirmation by the Court, a company limited by shares . . . and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way . . ."

14 Section 16(1) of the Companies Law provides:

> "The Court, if satisfied with respect to every creditor of the company who under section 15 is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit."

15 The company and the liquidators relied on the following statement in the judgment of Jones, J. in *In re Santiago Pipelines Co.* (4) of the matters that the court will take into account when exercising its discretion under s.16(1) (2012 (2) CILR 343, at paras. 12–14):

> "12 . . . The statutory purpose of ss. 15 and 16 of the Companies Law (which are based upon ss. 66 and 67 of the English Companies Act 1948) is creditor and shareholder protection. It was well established that an English court should exercise its discretion in favour of confirming a special resolution for a reduction of share capital if the following three criteria were satisfied. First, the shareholders (or different classes of shareholders) must be treated equitably, although equitable treatment does not necessarily mean equal treatment. Secondly, in circumstances where the company must convene an extraordinary general meeting of its shareholders, the purpose and effect of the proposed capital reduction must be properly explained to them in a circular letter or explanatory memorandum delivered with notice of the meeting, such that they are able to make an informed decision about the merits of the proposal. Thirdly, the court must be satisfied that the interests of creditors are unaffected or properly safeguarded. In the circumstances of these cases the question of shareholder and creditor protection does not arise . . .

13 Based upon two judgments of Harman, J. in *Re Ratners Group Plc* . . . and *Re Thorn EMI Plc* . . . it is now accepted, both as a matter of English law and Cayman law, that there is a fourth criteria. I have to be satisfied that the capital reduction is being done for a 'discernible purpose' but this court has never explained exactly what this means . . .

14 It is now said, as a matter of general principle, that the court must be satisfied in every case that a special resolution to reduce share capital has been passed for a 'discernible purpose' (see *In re ING Secs. (Japan) Ltd.* . . . and *In re China.Com Inc.* . . . In the Cayman context, this means more than merely satisfying the court that the Petitioner has some actual objective in mind and that the capital reduction is not merely an academic exercise which might or might not serve some useful purpose in the future. It means that the court must have a proper understanding of the commercial rationale for the overall transaction of which the capital reduction forms part. Clearly, it is no part of the court's role to second guess the commercial judgment of a company's directors and shareholders but the evidence must demonstrate that they are seeking to achieve some legitimate commercial purpose . . ."

16 During the hearing, I referred Mr. Wood to the following helpful and recent summary of the position (under English law) set out in the judgment of Snowden, J. in *In re Man Group plc* (3) ([2019] EWHC 1392 (Ch), at paras. 11 and 12):

"11. In relation to a reduction of capital, the Court will require satisfaction of the following matters,

a) The resolution reducing capital must be a validly passed special resolution.

b) The shareholders must be treated equitably in relation to the reduction. Shareholders do not all have to be treated in the same manner provided that any unequal treatment is either in accordance with the rights attached to any class or the consent of those affected by such treatment has been properly obtained.

c) The proposals must have been properly explained to the shareholders so that they can exercise an informed judgment upon them.

d) The creditors of the company must be safeguarded so that the proposals do not operate to their detriment, namely that there is a real likelihood that the reduction itself would result in the company being unable to discharge the debts when they fall due.

e) The reduction must be proposed for a discernible purpose.

12 Proposition (a) above arises from the wording of section 641(1)(b). Propositions (b), (c) and (d) are derived from the judgment of Harman J in *Re Ratners Group plc* [1988] BCLC 685 at 687b–d, with the judgment of Norris J in *Re Liberty International plc* [2010] 2 BCLC 665 at para. 11 supplementing proposition (d). Proposition (e) is derived from the judgment of Harman J in *Re Thorn EMI Plc* [1989] BCLC 612 at 616d."

Confirmation of the capital reduction—the company's submissions

17 The company and the liquidators submitted that all five requirements (that is the four requirements identified by Jones, J. together with the first requirement identified by Snowden, J.) were satisfied in the present case:

(a) The first requirement was satisfied because the judgment had determined the validity of special resolution approving the capital reduction. Mr. Wood submitted that while the time period within which Perfect Gate could seek permission to or lodge an appeal of the judgment had not yet expired, no such application had yet been made by Perfect Gate nor had Perfect Gate applied for a stay of execution of the judgment or for an adjournment of the hearing of the company's application for a confirmation order. The court should regard the special resolution as having been validly passed and in the absence of an application by Perfect Gate the court should not delay making the confirmation order.

(b) The second requirement was also satisfied since the capital reduction related only to ordinary shares and applied to each shareholder equally in proportion to the number of shares they hold. All of the shareholders will suffer an equal pro rata dilution of their holdings, but at the same time they will equally enjoy any value add that the restructuring will bring to their shares. Shareholders were treated fairly. Further and importantly, the capital reduction itself will not adversely impact shareholders. It did not involve a reduction in the company's equity, there was no diminution of any liability in respect of unpaid share capital (because there was none) and there was no return of capital to shareholders. The credit in the balance sheet arising from the capital reduction will be applied to eliminate an equivalent amount of the accumulated losses of the company. The capital reduction left the shareholders with proportionately the same number of shares. That will only change if the scheme is approved and the capital reorganization is implemented.

(c) The third requirement was satisfied because a proper explanation of the capital reduction and the capital restructuring had been provided to shareholders. The company had sent a detailed and comprehensive circular to shareholders (of more than 600 pages) containing full information concerning the overall restructuring. It was made clear in the circular that

the purpose of the capital reduction was to further the company's post-liquidation restructuring with a view to the company being able to continue to trade (with a reduced debt burden) and to avoid the liquidators having to continue the liquidation and realise the company's assets (resulting in no recovery for shareholders). The circular had clearly explained the effect of the capital reduction (and the capital reorganization) on the company's existing shareholdings.

(d) The fourth requirement was satisfied since the capital reduction itself had no impact on creditors. The assets of the company will remain intact (with no return to shareholders). Creditors were dealt with in and by the scheme, which required the separate approval of the requisite majority of creditors and the court. Indeed, the capital reduction was part of the post-liquidation reorganization which would benefit creditors by ensuring that they received a higher recovery under the scheme than they would recover if the corporate reorganization did not proceed.

(e) Finally, the fifth requirement was satisfied because the capital reduction was a necessary part of the overall post-liquidation reorganization which was for the benefit of the company's shareholders and creditors. The company is currently insolvent and in liquidation. The capital reduction will enable the company to consummate the conditions of the scheme and allow the company's debt burden to be reduced, thereby returning it to balance sheet solvency and allowing it to continue trading. As the circular sent to shareholders on April 27th, 2019 made clear, the object of the overall corporate restructuring was to "save" the company through an injection of capital from a new investor and others.

Confirmation of the capital reduction—discussion

18 I considered the five requirements or criteria referred to above. In my view they are satisfied in the present case and it is appropriate to confirm the reduction of capital.

19 I am satisfied that the evidence I have seen demonstrates that:

(a) the special resolution required by s.14 of the Companies Law has been duly passed;

(b) all shareholders have been treated uniformly and equitably in relation to the capital reduction;

(c) the circular sent to shareholders properly explained that part of the post-liquidation restructuring and capital reorganization relating to, and the terms and impact of, the capital reduction;

(d) the discernible purpose of the reduction of capital is clear in that it is a necessary step in the capital reorganization and required to permit the critical capital raising process to proceed; and

(e) the interests of the company's creditors are clearly protected and the position of creditors improved by the post-liquidation restructuring of which the capital reduction is a part.

20 I have carefully considered (i) the effect on the application to confirm the capital reduction of the evidence filed and arguments made by Perfect Gate in its opposition to the summons, and (ii) whether it is appropriate to confirm the capital reduction at a time when the period within which Perfect Gate may appeal the judgment has not expired and when the validity of the resolution is in issue in the Hong Kong proceedings:

(a) Perfect Gate has complained that the capital reorganization is unfair to existing shareholders because it effects too large a dilution of their interest in the equity. This is not an effect of the capital reduction, with which the court is primarily concerned. Perfect Gate's complaint of unfair treatment arises not from the capital reduction but from the decision to increase the company's share capital, enter into the subscription agreements and to undertake the capital raising exercise on the terms agreed by the liquidators. It would be necessary for Perfect Gate to show that there was a proper ground to challenge those decisions which it has not done. But even if it is appropriate for the court to have regard to the treatment of shareholders under transactions closely connected with the capital reduction, I am not satisfied that there is evidence of any relevant unfairness that would justify a refusal to confirm, or prevent the court from confirming, the capital reduction. The approach to the dilution of existing shareholders appears to be a reasonable one in all the circumstances. Furthermore, Perfect Gate's failure to oppose the confirmation of the capital reduction means that any issues arising out of its opposition to the summons are to be given considerably reduced weight.

(b) The validity of the special resolution passed at the EGM is a particularly important factor on the application to confirm the capital reduction as it is a precondition to the court's jurisdiction to confirm. Therefore, the court should be cautious about confirming the capital reduction while doubts as to the validity of the resolution exist. However, I have concluded that in the present case it is appropriate to confirm the reduction. It was open to Perfect Gate to notify the court that it intended to appeal the judgment before the hearing or to seek a stay of the judgment or an adjournment of the hearing to give it time to decide whether to lodge an appeal. It has taken none of these steps and remained silent. The judgment is therefore effective and not subject to a stay and determines, in this court, that the special resolution is valid. It would in my view be wrong in these circumstances, and in view of the need for the confirmation order to be made urgently to permit the post-liquidation restructuring to proceed, to delay making the confirmation order to await further developments and see whether Perfect Gate wishes to appeal the judgment. Nor, in my view, does the fact that Perfect Gate's application for

declaratory relief remains outstanding in the Hong Kong court require or justify such a delay. It will be a matter for the Hong Kong court to decide Perfect Gate's application for declaratory relief (and the strike-out summons) in such manner as it considers appropriate. It is to be hoped that inconsistent judgments can be avoided but the issue of the validity of the special resolution for the purpose of this jurisdiction, and therefore for the purpose of the application to confirm the capital reduction, is disposed of by the judgment.

(c) I discuss below, when discussing the same issue in relation to the sanction of the scheme, the possible impact of there being other conditions which have to be satisfied before the capital reduction can be implemented.

Sanctioning the scheme of arrangement—the law

21 The company relied on the summary in the Chief Justice's judgment in *In re SPhinX Group* (5) of the matters to be considered by the court in determining whether or not to exercise its discretion to sanction a scheme of arrangement. After citing the English position as explained by David Richards, J. in *Re Telewest Comms. plc (No. 1)* (6) ([2005] 1 BCLC 752, at paras. 20–22), Smellie, C.J. stated as follows (2014 (2) CILR 152, at para. 4):

"4 From these *dicta*, in order to sanction a scheme which has been approved by the requisite majority of creditors at the court-directed meetings, the court must be satisfied that—

(a) the meetings of the scheme claimants were summoned and held in accordance with the court's order ('the compliance issue');

(b) the scheme was approved by the requisite majority of those who voted at the meetings in person or by proxy ('the voting issue'); and

(c) the scheme is such as an intelligent, honest man acting in respect of his interest might reasonably approve ('the fairness issue')."

22 I would add that, once again, there is a helpful and recent summary of the position (under English law) set out in Mr. Justice Snowden's judgment in *Re Man Group plc* (3) ([2019] EWHC 1392 (Ch), at para. 10):

"10. The function of the Court at a sanction hearing for a scheme is summarised in the following extract from *Buckley on the Companies Acts* on section 899 of the Act which has frequently been cited with approval and applied by this Court:

> ‘Sanction of the court
>
> Once the meetings have approved the scheme, the sanction of the court must be sought. The sanction of the court is not a mere formality. Although the court has an unfettered discretion as to whether or not to sanction the scheme, it is likely to do so, as long as: (1) the provisions of the statute have been complied with; (2) the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (3) the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve . . .
>
> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting. The court will decline to sanction the scheme if the class has not been properly convened and properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme which had been unobserved when it had been approved by members or creditors, but will otherwise be slow to differ from the meeting.”

Sanctioning the scheme of arrangement—the company’s submissions

23 At the scheme meeting, held in Hong Kong on July 5th, 2019, the scheme was approved by the requisite majority of the single class of creditors. The resolution approving the scheme was passed by 90.9% in number of the scheme creditors present in person or by proxy or authorized representative and voting, holding 93.62% of the aggregate principal amount of the scheme claims represented by those scheme creditors present and voting. In total, 22 scheme creditors attended the scheme meeting by proxy or in person holding in aggregate HK$768,270,172.01 by value of scheme claims. The parallel scheme in Hong Kong was approved by the same majorities. Not every scheme creditor attended the scheme meeting. In total, the liquidators are aware of 43 claims totalling HK$1.68bn. Therefore, approximately half of all known scheme creditors attended the scheme meeting. There was no obligation on scheme creditors to attend the scheme meeting, and the proportion of attendees having regard to total scheme claims was significant. The liquidators submit that it was significant that of those scheme creditors who showed sufficient interest to attend and vote on the scheme, the overwhelming majority approved the scheme.

24 At the scheme meeting there were two votes against the scheme admitted for voting purposes. One was disputed and admitted in the sum of HK$1.00 even though the notice of claim lodged by that scheme creditor was for HK$202m. This claim was adjudicated by Mr. Yen as chairman as being a contingent claim and subject to a counterclaim by the company. This was the same approach to this particular scheme creditor as had been taken by the Official Receiver of Hong Kong at the first meeting of the company's creditors held on July 16th, 2015. The company and the liquidators pointed out that even if the claim had been allowed in full for voting purposes, it would not have changed the outcome of the meeting and the resolution approving the scheme would have still been passed by 83.42% of the value of claims (and a majority in number) of scheme creditors present and voting.

25 Based on the proofs of debt that have been submitted to the liquidators, the company's indebtedness is in the approximate amount of HK$1,677.9m. and comprises:

(a) wages, salaries and other employee benefits of approximately HK$2.2m;

(b) directors' fees of approximately HK$2.7m.;

(c) professional fees of approximately HK$2.4m.;

(d) rent of approximately HK$0.9m.;

(e) guaranteed bank loan of approximately HK$61.9m.;

(f) convertible bonds of approximately HK$540m.;

(g) corporate bonds of approximately HK$57.3m.;

(h) liabilities arising from a financial guarantee provided to the company's PRC subsidiaries of approximately HK$198.2m.; and

(i) liabilities arising from a financial guarantee provided to a guarantor of the company's PRC subsidiaries of approximately HK$812.3m.

26 As I have explained in the judgment, the liquidators consider that in the absence of a restructuring of the company's indebtedness as part of and to facilitate the capital reorganization, the only viable alternative is a realisation of the assets within the liquidation of the company and of its subsidiaries. In that event, the likely return to the scheme creditors is zero.

27 In light of this, the liquidators engaged in discussions with the company's major creditors to assess their appetite for a compromise of their indebtedness. The responses from creditors were positive and the liquidators then undertook investigations with a view to identifying

potential new (white knight) investors. Those investigations were successful and the proposed scheme was promulgated in conjunction with support and input from the scheme creditors.

28 At the time of the convening hearing before this court on April 30th, 2019, approximately 82% of scheme creditors by value had indicated their commitment to vote in favour of the scheme.

29 The ultimate objective of the scheme, as part of the broader post-liquidation restructuring, is to realise the value of the company's listing status on the Hong Kong stock exchange for the benefit of the company's creditors. Under the scheme, the company's creditors compromise their claims against the company in consideration for (subject to adjudication of their claims) distributions from (i) HK$80m., being part of the proceeds from the new share subscriptions made by the new investor and by others under a public share offer, and (ii) dividends and recoveries from the company's subsidiaries (however, the liquidators' liquidation analysis indicates that there are not expected to be any dividends or recoveries from the company's subsidiaries). The result for scheme creditors under the scheme is a dividend of approximately 4.3 cents in the dollar whereas, if a restructuring is not effected, scheme creditors will likely receive nothing following the realisation of assets by the liquidators.

30 The company and the liquidators prepared and distributed to scheme creditors a detailed explanatory statement which:

(a) summarized the court process for the scheme to be sanctioned and provided advice for scheme creditors as to how to participate in that process; provided a concise overview of the benefits for scheme creditors if the scheme is implemented; and a timeline of key events;

(b) explained the compromise to be effected by the scheme; the background to and the effect of the transactions proposed in the scheme and why scheme creditors should consider voting in favour of it;

(c) set out the mechanics of the restructuring whereby funds will be raised from new share subscriptions and those funds will be used primarily to purchase 100% of the shares in Yu Ming Investment Management Ltd. ("Yu Ming") for HK$400m. and pay HK$80m. to satisfy the claims of scheme creditors under the scheme;

(d) contained the liquidators' assessment of the recoveries and outcome for creditors in the event that the scheme was not approved and the post-liquidation restructuring did not proceed (in the liquidation analysis);

(e) confirmed that scheme creditors will be paid out rateably and that scheme creditors will have no further claims against the company;

(f) confirmed the liquidators' opinion that scheme creditors were likely to receive a better return through the scheme than through the sale of the company's assets in the liquidation;

(g) set out the conditions precedent to the scheme ("the conditions precedent") which needed to be satisfied before the scheme would become binding and effective. Section 3 of the explanatory statement stated that:

> "The Schemes will become binding and effective on the Company and Scheme Creditors under Cayman Islands law and Hong Kong law if the following conditions are satisfied:
>
> (a) [the requisite majority of creditors vote in favour of the schemes];
>
> (b) [this court sanctions the Cayman scheme] and an office copy of the [sanction order] is delivered to the [Cayman Registrar of Companies];
>
> (c) [the Hong Kong court sanctions the Hong Kong scheme] and an office copy of the [sanction order] is delivered to the [Hong Kong Registrar of Companies].
>
> . . .
>
> As the Schemes are part of the [post-liquidation restructuring and capital reorganization] the Closing of the Schemes is conditional upon:
>
> (a) the completion of the [capital reorganization, including the acquisition of the shares in Yu Ming, the subscriptions for new shares, the private placing and the public offer];
>
> (b) the Company receiving the [HK$80m., being part of the subscription proceeds of proceeds of the subscription and private placing];
>
> (c) the Executive Director of the Corporate Finance Division of the Securities and Futures Commission granting the [consent required because some scheme creditors are also shareholders]; and
>
> (d) the fulfilment of the conditions for the resumption of [the listing and trading of the company's shares] imposed by the [Hong Kong] Stock Exchange.
>
> All of these conditions cannot be waived."

(h) contained information concerning the person from whom the company will acquire shares in the target company, Yu Ming and the new investor; and

(i) set out the interests of the company's directors in the scheme.

31 Certain amendments to the scheme and the explanatory statement were made after the convening order. Paragraph 3 of the convening order required that the scheme and explanatory statement to be sent to creditors be substantially in the form of Schedule B to the convening order. As is normal in large schemes of this kind, it was understood that prior to being sent out it would be necessary for some further amendments to be made to these documents. Following the making of the convening order, the company amended the scheme and the explanatory statement in certain respects so as to improve the explanation of the restructuring proposal to scheme creditors. Those amendments comprised:

(a) amendments required by me;

(b) the correction of typographical, grammatical, and other minor errors;

(c) the insertion of basic details not known at the time of convening order (such as the date and time for the meeting of the scheme creditors); and

(d) the insertion/deletion of information to reflect changes in circumstances which occurred following the convening order. These changes were, in summary, as follows:

(i) amendments were made to include further details of the timing and amount of payments of sums to be advanced to the company by the vendor of the shares in Yu Ming;

(ii) amendments were made to expand and update the explanation on the progress of the restructuring since the appointment of liquidators, including, *inter alia*: (i) the uncooperativeness of the management of the company; (ii) the fact that the liquidators had undertaken a quantitative analysis of the expected return to scheme creditors which estimated a zero return in the event that it became necessary to realise the company's assets within the liquidation if the post-liquidation restructuring failed; (iii) details of the alternative restructuring and resumption proposals considered by the liquidators; and (iv) that the post-liquidation restructuring proposal—put forward by the seller of the shares in Yu Ming and the new investor—presented the best outcome for scheme creditors in the circumstances and was comparable to other successful restructuring proposals that the liquidators had previously handled;

(iii) amendments were made to inform the scheme creditors of the engagement of Lego Corporate Finance Ltd. as a financial adviser and that based on its advice the liquidators were satisfied that there was unlikely to be a better proposal in the short term than the current post-liquidation restructuring proposal;

(iv) amendments were made to include details of the cash consideration provided for participating creditors in comparable schemes of arrangements involving listed companies under (in those cases) provisional liquidation and similar stages of delisting;

(v) amendments were made to include details of the scheme costs, including a breakdown of the costs of the schemes to be paid out of the cash consideration of HK$80m.

32 The company and the liquidators submitted that these amendments were insubstantial so that para. 3 of the convening order had been complied with.

33 The company submitted that in these circumstances all the requirements for the sanction of the Cayman scheme had been satisfied:

(a) As regards the compliance issue, all the requirements of the convening order and the applicable Grand Court Rules had been complied with.

(b) As regards the voting issue, the scheme was approved by the requisite majorities required by s.86 of the Companies Law and the scheme had obtained substantial support.

(c) As regards the fairness issue, the evidence demonstrated that the scheme was one which an intelligent, honest man acting in respect of his interest might reasonably approve. The impact of the scheme on scheme creditors was simply to provide for an extinguishment of their debts in exchange for receiving a part-payment of the amount owing to them in excess of what they would (or were expected to) receive under the alternative to the current post-liquidation restructuring. The proper comparator for these purposes was the outcome of the realisation of the company's assets by the liquidators, which would occur if the post-liquidation restructuring was not approved and implemented. All scheme creditors will receive the same pro rata payment of their outstanding debt and the rights of priority creditors (secured creditors, of whom there appear to be none; preferential creditors totalling approximately HK$215,000 and creditors whose claims rank as liquidation expenses) are protected and preserved.

(d) As regards other issues relevant to the exercise by the court of its discretion:

(i) The court customarily considers whether the scheme will be effective in relevant foreign jurisdictions and will not sanction the scheme if the evidence demonstrates that it will not be. As to this, the main purpose of there being a scheme in Cayman was to ensure that scheme creditors cannot disrupt the smooth operation of the scheme by taking hostile action against the company in its place of incorporation. The scheme will be effective in the other relevant jurisdiction, which is Hong Kong, where the company and its subsidiaries carry on business and where the preponderance of the company's debts are located (most of the company's liabilities are governed by Hong Kong law). The parallel and inter-conditional scheme proposed in Hong Kong will ensure that such liabilities are effectively dealt with and compromised by the scheme.

(ii) The fact that the scheme was conditional on the Hong Kong scheme being sanctioned by the Hong Kong court and subject to the other conditions precedent did not prevent the court from making an order sanctioning the scheme and the court could and should make such an order now without waiting for the Hong Kong court's decision or the satisfaction of the other conditions precedent. Alternatively, the court can and should sanction the Cayman scheme subject to and conditional upon the Hong Kong court sanctioning the Hong Kong scheme. As regards the question of whether the court had jurisdiction to make a sanction order conditional on the satisfaction of certain conditions and when the court should do so, the company and the liquidators submitted as follows:

(A) Section 86(2) of the Companies Law provides that, if the statutory voting majorities are achieved, a compromise or arrangement will be binding "if sanctioned by the Court." The issue was whether, on its proper interpretation, the discretion afforded by s.86(2) permits the court to make a conditional sanction order.

(B) There was no Cayman Islands authority on the point and so regard should be had to the English position since s.899 of the English Companies Act 2006 contains a similar provision.

(C) The leading English authority was *Re Lombard Medical Technologies plc* (2). In this decision, Henderson, J. undertook a detailed analysis of the position in both

England and Australia as regards conditional sanction orders.

(D) In that case the scheme of arrangement in question was subject to conditions which needed to be satisfied before the scheme could become effective. The question was whether the court could sanction the scheme in those circumstances. Henderson, J. held that conditions could be attached to sanction, and in this case, the court could direct that the sanction order not be sealed or not be delivered to the Registrar of Companies until the conditions were satisfied. Henderson, J. stated ([2015] 1 BCLC 656, at para. 24):

> "I can see no reason in principle, however, why the court may not, in an appropriate case, sanction a scheme when there is an outstanding condition which still needs to be satisfied, and direct that the order should not be sealed (or, as in the present case, that the order should not be delivered to the registrar) until the condition has been satisfied."

(E) After reviewing relevant case law, Henderson, J. stated (*ibid.*, at para. 30):

> "In the light of the principles which I have discussed, I agree with Mr Shaw that (to return to the present case) there is no objection in principle either to the limited conditionality of the Scheme (in the sense that its operation was made conditional on the successful completion of the fundraising) or to the solution devised to the problem (whereby the order sanctioning the scheme would not be delivered to the registrar until the condition had been satisfied). There were good commercial reasons for proceeding in this way . . ."

(F) Henderson, J. then proceeded to review the decision of Hildyard, J. in *Re Fiberweb plc* (1) to determine whether that decision might cause him to take a different view. He concluded it did not.

(G) Henderson, J. sanctioned the scheme but directed that the sealed order not be delivered to the Registrar of Companies until the conditions precedent in the scheme were satisfied. He noted ([2015] 1 BCLC 656, at para. 42):

> ". . . the solution adopted in the present case finds some indirect support in previous authority and practice, and seems to me to fall well within the proper scope of the unfettered discretion conferred on the court by section 899(1)."

(H) The company and the liquidators submitted that if the court was concerned about the result of the hearing of the Hong Kong petition on July 22nd, 2019 and its impact on the Cayman Islands scheme, the unfettered discretion afforded by s.86(2) of the Companies Law permitted the making of a sanction order with an accompanying direction that the order not be delivered to the Registrar of Companies unless and until the Hong Kong scheme of arrangement was sanctioned. If that sanction was not given at the hearing in Hong Kong on July 22nd, 2019, the post-liquidation restructuring will collapse in any event.

(I) But they further submitted that, although the court had the power to make a conditional sanction order, it need and should not do so in the present case. The restructuring of the company involved parallel schemes of arrangement in the Cayman Islands and Hong Kong. If the Hong Kong scheme was not sanctioned on July 22nd, 2019, then the restructuring will fail. They noted the following comments made by Hildyard, J. in *Re Fiberweb* (1) ([2013] EWHC 4653 (Ch), at para. 7) and quoted by Henderson, J. in *Lombard Medical* (*ibid.*, at para. 36):

> "My own understanding is that the court has in the past, as a matter of practice, proceeded on the basis and, when alerted to the point, insisted on the bidder confirming to it that the conditions to which the offer was subject have been satisfied or waived, except in circumstances usually arising out of a cross-border context where, for example, the approval of some other court or regulator is required, in which case that conditionality having been explained will ordinarily be accepted."

(J) The company and the liquidators submitted that the same issue of conditionality did not arise in the context of the confirmation of the company's capital reduction. If the capital reduction was confirmed and the order lodged with the Registrar of Companies immediately,

its only effect will be to reduce the par value of the company's shares already in issue. The proportionate interests of the shareholders in the company will not be changed. Even if the Hong Kong scheme of arrangement was not sanctioned at the hearing on July 22nd, 2019 and the post-liquidation restructuring failed, shareholder interests would not be affected. Shareholders did not need the protection of a conditional confirmation order because the capital reduction did not adversely affect their rights and even if the post-liquidation restructuring failed, the shares would be worthless. Furthermore, it was important, in view of the very tight timetable set by the Hong Kong authorities and the process for issuing and listing the new shares pursuant to the capital reorganization that there be no conditionality to the court's order confirming that capital reduction.

Sanction of the scheme of arrangement—discussion

34 I accept the submissions made by the company and the liquidators in relation to the compliance issue, the voting issue and the fairness issue:

(a) I am satisfied that the terms of the convening order (including para. 3) and the applicable statutory provisions have been complied with.

(b) I am also satisfied that matters relating to the voting issue have been complied with. The scheme comfortably obtained the necessary statutory majorities in favour and a significant number of creditors attended the scheme meeting. The scheme creditors attending the meeting appear to have been fairly representative of the class and I have no reason to believe that the majority were acting in bad faith or that they were seeking to promote interests adverse to those of the class.

(c) I am also satisfied that an intelligent and honest creditor of the company could reasonably consider the scheme to be in his best interests. I am not required to be satisfied that the scheme is the only fair scheme or even the best scheme available. The scheme offers creditors a better return—albeit a modest return—than would probably be available if the liquidators were required to realise the company's assets and continue the liquidation.

(d) I would add that I am also not aware of any blot on the scheme.

35 I also accept the submissions of the company and the liquidators on the question of whether the court has the power to sanction schemes subject to the satisfaction of conditions to implementation which are unsatisfied at the hearing date and the question of whether the court can in

effect make its order subject to the satisfaction of certain conditions. I find the analysis and approach of Henderson, J. in *Lombard Medical* (2) to be completely convincing and consider that it should be followed in this jurisdiction. However, contrary to the primary case of the company and liquidators, I consider that the sanction order should not become effective unless and until the Hong Kong court has sanctioned the Hong Kong scheme. It seems to me to be important that this court retains control over the scheme process, in particular the time at which its scheme becomes effective. It would not be acceptable, and in the interests of scheme creditors, if this court were to sanction unconditionally the Cayman scheme and then there was a delay in the Hong Kong court's decision on the application to sanction the Hong Kong scheme (or if the Hong Kong scheme was modified in a manner that was arguably insignificant at a time when this court had already and finally determined the application to sanction the Cayman scheme). I appreciate that there is no risk of the Cayman scheme being implemented if the Hong Kong scheme is not sanctioned (or the capital reorganization is not completed) but there are other risks to be managed. I note Henderson, J.'s comments (at para. 26 of his judgment (*ibid.*)) when explaining that the court can sanction a scheme even when there is an outstanding condition at the hearing date or when the court's order is to be sealed:

> "Nor is it always indispensable, in my view, that an outstanding condition should be satisfied before the order is sealed. I can see no objection in principle to the court sanctioning a scheme which is conditional in one or more respects, *provided always that the court considers it appropriate to do so in the exercise of its discretion. Examples of the kind of condition which the court may be willing to sanction, even if they are unsatisfied at the date of the hearing, are outstanding requirements for foreign regulatory approval which there is no reason to suppose will not be granted.*" [Emphasis added.]

Of course, the Hong Kong court is not a foreign regulatory body but the point made by Henderson, J. nonetheless applies. The sanction of the Hong Kong scheme is a condition to implementation of the Cayman scheme and the application for sanction is subject to opposition, the precise grounds of which are unclear. There is in my view a sufficient degree of uncertainty both as to the outcome and the timing of the Hong Kong court's decision to require caution (the uncertainty is increased in the present case because it appears, as I have explained in para. 11 above, that Perfect Gate has the unilateral ability to cause the post-liquidation restructuring to fail). Therefore I decided that the sanction order should not be sealed until the Hong Kong court had decided to sanction the Hong Kong scheme and that this court should retain the ability to make further orders if that did not happen within the near future. I directed that the following wording be included in the sanction order:

> "This Order shall not be sealed until the Court receives written confirmation from the Company's attorneys [Harneys] that the High Court of the Hong Kong Special Administrative Region has sanctioned the Hong Kong scheme without modification. If confirmation has not been received by 16 August 2019, this Order may not be sealed without further order of the Court and the Company's application for sanction of the scheme shall be restored to be heard at a time to be fixed."

36 I accept the company's and the liquidators' submission that a similar condition should not, on this occasion, be included in the order confirming the capital reduction. I was minded to include such a condition, as it seemed to me to be inappropriate to confirm the capital reduction unconditionally when there was a material risk that the capital reorganization of which it was a part might not proceed. However, in view of the importance of the capital reduction becoming unconditional without delay in order to allow the practical steps needed to have the new shares issued and listed in time, and the fact that shareholders would suffer no prejudice if the reduction was confirmed but the post-liquidation restructuring failed, I decided that it was appropriate to make the confirmation order on an unconditional basis.

37 I would add one further point. Throughout this case I have reminded the liquidators (and Perfect Gate) of the need to consider the coordination of the applications being made in this court and the Hong Kong court (and the possible benefit of and need for common directions regarding the filing of evidence and submissions in both courts and even of court-to-court communication and simultaneous hearings). For reasons of which I am not aware, this has not proved to be possible in this case. I do not intend to be critical. There may be good reasons why these steps were considered to be inappropriate or unavailable in this case (and I would note with gratitude that Mr. Justice Harris in the Hong Kong court very helpfully sent me a copy of his decision of July 9th). But I would remind parties for the future to keep the need for such coordination firmly in mind.

Orders accordingly.

Attorneys: *Harney Westwood & Riegels* for the company and the liquidators.

[2017 (2) CILR 526]

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED

GRAND CT. (Segal, J.) September 19th, 2017

Companies — liquidators — recognition of foreign liquidator — court has common law power to recognize and assist foreign liquidator appointed in jurisdiction other than that in which insolvent company incorporated — court to apply principle of modified universalism — foreign liquidators not to be given powers "as if" appointed as provisional liquidators by domestic court

Companies — liquidators — recognition of foreign liquidator — foreign-appointed liquidators of Cayman incorporated company authorized to apply under Companies Law (2016 Revision), s.86(1) for meeting of creditors to consider proposed scheme (parallel to foreign scheme), and to consent to scheme on company's behalf — company had substantial connection with overseas jurisdiction — no likelihood of Cayman winding up

Foreign liquidators applied for recognition and assistance.

The company was incorporated in the Cayman Islands but had very significant connections to Hong Kong where its shares had been listed on the Hong Kong Stock Exchange and where it was administered and registered. In 2014, a creditor of the company had presented a winding-up petition in Hong Kong on the ground that the company was insolvent and unable to pay its debts. In 2015, the High Court of the Hong Kong Administrative Region had granted a winding-up order and appointed liquidators.

The liquidators considered that the best option for maximizing recoveries for the company's creditors was to reorganize the company and give effect to a resumption proposal in order to allow the company's shares to be relisted on the HKSE. Pursuant to the resumption proposal, a capital reorganization of the company's share capital would take place so as to facilitate the issue of new shares in the company. Funds raised would be used to fund a settlement for the company's creditors under the proposed schemes of arrangement.

In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions, the liquidators would apply on behalf of the company to the Hong Kong court for the approval and sanctioning of a scheme of arrangement. In addition, they deemed it necessary for a

parallel scheme to be implemented in the Cayman Islands, being the place of the company's incorporation. They considered it undesirable for a winding-up petition to be presented in this jurisdiction and for an application then to be made for the appointment of provisional liquidators who could promote the Cayman scheme.

On the liquidators' application, the Hong Kong court issued a letter of request seeking an order that the liquidators be recognized by the Grand Court and treated in all respects as if they had been appointed in this jurisdiction. The liquidators wished to be able to promote the Cayman scheme and to apply to the court for an order under s.86(1) of the Companies Law (2016 Revision) convening a meeting of creditors. An order was also sought that s.97 of the Law applied so that no action could be proceeded with or commenced against the company except with the leave of the court and on such terms as might be imposed. The liquidators applied *ex parte* for the orders sought.

The liquidators submitted *inter alia* that (a) the court had an inherent jurisdiction to recognize the powers given to, and to grant assistance to, foreign liquidators appointed in a country other than that in which the company was incorporated; and (b) such jurisdiction could and should be exercised at least where there would not be, or was unlikely to be, a winding up in the country of incorporation; probably also in any case in which the relief sought by the foreign liquidator would also be available to a Cayman official liquidator if appointed and there was no reason why, having regard to the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and where the company had submitted to the jurisdiction of the relevant foreign court.

Held, ruling as follows:

(1) Under Part XVII of the Companies Law, the court had a statutory jurisdiction to recognize and assist foreign representatives appointed in the place of a company's incorporation. In addition, the court had a common law power to recognize and assist foreign court appointed representatives. If the circumstances justified the use of that common law power, and subject to the limitations on its use, the power could be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of a company's affairs by the territorial limits of its powers. In deciding whether and if so how to exercise the power, the court would have regard to and apply the approach known as the principle of modified universalism. Suitable orders included any order that the court could make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to the proceedings before it). The court would use and rely on domestic law to fashion and find a form of relief for the foreign liquidator that achieved the purpose for which the power could

be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Therefore, the court could not grant relief by making an order that could only be made in reliance on a domestic statutory power which, by its terms, did not apply in the circumstances (*e.g.* by making an order that could only be made if a domestic scheme of arrangement had been applied for and approved but where there was no such scheme). Nor could the court make an order that granted relief to the foreign liquidator that depended on there being a domestic law right which did not exist in the circumstances. In each case the court must start by considering the nature and form of relief sought by the foreign liquidator. Sometimes the foreign liquidator would be asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There might well be no need to rely on the common law power in such a case. Sometimes, the liquidator would be asking the requested court to exercise its case management powers in proceedings before it by adjourning or staying them or the execution of a domestic judgment arising therefrom (the exercise of such case management powers could be said to involve an exercise of the common law power). Sometimes, the foreign liquidator would seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needed to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there would be no need to rely on the common law power. Where the cause of action was vested in the foreign liquidator, or he was seeking additional relief in reliance on his powers as liquidator, then the common law power to recognize and grant assistance to the foreign liquidator would come into play. Where the foreign liquidator was appointed in the country of incorporation of the company concerned, the domestic private international law of the requested country would apply so that the liquidator was treated as being entitled to act for and on behalf of the company. To that extent he would be entitled to recognition of his powers. Therefore, technically, he would not need to rely on the exercise of the common law power (at least when he was only taking action in the name and on behalf of the company and those seeking to challenge the action were claiming through the company). However, if the foreign liquidator was not appointed in the country of incorporation, he could not rely on this rule of private international law and must instead invoke the common law power in order to be permitted to act on behalf of the company (paras. 20–26).

(2) In the present case, the liquidators wished to be able to promote a Cayman scheme and in particular to apply for an order under s.86(1) of the Companies Law convening a meeting of creditors. The liquidators could apply if they were entitled or permitted to act for and on behalf of the company. They were not entitled under Cayman private international law to act on behalf of the company because they had not been appointed

in the company's country of incorporation. Under Cayman law, having regard to the company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the company were the company's directors and shareholders. The winding-up order, as an order of a foreign court, was not binding or enforceable in the Cayman Islands and did not prevent these corporate organs having the authority to act for and bind the company. The court would, however, exercise its common law power to recognize and assist the liquidators. The conditions for the exercise of the power were satisfied for the following reasons: (a) The relief that the liquidators required and which should be granted was an order authorizing them to make an application under s.86(1) of the Companies Law and to consent to the proposed scheme on the company's behalf. (b) The liquidators wished simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process, which could be achieved by the court making an order on the above terms and by making a direction to the effect that any proceedings commenced or any winding-up petition presented against the company be assigned to the present judge (who could ensure that appropriate case management orders were made). (c) In the present case the court was in substance dealing with a governance question, namely whether to permit the liquidators to act on behalf of the company in presenting an application under s.86(1) and consenting to the proposed scheme on behalf of the company. No issues arose involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they sought. It appeared that the company's board and directors were currently unable or unwilling to act. It also appeared that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the liquidators' application. (d) There was no likelihood of an application being made for a winding-up order in Cayman. (e) It was clear from the evidence that the company had substantial contacts with Hong Kong. (f) There appeared to be no need for or reason why creditors or members would benefit from a Cayman winding up or from the appointment of a provisional liquidator in Cayman. (g) There were also no local reputational, regulatory or policy reasons requiring a local winding up. In the present case, the Hong Kong liquidation was the only proceeding that had been or was likely to be commenced in respect of the company and was taking place in a jurisdiction with which the company had substantial connections. The company's centre of main interests (as the term was used in EU insolvency law) was probably Hong Kong, which was a consideration of considerable weight when deciding whether the foreign, non-place of incorporation liquidation should be treated as competent and justifying assistance. In these circumstances, the purpose for which the power to recognize and assist might be exercised was fully engaged and justified the exercise of the power (paras. 29–30).

(3) The court expressed its preliminary view that the submission by a company to the jurisdiction of a foreign court in which a winding-up order was made and a foreign liquidator appointed could in principle be a sufficient basis for the recognition of the foreign liquidator's powers to act for the company. The court was not in a position to form a concluded view as to whether registration of a company in a foreign jurisdiction was sufficient to constitute submission for these purposes (para. 33).

(4) In a case such as the present in which the court was proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up would be made, that the company's directors and shareholders had not sought and did not intend to exercise any residual powers and rights that they might have to act on behalf of the company and that the relief sought by the liquidators was demonstrably in the interests of all stakeholders, it was important that the directors, stakeholders and creditors were notified of the summons and given an opportunity to notify the liquidators and the court of any objections, to make submissions and to apply to the court if they wished to do so. The court therefore proposed to make an order that authorized the liquidators to apply under s.86(1) of the Companies Law but that also required the liquidators to notify, by a suitable means and within an appropriate timescale, the directors, stakeholders and creditors of the summons and to make available copies of the summons and supporting evidence to any person who wished to receive a copy before the liquidators made any such application. If there were objections or submissions, or if a person wished to be heard, there would be a further hearing of the summons. The directors, stakeholders and creditors would thus have adequate notice and opportunity to object, without unduly delaying the scheme process by holding a further hearing which might not be necessary (paras. 36–37).

(5) The court was unable, in the exercise of the common law power, to grant the order sought by the liquidators which would recognize them and treat them as having all the powers of provisional liquidators appointed by the Grand Court, as it was contrary to the principle outlined in English case law that it was impermissible to grant relief that was only available to provisional liquidators appointed by this court in circumstances in which no such provisional liquidators had been appointed, and to grant relief "as if" provisional liquidators had been appointed. Nor could the court make the order sought pursuant to s.97 of the Companies Law, as that section could not apply in the absence of a provisional liquidator appointed by the court. The liquidators' objectives could, however, be achieved by an order in a different form, authorizing them to convene the scheme meetings, to make such other applications as were required and to consent to the scheme on behalf of the company. Furthermore, relief having the same effect as s.97 could be achieved by a direction that required all proceedings commenced or to be commenced against the company to be allocated to and heard by the present judge, which would enable him to make

suitable case management orders for adjournments or stays (paras. 38–42).

Cases cited:

(1)*African Minerals Ltd. (Joint Administrators)* v. *Madison Pacific Trust Ltd.*, HCMP 865/2015; [2015] HKEC 641, referred to.

(2)*Anderson*, *In re*, [1911] 1 K.B. 896, *dicta* of Phillimore, J. considered.

(3)*BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)*, [1997] HKLRD 304, considered.

(4)*Basis Yield Alpha Fund (Master), In re*, 2008 CILR 50, referred to.

(5)*Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)*, 2005–06 MLR 297; [2006] UKPC 26; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2006] 2 All E.R. (Comm) 695; [2006] BCC 962; [2007] 2 BCLC 141, considered.

(6)*Davidson's Settlement Trusts*, *In re* (1873), L.R. 15 Eq. 383; 37 J.P. 484; 42 L.J. Ch. 347; 21 W.R. 454, considered.

(7)*Dickson Group Holdings Ltd.*, *Re*, [2008] Bda LR 34, followed.

(8)*Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.*, [1927] A.C. 95, considered.

(9)*Felixstowe Dock & Ry. Co.* v. *U.S. Lines Inc.*, [1989] Q.B. 360; [1989] 2 W.L.R. 109; [1988] 2 All E.R. 77; [1987] 2 Lloyd's Rep. 76, referred to.

(10) *Fu Ji Food & Catering Servs. Holdings Ltd.*, *In re*, Grand Ct., FSD Cause No. 222 of 2010, unreported, followed.

(11) *HIH Casualty & Gen. Ins. Ltd.*, *In re*, [2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] 3 All E.R. 869; [2008] Bus. L.R. 905; [2008] BCC 349; [2012] 2 BCLC 655; [2008] BPIR 581; [2008] Lloyd's Rep. I.R. 756, considered,

(12) *Hooley Ltd.*, *Re*, [2016] CSOH 141; 2017 SLT 58; [2016] BCC 826, distinguished.

(13) *International Tin Council*, *In re*, [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890; (1987), 3 BCC 103; [1987] BCLC 272, referred to.

(14) *Kilderkin Invs. Grand Cayman* v. *Player*, 1984–85 CILR 63, referred to.

(15) *Lee Wah Bank Ltd.*, *Re*, [1926] 2 M.C. 81, considered.

(16) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 2 All E.R. 943; [1973] F.S.R. 365; [1974] R.P.C. 101; (1973), 117 Sol. Jo. 567, referred to.

(17) *Opti-Medix Ltd.*, *Re*, [2016] 4 SLR 312; [2016] SGHC 108, considered.

(18) *Picard* v. *Primeo Fund*, 2013 (1) CILR 164, considered.

(19) *Queensland Mercantile & Agency Co. Ltd.* v. *Australasian Inv. Co. Ltd.* (1888), 15 R. 935, considered.

(20) *Rome* v. *Punjab National Bank (No. 2)*, [1989] 1 W.L.R. 1211; [1990]

1 All E.R. 58; [1989] 2 Lloyd's Rep. 354; (1989), 5 BCC 785; [1990] BCLC 20, considered.
(21) *Rubin* v. *Eurofinance SA*, [2012] UKSC 46; [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2013] 1 All E.R. (Comm) 513; [2013] Bus. L.R. 1; [2012] 2 Lloyd's Rep. 615; [2013] BCC 1; [2012] 2 BCLC 682, followed.
(22) *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers*, [2014] UKPC 36; [2015] A.C. 1675; [2015] 2 W.L.R. 971; [2015] BCC 66; [2014] 2 BCLC 597, followed.
(23) *Stewart & Matthews Ltd.*, *Re* (1916), 10 WWR 154; 26 Man. R. 277, considered.
(24) *Stichting Shell Pensioenfonds* v. *Krys*, [2014] UKPC 41; [2015] A.C. 616; [2015] 2 W.L.R. 289; [2015] 2 All E.R. (Comm) 97; [2015] BCC 205; [2015] 1 BCLC 597, followed.

Legislation construed:
Companies Law (2016 Revision), s.86(1): The relevant terms of this sub-section are set out at para. 27.
C. Stanley, *Q.C.* and *S. Maloney* for the liquidators.

1 **SEGAL, J.:**

The application, the relief sought and a summary of the orders to be made

I have before me an *ex parte* summons ("the summons") issued by the Hong Kong liquidators of a Cayman company, China Agrotech Holdings Ltd. ("the company"). In the summons, the Hong Kong liquidators seek orders from this court giving them certain powers and the authority to act on behalf of the company for the limited purpose of presenting a petition for a scheme of arrangement between the company and its creditors in Cayman as part of a corporate rescue of the company involving a parallel scheme of arrangement with creditors to be filed in the High Court of the Hong Kong Administrative Region ("the Hong Kong court") and a restructuring of the company's capital with shareholder approval.

2 The summons was supported by two affirmations made by Chan So Fun ("Mr. Chan"), a solicitor in Hong Kong in the firm of solicitors advising the Hong Kong liquidators (Michael Li & Co.), two affidavits made by David Yen Ching Wai (one of the Hong Kong liquidators and a managing director of Ernst & Young Transactions Ltd.), one affirmation made by Stephen Liu Yiu Keung (the other Hong Kong liquidator and also a managing director of Ernst & Young Transactions Ltd.) and one affidavit made by David Andrew Freeman (a paralegal with Ogier, the firm of attorneys acting for the liquidators). David Yen Ching Wai and Stephen Liu Yiu Keung are referred to as the liquidators. As I have said, this was an

ex parte summons and so no notice has yet been given to the company's directors, shareholders or creditors.

3 The summons was issued pursuant to a letter of request dated July 19th, 2017 from the Hong Kong court addressed to this court, which was issued pursuant to an order of Harris, J. ("the letter of request"). The letter of request sets out the orders which this court is requested to make. I shall explain and discuss the precise terms of the proposed orders shortly.

4 For the reasons explained below, I have concluded that I can and should permit the liquidators to apply in the name and on behalf of the company for and promote a parallel scheme in Cayman and that I should take steps that will ensure that proceedings commenced against the company pending the consideration and sanctioning of the scheme can be adjourned or stayed in order to allow the scheme process to be completed. However, I consider that the order to be made should be in a different form from and grant relief in a different manner from that detailed in and set out in the letter of request (although the order will be in accordance with and respond to the letter of request, which invited this court to give such further or other relief by way of cross-border judicial assistance at common law as this court considers just and convenient). I also consider that the liquidators should only be permitted to apply for an order convening the scheme meeting(s) after the company's directors, shareholders and creditors have been notified of the summons and given an opportunity to file objections or submissions and be heard by this court. If no such objections or submissions are filed, and if no one notifies the liquidators of their intention to appear and be heard, the liquidators may proceed to file the company's petition for an order convening the scheme meeting(s) without the need for a further hearing.

The background to the summons

5 The company has various significant connections with Hong Kong. In particular, its shares have been listed on the Main Board of the Hong Kong Stock Exchange (HKSE) since January 14th, 2002. However, since September 18th, 2014 the company's shares have been suspended from trading. Furthermore, the corporate business of the company has been administered from Hong Kong and the company was registered under Part XI of the former Companies Ordinance (*cap.* 32) on November 4th, 1999.

6 On November 11th, 2014, a creditor of the company presented a winding-up petition on the ground that the company was insolvent and unable to pay its debts. On August 17th, 2015, the Hong Kong court made a winding-up order ("the winding-up order") and appointed the liquidators.

7 Since their appointment, the liquidators have considered what action to take in order to maximize recoveries for and protect the interests of the

company's creditors. They have concluded that the best option available involves giving effect to a resumption proposal and reorganization of the company. The company, with Fine Era Ltd. ("the vendor"), which is a BVI company, submitted a resumption proposal to the HKSE on August 24th, 2016. The purpose of the resumption proposal is to permit the company to satisfy the HKSE's conditions for allowing the company's shares to be re-listed, and to inject into the company an active and profitable business, sufficient funds to permit the company to make a payment to its creditors and for working capital and the payment of the fees involved in the process.

8 The resumption proposal involves an agreement between the company and the vendor with various terms and steps. Under the agreement, the company will purchase from the vendor for a consideration of HK$400,000,000 the entire equity interest in Yu Ming Investment Management Ltd. ("Yu Ming"). Yu Ming is a licensed corporation carrying on various regulated activities including dealing in securities, advising on securities and asset management. Following the acquisition by the company of the equity interests in Yu Ming there will be a capital reorganization of the share capital of the company (comprising a capital reduction, share consolidation and increase in the company's authorized share capital) so as to facilitate the issue of new shares in the company under a placing and open offer. The placing will raise funds of approximately HK$462,222,000 which will be used for the partial settlement of the consideration payable by the company for the acquisition of the equity interests in Yu Ming and also to fund a settlement to be offered to the company's creditors under the proposed schemes of arrangement. Further funds of approximately HK$78,137,000 will also be raised under the proposed open offer. The company will transfer HK$80,000,000 from the placing to the proposed schemes of arrangement for distribution to the company's creditors in settlement of their debts. In addition, the vendor will provide a cash advance to the company and additional funding to finance fees.

9 In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions, the liquidators will apply on behalf of the company to the Hong Kong court for the approval and sanctioning of a scheme of arrangement and will also apply for the permanent stay of the Hong Kong winding up upon the successful implementation of the scheme. In addition to the Hong Kong scheme, the liquidators wish to promote a Cayman scheme. After consulting legal advisers in both Hong Kong and Cayman, the liquidators concluded that it was necessary for an inter-conditional scheme to be implemented in the company's place of incorporation, that is the Cayman Islands, in parallel with the proposed Hong Kong scheme.

10 The liquidators also concluded that it would not be possible or appropriate in the present case for a winding-up petition to be presented in Cayman in respect of the company and for an application to be made in Cayman for the appointment of provisional liquidators who would then promote the Cayman scheme. Such an approach has, of course, been taken in a number of other cases in the past—in which a company subject to a foreign insolvency proceeding and proposing to implement a corporate reorganization or rescue has, following the presentation of a winding-up petition, applied for the appointment of a provisional liquidator under s.104(3) of the Companies Law (2016 Revision) ("the Companies Law") so that the provisional liquidator, working in conjunction with the foreign representative, could apply under s.86(1) of the Companies Law on behalf of the company for the convening of meetings of creditors to approve and the sanction by the court of a Cayman scheme (with the benefit of the statutory stay and moratorium). The liquidators took advice from Richard de Lacy, Q.C. (who sadly died recently and to whom I should like to pay tribute as a fine Cayman and English lawyer and a true gentleman). Based on this advice they concluded that there were various uncertainties that made it undesirable to seek to present a winding-up petition in Cayman, particularly if an alternative option was available. Mr. de Lacy had expressed a concern that before the company's directors could present a winding-up petition they would need to obtain a special resolution from the company's shareholders, which would not only be time consuming and costly but would create difficulties for a listed company the trading of whose shares had been suspended (although I note that it does appear that the company's articles of association give the directors the power to petition without shareholder approval). Mr. de Lacy also noted that it was unclear whether the directors would be treated by this court as having the power and authority to present a winding-up petition following the appointment of the liquidators. He had therefore recommended that the liquidators apply to the Hong Kong court for the issue of a letter of request to this court in which the Hong Kong court would ask this court to make orders in a suitable form that would allow the liquidators to promote the proposed scheme in Cayman.

The letter of request

11 The liquidators, as I have noted, did apply to the Hong Kong court for the issue of a letter of request and Harris, J. ordered that a letter of request be issued. The letter of request was issued on July 19th, 2017. The following points emerge:

(a) The letter of request recited the appointment of the liquidators and that—

"the Liquidators have demonstrated to the satisfaction of this Court that it is necessary and desirable for the purposes of implementing

the rescue and restructuring of the Company for the benefit of the Company's creditors and shareholders and that it is in the interest of justice to assist the Lliquidators in exercising all the powers, duties and discretions afforded to them by the [winding-up order] (and applicable law); and that it is just and convenient that [the letter of request] be issued."

(b) The letter of request requested this court "pursuant to its inherent jurisdiction and all other powers vested in it, to assist and act in aid of the Hong Kong court" in the winding-up proceedings in respect of the company by making the orders requested.

(c) The orders requested were as follows:

"1. Making an order if [this court] thinks fit that the Liquidators . . . be recognised by [this court] and be treated in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by [this court], including recognition of the powers and authority of the Liquidators to act on behalf of the Company, amongst other things:

(1) to secure the alteration [of] or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

(2) to pay a class or classes of creditors in full;

(3) to make a compromise or arrangement with—

(a) creditors or persons claiming to be creditors;

(b) persons having or alleging themselves to her of [*sic*] any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the Company may be rendered liable.

(4) to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and—

(a) a contributory;

(b) an alleged contributory; or

(c) any other debtor or person apprehending liability to the Company.

(5) to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

(6) to 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;

(7) to 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;

(8) to appoint an agent to do any business that the Liquidator is unable to do in person; and

(9) to employ legal advisers to assist the Liquidators in performing the liquidators' duties.

2. If thought fit, making such further or other Orders as may be required in accordance with such recognition and, in particular, an Order (having the same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) [Ordinance] (CAP 32)) that section 97 of the Cayman Islands Companies Law (2016 Revision) shall apply to the company so that no action or proceeding shall be proceeded with or commenced against the company within the jurisdiction of [this court] except by leave of [this court] and subject to such terms as [this court] may impose;

3. Giving such further or other relief or assistance by way of cross-border judicial assistance at common law as [this court] may think just and convenient; and

4. The Liquidators [to] have liberty to apply for further relief to [this court]."

The summons and the draft order

12 The summons seeks orders in similar terms as follows:

"1. That the [order of the Hong Kong court dated August 17th, 2015 appointing the liquidators (the appointment order)] and [the liquidators] be recognised by this Court such that the Appointment Order be treated in all respects in the same manner as if the Appointment Order had been made and [the liquidators] had been appointed as the joint and several provisional liquidators of the company by this Court, including recognition of the powers and authority of [the liquidators] to act on behalf of the Company, including, inter alia;

a. to alter or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

b. to pay a class or classes of creditors in full;

c. to make a compromise or arrangement with—

i. creditors or persons claiming to be creditors;

ii. persons having or alleging themselves to her of [*sic*] any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the Company may be rendered liable.

d. to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and—

1. a contributory;

2. an alleged contributory; or

3. any other debtor or person apprehending liability to the Company.

e. to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

f. to 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;

g. to 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;

h. to appoint an agent to do any business that the Liquidator is unable to do in person; and

i. to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.

2. [That in accordance with such recognition as set out in para. 1 above and for the avoidance of doubt] section 97 of the Companies Law (2016 Revision) shall apply to the Company so that no action or proceedings shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this Court may impose.

3. That the [liquidators] shall have liberty to apply to this Court in respect of any matter concerning the Company and arising during the

period of the appointment of the [liquidators] as Joint Provisional Liquidators of the Company and by doing all such things as may be necessary to assist the [liquidators] (or one or more of them) in connection with their appointment as the joint and several provisional liquidators of the Company."

13 The draft order filed by the liquidators sets out the orders sought in the summons in the same form, save that the words in square brackets at the beginning of para. 2 were omitted.

The liquidators' submissions

14 The submissions of Ms. Stanley, Q.C. for the liquidators can be summarized as follows:

(a) The court has an inherent jurisdiction (at common law) to recognize the powers given (and to grant assistance) to a foreign liquidator appointed by an order of a competent court and to send and receive letters of request relating to the recognition of such court-appointed liquidators (citing in support, in relation to letters of request,)).

(b) The common law jurisdiction to recognize (and assist) foreign insolvency officeholders appointed in the country of incorporation of the company is well established in Cayman—see, for example, in relation to the recognition of a receiver appointed by a foreign court in the company's place of incorporation, –83) and also) (Ms. Stanley notes that the Cayman legislature has, in Part XVII of the Companies Law, also codified and extended the court's powers in relation to foreign representatives appointed in the country of incorporation).

(c) But the non-statutory jurisdiction is not limited to foreign insolvency officeholders, including liquidators, appointed by a court in the country of incorporation of the relevant company. The court has jurisdiction to recognize and grant assistance to liquidators appointed by other courts in certain circumstances.

(d) Such jurisdiction can and should be exercised—

(i) at least where the evidence establishes that there will not be, or that it is unlikely that there will be, a winding up in the country of incorporation;

(ii) probably also in any case in which the relief sought by the foreign liquidator would be available to a Cayman official liquidator if appointed and there is no reason why, having

regard to the interests of the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and

(iii) where the company concerned has submitted to the jurisdiction of the relevant foreign court.

(e) As regards (d)(i), in the present case the evidence demonstrates that it is unlikely that any application will be made for a Cayman winding up. Accordingly, the basis for exercising the jurisdiction to recognize and assist on the first ground is established. The court should exercise the jurisdiction because the company has the right under the Companies Law to apply to the court and commence the scheme approval process and since the liquidators are acting on behalf of the company, their action is in accordance with the statutory power and Cayman law; it is manifestly in the interests of all the company's stakeholders to permit the liquidators to proceed with the Cayman scheme and granting the relief sought involves the court cooperating, in accordance with the principle of comity, with the Hong Kong court and the liquidators it has appointed (as the only proceeding commenced and to be commenced in relation to the company and a court with which the company has substantial and significant connections) in circumstances where there are no policy or other reasons which require a local winding up or which would require and justify refusing the relief sought by the liquidators.

(f) As regards (d)(ii), a local liquidator would be able to petition the court to convene meetings of creditors to vote on the scheme but a local winding up is unnecessary as it would involve unnecessary expense and no additional benefits to creditors and members (unless, of course, a Cayman winding up is necessary in order for there to be a Cayman scheme).

(g) A Cayman winding up is unlikely because none of those with standing to present a winding-up petition are able or willing to do so. As David Yen Ching Wai stated in his second affidavit, the company's directors (those directors who have not resigned) have been unwilling to contact and cooperate with the liquidators and appear unwilling to exercise any residual power which the directors might retain to act on behalf of the company and present a petition. Indeed, it was arguable that the directors could not exercise any such power (at least without the consent of the liquidators) following the making of the winding-up order. Furthermore, it was unlikely that the shareholders would wish or be prepared to present a petition. In addition, the company's creditors (many of whom had already participated and filed proofs in the Hong Kong liquidation) also have not indicated any intention to present a petition for or wish to have a Cayman winding up. The winding-up order was made

over two years ago and no creditor has sought a Cayman winding up since then.

(h) A Cayman winding up is unnecessary because it has already been determined that the resumption proposal is in the best interests of the company's creditors and shareholders and a Cayman winding up is not needed to implement that proposal or to protect the interests of creditors or other stakeholders (the resumption proposal will not require a distribution by the liquidators to creditors and will involve a stay of the Hong Kong liquidation so that there will be no risk of any differences between the rules regulating distributions or avoidance actions in Hong Kong and Cayman giving rise to differences of outcomes for creditors or members). The liquidators with the support of the Hong Kong court have concluded that they should give effect to the resumption proposal and exit from the Hong Kong liquidation without the need for a Cayman winding up by obtaining the approval of creditors to and the sanction of the Hong Kong and Cayman courts for the schemes (and to a capital reduction and reorganization).

(i) As regards (d)(iii), since the company submitted to the jurisdiction of the Hong Kong court by registering as an overseas company in Hong Kong, this court should recognize and give effect to the winding-up order, at least the powers of the liquidators thereunder or resulting therefrom to act on behalf of the company (including the power to act on behalf of the company for the purpose of presenting a petition under s.86(1) of the Companies Law for an order convening a meeting of creditors and for the sanctioning of a scheme of arrangement in respect of the company).

(j) The company registered under Part XI of the former Companies Ordinance (*cap.* 32) on November 4th, 1999 (Part XI has now been superseded by Part 16 of the Companies Ordinance (*cap.* 622), to which the company is now subject). Part XI (and Part 16) relate to overseas companies, that is companies incorporated outside Hong Kong, which have established a place of business in Hong Kong. According to Mr. Chan (see para. 9 of his second affirmation):

> "By registering under Part XI of the former Companies Ordinance (Cap 32), the company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the company is 'within the jurisdiction' and can therefore be served with a winding up petition in accordance with Order 10, rr.1–5 of the Rules . . . and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014) . . ."

15 Ms. Stanley relied on a number of textbooks and cases in support of her submission that the court had jurisdiction to and could recognize the

appointment and powers of a liquidator appointed by a court in a jurisdiction other than the place of incorporation. In particular, she noted and relied on a judgment of Kawaley, J. in the Supreme Court of Bermuda (in 2008, *Re Dickson Group Holdings Ltd.* (7)) in a case which was based on similar facts and circumstances to the present case in which the learned judge had permitted a Hong Kong liquidator appointed in respect of a Bermudian company to summon a meeting of creditors to consider a scheme of arrangement in Bermuda. She also noted and relied in particular on an unreported judgment of this court (*In re Fu Ji Food & Catering Holdings Servs. Ltd.* (10)), delivered by the Chief Justice, involving a provisional liquidator appointed in Hong Kong in respect of a Cayman company and in which the Chief Justice made orders recognizing the provisional liquidator's powers to alter and deal with the capital structure of the company and staying proceedings against the company.

16 Ms. Stanley's submissions on the grounds I have identified in para. 13(d)(i) and (ii) above can be summarized as follows:

(a) Ms. Stanley referred to the discussion in Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed. (2012) and submitted that the starting point in the analysis was Rule 179 (para. 30R–100, at 1581) which is in the following terms: "... [T]he authority of a liquidator appointed under the law of the place of incorporation is recognised in England."

(b) But, Ms. Stanley pointed out, in the commentary on Rule 179, Dicey, Morris & Collins amplify their analysis and suggest that the non-statutory jurisdiction to recognize and assist may extend beyond liquidators appointed in the place of incorporation. The commentary suggests that recognition may be permissible where the appointment is made in (under the law of) the country where the company concerned carries on business or, where there is no likelihood of a liquidation in the country of incorporation, in another country. The relevant parts of the commentary are as follows (paras. 30–102 – 30–104, at 1581–1582):

"30–102

> The effect of a foreign winding-up order in England has seldom been before the courts. Rule 179 is however justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here.

30–103

> *Rule 179 should not, however, be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law.* It merely states the position which has been established to date. First, and generally, in determining whether to exercise its

jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition, that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company. *More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.*

30–104

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. The protagonist of recognition in such a case could urge that 'it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves.' However, even if an appeal to comity has any force in this context (which is doubtful), it has been rejected in the context of company insolvency, though it is possible that the liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. *Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of liquidation in the country of incorporation.*" [Emphasis added. Footnote omitted.]

(c) Ms. Stanley noted that in *Rubin* v. *Eurofinance SA* (21) ("*Rubin*") Lord Collins had referred to Rule 179 and said ([2012] UKSC 46, at para. 13) that—

"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)." [Emphasis added.]

However, she submitted, this statement was not inconsistent with the commentary set out above since a general rule need not be, and should not be treated as, the exclusive rule (I also note Lord Collins's comment (*ibid.*, at para. 31) that "the common law assistance cases . . . [had] involved cases in which the foreign court was a court of competent jurisdiction in the sense that the . . . company, was incorporated there.")

(d) Ms. Stanley also noted that in *In re HIH Casualty & Gen. Ins. Ltd.* (11) Lord Hoffmann had indicated (*obiter*) that a test other than the place of incorporation test might be more appropriate for determining whether the foreign court was competent for recognition purposes ([2008] 1 W.L.R. 852, at 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."

While Lord Collins in *Rubin* (21) had referred to this passage ([2012] UKSC 46, at para. 121) and refused (*ibid.*, at para. 129) to change the settled law on the recognition and enforcement of foreign judgments by formulating a judge-made, common law rule which would recognize judgments in foreign insolvency proceedings where the foreign court conducting the insolvency proceeding was to be regarded as being competent by reason of the connections between the court and company concerned (such as the country where the insolvent entity has its centre of interests or the country with which the judgment debtor has some other sufficient or substantial connection), his judgment and analysis did not affect this part of Lord Hoffmann's judgment or the cogency of the comments he had made as they relate to the scope of the common law jurisdiction to recognize foreign liquidators.

(e) Ms. Stanley noted that another leading English law textbook dealing with cross-border insolvency also supported the view that recognition

should be granted to a liquidator appointed by a court outside the place of incorporation in a case where there was no likelihood of a liquidation being commenced in the country of incorporation. In Sheldon *et al.* (eds.), *Cross-Border Insolvency*, 4th ed., ch. 6 (2015), the point is made as follows (para. 6.81, at 281):

> "If the English rules on recognition were restricted to the place of incorporation and an insolvency proceeding has not or even cannot there occur, then no foreign insolvency whatsoever could be recognised. Plainly this would be most unsatisfactory. Accordingly, it is suggested that recognition is possible 'where there is no likelihood of a liquidation in the country of incorporation.'"

(f) Ms. Stanley, as I have mentioned, relied on the judgment of Kawaley, J. in Bermuda in *Re Dickson Group Holdings Ltd.* (7). The decision in *Dickson Group* and Ms. Stanley's submissions based on the decision can be summarized as follows:

> (i) In this case, *Dickson Group Holdings Ltd.* was a company incorporated in Bermuda in respect of which a winding-up order had been made in Hong Kong. Although the company had been incorporated in Bermuda, no business activities took place there but instead the main focus of the company's business was Hong Kong and the People's Republic of China. The liquidators wished to promote a scheme of arrangement which would restructure the company's affairs and leave it in a solvent position. They had decided that there was no need for a winding up in Bermuda but there was a need for a Bermudian scheme as well as a scheme in Hong Kong. Accordingly, a summons was issued by the company acting by the Hong Kong liquidators under s.99 of the Bermuda Companies Act 1981 for leave to summons a meeting of creditors to consider the scheme.
>
> (ii) The liquidators did not separately and explicitly seek an order recognizing their appointment and powers under the Hong Kong winding-up order but Kawaley, J. considered that recognition was required. The learned judge considered ([2008] Bda LR 34, at para. 6) recognition to be necessary even though the company's directors had "remained in place for Bermuda law purposes, and . . . had passed a resolution supporting the . . . application." While the directors might, from a Bermudian perspective, retain powers to bind the company, the scheme and the application were in substance controlled by the liquidators and therefore it would be artificial to proceed on the basis that the company was effectively acting, in making the application, just by its directors (an argument which Kawaley, J. labelled (*ibid.*, at para. 28) "a Temple point"!) and grant the company leave to summon a meeting of creditors without

deciding that it was permissible and appropriate to recognize the liquidators' appointment and powers to act on behalf of the company.

(iii) Counsel for the liquidators argued that there was an exception to the requirement that the foreign liquidator be appointed in the place of incorporation in a case in which there was no likelihood of a winding up taking place there, and that this was such a case. After noting that—

> "it seemed to be unprecedented, however, for this Court to recognise and enforce insolvency orders of a foreign court in respect of a Bermudian company in circumstances where (a) no parallel insolvency proceedings have been commenced in Bermuda, and (b) the Bermudian company has not only been placed into a restructuring proceedings abroad, but has been placed into 'full-blown' liquidation in what amount to primary (as opposed to ancillary) proceedings abroad"—

Kawaley, J. referred to the commentary on Rule 179 in *Dicey, Morris & Collins* (*op. cit.*) which I have set out above (although in 2008 Lord Collins was yet to be recorded as a co-author and the textbook was referred to as *Dicey & Morris*, and was in its 12th edition, with r.179 being r.160), to a passage in the second edition of Philip Wood's *Principles of International Insolvency* (2005) (in which Mr. Wood had said that there was a disadvantage to recognizing only a liquidation in the country of incorporation as many companies were incorporated in one jurisdiction but carried on their principal place of business elsewhere so that it would seem odd to refuse to recognize a liquidation where the main assets are located) and to a passage in Professor Ian Fletcher's *Insolvency in Private International Law* (2007), in which Professor Fletcher stated that where there were no winding-up proceedings in the place of incorporation, insolvency proceedings taking place in another jurisdiction might be considered to be the most appropriate way to wind up the company.

(iv) After referring to the "high judicial authority" and the analysis of the court's "common law discretion" in the judgment of Lord Hoffmann in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)* (5) ("*Cambridge Gas*"), Kawaley, J. concluded ([2008] Bda LR 34, at para. 19):

> "All of this learning suggests the following principles which I adopt: (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding-up proceeding in relation to a local company which is not being wound-up at all its own domicile [*sic*]; and (b) the main practical consideration

> is whether or not a foreign primary proceeding is the most convenient means of winding-up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand. These two broad considerations must in my judgment be applied having regard to two fundamental principles of insolvency law: (a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company's liquidation to a single coherent regime so that all creditors share ratably, irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance with the law of the company's place of incorporation, irrespective of the accidental location of assets outside of that jurisdiction. The application of all of these guiding principles will vary depending on the facts of the specific case."

(v) Kawaley, J. noted that since it was no longer intended to wind up the company (the winding up was to be stayed and the company rescued) it was unnecessary to consider in depth the circumstances in which a Bermudian court would decline to recognize a foreign winding-up proceeding in respect of a Bermudian company (and insist on a local Bermudian liquidation). He stated however (*ibid.*, at para. 24) that there should not be an expectation that the court in Bermuda would rubber stamp and always give recognition to such foreign proceedings. In any liquidation of substance, it will be impossible for the place of incorporation to be ignored because, for example, absent a local winding up, creditors not subject to limitation constraints could apply for a local winding up after and despite the foreign winding up, the directors remain in office and there may be local reputational, regulatory and policy reasons requiring a local proceeding.

(vi) The learned judge in exercising his discretion concluded as follows (*ibid.*, at paras. 34–37):

> "34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.

> 35. The aim of the Scheme, most directly, is to eliminate the Company's existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company's share capital become[s] effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company's shares. The purchase monies will fund the creditors' Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.
>
> 36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here. As I observed in the context of parallel receivership proceedings:
>
> > 'In the present case, with its centre of gravity clearly more in Hong Kong than Bermuda, this Court has, in my view rightly, been content to accord a leading role as regards assessment of costs and otherwise to the High Court of Hong Kong. In cases where Bermuda-based office holders subject to the primary supervisory jurisdiction of this Court were involved, this jurisdiction would logically expect to play a larger role.'
>
> 37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda-incorporated company."

(g) Ms. Stanley noted and accepted that Kawaley, J.'s approach had been based on and followed the analysis of Lord Hoffmann in *Cambridge Gas* (5) and that his judgment had been delivered before the decision of the Supreme Court in *Rubin* (21) and the important decision of the Privy Council (sitting on appeal from Bermuda) in *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers* (22) ("*Singularis*"). Both decisions had (as is well known amongst insolvency lawyers and practitioners) included

comments critical of Lord Hoffmann's approach and reasoning (in *Singularis*, Lord Sumption had noted ([2014] UKPC 36, at para. 18) that *Cambridge Gas* had "[marked] the furthest that the common law courts [had] gone in developing the common law powers of the court to assist a foreign liquidation [and had] proved to be a controversial decision"). However, Ms. Stanley submitted that none of the criticisms and *dicta* declaring that *Cambridge Gas* was (at least in part) wrongly decided meant that Kawaley, J.'s decision was wrong and should not be followed. The challenge to *Cambridge Gas* affected the decision in so far as it held that a foreign insolvency judgment could be recognized and enforced at common law even when the normal common law rules did not permit this and that the court could by way of common law assistance order that foreign liquidators could rely on and exercise rights under local statutes that did not otherwise apply (by acting as if a local statutory insolvency or restructuring procedure had been commenced and the related statutory powers had been available and applied). But Kawaley, J. had relied on neither of these aspects, nor on any of the other aspects of the *Cambridge Gas* judgment that had been criticized in *Rubin* and *Singularis*.

(h) Ms. Stanley also relied, as I have mentioned, on the 2010 decision of the Chief Justice in *In re Fu Ji Food & Catering Servs. Holdings Ltd.* (10). She pointed out that this is another pre-*Rubin* and pre-*Singularis* case. The judgment is not reported but the Chief Justice gave a helpful summary of the facts and his decision in an article published in 2 *Beijing Law Review* 145–154 (2011) ("A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-operation"). The following is the relevant section in the Chief Justice's article (*ibid.*, at 150–151):

> "*The Matter of FU JI Food and Catering Services Holdings Limited* (FSD Cause No: 222 of 2010, Grand Court of the Cayman Islands) involved an unusual request for judicial assistance from the High Court of Hong Kong to the Grand Court.
>
> Fu Ji Food and Catering Services, is a Cayman Islands holding company which has subsidiaries operating a substantial business in the People's Republic of China (PRC). The group's underlying business interests—principally in food production, restaurants and related services—experienced massive strain in 2009 and the trading of the company's shares on the Hong Kong Stock Exchange (HKSE) was suspended.
>
> As the company was also registered in Hong Kong, the High Court there was persuaded to place it into provisional liquidation to allow for its capital restructuring, an eminently attainable objective, given the substantial underlying value of the company and the then active interest of potential buyers.

This objective would not have been realised, however, if, despite its provisional liquidation in Hong Kong, creditors remained able to petition for the winding up of the company in the Cayman Islands, the place of its incorporation and domicile, or remained able otherwise to sue the company for recovery of indebtedness before the Cayman Courts.

The company therefore needed the protection of a stay of proceedings by the Cayman Courts and the ability of its provisional liquidators (the JPLs) to act for the company in the Cayman Islands. Hence the request from the High Court of Hong Kong.

The Grand Court first noted the existence of its inherent jurisdiction at common law to send or receive letters of request for judicial assistance.

Recognising and accepting that the objectives of the restructuring involved the protection of the interests of all the creditors of the company and its subsidiaries, as well as the interests of the company itself (in being allowed to resume listing and trading on the HKSE and so to be divested as a going concern), the request of the High Court was regarded as justified. In granting the request, the Grand Court accepted that, although it was asked to act in aid of the provisional liquidation order of a foreign court over a Cayman Islands company, doing so in the circumstances presented no public policy objections but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality. The following further dicta from *Cambridge Gas* was noted and applied:

> 'The 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 (para 22, page 518).'

In accepting the request, the Grand Court also accepted that the company (Fu Ji Food Ltd) had a real and substantial connection to Hong Kong, being the jurisdiction from which its underlying business interests in the PRC were administered and in which its financing and working capital were raised. The restructuring was aimed at restoring the company to the HKSE and, with the new investor, to enable it to carry on its business in Hong Kong, where the provisional liquidation would close without a winding up.

It was ordered that the JPLs and their Appointment Order be recognized in all respects as if appointed and made by the Grand Court, including, in particular, the power and authority of the JPLs to

alter or otherwise deal with the capital structure of Fu Ji Food in accordance with the terms of the Appointment Order.

It was further ordered, therefore, that section 97 of the Cayman Islands Companies Law shall apply in relation to the company so that no action or proceeding shall be commenced or proceeded with against the company within the jurisdiction of the Grand Court except by leave of that court and subject to such terms as it may impose. It was additionally ordered that the JPLs have liberty to apply to the Grand Court in respect of any matter concerning the company and arising during the period of the JLPs' appointment.

Difficulties in deciding whether to accede to foreign insolvency proceedings may, however, arise when there are compelling reasons for winding up in the Cayman Islands or where there are already insolvency proceedings underway before the Cayman Courts involving the same company or involving related companies. These difficulties are likely to be addressed on the case-by-case basis, although the emergent principles of private international law, as recognised in Article 29 of the UNCITRAL Model Law, would maintain the pre-eminence of local insolvency proceedings over foreign proceedings."

(i) Ms. Stanley also relied on the recent decision of Aedit Abdullah, J.C. sitting in the High Court of Singapore in *Re Opti-Medix Ltd.* (17) in which the Singapore court recognized a Japanese liquidation of BVI companies. This is a post-*Rubin* (21) case.

(i) The case involved two BVI companies in respect of which bankruptcy orders had been made by the Tokyo District Court. The companies had assets (in the form of funds credited to bank accounts) in Singapore and the Japanese trustee wanted to exercise his powers under the Japanese bankruptcy orders to deal with, collect in and remit to Japan the funds in the bank accounts. For this purpose he sought an order recognizing his appointment and for the appointment of a foreign bankruptcy trustee by the Singapore court. The trustee also gave an undertaking to pay all preferential debts and other debts in Singapore before remitting any funds out of Singapore.

(ii) The Japanese trustee argued that since there were no competing claims by liquidators from different jurisdictions, the Singapore court should recognize his appointment (no prejudice would be suffered as there were only three Singapore creditors, the notes issued by the company had been sold only in Japan, any debts in Singapore were incurred only for administrative services and notice of the liquidation had also been advertised in Singapore, and no one had contacted the trustee's solicitors). Accordingly, the trustee submitted that his appointment should be recognized even though he

was not a liquidator appointed in the place of incorporation of the companies because there was no likelihood of insolvency proceedings in the BVI. He relied in particular on Rule 179 and the commentary thereto in *Dicey, Morris & Collins* (*op. cit.*) (at that date Rule 166 of the 14th edition (2006)) and Tom Smith, Q.C.'s chapter in *Cross-Border Insolvency* (ch. 6, in particular para. 6.81 (*loc. cit.*)).

(iii) The learned judge granted the relief sought. He noted that the Singapore court had in the past recognized foreign liquidators (citing *Re Lee Wah Bank Ltd.* (15), which appears to be a case involving the recognition of a liquidator appointed in a jurisdiction other than the country of incorporation); referred to and agreed with Lord Hoffmann's statements in *HIH* (11) ([2008] UKHL 21, at para. 31) and noted Lord Collins' conclusion in his judgment in *Rubin* ([2012] UKSC 46, at paras. 129–130) that it was not open to the courts to introduce a new basis for recognition of foreign judgments by reference to the connection between the judgment creditor and the jurisdiction in which the foreign insolvency proceedings had been commenced in respect of it) and cited and agreed with the following passage from *Cross-Border Insolvency* (*op. cit.*, para. 6.80, at 281):

> "... there is a measure of authority that the law of the place of incorporation does not occupy an exclusive position; other foreign insolvency proceedings may also be granted recognition in the English court. However, the issues which arise in light of the comments of Lord Collins in *Rubin* are, first, whether the existing authorities do provide sufficient support for a test of recognition based on factors other than the place of incorporation; and, secondly, whether there is any ability for the common law to develop in this area without legislative intervention.
>
> As to the first issue, it is suggested that Lord Collins in Rubin may well have overstated the extent to which the existing common law authorities give an exclusive role to the place of incorporation in determining whether foreign insolvency proceedings should be recognised. As to the second issue, it is difficult to see why the common law could not develop a broader test based on the concept of 'centre of main interests', as envisaged by Lord Hoffmann in *HIH*."

(iv) So Aedit Abdullah, J.C. concluded that he was able to recognize the Japanese trustee even though not appointed in the BVI and was prepared to use, as the test for determining whether the Japanese court was competent for these purposes, the centre of main interests test (which he held was satisfied since Japan was essentially the sole place in which actual business was carried on). He noted ([2016] 4 SLR 312, at para. 18):

"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 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. 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."

(v) But he also considered that it was also possible to justify the recognition of the Japanese trustee on other "practical grounds." He said (*ibid.*, at para. 26):

"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 Russo-Asiatic Bank* . . . could perhaps be explained on this practical basis."

(j) Ms. Stanley also noted that Harris, J. in the Hong Kong court in *African Minerals Ltd. (Joint Administrators)* v. *Madison Pacific Trust Ltd.* (1) had been prepared to assume without deciding that the Hong Kong court could in principle recognize liquidators or (administrators) appointed in a jurisdiction other than the place of incorporation (although he noted that the point was open to argument, citing Millett, J. in *In re International Tin Council* (13) ([1987] Ch. at 447) and Lord Collins in *Rubin* (21)). She also referred to the various cases discussed in *Cross-Border Insolvency*, *op. cit.*, at paras. 6.68–6.80, at 275–281, under the sub-heading "Place of incorporation not exclusive," in which courts had recognized the effect of a liquidation taking place in a jurisdiction other than that of the place of incorporation. She referred in particular to the following cases:

(i) *Queensland Mercantile & Agency Co. Ltd.* v. *Australasian Inv. Co. Ltd.* (19), a decision of the Court of Session (Inner House) involving liquidations both in the place of incorporation and another jurisdiction. The case related to a Queensland incorporated company which was being wound up in Queensland but there was also a subsequent (ancillary) winding-up order made in England. In the course of the English proceedings, the English court made an order staying proceedings in Scotland against the company. The effect of this order was considered by the Court of Session in Scotland, which gave effect to the English order and thus recognized a liquidation other than that under the law of the place of incorporation.

(ii) *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)* (3), a decision of the Hong Kong court. BCCI (Overseas) Ltd. was incorporated in Cayman and had opened a branch in Macau. The officers of the Macau branch placed funds from the branch on deposit with a Hong Kong bank. Subsequently the company was put into liquidation pursuant to an order of this court and then the branch was ordered to be liquidated out of court pursuant to an order of the Governor of Macau. Under the law of Macau, the assets recovered by the Macau liquidator would be ring-fenced. Both the Cayman liquidator and the Macau liquidator claimed the funds held on deposit in Hong Kong. The Hong Kong court allowed the Macau liquidator, as the representative of creditors entitled to prove in the Macau liquidation, to be a party to the proceedings in Hong Kong and to that extent the Macau liquidation was recognized but the rights to the funds on deposit in Hong Kong were governed by Hong Kong law as the *lex situs*. The Hong Kong court ordered the funds to be paid to the Cayman liquidator.

(iii) *Re Lee Wah Bank Ltd.* (15), a decision (as was noted in *Re Opti-Medix Ltd.* (17)) of the High Court of Singapore. Here a Hong Kong bank had a branch in Saigon. The branch had an account in Singapore at a time when winding-up proceedings were commenced in Hong Kong and Saigon. The Hong Kong liquidator and the Saigon liquidator both claimed the money. The Singapore court held that either liquidator could give a good receipt for the money and that the court had a discretion to direct payment to either liquidator.

(iv) I note that it is stated at para. 6.74 of *Cross-Border Insolvency* with reference to *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)* (3) and *Re Lee Wah Bank Ltd.* (15) (*op. cit.*, at 278) that—

> "although the results in both these cases are by no means surprising, the important point to note is that the liquidator of the relevant branch was recognised: the courts did not take the

approach that, because there was a liquidation in the place of incorporation, that in itself automatically put an end to any dispute."

(v) *Re Stewart & Matthews Ltd.* (23), a Canadian case. In this case a company incorporated in Manitoba carried on all of its business in Minnesota. The company petitioned the bankruptcy court in Minnesota and a trustee in bankruptcy was appointed. Subsequently a winding-up order was made in Manitoba. On an application supported by the majority of the company's creditors, the Canadian court stayed the Manitoban winding up in favour of the US bankruptcy. In *Cross-Border Insolvency*, *op. cit.*, para. 6.78, at 280, it is suggested that "it can only be that the court of the domicile of the company was prepared to grant recognition to the foreign (American) liquidation; otherwise, Canadian assets would not have been transferred to America."

(k) Finally, Ms. Stanley drew to my attention a Scottish case in which Lord Tyre in the Court of Session (Outer House) refused to grant relief in support of a foreign liquidation taking place outside the country of incorporation of the company concerned. The case is *Re Hooley Ltd.* (12). Ms. Stanley pointed out that since Lord Tyre's judgment contained certain *dicta* that, and because his decision, might be considered to be inconsistent with her submissions, she considered it necessary to refer the court to the case:

(i) As Ms. Stanley explained the case involved three Scottish companies. One of the companies (T Ltd.) was placed into insolvent winding up by the Indian court. In 2012, an administration order was made by the Scottish court in relation to T Ltd. The administrators agreed and entered into contracts for the sale of T Ltd.'s underlying assets to Hooley Ltd. (the petitioner), and then Hooley Ltd., having paid the purchase consideration, sought a declaration from the Scottish court as to its rights under the agreement and that the agreements were valid and enforceable and that the administrators had been entitled to enter into the agreements (without the need for the Scottish court's approval). The respondent to the petition was a creditor of T Ltd. It objected to the order sought and argued that "the court should refrain from hindering the Indian winding up by making any order which appeared to confirm the effectiveness of the exercise by the administrator of any power regarding assets in India or governed by Indian law."

(ii) The administrator's response was summarized by Lord Tyre as follows (2017 SLT 58, at para. 30):

". . . [I]t was not suggested on behalf of Hooley that this court should not apply the principle of modified universalism as

> defined by Lord Sumption in *Singularis* (above). The principle was, however subject to domestic law and public policy, and the court could only act within the limits of its own statutory and common law powers. Most importantly, its purpose was to assist a court exercising insolvency jurisdiction *in the place of the company's incorporation* to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. The principle could not be applied to winding up proceedings in a country other than the place of incorporation. That indeed would hinder universalism. The Scottish courts could recognise and assist ancillary windings up (i.e. winding up processes taking place other than in a court in the place of incorporation), but they did not and could not defer to such ancillary windings up." [Emphasis in original.]

(iii) Lord Tyre accepted the administrators' submissions and granted the declarations sought (confirming that the administrators had been authorized and entitled to sell and refusing to require the Scottish administrators to refrain from exercising their powers so as to avoid any interference with the Indian insolvency proceeding). Lord Tyre said as follows (*ibid.*, at para. 35):

> "The principle of modified universalism has not, to date, been the subject of examination by a Scottish court. For present purposes it is sufficient for me to say that nothing was placed before me that might indicate that it should not be recognised. There is nothing new in a Scottish court lending assistance to foreign winding up proceedings: see e.g. *The Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd.* The same case demonstrates that Scots law has long recognised that there may be a principal liquidation in the country of the company's incorporation and an ancillary liquidation in another jurisdiction. In my opinion, however, Hooley is well founded in its submission that *the principle of modified universalism has not been recognised by the Supreme Court or the Privy Council as applying beyond the situation where winding up proceedings are taking place in the jurisdiction in which the company is incorporated.*" [Emphasis added.]

(iv) Ms. Stanley submitted that *Hooley* (12) was distinguishable from the present case, in particular because Lord Tyre was required to deal with a very different type of fact pattern. *Hooley* involved an asserted inconsistency or conflict (asserted by a creditor rather than the foreign liquidator or foreign court) between a domestic (Scottish) insolvency proceeding (taking place in the country of incorporation of the companies concerned) and the foreign liquidation and an application for relief that challenged and sought to limit the powers

> of the Scottish officeholder. In stark contrast, in the instant case there is no conflict and no question of subordinating the Cayman court (or its officeholder) to the Hong Kong court; rather, the court is being asked to recognize the Hong Kong orders with a view to promoting a single coordinated process via parallel schemes of arrangement.

17 Ms. Stanley's arguments as to the ground I have identified in para. 13(d)(iii), based on the company's submission to the jurisdiction of the Hong Kong court, can be summarized as follows:

(a) In the circumstances of this case, the company has submitted to the jurisdiction of the Hong Kong court, and it could not be heard to say that it was not bound by the winding-up order and the order appointing the liquidators (including the liquidators' powers to act on behalf of the company for the purpose of applying for orders under s.86(1) of the Companies Law).

(b) The analysis set out in *Cross-Border Insolvency*, *op. cit.*, correctly summarized the applicable law. Paragraph 6.88 states as follows (at 284):

> "However, the Privy Council in *Cambridge Gas* had plainly proceeded on the basis that submission would be sufficient, and it is suggested that there is no reason for regarding this part of the reasoning as having been overruled by *Rubin*. Accordingly, where a corporation invokes the insolvency jurisdiction of a foreign court, or otherwise validly submits thereto, the proceedings may be accorded recognition by the English court."

(c) As is stated in para. 6.84 of *Cross-Border Insolvency* (at 283), it is clearly established as a matter of personal bankruptcy law that foreign proceedings may be recognized if the debtor submitted to the jurisdiction of the foreign court. Ms. Stanley relied on *In re Davidson's Settlement Trusts* (6). This case involved the bankruptcy in Queensland of Walter Davidson based on his own petition, and the subsequent application to the English court by the official assignee appointed in Queensland for an order that he be entitled to withdraw and remit to Australia funds held in court in England for Mr. Davidson (representing funds settled on Mr. Davidson by his deceased father). After Mr. Davidson had presented his own bankruptcy petition to the Queensland court, he died intestate, leaving a widow; his widow was appointed to represent Mr. Davidson's estate and she opposed the official assignee's application. Ms. Stanley referred me to the following passage from the judgment of James, L.J. (L.R. 15 Eq. at 385–386):

> "Whether the domicil of the insolvent was English or colonial, for the purpose of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in *Queensland* cannot be disputed by the representative of the insolvent, who became an

> insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony, and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in Court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts, and a surplus here is only in the imagination."

(d) Lord Hoffmann in *Cambridge Gas* (5) had referred to *In re Davidson's Settlement Trusts* and confirmed the principle on which the decision was based as follows ([2006] UKPC 26, at para. 19):

> "The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English movables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in *Solomons v Ross*, or in which he submitted to the jurisdiction*: Re Davidson's Settlement Trusts* . . . It may be that the criteria for recognition should be wider, but that question does not arise in this case. *Submission to the jurisdiction is enough.* In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property." [Emphasis added].

(e) The effect of submission should, in principle, be the same in the case of a corporate insolvency as in the case of a personal bankruptcy (although, as is acknowledged in para. 6.84 (*ibid.*) of *Cross-Border Insolvency*, "submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon"). The only material difference between bankruptcy and corporate insolvency is that there is no need for a vesting order in the latter because the foreign assets of the company remain in the company, whereas in the case of a trustee in bankruptcy those assets need formally to be vested in him. Ms. Stanley submitted that this difference does not, and should not, lead to different rules for recognition.

(f) Submission by the company to the jurisdiction of the foreign court prevented anyone claiming through the company from challenging or denying the foreign liquidators' powers to act on behalf of the company, which powers were granted by or resulted from (in a case in which the powers were granted by a foreign statute following the making of) the foreign court's order.

(g) Ms. Stanley noted that in *Cambridge Gas* (5) the issue of submission had arisen but the discussion in that case related to submission not by

the company but by a shareholder, who was treated as a third party. In *Cambridge Gas*, the issue was whether the New York Bankruptcy Court's confirmation order in the chapter 11 proceedings relating to Navigator Holdings plc ("Navigator"), a Manx corporation, pursuant to which the shares in Navigator held by Cambridge Gas Transport Corporation ("Cambridge Gas"), a Cayman company, were to be transferred to Navigator's chapter 11 creditors' committee, was to be recognized. In these circumstances, there was, for the purpose of deciding whether the common law rules for recognizing and enforcing foreign judgments applied, an issue as to how to characterize the Bankruptcy Court's confirmation order (as well, of course, as to whether these common law rules applied differently to judgments obtained in the course of bankruptcy and insolvency proceedings). Was it an *in personam* order against Cambridge Gas (as shareholder) so that Cambridge Gas must have submitted to the chapter 11 proceedings for it to be bound or was it to be characterized in some other way which avoided the need to find a submission by Cambridge Gas? If the confirmation order was to be treated as an *in personam* order against Cambridge Gas under the ordinary common law rules regulating the recognition of foreign judgments, Cambridge Gas would have had to submit. It had not directly done so and had not participated directly in the chapter 11 proceedings (but its parent company had done so, perhaps on its instructions) and therefore the Deemster in the High Court of the Isle of Man concluded that Cambridge Gas had not submitted. His decision on this point was not appealed. But it seems that Lord Hoffmann thought this result surprising (presumably because he thought, on the facts, that Cambridge Gas's involvement in the chapter 11 proceedings albeit indirect was on the evidence sufficient to give rise to a submission (*ibid.*, at para. 10)). In any event, submitted Ms. Stanley, *Cambridge Gas* did not involve a decision on or analysis of the effect of a submission by the company on the recognition of the powers of a foreign liquidator to act on behalf of the company (and of other corporate organs, such as the board of directors, to act on the company's behalf). Furthermore, Ms. Stanley submitted that there was nothing in the Supreme Court's judgment in *Rubin* (21) that was inconsistent with or undermined the validity of the proposition that where the company submitted to the foreign court the powers of the foreign liquidator to act for the company would be recognized.

(h) Further, even though in the present case the Hong Kong winding up had not been commenced by a petition presented by the company, the company's registration under Part XI of the former Companies Ordinance (*cap.* 32) was sufficient to constitute a submission to any order made by the Hong Kong court, including the winding-up order. Ms. Stanley relied on the statement made by Mr. Chan in his second affirmation, which I have quoted above, as to the effect of the registration as a matter of Hong Kong law. Ms. Stanley did not appear (nor on the evidence did it appear

possible for the liquidators) to rely on participation by the company's directors or shareholders in the Hong Kong liquidation, which should be treated as sufficient to amount to a submission to those proceedings.

Discussion and decision—the issues to be decided

18 It seems to me that the following four main issues arise:

(a) Does the court have jurisdiction or the power to grant the relief sought by the liquidators in the present circumstances (the jurisdiction or power issue)?

(b) If it does have jurisdiction or the power, should the court make an order and exercise the jurisdiction or power in the present circumstances (the exercise of discretion issue)?

(c) Assuming the court is otherwise able and willing to grant the relief sought, should the court do so without notice being, and before notice is, given of the summons to the company's directors, shareholders and creditors (the notice issue)?

(d) What form of relief should the court grant and order should the court make (the nature of the relief issue)?

The jurisdiction or power issue

19 The first question is whether the court is able to grant the relief sought in the present circumstances. There are three sub-issues:

(a) What is the juridical nature and scope of the court's non-statutory jurisdiction to recognize and assist foreign court-appointed liquidators?

(b) What is the relief being sought by the liquidators?

(c) Is that relief within the scope of the court's jurisdiction or powers?

20 The juridical nature and scope of the court's non-statutory jurisdiction to recognize and assist foreign court-appointed liquidators has, as is well known, been the subject of much judicial comment and academic and practitioner commentary and has generated a voluminous body of secondary literature, in particular since the decisions in *Rubin* (21) and *Singularis* (22). Some, but not all, of the decisions and only a small proportion (thankfully) of the literature have been cited to me on this application and I will confine my comments (with limited exceptions) to the materials which have been cited to me.

21 It seems to me that the most recent, detailed and significant analysis of the juridical nature and basis of the non-statutory jurisdiction to recognize and assist is to be found in the majority judgments in *Singularis*, in particular the judgment of Lord Sumption. For this reason, this seems to me the proper place to start any discussion of this jurisdiction.

22 Before considering the decision and approach taken in *Singularis*, I should make two preliminary points. First, as I have noted, in Cayman we have a statutory jurisdiction to recognize and assist foreign representatives under Part XVII of the Companies Law. This statutory jurisdiction is only available where the foreign representative is appointed in the place of incorporation (see the definition of "debtor" in s.240, which states that "debtor" for the purposes of the definition of a foreign representative—a liquidator appointed in respect of a debtor—means a foreign corporation or other foreign legal entity subject to a bankruptcy proceeding in the country in which it is incorporated or established—"established" in this context appears only to be the equivalent of the place of incorporation in cases of, and is to be applied to, other foreign entities and not foreign corporations). But the statutory jurisdiction has not pre-empted or removed the non-statutory, common law based jurisdiction. This was the view of Jones, J. in), where the learned judge said as follows: "Part XVII [of the Companies Law] supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision." This seems to me to be correct. Secondly, *Singularis* is, as I have noted, a decision of the Privy Council (on appeal from Bermuda). Ms. Stanley did not address the question as to the extent to which this court should follow *Singularis* but for the purpose of this application I intend to treat the decision and analysis as authoritative albeit not technically binding on me.

23 The analysis in *Singularis* (22) (as well as in *Rubin* (21)) used a particular terminology to describe the jurisdiction that the court was exercising—there are repeated references to common law powers to be applied having regard to common law principles. The following extracts from the core parts of Lord Sumption's judgment illustrate the use of this terminology and his analysis of the basis, nature and scope of the jurisdiction ([2014] UKPC 36, at paras. 10–12, para. 19, para. 23 and para. 25):

> "10 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 . . .
>
> 11 . . . The question [of] what if any *power* the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First the proceedings are a

'mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established', to use the expression of Lord Hoffmann in *Cambridge Gas* . . . Inherent in this function of a winding up is the statutory trust of the company's assets . . . and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction . . . Fourth, it brings into play procedural powers generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities . . .

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. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed, rules 216 and 217 . . .

19 . . . 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* . . .

23 . . . *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. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets

and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can . . .

25 In the Board's opinion, *there 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*, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* (at both levels) shows, *common law powers of this kind* are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, *as with other powers of compulsion exercisable against an innocent third party*, its exercise is conditional on the applicant being prepared to

pay the third party's reasonable costs of compliance." [Emphasis added.]

24 In *Singularis* (22), Lord Collins also referred to the court's common law power (*ibid.*, at paras. 51–58):

> "51 The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 that *at common law the court has power to recognise and grant assistance to foreign insolvency proceedings*: para 29 . . .
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> 53 *The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.*
>
> 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*, 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) . . .
>
> 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." [Emphasis added.]

25 Lord Collins also used the power terminology in *Rubin* (21) and summarized the position in this way ([2012] UKSC 46, at para. 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 international element." [Emphasis added.]

26 It seems to me that, based on these statements concerning the nature and scope of the non-statutory jurisdiction to assist, the following points can be made:

(a) The court is to be treated as having a power to recognize and grant assistance to foreign proceedings and liquidators (at least where those proceedings are commenced in and the liquidators are appointed by a court). This is a power of the court. If the circumstances justify its use, and subject to the limitations on its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. This is the purpose for which the power can be exercised.

(b) The court's power as so described is in substance a non-statutory jurisdiction which is based on and justified by the public interests identified by Lord Sumption. In deciding whether and how to exercise the power, the court has regard to and applies the approach which has been labelled the principle of modified universalism. This term is a convenient shorthand for the approach that the court takes when exercising the power which recognizes both the purpose for which the power is to be exercised (to allow a foreign liquidator appointed by a competent court to conduct the liquidation across borders despite the territorial limitations to which his powers are otherwise subject) and also the applicable limitations which apply to the power or condition or qualify its exercise. (I would, for myself, note that there appears to be an unhelpful tendency in the writings of some commentators to mischaracterize the status and effect of this guiding and flexible principle by elevating it into a rigid rule of law that independently generates rights and remedies and is to be treated, and applied, as if it were a doctrine in metaphysics or theology.)

(c) Suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it). The court is using and relying on its domestic law to fashion and find a form of relief for the foreign liquidator that achieves the purpose for which the power can be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Accordingly, the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory power which, by its terms, does not apply in the circumstances—for example by making an order which could only be made if a domestic scheme of arrangement had been applied for and approved where no such scheme can be or has been applied for. Nor can the court make an order that grants relief to the foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist—for example, in the view of both the majority and the

minority in *Singularis* (22), the court cannot order that an auditor subject to the *in personam* jurisdiction of the court provide information to the foreign liquidator when the auditor is not subject to a domestic law duty or obligation in the circumstances to provide it and when there is no right under domestic law for a party in the position of the foreign liquidator to such information. It is an interesting question, which I do not need to resolve on this application, whether the Privy Council created—or recognized—a special common law right or remedy enforceable by the Cayman liquidators which responded to and arose out of the liquidators' need to have the information sought or whether the Board was merely recognizing a right, which was analogous to the *Norwich Pharmacal* right or remedy (see *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (16)) available to any litigant in a similar position (of course the Board refused to grant the relief sought because the Cayman liquidators were said—or perhaps more accurately on the case as argued, assumed—not to have the power under Cayman law to obtain the relevant information from the auditors, although one wonders why, if the common law of Bermuda recognized their entitlement to the information, or the Bermudian court's power to make an order requiring the information to be provided, such an entitlement or power was not available under Cayman law and in this court).

(d) The court must in each case start by considering the nature and form of relief sought by the foreign liquidator. This can take a number of different forms and the legal analysis varies depending on the nature of the relief sought. Sometimes, the foreign liquidator is asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There may well be no need to rely on or exercise the common law power in this case. Sometimes, the foreign liquidator is asking the requested court just to exercise its case management powers in proceedings before it by adjourning or staying those proceedings or the execution of a domestic judgment arising therefrom. The exercise of such case management powers can be said to involve an exercise of the common law power. Sometimes the foreign liquidator will seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needs to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there will be no need to rely on the common law power. Where the cause of action is vested in the foreign liquidator or he is seeking additional relief in reliance on his powers as liquidator then the common law power to recognize and grant assistance to the foreign liquidator comes into play.

(e) Where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company. To that extent he will be entitled to recognition of his powers. As I have pointed out, the principles of domestic private international law produce that result. Therefore, technically, the foreign liquidator does not need to rely on, and this result does not depend on the exercise of, the common law power (at least when the foreign liquidator is only taking action in the name of and on behalf of the company and those seeking to challenge the foreign liquidator's action are claiming through the company). However, when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company.

(f) The limitations on the common law power (both as to its scope and the circumstances in which it will be exercised) are those described by Lord Sumption and those I have set out above.

27 In the present case, the liquidators wish to be able to promote a Cayman scheme and in particular to apply to the court for an order under s.86(1) of the Companies Law convening a meeting of creditors. Section 86(1) states:

> "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, *on the application of the company* or of any creditor or member of the company, or where the company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs." [Emphasis added.]

28 Accordingly, the liquidators can apply if they are able or permitted to act for and on behalf of the company. Two main questions therefore arise. First, are the liquidators able—are they treated under Cayman private international law as being entitled—to act on behalf of the company (and therefore able to cause the company to make an application under s.86(1) of the Companies Law)? If not, can and should the court exercise its power to recognize and assist so as to permit them to do so, and if so how?

The position under private international law rules where the foreign liquidator is not appointed in the place of incorporation

29 As regards the first question, the answer is no:

(a) Because the liquidators are not appointed in the company's country of incorporation they are not, as a matter of Cayman private international law, treated as being empowered to act on behalf of the company. As Professor Briggs notes in *Private International Law in English Courts*, paras. 10.15, 10.16 and 10.22, at 804–805 and 808 (2014):

> "10.15 A corporation is an artificial creation, a legal person. The question whether, and with what powers, a body corporate has been created can only be determined by the law under which its creation took place, which for the common law rules of private international law means the *lex incorporationis*.
>
> 10.16 Likewise, the question who is empowered to act on behalf of the corporation, and in what circumstances, is a matter for the *lex incorporationis* to specify . . .
>
> . . .
>
> 10.22 Likewise, the question of who is entitled to sue in the company's name . . . is almost inevitably a matter for the *lex incorporationis* . . ."

(b) Under Cayman law, having regard to the company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the company are the company's directors and shareholders. The winding-up order without more does not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the company. The winding-up order is not, as an order of a foreign court, of itself binding or enforceable in Cayman (see *Felixstowe Dock & Ry. Co.* v. *U.S. Lines Inc.* (9) ([1989] Q.B. at 375)). Of course, before taking any action the directors would need to consider the effect (both legal and practical) of the winding-up order and would be unlikely to act, and are likely to be advised not to act, without the consent of the liquidators, certainly where they are subject to the *in personam* jurisdiction of the Hong Kong court and save in a case where there was some proper justification for not acting as directed by the liquidators.

(c) It was no doubt the Hong Kong liquidators' lack of authority, as a matter of Bermudian private international law, which resulted in the directors in *Re Dickson Group Holdings Ltd.* (7) remaining in place for Bermuda law purposes and passing a resolution supporting the Hong Kong liquidators' application for leave to summon a meeting of creditors. This meant that, under the law of incorporation, a corporate organ recognized as having authority to act for the company, and to authorize the company to apply for an order to convene a meeting of creditors, had approved and authorized the issue of the summons. At the very least, this was a prudent belt and braces approach (the application in the *Dickson Group Holdings Ltd.* case had been issued by and in the name of the

company). This step has not been taken in the present case because, as the second affidavit of David Yen Ching Wai makes clear, despite the liquidators' best efforts, the directors are not cooperating and have failed to respond to the liquidators' efforts to contact them (it appears that one director has been disqualified from acting while others have resigned—including the two Hong Kong based directors—or indicated that they intend to resign from the board).

The exercise of discretion issue

30 As regards the second question:

(a) It seems to me that the power to recognize and assist arises and applies even in a case where the foreign liquidator has been appointed in a place other than the country of incorporation. It is true that, as I have explained, the private international law rule which requires recognition of the power of a foreign liquidator appointed in the country of incorporation to act for the company does not apply. But, in light of the nature and scope of the power to recognize and assist, as I have explained it above, I see no reason for concluding that the power is wholly unavailable and cannot be used just because the foreign liquidator has been appointed in a place which is not the country of incorporation.

(b) The significance and impact of the appointment being made in the country of incorporation was also discussed in *Stichting Shell Pensioenfonds* v. *Krys* (24) ("*Stichting Shell*"), another important and recent decision of the Privy Council (sitting on appeal from the Eastern Caribbean Court of Appeal in a case involving the BVI). In that case, the advice of the Board was given in a judgment of Lord Sumption and Lord Toulson. They commented as follows ([2014] UKPC 41, at para. 14):

> "In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute . . . In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court but all assets world-wide . . . *It 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 . . ." [Emphasis added.]

(c) This confirms that at least one of the important reasons why an appointment in the place of incorporation is significant is because it brings with it the effects under private international law that I have already mentioned. Liquidators appointed by a court in the place of incorporation can take advantage of these rules of private international law (which are

applied in many jurisdictions), and therefore in practice expect to be able to conduct the liquidation and be effective, and act for the company, in multiple jurisdictions.

(d) I also note that there are some highly respected commentators who suggest that the powers of a liquidator appointed in a country other than the place of incorporation should be limited to dealing with the assets of and acting on behalf of the company in that territory and not beyond it. For example, Professor Ian Fletcher says the following in the latest and recent edition of *The Law of Insolvency*, 5th ed., para. 30–057, at 959 (2017):

> "A liquidator appointed under the law of the company's place of incorporation will be recognised at English law as having authority to wind up the company and to [be] represented in legal proceedings brought either against or on behalf of the company provided that such representative authority is conferred upon him by the law governing his appointment. Conversely, there is no reported incidence of recognition having been accorded in England to a liquidator appointed under the law of some other jurisdiction than that in which the company underwent incorporation. With respect to liquidations of this kind, the inference which most readily suggests itself is that, the effects of such a liquidation being regarded as of necessity, confined to the territorial limits of the jurisdiction in which the winding up is taking place, the liquidator's capacity to act on the company's behalf and to deal with its assets must be deemed to be similarly restricted so as to be limited to property situate[d] within the jurisdiction of the foreign court."

(e) But it seems to me that the inapplicability of the rules of private international law that treat a foreign liquidator appointed in the country of incorporation as having proper authority to act for and to bind the company or as effecting in substance a universal succession to the company's assets does not preclude the court exercising its non-statutory power to assist a foreign liquidator appointed outside the place of incorporation where the conditions for the exercise of that power are satisfied. The power is capable of having a wider application than these rules of private international law so that the power can be exercised even when the rules of private international law do not apply to require recognition of the foreign liquidator's powers or status.

(f) It seems to me that in the present case the conditions for the exercise of that power are in principle satisfied for the following reasons:

> (i) It seems to me that the relief that the liquidators need and should be granted is an order authorizing them to make an application under s.86(1) of the Companies Law and to consent to the proposed scheme on the company's behalf.

(ii) The liquidators wish (as Ms. Stanley confirmed during the hearing) simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process. This can be achieved by the court making an order in the terms I have just mentioned and by making a direction to the effect that any proceedings commenced or any winding-up petition presented against the company be assigned to me (so that I can ensure that appropriate case management orders are made to stay or adjourn such proceedings pending the completion of the scheme process save in exceptional circumstances which would justify a different approach).

(iii) In the present case, the court is in substance dealing with a governance question, namely whether to permit the liquidators to act on behalf of the company in presenting an application under s.86(1) of the Companies Law and in consenting to the proposed scheme on behalf of the company. The issue is who should be entitled to act and bring proceedings for a scheme on behalf of the company (in the context of a corporate rescue or reorganization—albeit not one that involves all creditors being paid in full). No issues arise involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they seek. It appears that currently the company's board and its directors are unable or unwilling to act (while the directors could, I assume, act and support or authorize the making by the company of an application under s.86(1), with the consent of the liquidators they have shown no sign that they will take any steps to support or oppose the liquidators' plans or this application). It also appears that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the liquidators' application (although as I explain below, I think that it is important to ensure that there really is no objection and to give all those affected an opportunity to be heard, to give notice to the directors and shareholders of the liquidators' plan to promote a parallel scheme in Cayman, the summons and the order that I make on this application).

(iv) It also appears to be the case that there is no likelihood of an application being made for a winding-up order in Cayman. The winding-up order was made on February 9th, 2015. As David Yen Ching Wai explains in his second affidavit, creditors have participated in the Hong Kong liquidation and 39 proofs of debt have been lodged. If creditors considered it to be in their interests to have a Cayman winding up they are expected to have made that clear and either applied in Hong Kong for permission or taken steps in Cayman to present a petition in Cayman. They have not done so in

over two and a half years and it appears from the evidence filed in support of the summons that creditors are aware of and not objecting to the proposed schemes of arrangement (although, once again, as I explain below, I think it important to ensure that creditors are given proper notice of the liquidators' plan to promote a parallel scheme in Cayman, the summons and the order that I make on this application).

(v) It is clear on the evidence that the company has substantial contacts with Hong Kong. As I have already noted, the company's shares have been listed and are to be relisted on the Main Board of the HKSE; the corporate business of the company has been administered from Hong Kong (with all the directors having addresses in Hong Kong or the PRC); the company was registered under Part XI of the former Hong Kong Companies Ordinance on November 4th, 1999; virtually all the company's shareholders have addresses in Hong Kong (the company's largest registered shareholder, HKSCC Nominees Ltd., which owns and operates the Hong Kong Central Clearing and Settlement System (CCASS), held as at August 17th 99.02% of the company's shares and all CCASS participants were registered with Hong Kong addresses) and 2.7% of the value of all proofs of debt lodged in the Hong Kong liquidation have been filed by persons located in Hong Kong and 74.9% of proofs have been lodged by persons located in the PRC.

(vi) There appears on the evidence to be no need for or reason why creditors or members would benefit by a Cayman winding up or from a provisional liquidator being appointed in Cayman. The liquidators consider that a Cayman liquidation or provisional liquidation would just incur additional cost and result in unnecessary delays and there is no risk of prejudice to stakeholders in not having such a proceeding. This, on the evidence, seems right to me.

(vii) This is also not a case in which there are any local reputational, regulatory and policy reasons requiring a local proceeding. I agree with, and wholeheartedly endorse, the approach explained and the caveats identified by Kawaley, J. in his judgment in *Dickson Group* (7) ([2008] Bda LR 34, at para. 29). In appropriate cases, the requested court may have to refuse to grant assistance and the relief sought by a foreign liquidator where a local liquidation or provisional liquidation is needed (and I also note that the Chief Justice made the same point in his summary of his judgment in *Fu Ji Food* (10) and expressed the same reservations, commenting that there may be cases in which there are "compelling reasons" for a Cayman winding up).

(g) Therefore, in the present case the Hong Kong liquidation is the only proceeding which has been or is likely to be commenced in respect of the

company and is taking place in a jurisdiction with which the company has substantial connections. I note that the company's centre of main interests, as that term is used in the EU Insolvency Regulation or the UNCITRAL Model Law, is probably in Hong Kong and that seems to me to be a consideration of considerable weight to be taken into account when deciding whether the foreign, non-place of incorporation liquidation should be treated as competent and justifying assistance, although I do not consider it to be determinative. There is therefore a foreign liquidation taking place in a jurisdiction which should be treated as competent, no other insolvency proceeding in prospect and a proper need (endorsed and supported by a well-respected foreign court) for the foreign liquidator to be able to exercise his powers to represent the company in the local court and jurisdiction in order to be able effectively to conduct and achieve the purposes of the liquidation in the interests of creditors and other stakeholders. It seems to me that in these circumstances the purpose for which the power to recognize and assist may be exercised is fully engaged so as to justify the exercise of the power (and the authorities relied on by Ms. Stanley support its exercise in the present case).

(h) None of the limitations which Lord Sumption identified applies in the present case to prevent the exercise of the power to recognize and assist the liquidators. They have a power as a matter of Hong Kong law to act for and on behalf of the company and to promote schemes of arrangement. Furthermore, while the liquidators wish to use and rely on the statutory jurisdiction to apply for a Cayman scheme (under s.86(1)) that jurisdiction (and the applicable statutory provision) is available in the circumstances. Section 86(1) permits an application to be made by the company and the liquidators can be authorized by the court to make such an application on the company's behalf. This does not involve the heresy or impermissible exercise of the common law power identified by Lord Collins in *Singularis* (22) ([2014] UKPC 36, at paras. 78–83) in which the court applies legislation which otherwise does not apply "as if" it applied. Provided that the liquidators can properly make an application in the company's name and are authorized to do so on the company's behalf, the statutory jurisdiction to apply for an order convening a meeting of creditors may be invoked in accordance with its terms. It seems to me that the court may without the need to rely on a statutory power not otherwise available and in a manner that is in accordance with domestic law make an order against and in respect of a Cayman company authorizing a foreign liquidator to make such an application and giving him powers to act on behalf of the company for that purpose.

(i) In my view, *Re Dickson Group Holdings Ltd.* (7) was correctly decided and I see myself as following in general terms the approach taken in that case by Kawaley, J., although I have sought to update and modify the analysis of the common law power and how it is to be applied to

reflect the judgments in *Rubin* (21) and *Singularis* (22). I also consider that I can rely on and am following the approach of the Chief Justice in *Fu Ji Food* (10) subject to a similar updating of and adjustment to the analysis of the common law power (and consequently to the form and nature of the relief to be granted to the foreign liquidator). I also agree with the result in *Re Opti-Medix Ltd.* (17) although I have sought to provide a different and more detailed analysis of the common law power. I agree with Ms. Stanley that the result and reasoning of Lord Tyre in *Hooley* (12) is not inconsistent with the approach I have adopted or the liquidators' application. It is hardly surprising that a Scottish court would refuse to interfere with a sale agreed and entered into by Scottish administrators (whom it had appointed) on a post-transaction application made by a creditor rather than the foreign liquidator and without a request of the Indian court. The present case is very different and presents wholly different issues. I also regard the commentary in both *Dicey, Morris & Collins* and *Cross-Border Insolvency* to be helpful and broadly correct and take comfort from the various cases cited in those texts and by Ms. Stanley in which courts, in admittedly different contexts, have been prepared to recognize and assist foreign liquidators appointed outside the country of incorporation.

The submission to jurisdiction point

31 Ms. Stanley, as I have noted, also argues that submission by the company to the jurisdiction of the foreign court in which the winding-up order is made and the foreign liquidator is appointed is a separate ground which justifies the requested court recognizing (and indeed requires the requested court to recognize) the powers of the foreign liquidator to act on behalf of the company and that the company has submitted to the jurisdiction of the Hong Kong court in the present case.

32 It seems to me that two main issues arise:

(a) Is submission a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company?

(b) If so, what constitutes submission for these purposes—in particular is registration as an overseas company sufficient or is it necessary that the company applies for the commencement of (or actively participates in) the foreign liquidation?

33 As regards the first issue, I would make the following comments, subject to the caveat that my views are preliminary since, as the textbooks cited to me make clear, the issue has not been the subject of a full consideration by any previous decision and this has been an *ex parte* application in which the counter-arguments have not been aired and tested:

(a) In my view, submission can in principle be sufficient for certain purposes.

(b) At para. 6.84 of *Cross-Border Insolvency*, Mr. Smith notes, prior to reaching the conclusion relied on by Ms. Stanley and quoted above, that there is no clear authority on the effect on a foreign liquidator's application for recognition or assistance of a submission by the company to the jurisdiction of the foreign court (at 283):

> "In the case of bankruptcy, it is clearly established that foreign proceedings may be recognised in England if the debtor submitted to the jurisdiction of the foreign court. However, submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon."

(c) But it does appear that (in addition to Lord Hoffmann in *Cambridge Gas* (5) in the passage referring to *In re Davidson's Settlement Trusts* (6) relied on by Ms. Stanley and quoted above) both Lord Collins and Lord Mance in *Rubin* (21) accepted, or perhaps assumed, that submission by a corporate debtor (as well as an individual bankrupt) would be sufficient.

(i) In *Rubin*, when discussing *Cambridge Gas*, Lord Collins said as follows ([2012] UKSC 46, at para. 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, 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.*" [Emphasis added.]

(ii) The second italicized passage is quoted and relied on by Ms. Stanley. I think that the first quoted passage is also worth noting. (I also think that Ms. Stanley is right to say that there is nothing in the subsequent criticisms of Lord Hoffmann's analysis or the result in

Cambridge Gas which prevents a court concluding that a submission by a company would be a sufficient ground for recognizing the foreign liquidator's powers to act for the company.) The significance of submission has been highlighted and strengthened by the Board's judgment in *Stichting Shell* (24). Furthermore, there is an argument that the result in *Cambridge Gas* can be justified on the basis of there having been a submission—the submission by Navigator having been sufficient to constitute a submission by its shareholders, at least to the extent of preventing them challenging the orders of the foreign court: see Briggs, "Judicial assistance still in need of judicial assistance" ([2015] 2 LMCLQ 179–193).

(iii) Lord Mance said the following in his dissenting judgment in *Rubin* ([2012] UKSC 46, at para. 189):

> "Lord Clarke 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 . . . *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'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." [Emphasis added.]

(iv) The personal bankruptcy rule in Dicey, Morris & Collins, *op. cit.*, to which Lord Mance was referring (para. 31R–059, at 1750) states that—

> "(2) . . . English courts will recognise that the courts of any other foreign country have jurisdiction over a debtor if—
>
> (a) he was domiciled in that country at the time of the presentation of the petition or

(b) he submitted to the jurisdiction of its courts, whether by himself presenting the petition or by appearing in the proceedings."

Paragraph 31–064 states as follows (at 1751):

"Clause (2) of the Rule . . . must be regarded as somewhat speculative, because the question is a vexed and controversial one which English courts have had few opportunities of considering. It was at one time supposed that English courts would recognise the bankruptcy jurisdiction of a foreign court only if the debtor was domiciled in the foreign country. But it has since become clear that they will also do so if the debtor submitted to the jurisdiction of the foreign court, whether by presenting the petition himself, or by appealing against the adjudication, or by appearing in the proceedings at some stage either personally or by his counsel or solicitor."

(v) *Dicey, Morris & Collins*, *op. cit.*, refers to and relies on *In re Davidson's Settlement Trusts* (6) to support the proposition that the presentation by the personal debtor of his own petition will be sufficient. They also refer to *In re Anderson* (2). In this case a debtor, whose domicile was English and who was entitled to a reversionary interest in personalty (a fund) in England, was adjudicated bankrupt in New Zealand on a creditor's petition. Subsequently, he was adjudicated bankrupt in England. The reversionary interest, which by an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England and he at once gave notice of his title to the trustees of the fund and argued that he was entitled to it as against the New Zealand trustee. Phillimore, J. held that the New Zealand trustee was entitled, as against the trustee in bankruptcy in England, to the reversionary interest. The record in the New Zealand proceedings showed that though not a consenting party, he was a party by his solicitor to the adjudication in bankruptcy and had recognized the adjudication by applying some time afterwards for his discharge and obtaining it. Phillimore, J. said ([1911] 1 K.B. at 902):

"Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. *If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it, as in In re Davidson's Settlement Trusts . . . and In re*

> *Lawson's Trusts . . . Therefore I think that the adjudication passed, as against him and, therefore, as against anybody claiming under or through him, his personal property wherever situate . . .*" [Emphasis added.]

(vi) It seems to me that Ms. Stanley is right to say that, at least as regards the issue of whether anyone other than the foreign liquidator should be recognized and treated as having the right and power to act on behalf of the company, there is no principled basis for distinguishing between the effect of submission by an individual and a corporate debtor. As Phillimore, J. says, it is the fact that the debtor has become and made itself a party to the foreign proceedings that is key and affects anyone claiming under or through the debtor. The fact that under personal bankruptcy law there is a vesting and transfer of title in the debtor's property to the trustee is of no consequence in this context. The vesting or transfer of property outside the foreign jurisdiction is not recognized as a matter of the private international law of the requested court. In a corporate context, if the company has submitted to the foreign court and the insolvency proceedings by applying for the appointment of the liquidator or participating in the foreign insolvency proceedings, its board or shareholders cannot be heard to deny the effects of the appointment (in a case where the company presents its own petition or application in the foreign court) requested by the company and (in any case in which the company through its proper officers has participated in the foreign liquidation or otherwise acted so as to give rise to a submission) the consequences, as regards corporate authority and the power to act on behalf of the company, that follow from the appointment and the foreign court's order.

34 As regards the second question, I would make the following comments (which once again must also be subject to a caveat to the effect that I express here only preliminary views since not only were the arguments not tested on an *inter partes* hearing but the evidence of Hong Kong law was not detailed and limited and Ms. Stanley did not explore the issue or relevant authorities in any depth):

(a) As I have noted, the liquidators rely on the company's registration under Part XI of the former Companies Ordinance as establishing its submission to the jurisdiction of the Hong Kong court generally and in particular with respect to the Hong Kong winding-up proceedings. As I have already noted, Mr. Chan in para. 9 of his second affirmation says as follows:

> "By registering under Part XI of the former Companies Ordinance (Cap. 32), the company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong

> Kong (the Rules), compliance with Part XI means that the company is 'within the jurisdiction' and can therefore be served with a winding up petition in accordance with Order 10, rr.1–5 of the Rules . . . and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014) . . ."

(b) Part XI applies to an overseas company which has established a place of business in Hong Kong (see s.332). In common with similar English statutory and procedural rules, Part XI and the Rules (as defined in Mr. Chan's second affirmation) permit service to be effected in Hong Kong on the overseas company either by service addressed to any person in Hong Kong whose name has been delivered to the Registrar as being authorized to accept service or where the overseas company makes default in filing these details by service at any place of business established by the overseas company in Hong Kong or if the company no longer has a place of business in Hong Kong by sending the document to the company's principal place of business in its place of incorporation or to any place in Hong Kong at which the company had a place of business within the previous three years (see s.338).

(c) The question arises as to the legal effect of these provisions and as to whether they result in mere registration constituting a submission for the purposes of recognition of the foreign liquidator's powers.

(d) As regards what is required for there to be a submission, I note that in their judgment in *Stichting Shell* (24) Lord Sumption and Lord Toulson ([2014] UKPC 41, at para. 31) comment that—

> "a submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the Defendant lodged a proof."

The company must by some voluntary act accept that it is subject to and bound by the jurisdiction of the foreign court pursuant to which the order in question is made. Registration *prima facie* appears to be a voluntary act by which the overseas company concerned allows itself to become subject to the foreign court's jurisdiction and to accept that such jurisdiction may be taken and assumed by service of process on the company's appointed authorized representative. If the applicable rules regulating the effect of registration provide for and permit service of a winding-up petition as well as originating process relating to ordinary civil litigation then it should follow that there is also a voluntary acceptance of the foreign court's winding-up jurisdiction.

(e) However, the difficulty I have is that it appears to be arguable that registration by an overseas company of particulars (of a person authorized to accept service), when required only where the overseas company has established a base of business in the foreign jurisdiction, is to be treated as permitting the foreign court to take and assume jurisdiction by reason of the company's presence in the foreign jurisdiction rather than its submission. Furthermore, the analysis of the legal effect of the registration gives rise to questions of construction of the relevant foreign legislation and requires proper evidence of foreign law (which is not available on this application) and appears, at least by reference to the English authorities of which I am aware (but which were not cited to me or the subject of submissions by Ms. Stanley) to raise difficult issues which may be contested and would require further submissions before I would be prepared to form a view.

(f) In Professor Richard Fentiman's *International Commercial Litigation*, 2nd ed. (2015) he says as follows (para. 9.13, at 324):

> "It has been said that a foreign company having a branch in England submits to the jurisdiction merely by complying with its Companies Act obligation to file an address for service.[35] In such cases, however, the basis for jurisdiction is the defendant's presence in England. By providing an address for service the company is merely ensuring that service may be effected easily. This is confirmed by the rule that such a company may be served at its place of business even if it has provided no address.
>
> [35] *Employers Liability Assurance Corp v Sedgwick, Collins & Co* [1927] AC 95, 104, 107, 114 (HL)."

(g) So, Professor Fentiman considers that registration of particulars by an overseas company does not permit the court of the place where the registration is made to take jurisdiction because the overseas company has submitted generally to the jurisdiction of the foreign court. It is presence through the place of business that is the operative factor. Having a presence or place of business in the country of the foreign court is, of course, in the current context insufficient and is different from submitting to the jurisdiction of the foreign court, which is what is required (I also note that *Dicey, Morris & Collins* (*op. cit.*) state that the statutory and procedural rules relating to overseas companies are "exclusively concerned with *service*" and therefore are perhaps of limited significance and effect—see para. 11–117, at 416).

(h) It does appear, however, that the judgments in *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.* (8) were based on the proposition that the foreign company concerned had submitted to the jurisdiction of the English courts. In that case, as Sir John May noted in

the Court of Appeal in *Rome* v. *Punjab National Bank (No. 2)* (20) ([1989] 1 W.L.R. at 1218):

> "The judgment debtor was a Russian company which had carried on business in London before the 1914–1918 war and had registered a Mr. Collins as its agent to accept service. After 1917 the company's business and assets were transferred to the Soviet government under the revolutionary legislation. In 1923 a writ was served on Mr. Collins, and, in default of appearance, judgment was signed against the defendants despite Mr. Collins' protest that the company had ceased to exist. In both tribunals the validity of the service was challenged, but having found that the company continued to exist *both the Court of Appeal and the House of Lords held that the Russian company, by filing Mr. Collins' name and address, had submitted voluntarily to the jurisdiction of the English courts and that so long as his name remained on the register, service on him was good service.*" [Emphasis added.]

(i) In *Rome* v. *Punjab National Bank (No. 2)*, the Court of Appeal held that on a true construction of the relevant provisions of the Companies Act 1985 (s.695(1)) a writ was sufficiently served on an overseas company if addressed to a person whose name and address had been delivered to the registrar of companies and left at or sent by post to that address, notwithstanding that the company had ceased to carry on business in Great Britain, that the persons so named were no longer resident there, and that those facts had been notified to the registrar under the 1985 Act. The decision is not referred to by Professor Fentiman and does, as it seems to me, suggest that the basis for jurisdiction in cases involving overseas companies is not presence (or at least presence alone) in the foreign jurisdiction.

(j) Furthermore, I note that the Hong Kong Companies Ordinance in terms provides for service on the overseas company even if it no longer has a place of business in Hong Kong. This suggests that the existence of a place of business is not the key factor or the only relevant basis on which the Hong Kong court is to be treated as taking jurisdiction.

(k) It seems to me that the basis on which jurisdiction over the overseas company is taken is properly to be treated as statutory and therefore whether registration gives rise to and is to be characterized for present purposes as a submission to the foreign jurisdiction is in part a question of statutory construction and in part a question as to whether as a matter of Cayman law the effects of the foreign statute are to be treated as sufficient to amount to a submission.

(l) My provisional view is that they are but, as I have said, there are doubts and issues which require evidence of foreign law and fuller consideration and I therefore do not wish on this application to express a

firm view. I would also wish to consider carefully whether if registration can be treated as a submission it constitutes a submission for the purpose of a liquidation taking place in that jurisdiction. I note that Lord Mance in the passage from *Rubin* (21) quoted above referred to the need for there to be a submission to "the foreign bankruptcy jurisdiction" and it seems to me to be arguable that what is required is that the company apply for the commencement of the foreign liquidation or that its directors or shareholders (or other proper representatives) authorize participation in the foreign liquidation. As I have noted, neither of these conditions is satisfied in the present case.

(m) Accordingly, where the position is not settled and there has only been a limited opportunity for the citation of authority or argument, I do not consider that I am in a position to form a concluded view on this issue. I am reassured by the fact that in this case, in view of the conclusion I have reached regarding the availability of and the justifications for the exercise of the common law power, I am able to grant the relief sought by the liquidators without the need to determine that the company has submitted to the insolvency jurisdiction of the Hong Kong court.

The notice issue

35 As I have noted above, there is a further issue which needs to be considered. This is whether I should grant the relief sought by the liquidators before notice has been given to the company's directors, shareholders and creditors. The summons has been applied for on an *ex parte* basis and while notice of the resumption proposal and the liquidators' plans to promote parallel schemes of arrangement in Hong Kong and Cayman has been given and details notified to shareholders and creditors, the directors, shareholders and creditors have not seen the summons or the evidence in support and have not been given an opportunity to notify the liquidators of any objections or views or to make submissions or appear on the summons.

36 In a case such as the present one, where I am proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up will be made; that the company's directors and shareholders have not sought and do not intend to exercise any residual powers and rights which they may have to act on behalf of the company and that the relief sought by the liquidators is demonstrably in the interests of all stakeholders, it seems to me to be important that the directors, shareholders and creditors are notified of the summons specifically and given an opportunity to notify the liquidators and the court of any objections, to make submissions and to apply to the court should they wish to do so.

37 It would be open to me to direct the liquidators to give notice of the summons before making the order sought and to require a further hearing if any objections are received or to give the directors, shareholders or creditors an opportunity to appear and make submissions. However, this seems to me to be unnecessary. Instead I propose to make an order in the form discussed below which will authorize the liquidators to apply under s.86(1) of the Companies Law and to petition the court for an order convening the meetings required in connection with the proposed scheme but which will also require the liquidators to notify, by a suitable means and within an appropriate timescale, the directors, shareholders and creditors of the summons and to make available copies of the summons and evidence in support to any such person who wishes to receive a copy before the liquidators make any such application. This will ensure that the directors, shareholders and creditors are given adequate notice of the summons and an opportunity to object or to make an application to this court before the liquidators proceed to petition the court for an order convening the scheme meetings. If there are any objections or submissions, or if any such person wishes to be heard, a further hearing of the summons will be listed in order to consider such objections or submissions and hear any person who wishes to appear and the court can then decide how to proceed. If, however, no such objections, submissions or notices of an intention to appear are received before the time to be specified in the order, then the liquidators will be authorized and permitted to proceed thereafter to apply to the court for an order convening the scheme meetings. This will balance the need to ensure that anyone wishing to raise an objection has the opportunity to do so before the liquidators proceed with the scheme without unduly delaying the scheme process by requiring a further hearing, which may be unnecessary.

The nature of relief issue

38 The letter of request and the draft order provided by the liquidators, as I have explained, sought an order which would recognize the liquidators and treat them "in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by this Court . . ." The order would then recognize the powers and authority of the liquidators to act on behalf of the company generally and also for the various purposes set out in the letter of request and draft order.

39 The letter of request and the draft order also sought an order that s.97 of the Companies Law shall apply to the company (and which would have the same or substantially the same effect as s.186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance) so that no action or proceeding shall be proceeded with or commenced against the company within the jurisdiction of this court except by leave of this court and subject to such terms as this court may impact.

40 It seems to me that the court is unable, in the exercise of the common law power, to make either of these orders. Granting relief which is only available to provisional liquidators appointed by this court in circumstances when no such provisional liquidators have been appointed, and granting relief "as if" provisional liquidators had been appointed seems to me to be precisely what Lord Collins in *Rubin* (21) and *Singularis* (22) had said was impermissible. The same applies to an order that would declare that s.97 applies to the company in circumstances where that section does not and cannot so apply in the absence of a provisional liquidator being appointed by this court. It seems that the letter of request and the draft order were drafted so as to reflect the form of order made by the Chief Justice in the *Fu Ji Food* case (10).

41 However it seems to me that the objective of the liquidators can properly be achieved by an order in a different form. I have already outlined above the form of order that I have in mind. The liquidators wish and need to be able to apply to this court for an order convening the scheme meetings, to make such other applications as are required in connection with and to promote the proposed Cayman scheme and to consent to such scheme on behalf of the company. This objective can be achieved by an order which authorizes the liquidators to take this action. Furthermore, relief having the same effect as s.97 of the Companies Law can be achieved by a direction that requires all proceedings commenced or to be commenced (including proceedings for injunctive relief or to execute a judgment) against the company be allocated to and heard by me. This order will ensure that any action taken by creditors or shareholders will become before me and will allow me to make suitable case management orders for adjournments or stays to allow the scheme to proceed (unless there are exceptional circumstances that justify the commencement or continuation of proceedings).

42 Ms. Stanley indicated at the hearing that this approach would be acceptable to the liquidators. Accordingly, I shall make an order in these terms, the precise form of which is to be proposed by Ms. Stanley and approved by me.

Order accordingly.

Attorneys: *Ogier* for the liquidators.

THE "SLOW MOTION LIQUIDATION JEOPARDY" – THE WRONG DEBTOR FOR JUDICIAL RESCUE

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"'slow motion liquidation' is the worst outcome because the debtor's remaining assets are expended on professional fees of the failed restructuring instead of going to creditors"

Introduction

The entry by an insolvent debtor into a judicial rescue process when the debtor was not, in fact, viable to be rescued – there being insufficient creditor support – and inevitably leads to a liquidation, is a disaster. This category of "slow motion liquidation" is the worst outcome because the debtor's remaining assets are expended on professional fees of the failed restructuring instead of going to creditors. In this article, we identify three different meanings of "slow motion liquidation", and categorise them for analytical purposes. A judicial rescue process allows an insolvent debtor to obtain a moratorium over enforcement of its debts, for effecting a restructuring of its capital structure, if the necessary statutory voting thresholds – for example, in a scheme of arrangement – can be met.

Category 1: Slow motion liquidation – the dying business

In commerce, the term "slow motion liquidation" often refers pejoratively to businesses that are too slow to calibrate a modern competitive offering and are therefore in the death throes. For example, it was used to describe the state in which the US retailers, Sears[1] and Kmart[2] had been in for the past few years: a drawn-out shuttering of its business because of a number of factors including competition with the e-commerce platform, Amazon and more recently, COVID-19. Singapore's streaming service, Hooq Digital, was similarly described, due to mounting losses and its inability to compete in an increasingly crowded Southeast Asia streaming market.[3] The Sears Holdings Corporation (the parent company of Sears and Kmart after the merger) recently brought its four-year-old Chapter 11 bankruptcy to a close. Singtel, the majority owner of Hooq, was the one who commenced the creditors' voluntary liquidation of Hooq in March 2020.

Category 2: Slow motion liquidation – possible justifiable cases: run down, run-off and soft wind downs

Philip R Wood CBE, KC (Hon) in his seminal text, *Principles of International Insolvency*, used the term "slow motion liquidation" in the context of describing judicial rescue or reorganisation: *"The use of judicial reorganisations in most jurisdictions seems not as great as expected and many of these are just a slow-motion liquidation. Most proceedings are actually liquidations."*[4] This is a comment on both the efficacy and volume of court-supervised rescues. Further, Professor Wood explains that a judicial rescue that results in a slow motion liquidation may be a suitable way to "run down" and liquidate a debtor, essentially a distributive liquidation, and explains its advantages: (1) that it buys time for the debtor because it may not initially be possible to ascertain whether the debtor can survive; (2) the stays on creditors in the case of a judicial organisation may be wider than in the case of a liquidation, e.g. stays on contract cancellations, so that the business can better be kept together; and (3) the rescue gives the company breathing space to negotiate a final sale but at the same time to keep the business going so that it can be sold as a going concern. Professor Wood in his 2009 article *"The Philosophy of insolvency rescue"* for the Journal of International Banking and Finance Law further describes how slow motion liquidations have been used: *"Until now, reorganisations have not been mainstream in many advanced jurisdictions outside the US, except in mega cases where often they are used as a slow-motion liquidation with a quick sale of viable assets followed by a groaning winding-up of the rest over many longer years..."*[5].

This concept bears similarities to "run-off" in the insurance industry, where an insurance company ceases writing a line of business or ceases underwriting altogether. An insurance company entering run-off does not collect new premiums, but claims for existing business are paid from reserves until all are settled. Similarly, portfolio run-off describes a decline in fixed-term investment assets when proceeds from maturing fixed-term securities are not reinvested. Investment returns decline over time in a portfolio run-off as the asset base generating returns shrinks. A major difference is that run-off need not involve insolvency.

1 Isidore, Chris. "Sears is dying a quiet, invisible death" *CNN Business*, 30 December 2020: https://edition.cnn.com/2020/12/29/business/sears-grim-future/index.html.
2 Mack, Zachary. "This Iconic Retailer Is Closing All But 6 Stores by the End of 2021", *BestLife*, 10 November 2021: https://bestlifeonline.com/news-kmart-closing-stores; Northrup Laura, "Kmart: Stockroom Purges Are About Efficiency, Making Employees' Jobs Easier." *Consumerist*, 26 July 2016: https://consumerist.com/2016/07/26/kmart-stockroom-purges-are-about-efficiency-making-employees-jobs-easier/index.html.
3 Frater, Patrick. "Asian Streamer Hooq's Slow Motion Liquidation Keeps Producers in Limbo" *Variety*, 28 May 2020: https://variety.com/2020/biz/asia/asian-producers-limbo-by-hooqs-slow-motion-liquidation-1234616071.
4 Wood, Phillip R. "Comparison of Work-outs, Judicial Rescues and Liquidations" para 5-001 *Principles of International Insolvency*, 3rd Ed, Sweet & Maxwell, 2019.
5 Wood, Philip R. "The Philosophy of insolvency rescue". *Journal of International Banking and Finance Law* (2009) 6 JIBFL 309, vol 24, issue 6, 2009, 1 June 2009.

In the aftermath of the 2008 Global Financial Crisis, a number of Cayman Islands hedge funds faced large numbers of redemption requests putting enormous pressure on the continued viability of those funds. In response, funds often imposed suspensions on redemptions, and commenced what became known as "soft wind-downs". However, the Cayman Islands Grand Court will not allow a soft wind-down to go on for too long and investor wishes may well lead to a winding up of the fund on the just and equitable ground, there bring a loss of substratum.[6] These same funds had represented to investors that they had the necessary periodic liquidity for redemptions, and cannot therefore impose an indefinite suspension of redemptions. Again, a soft wind-down may or may not involve insolvency.

Category 3: Slow motion liquidation – non-viable debtors

However, we proffer a third category of slow motion liquidation: The entry by an insolvent debtor into a judicial rescue process when the debtor was not, in fact, viable to be rescued – there being insufficient creditor support – and inevitably leads to a liquidation. This category of "slow motion liquidation" is the worst outcome because the debtor's remaining assets are expended on professional fees of the failed restructuring instead of going to creditors. In these circumstances, had the debtor been wound up at the beginning, scarce assets would have been directed to the creditors. This outcome is possible by innocent mistake (so long as it does not go on for too long) based on an erroneous faith in the viability of the underlying business and support from creditors - or by fraudulent design of a debtor. The jeopardy is particularly acute following the landmark case of *BTI 2014 v Sequana SA* where the UK Supreme Court confirmed directors' duty to consider and act in the interest of creditors.[7] In its judgment, the UK Supreme Court noted that there was a coherent and principled justification for the duty: creditors always have an economic interest in a company's assets, the relative importance of which increases as the company nears insolvency. When a company's financial troubles are dire such that insolvency is inevitable, creditors' claims become paramount as the company's shareholders no longer have a valuable interest in the company's assets. The UK Supreme Court noted that, in the context of corporate rescue, the duty *"encourages directors to consider the financial status of the company and the interest of its creditors, and to seek the assistance of insolvency practitioners at an earlier stage than they might otherwise have done in order to bring the company back from the brink of insolvency."*

In *Re Joint Provisional Liquidators of China Bozza Development Holdings Ltd*, although the Hong Kong High Court recognised the appointment of Cayman Islands light touch provisional liquidators, it refused to grant an order giving active assistance due to concerns on how the provisional liquidators approached the restructuring.[8] The Hong Kong High Court's granting of mere recognition reflected the reality that provisional liquidation was seemingly *"being abused to obtain a de facto moratorium of enforcement actions by creditors in Hong Kong."* The Hong Kong High Court criticised both the board and the provisional liquidators for focusing on their own interests in avoiding liquidation and retaining shareholder value over that of the financial interests of the creditors.

In *UP Energy*, the Bermuda provisional liquidators had resisted a winding up order where it was said that they had not carried out any meaningful investigation into the affairs of the debtor, despite having been appointed to office for over five years. The debtor was ultimately wound up by the Hong Kong High Court.[9]

In *GTI*, an unpaid creditor whose debt was not in dispute sought an immediate winding up order against the debtor.[10] Since the appointment of the Cayman Islands provisional liquidators for about 18 months, the financial position of the debtor and its subsidiaries had not improved, and the debtor was unable to meet the basic requirement of producing audited financial statements. In determining whether the proposed restructuring was feasible, the Hong Kong High Court considered the opinions of the unsecured creditors, who had the right to determine whether they were willing to accept the proposed restructuring. It was not up to the debtor or the provisional liquidators to determine whether accepting the proposed restructuring was in the best interests of the creditors. The Hong Kong High Court held that the proposed scheme was not feasible.

In *Carnival Group International Holdings Limited*, the Hong Kong High Court ordered that directors of a Bermuda-incorporated, Chinese property development company which opposed a winding up based on an unrealistic restructuring proposal to be joined as defendants in proceedings so that costs may be awarded against them for their conduct.[11] The Hong Kong High Court held that the so-called restructuring effort was a pretext to obtain multiple adjournments of the winding up petition and that the debtor had failed to comply with court orders requiring the company to file evidence on the progress of the supposed restructuring.

In the case of *NewOcean*, the Bermuda Court of Appeal allowed a bank creditor's appeal of the adjournment of its petition and ordered the immediate winding up of the company.[12] The Bermuda Court of Appeal overturned the lower court's decision to exercise its discretion to adjourn the petition in favour of a light touch provisional liquidation. The Bermuda Court of Appeal, amongst other things, found that the company's management had failed to cooperate fully with the provisional liquidators. In such circumstances, it was preferable that the creditors be granted their winding up order to safeguard their interests, especially where the light touch provisional liquidators had limited control over the disposal of the company's property to satisfy its debts.

In *ACL Asean Tower Holdco*, the Grand Court of the Cayman

6 *Re Harbinger Class PE Holdings (Cayman) Ltd* (unreported) 10 November 2015; Grand Court Cause No FSD 80 of 2015 (concerning closed-ended funds) and *In the Matter of Belmont Asset Based Lending Limited* [2010] 1 CILR 83 (concerning open-ended funds)
7 [2022] UKSC 25.
8 [2021] HKCFI 1235.
9 [2022] HKCFI 1329.
10 [2021] HKCFI 3647.
11 [2022] HKCFI 2668.
12 *HSBC v NewOcean Energy Holdings Limited* [2021] CA (Bda) 16 Civ; Civ/2022/11.

Islands exercised discretion in adjourning a winding up petition and appointing provisional liquidators to the company, even though it had found that a case for winding up had been made in December 2018.[13] In demonstrating a willingness to appoint provisional liquidators to explore the viability of a restructuring, the Grand Court specifically directed that they prepare and submit a report within two months. However, by January 2019, the provisional liquidators reported that they did not consider a financial restructuring to be viable and recommended the company be placed into official liquidation immediately. By the adjourned petition hearing in February 2019, the Grand Court said its only concern at this juncture was whether there was a possibility that the shareholder and founder of the company seeking the adjournment was able to *"pull a rabbit out of a hat"* by coming up with a proposal that might result in the petitioners agreeing to withdraw their petition. The Grand Court likened the adjournment application to the one made orally in *Re Harlequin Hotels and Resorts Limited*[14] where it was unsupported evidence and equated to a *"brave last–ditch battle to defend the Company to 'Custer's land stand'."* The company was subsequently wound up.

Professor Wai Yee Wan of City University of Hong Kong, the author of *Court-Supervised Restructuring of Large Distressed Companies in Asia* noted that when a debtor is insolvent, the debtor's appointment of advisers and the associated costs are paid out of the money that would otherwise go to the creditors.[15] She notes this in the Singapore case of Hyflux Limited, where the debtor filed for the Singapore High Court's protection in May 2018, was subsequently put into judicial management in November 2020 and then, after 12 extensions of the moratorium to rescue the company, was finally placed in liquidation in July 2021. Early on in the restructuring, some of the creditors objected to the S$25 million success fee that the debtor had planned to pay to the proposed scheme manager because it was too high relative to the potential recovery.[16] By November 2020 these creditors succeeded in replacing the debtor's board with judicial managers on the basis that they could no longer trust the debtor's management to lead the restructuring negotiations.[17] By July 2021, the judicial managers filed to wind up the debtor after all restructuring negotiations with potential investors failed. The objectives of the judicial management were *"no longer capable of achievement"* and that the remaining value of Hyflux was *"best realized in a liquidation."* After more than three years of failed restructuring attempts, the liquidation of Hyflux was estimated to bring in S$200 million, a fraction of the S$2.8 billion creditors claimed for in 2018.

In March 2020, the Singapore High Court made a full judicial management order against commodities trader Agritrade International five weeks after putting interim measures in place over suspected *"massive and systemic fraud"*.[18] The company had earlier sought a moratorium to allow it and investors to enter into an agreement.[19] However, a coalition of creditors argued that the position was *"not workable"* because the interim measures was only a stop-gap. A full order turning the appointed interim judicial manger into judicial managers with the *"full range of powers"* over Agritrade was required in order for the judicial managers to negotiate with the investors.

Pragmatism eats doctrine for breakfast

Do these cases indicate that there is a doctrinal collision between judicial rescue versus final liquidation? No. The cases are not evaluative of the merits of either process, and either process may well be appropriate depending on the viability of the debtor. Clearly, a choice has to be made based on the pragmatism of whether creditor support can be garnered for the debtor to be viable. The world's major economies have generally adopted modern "low entry" corporate rescue regimes for debtors. For example, the Cayman Islands has a restructuring officer regime, the BVI and Bermuda use light touch provisional liquidation, the US has Chapter 11, the UK has administration and Singapore has scheme managers and judicial management. This debtor-side policy now manifests itself in corporate judicial rescues, instead of final liquidations. The aim is to help debtors survive temporary problems and thereby improve unsecured creditor returns. Rescue seeks to compromise debt within the framework of a court process, and is more formal than a consensual "work-out" amongst the creditors – whilst liquidation is a terminal endeavour. A winding up terminates a debtor's beneficial interest in its property; and impresses the debtor's property with a trust to be applied for the persons interested in the winding up. "Creditor friendly" and "debtor friendly" labels for jurisdictions are moderately helpful for classification purposes, but can be superficial. In truth, these labels broadly concern the extent of any rescue stay (especially over security) and whether the management of the debtor can remain *in situ*. Further, all jurisdictions can effect mild or strong forms of rescue in some way, even if only through imposing a stay on enforcement action.

In any event, the cases above are exceptions, because there are countless examples of successful rescues carried out with the aid of restructuring professionals and their advisers under the supervision of the Court. *Re Da Yu Financial Holdings Limited*, [20] *In the Matter of China Oil Gangran Energy Group Holdings Limited*[21] and *Re Rongxinda Development (BVI) Ltd*[22] are but a few recent examples between Hong Kong and offshore jurisdictions, which has resulted in the swift and successful execution of a restructuring plan. The cases of failed judicial rescues are

13 *In the Matter of ACL Asean Tower HOLCO Limited* Cause No. FSD 171 of 2018 (IKJ), Judgment dated 8 March 2019 (unreported).
14 FSD 121 of 2018 (IKJ), Judgment dated 13 September 2018 (unreported).
15 Wai Yee Wan. "Insolvency Practitioners as Gatekeeper Intermediaries" *Court-Supervised Restructuring of Large Distressed Companies in Asia*, Hart Publishing, 2022: para 6.3.2.1 (p.204).
16 "Hyflux to rejig adviser fee pot after WongP's exit, finds nTan's fees 'fully justified'" *The Straits Times*, 4 March 2020: https://www.straitstimes.com/business/companies-markets/hyflux-to-rejig-adviser-fee-pot-after-wongps-exit-finds-ntan-fees-fully.
17 Leong, Grace. "Hyflux put under judicial management; founder Olivia Lum loses control over firm" *The Straits Times*, 16 November 2020: https://www.straitstimes.com/business/companies-markets/hyflux-put-under-judicial-management.
18 Clarke, Ben. "Judicial managers appointed over Agritrade in Singapore" *Global Restructuring Review*, 30 March 2020: https://globalrestructuringreview.com/article/judicial-managers-appointed-over-agritrade-in-singapore.
19 Fermanis, Jordan. "Singaporean commodity trader placed under interim judicial management" *Global Restructuring Review,* 20 February 2020, https://globalrestructuringreview.com/article/singaporean-commodity-trader-placed-under-interim-judicial-management.
20 [2019] HKCFI 2531.
21 [2020] HKCFI 825.
22 Claim No. BVIHC (COM) 2022/0008.

simply the efficiency of Court scrutiny in action. Non-viable companies cannot be rescued and must be wound up.

Lessons for the future

In nearly all of the failed rescue cases above, it would appear that the debtor ought never to have been put into a judicial rescue process in the first place – and the following questions should be asked during any rescue:

1. **Why do the rescue professionals consider that the debtor is viable (including whether there is creditor support)?** Early-warning red flags should be raised immediately when a restructuring appears to be heading for liquidation. Transparent communication with creditors is critical. In order to avoid conflicts of interest, it is imperative that restructuring professionals are independent of the company and its management so that successful resuscitation of an insolvent company does not come at the price of creditors incurring unreasonable deductions on their recoveries. Restructuring professionals in the role of court-appointed restructuring officers or provisional liquidators owe their duties to the creditors as a whole.

2. **Why do the board of directors consider that the debtor is viable?** Directors must act in accordance with their fiduciary duties to creditors. Unless concrete assurances are given and contingencies within the restructuring plan are put in place, the moment there is any doubt as to the viability of the business, final liquidation should be strongly considered in order to preserve and maximise recoveries for the creditors.

3. **Why was the Court not asked by creditors to wind up the debtor, or did not accede to a winding up of the debtor sooner?** The court should consider the prima facie viability of the debtor and its business at an early stage. In order to maintain its efficacy, judicial rescues of insolvent companies should take place in a matter of weeks, not over the course of months, and certainly not years. Long moratoriums should rarely be granted and/or extended by the court.

4. **When did it become clear that creditor support was not present to meet the scheme thresholds?** Genuine judicial rescues need to be quickly identified. Caution should be exercised and potentially acted upon when delay, lack of openness and repeated lack of disclosure by the company occurs within the restructuring.

Conclusion

Viewing judicial rescue and final liquidations through the lens of a zero-sum game is not only unhelpful but completely misses the point. Both routes are essential and should co-exist in the framework of an effective insolvency regime in any developed economy. Where a debtor is not viable, the main thrust of the law should be swift and efficient liquidation to maximise recoveries for the benefit of the creditors. Liquidations can include preservation and sale of the business, as distinct from the company. On the other hand, where a debtor is viable, its assets are often more valuable if retained as a rehabilitated business than if sold in a liquidation. The rescue of a business preserves jobs, provides creditors with a greater return based on higher going concern values of the business, potentially produces a return for owners and shareholders, and obtains for any country the fruits of a rehabilitated enterprise.[23] The World Bank observes that effective insolvency regimes, which include both judicial rescue and more informal restructuring tools, preserve jobs by facilitating the survival of distressed but viable enterprises, reduce credit risk, and help strengthen access to credit at a lower price.[24]

23 International Bank for Reconstruction and Development. *Principles for Effective Insolvency and Creditor/Debtor Regimes.* The World Bank, Washington DC, 2021.
24 Jose M. Garrido. *Out-of-Court Debt Restructuring*. A World Bank Study, Washington DC, 2012.