CHAPTER 3

PROVISIONAL LIQUIDATION

Originally authored by the Honourable Mr. Justice Jonathan Harris and Dr. Charles Qu - as updated accordingly

I. INTRODUCTION

3.001 Section 85 of the Companies Act 1862 introduced the role of provisional liquidators into English company law. It provided that any time after the presentation of a winding-up petition, and before the first appointment of liquidators, the court might appoint provisionally an official liquidator. The practice was to appoint provisional liquidators on the application of the company if the petition was unopposed. It appears that if the petition was opposed their appointment was initially rare, reflecting a concern that it might paralyse the affairs of the company.[1]

However, it quickly became recognised that the power should be exercised if it was necessary in order to protect the assets of the company.[2] Although the early judgments are very brief and contain little or no reasoning, the courts presumably saw the protection of assets as being a logical extension of the rationale for appointing provisional liquidators in the case of unopposed petitions, where there was no threat to the ongoing business of a company. A company, particularly one subject to a petition based on insolvency, whose assets were being dissipated, was unlikely to have a business to be damaged, or to the extent that it did, the risk of material damage was outweighed by the desirability of avoiding the dissipation of assets to the prejudice of creditors.

Similar provisions appeared in the Companies Act 1890, although due to what appears to have been an anomaly in s.4(5) of that Act, there was some doubt whether any person other than the official receiver could be appointed as a provisional liquidator, although s.92 of the early 1862 Act had made it clear that this was possible.[3] This problem was circumvented by appointing the official receiver as provisional liquidator with the power to apply to court for the appointment of a special manager.[4]

Section 184 of the Companies Act 1929 contained provisions for the appointment of provisional liquidators, which were repeated in s.238 of the Companies Act 1948 and from which the wording of s.193 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUO") is derived.

Section 193 of the CWUO provides:

> (1) Subject to the provisions of this section, the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition;
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> (2) The appointment of a provisional liquidator may be made at any time before the making of a winding-up order, and either the Official Receiver or any other fit person may be appointed; and
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> (3) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him.

In *Re Dry Docks Corporation of London*,[5] Kay J asked rhetorically:

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[1] *Emmerson's Case* (1866) LR Eq 231, 236; *Re Cilfoden Benefit Building Society* (1868) 3 Ch App 462; *Re Finance Co* (1866) 35 Beav 473.
[2] *Re Marseilles Extension Railway and Land Co* [1867] WN 68; *Re Hammersmith Town Hall Co* (1877) 6 Ch D 112.
[3] *Re Mercantile Bank of Australia* [1892] 2 Ch 204.
[4] *Re Bound & Co* [1893] WN 21.
[5] (1888) 39 Ch D 306, 309.

"Now, what is the object of appointing a provisional liquidator under a petition which asks for a winding-up?".

His Lordship answered this question in terms, which are frequently echoed in subsequent cases:[6]

"…the object is to keep things in status quo and to prevent anybody from getting priority".

As we will see later in this chapter, recent years in Hong Kong have seen a move considerably beyond these parameters reflecting both the broad discretion inherent in the general language in which s.193(1) of the CWUO is framed and the commercial exigencies arising from Hong Kong's economic problems in the later 1990s following what is generally referred to as Asia's financial crisis. However, this underlying principle is reflected in the circumstances in which provisional liquidators have historically been commonly appointed by the court in England and Hong Kong, which we consider below.

II. CRITERIA FOR THE APPOINTMENT OF PROVISIONAL LIQUIDATORS GENERALLY

3.002 The CWUO creates a fair system for the ranking and payment of creditors' claims and maximizing returns on proved claims is achieved by a statutory regime whereby creditors' rights to pursue their claims individually are substituted by a debt collection process managed by a court-appointed liquidator independent of the company's management and ownership on behalf of its creditors as a class (CWUO, ss. 187, 263 – 265). The court will in any event appoint a liquidator on the making of the winding up order (CWUO, s.194) but may appoint a provisional liquidator at any time following presentation of the petition and prior to making a winding-up order if the petitioner can demonstrate that the company's assets are in jeopardy and need to be safeguarded, and in which case the court will make the appointment pursuant to suitable terms (CWUO, s.193). See also *Re Weihong Petroleum Co Ltd* [2002] 1 HKLRD 541.

The authorities establish that there are two criteria that have to be satisfied before the court will appoint provisional liquidators: (i) first, the court will require that the applicant, normally the petitioner, demonstrate a *prima facie* case for the granting of a winding-up order; and (ii) secondly, that in the circumstances of the case a provisional liquidator should be appointed.[7]

The first criterion is normally easily addressed, if not necessarily easily answered. The court will need to be satisfied that there is a reasonable prospect that the petition will succeed.[8] In the case of a winding-up on the grounds of insolvency it may be easily satisfied because a statutory demand has been served and not met. In other cases the

[6] See, e.g., *Levy v Napier* 1962 SC 468, 477; *Re Carapark Industrial Pty Ltd* [1967] 1 NSWR 337, 341.

[7] *Re Union Accident Insurance Co Ltd* [1972] 1 L1L Rep 297, 300(2)–301(1); *Re Yick Fung Estates Ltd* [1986] HKLR 240, CA, at 244, 252, 253; *SFC v Mandarin Resources* [1997] 2 HKC 166, 172 B-E; *Re Boldwin Construction Company* (unrep., 31 October 2002, HCCW 340, 345, 346, & HCA 1036/02, [2002] HKEC 1473), Kwan J, at §29(2) & (3); *Re Max Sunny Ltd* (unrep., HCCW 84 and 85/22014 [2014] HKEC 1286).

[8] *Re Yick Fung Estates Ltd* [1986] HKLR 240, CA, at 244, 252.

debt may be so substantial in comparison to what is known about the financial health of the company that the court will be fairly readily persuaded of actual insolvency. In the case of a petition based on the just and equitable ground, it may be necessary to consider, in some detail, allegations of impropriety or prejudice in the management of a company's affairs and the first criterion will take on greater importance. In *Re The Prudential Enterprise Ltd*,[9] the unsuccessful *inter partes* application for the appointment of provisional liquidators before Madam Justice Chu lasted 13 days. The petitioners had made a number of allegations of impropriety against respondents in the management of the company's affairs and funds. Madam Justice Chu, in considering the first criterion, said:

"In considering whether there is a good *prima facie* case on the petition, it is necessary to look at the core complaints and to assess their prospect of success. I do not however regard it appropriate to conduct a minute and detailed analysis of the evidence on the affidavits or to undertake a mini-trial of the allegations involved. A provisional view of the issues in question will be sufficient at this stage".[10]

As the *Prudential Enterprises Case* demonstrates, this will not necessarily be a straightforward task. More recently in *GFT Fashions Ltd*[11] the petitioners also presented a petition on the just and equitable ground. The successful hearing before Barma J of the application to appoint provisional liquidators lasted three days.

The normal purpose for appointing provisional liquidators is to preserve the assets of the company, most commonly in the case of insolvent companies, for the benefit of creditors although it may, in the case of a just and equitable petition, be to preserve them for the benefit of contributories. The most common ground for seeking the appointment of provisional liquidators is a risk of dissipation of the assets of a company. This is not dissipation in the sense commonly used in the context of *Mareva* injunctions, namely, deliberately removing assets. It is the risk of the assets of a company being dealt with in a way which jeopardises the prospects of a rateable distribution of a company's assets to its creditors at the date of presentation of the winding-up petition.[12]

There may be no deliberate dissipation of assets, only a situation in which there is a serious risk that unless independent insolvency practitioners are appointed to take charge of the company the value of its assets will be jeopardised. In recent years the court has appointed provisional liquidators in various different circumstances. Unfortunately, because many of the applications have been made on an *ex parte* basis they have not resulted in written judgments.

In the context of listed companies the Companies Court has been willing to appoint provisional liquidators to realise the value of a listed status in circumstance which demonstrate that they are better able to do so than the existing management of the company. This subject is discussed in more detail later in this chapter.

[9] (unrep., HCCW 594 of 1999).

[10] *Re The Prudential Enterprise Ltd* (unrep., HCCW 594 1999 at para.10).

[11] (unrep., 8 April 2003, HCCW 203 of 2003).

[12] *Re a Company, ex p Nyckein Finance Co Ltd* [1991] BCLC 539, 542.

The circumstances in which provisional liquidators can be appointed are not limited to any particular type of circumstances. As the editors of *Buckley on the Companies Acts*[13] observe in the context of the equivalent English legislation:

> "...the section confers quite general powers on the court and, depending on the circumstances of each case, there may be other matters which may be relevant, such as public interest".

Public interest is directly relevant in the case of petitions presented by the Securities and Futures Commission ("SFC") pursuant to s.212 of the Securities and Futures Ordinance, (Cap.571) ("SFO").

Following the significant fall in the value of local stocks in response to the Asian economic crisis of 1997 a number of stock brokers experienced difficulties, which revealed to the SFC irregularities, which lead to the presentation of petitions for the winding-up of a number of such companies, in particular *C&A Pacific Finance Ltd.*[14] Following a hearing on 20 and 21 January 1998, Yuen J appointed provisional liquidators over the company.

Provisional liquidators were also appointed by the Companies Court following the presentation of a petition by the Insurance Authority pursuant to s.44 of the Insurance Ordinance (Cap.41), for the winding-up of a number of companies in the *HIH Group*.

The broad principles upon which the courts act in considering applications for the appointment of provisional liquidators are normally distilled into the following four criteria:

- the commercial realities;
- the degree of urgency;
- the need for an order; and
- the balance of convenience.

They are referred to in a number of cases. Commonly cited are: *Re Five Lakes Investment Company Ltd*;[15] *Re Boldwin Construction Company*;[16] and *Re Max Sunny Ltd.*[17]

III. PERSONS WHO MAY BE APPOINTED AS A PROVISIONAL LIQUIDATOR

3.003 The courts have in the past tended to appoint the Official Receiver as provisional liquidator, although a substantial portion of the more private liquidators are being appointed under what is known as "Panel T Scheme". The predecessor of Panel T was Panel B, which the Official Receiver introduced in 1997 in a bid to reduce its administrative burden. Under Panel B, summary corporate insolvency cases (where the

[13] 14th edn, (London: Butterworths), vol 1, 587.
[14] (unrep., HCCW 36 of 1998).
[15] [1985] HKLR 273, 283–284, HC.
[16] (unrep., 31 October 2002, HCCW 340, 345, 346, & HCA 1036 of 02, [2002] HKEC 1473); per Kwan J, 29(4).
[17] (unrep., HCCW 84 and 85/22014, [2014] HKEC 1286).

assets are less than HK$200,000) were briefed out to the private sector under a rotation system. Subsequently, the Standing Committee on Company Law Reform ("SCCLR") found that the Panel B Scheme was inconsistent with the then legislative provisions, under which the Official Receiver was necessarily the provisional liquidator in every case and a private sector practitioner could only act as the Official Receiver's agent.

The SCCLR proposed the revision of s.194 of the CWUO to empower the Official Receiver to appoint a suitable person as the provisional liquidator on the making of winding-up order and thereafter liquidator. The Official Receiver then set up Panel T to replace Panel B.[18]

Where no provisional liquidator has been appointed when a winding-up order is made, the Official Receiver becomes the provisional liquidator.[19] There is often a delay in the appointment of a liquidator, sometimes for up to three months, from the making of a winding-up order. In this kind of situation, the Official Receiver acts as the provisional liquidator until it is clear that the net realisable assets will exceed HK$200,000, in which case the provisional liquidator will be replaced by a liquidator appointed from Panel A. Where the net realizable assets, in the opinion of the Official Receiver, are not likely to exceeded HK$200,000, the Official Receiver has the power to appoint a private practitioner to be the provisional liquidator.[20]

The courts are generally reluctant to appoint a person to be a provisional liquidator, if that person has had a personal or professional association with the company or its present or past officers.[21] The *Code of Ethics for Professional Accountants* published by the Hong Kong Institute of Certified Public Accountants prohibits an accounting firm, or a partner or employee of that firm, from accepting appointment as liquidator of an insolvent company, if the firm or that partner or employee has during the previous two years had a professional relationship with that company.[22] The courts may refuse to appoint a proposed provisional liquidator if that person is involved in one way or another with the creditor petitioner.[23]

IV. EFFECT OF THE APPOINTMENT OF A PROVISIONAL LIQUIDATOR

The appointment of a provisional liquidator can have serious effects on the company itself, the company's officers and agents, as well as third parties. **3.004**

[18] *Re Goldlory Restaurant Ltd* [2006] 3 HKLRD 331 at 337–338 per Kwan J. See also *Re Newsweb International Ltd* [2007] HKEC 789 at [9] per Barma J. For a summary of the tender process under Panel T, see *Re Bondfield International Ltd (No 1)* [2005] HKEC 1706.
[19] CWUO, s.194.
[20] CWUO, s.194(1A). For further discussions see [3.009] below. For the history of s.194 (1A), see *Re Bonfield International Ltd* 2006 WL 1589722, [2006] HKEC 1113 at [10]–[15]; see also *Re Goldlory Restaurant Ltd* [2006] 3 HKLRD 331 at 338; *Re Sweetmart Garment Works Ltd (No 2)* [2009] 5 HKLRD 220 at 222-223.
[21] *Re Davidson Beggs Insurance Pty Ltd* (1984) 2 ACLC 735 at 735 *per* McLelland J.
[22] Code of Ethics for Professional Accountants, at paras 432.6, 432.8–432.11. See also *Re Mount Everest Investments Ltd* [1988] 2 HKLR 175, 178; *Re Plus Holdings Ltd* [2007] HKLRD 725, 730.
[23] *Re Plus Holdings Ltd* [2007] HKLRD 725, where Kwan J refused to appoint an auditor who had a strong affiliation with the parent company of the creditor-petitioner.

The appointment of a provisional liquidator does not affect the existence, identity, and character of the company.[24] An appointment, on the other hand, may have the effect of paralysing the company.[25]

In *Re McLennon Holdings Pty Ltd* (1983) 1 ACLC 786 at 788, as per Master Lee QC:

> "… [T]he appointment of a provisional liquidator effectively paralyses the company".

This is because the company's property and things in action will be placed under the control of the provisional liquidator upon his or her appointment (CWUO, s.197). But note that the CWUO does not contain a general provision on the power of a provisional liquidator. In circumstances where the Official Receiver becomes a provisional liquidator, that provisional liquidator has the power to carry on the business of the company so far as may be necessary for the beneficial winding-up thereof (CWUO, ss.199(2) and 199(4) to 199(5)). The power of carrying on business of the company of a provisional liquidator appointment in other circumstances will be determined by the terms of the appointment order.

In addition, an appointment also displaces its directors.[26] The directors, however, retain some reserve powers to instruct solicitors or counsel to oppose the current winding-up petition and appeal against a winding-up order, if such an order is made.[27] The appointment of a provisional liquidator also revokes the authority of a non-director agent of the company. This is because retaining the power of a director or any other agents to act on behalf of the company would be inconsistent with the provisional liquidator's power of control over the company's property and operation.[28]

The most notable effect of the appointment of a provisional liquidator is that when such an appointment is made, no action or proceeding against the company may be proceeded with or commenced against the company except with the leave of the court.[29] The appointment of a provisional liquidator, however, does not, of itself, terminate the company's contracts.[30]

V. PROVISIONAL LIQUIDATION AS AN AID TO RESTRUCTURING A COMPANY'S DEBT

3.005 As has already been observed, the Asian economic crisis of 1997 and 1998 introduced severe financial problems into Hong Kong and there were many resulting insolvencies. Whilst in most cases these required little more than conventional liquidations, this was not suitable in all cases and, in particular, not in the case of insurance companies and

[24] *P & C Connell Pty Ltd (prov liq app) v The Electricity Trust of South Australia* (1990) 8 ACLC 975 at 979 *per* Mullighan J (Where the company was held to remain a debtor after the appointment was made).
[25] *Re London, Hamburg & Continental Exchange Bank, Emmerson's Case* (1866) 2 Eq 231 at 237 *per* Lord Remilly MR ("The moment the provisional liquidator is appointed, no transfer can take place in the books….").
[26] *South Downs Packers Pty Ltd v Beaver* (1984) 8 ACLR 990.
[27] *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at 1113 *per* Plowman J.
[28] *Pacific & General Insurance Ltd (in liq) v Hazell; Pacific & General Insurance Ltd (in liq) v Home & Overseas Insurance Co Ltd* [1997] BCC 400 at 408 per Moore-Bick J.
[29] CWUO, s.186.
[30] Nor does liquidation have this effect, *BCCI v Malik* [1996] BCC 15 at 17 *per* Nicholas Stewart QC.

listed companies. The practice of keeping insurance companies in provisional liquidation and liquidating them through the introduction of a scheme of arrangement developed in the United Kingdom as a result of administration procedures not being available in the case of insurance companies before the provisions of the Financial Services and Markets Act 2000, s.360 came into effect.

In Hong Kong there is no provision for the administration of an insolvent company as an alternative to a liquidation. A liquidation of a listed company, or even a private business, which has a residual value which can be realised, is not attractive because of the negative impact that it can have on the value of the listed company or the business. As a consequence the practice developed of seeking orders for the appointment of provisional liquidators with a view to the companies concerned being restructured out of provisional liquidation. Commonly this involves the provisional liquidators introducing a scheme of arrangement pursuant to the Companies Ordinance (Cap.622) ("CO").

The first example of this was the provisional liquidation of the *HIH Group* of Insurance companies, which consisted of four companies in Hong Kong: *HIH Insurance (Asia) Ltd*,[31] *HIH Holdings (Asia) Ltd*,[32] *HIH Casualty and General Insurance (Asia) Ltd*,[33] and *FAI First Pacific Insurance Company Ltd*.[34] As explained above provisional liquidators were originally appointed to take charge of the companies on an application by the Insurance Commissioner. After their appointment the provisional liquidators sought the continuation of the provisional liquidation specifically in order that they could introduce a scheme of arrangement out of provisional liquidation. At a hearing on 21 December 2001, Hartmann J rejected the Official Receiver's objection to the company continuing in provisional liquidation in order that a scheme of arrangement could be introduced pursuant to (now former) s.166 of the predecessor CO.

The Official Receiver argued that this was effectively to allow a form of administration of insolvent companies. As the Hong Kong legislature (unlike England) had considered and rejected introducing a statutory regime for administration of companies it was inappropriate for the courts to do so using the mechanism of provisional liquidation. In reaching his conclusion His Lordship reviewed the authorities in the following terms:

> "21. Mr Harris, on behalf of the provisional liquidators, has referred me to the fact that in other jurisdictions - in respect of insurance companies - the procedures contemplated by the provisional liquidators have received the endorsement of the courts. In this regard, Mr Harris has made reference to the work of Gabriel Moss QC, *Cross Frontier Insolvency Companies*, where on page 11 the author says:
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> > '… Schemes of arrangement and provisional liquidation both have long and distinguished histories in their own right but their combined use in relation to insurance companies has only occurred in the last 10 years or so. The first application of this combined procedure appears to have occurred in 1992 in relation to the 'KELM' (later 'KWELM') insurance companies. In those cases,

[31] See *Re HIH Insurance (Asia) Ltd* (unrep., 21 December 2001, HCCW 337/2001).
[32] See *Re HIH Holdings (Asia) Ltd* (unrep., 21 December 2001, HCCW 337/2001).
[33] See *Re HIH Casualty and General Insurance (Asia) Ltd* (unrep., 21 December 2001, HCCW 340/2001).
[34] See *Re FAI First Pacific Insurance Company Ltd* (unrep., 21 December 2001, HCCW 339 & 340 of 2001).

> the directors of the companies had presented winding-up petitions against the companies in order to be in a position to obtain a (discretionary) stay on proceedings against the company whilst a scheme was being agreed and implemented.

However, certain creditors were unhappy with the management of the company and sought greater control over the companies and the implementation of the scheme. They made a successful application for the appointment of provisional liquidators over the companies who were given wide powers, akin to those of an administrator, to manage the companies and to take over the preparation and implementation of the scheme. Subsequently a scheme of arrangement was in fact approved and implemented.

The precedent set by the KWELM cases has been followed in many of the subsequent insurance insolvencies and the procedure of combining a scheme of arrangement with provisional liquidation has become accepted as an effective and efficient insolvency procedure for dealing with insolvent insurance companies. Indeed the procedure has been expressly approved by the courts, including the Court of Appeal'.

22. In *Re English & American Insurance Co Ltd* [1994] 1 BCLC 649 at 650, Harman J said of the appointment of provisional liquidators:

> 'That is all part of the developing practice of the Court of using a petition by the Company for its own winding-up as the basis for the appointment of provisional liquidators. That practice has been developed to mitigate the difficulties caused by the fact that administration procedures are not available in respect of insurance companies … It seems to me a useful practice and I do not wish in any way to cast doubt or discredit upon it. It is a good system in particular…where there is hope that there will be a scheme of arrangement under Section 425 of the Companies Act 1985 in the future'.

23. The 'administration procedures' referred to by Harman J are not available in Hong Kong in respect of companies whatever the nature of their business. In respect of insurance companies, therefore, Hong Kong must look to mitigate the difficulties that such absence may cause.

24. More recently, in *Re Hawk Insurance Company Ltd* [2001] 2 BCLC 480 the English Court of Appeal acknowledged that the procedure approved of by Harman J was a simple, inexpensive and expeditious way of winding-up the company without resorting to a formal liquidation".

This case raised issues particular to insurance companies. The making of a winding-up order would have had immediate deleterious effects on the interests of those creditors of the companies who were insured; which represented the vast majority in value. In particular it would have led to the immediate termination of certain cover. As can be seen from the extract from Hartmann J's judgment in *HIH Group,* as quoted previously, the submission made on behalf of the Official Receiver that the court should not do what the legislature had expressly considered and rejected was of limited force given that the scheme of administration in England does not apply to insurance companies.

This suggests that the English legislature considered that in the case of insurance companies the existing practice should be left in place and a similar conclusion could be drawn about the intention of the Hong Kong legislature; although there is no evidence that the Hong Kong legislature has ever given consideration to the specific problem of insolvent insurance companies. Mr Justice Hartmann also heard what appears to have been the first of the line of cases in which the courts considered whether it was a legitimate use of CWUO, s.193 to appoint provisional liquidators with the specific intention that a company be restructured in provisional liquidation rather than be wound up.

In January 2002, Mr Justice Hartmann appointed provisional liquidators over *Seapower Resources International Ltd.*[35] Unfortunately, there is no written judgment of his Lordship's judgment. However, following a subsequent hearing in the winding-up proceedings, Barma J described the provisional liquidators approach to their appointment in the following terms, which reflects the reasons why they were appointed:

> "The reasons it appears that the provisional liquidators took the view that there was scope for recovery of some value for the benefit of the Company's creditors by causing the Company to enter into a scheme of arrangement and capital restructuring which would have the effect of enabling a new investor to come in and acquire a controlling interest in the Company and thus to take advantage of its listed status. There has for some time been a market in such transactions, and the price paid reflects the value to the potential investor of the listing of such a company. It is of course possible that other underlying assets of the company may influence a potential investor in his decision as to whether or not to invest, and if so, how much to pay for the shares of such a company".[36]

The courts had by October 2003 sanctioned schemes of arrangement pursuant to (now former) s.166 of the predecessor CO, which involved the compromise of creditors' debts out of funds injected into a company as part of the consideration paid for the acquisition of control of a company and as a result its listed status by an independent investor.[37] In the earlier cases the companies had already been compulsorily wound up at the time the schemes of arrangement had been introduced. Madam Justice Kwan accepted in *Re Luen Cheung Tai International Holdings Ltd*[38] that:

> "… the listed status would be far more attractive to potential investors and could fetch a much higher value than in the situation after a winding-up order is made, judging from the price generated for the listed status in *Re Keview Technology (BN) Ltd* [2002] 2 HKLRD 290, at p.296B [Court of First Instance]".

In a series of cases, including the two just cited, the courts accepted that it had the jurisdiction to appoint provisional liquidators to facilitate a restructuring of an

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[35] (unrep., 14 Nov 2003, HCCW 1325/2001, [2003] HKEC 1372).
[36] (unrep., 2 October 2003).
[37] *Yaohan Hong Kong Corporation Ltd* [2001] 1 HKLRD 363; *Rhine Holdings Ltd* [2000] 3 HKC 543; *Re Albatronics Ltd (Far East) Ltd* [2002] 4 HKC 99.
[38] [2002] 3 HKLRD 610, CFI, para.28, [2003] 2 HKLRD 719, CA.

insolvent company's if the primary purpose of the application is for the protection of corporate assets.[39]

Commonly in these cases the petitioner is a bank which represents a group of financial creditors who have concluded that there is no realistic prospect of the company being able to propose a debt restructuring, which would be acceptable to its financial creditors.

In *Legend International Resorts Ltd*,[40] Morgan Stanley Emerging Markets Inc issued a petition on the grounds of insolvency to wind up *Legend International Resorts Ltd* and applied for the appointment of provisional liquidators to facilitate a rescue of the company. The Company was listed on the main board of *The Stock Exchange of Hong Kong Ltd*. The company's business and assets were all located in the Philippines in which it operated a casino. Immediately after the winding-up petition was issued the company filed a petition for corporate rehabilitation in the Philippines and the day before the hearing of the application to appoint provisional liquidators a court in the Philippines made an order appointing a rehabilitation receiver and stayed all claims against the company. The petitioner's application in Hong Kong was adjourned. It was subsequently restored. The company contested the application on the ground, amongst others, that the Court did not have the jurisdiction to appoint provisional liquidators to facilitate a restructuring.

The petitioner was what is commonly known as a "vulture fund" which bought distressed debt. The petitioner had continued to buy the debt of the company after it presented the winding-up petition. The company argued that the petition had not been presented for the purpose of providing a class remedy for the general body of creditors, but to obtain a collateral benefit for the petitioner. The petitioner, so the argument developed, was using the winding-up procedure improperly to exert pressure on the company to prefer the petitioner's debt or to seize indirect control of the company's administration. Madam Justice Kwan rejected this argument before turning to consider whether the court had jurisdiction to appoint provisional liquidators to facilitate a restructuring.

In challenging the correctness of the view taken by the court in the authorities referred to earlier, the company relied on the Court of Appeal's decision in *Credit Lyonnais v SK Global Hang Kong Ltd*,[41] in which the Court of Appeal held that whilst the Court retains an inherent jurisdiction in very special circumstances to stay execution of a judgment in situations other than those expressly permitted under the Rules of the High Court (Cap.4A), as neither a winding-up nor a scheme of arrangement was imminent, the possibility or even a reasonable prospect of a restructuring of the judgment debtor's debts was not a sufficient reason to order a stay. In rejecting the company's argument[42] based on the reasoning of the Court of Appeal, Kwan J relied on the Court of Appeal's earlier decision in *Re Luen Cheong Tai International Holding Ltd*.[43]

[39] *Re I-China Holdings Ltd* [2003] 1 HKLRD 629 (CFI); see also *Re Fujian Group Ltd* (unrep., 15 January 2003, HCCW 68 of 2003, [2003] HKEC 266); *Re Jinro (HK) Ltd* (unrep., 9 July 2003, HCCW 1352/2001, [2003] HKEC 1103, per Kwan J).

[40] *Legend International Resorts Ltd* [2005] 3 HKLRD 16, paras 74 to 92.

[41] [2003] 4 HKC 104.

[42] At the time of publication this decision and this particular issue are under appeal.

[43] [2003] 2 HKLRD 719, CA.

In *Luen Cheong Tai* the Court of Appeal struck out the company's notice of appeal, the second ground of which was that the judge was wrong in law in concluding that a provisional liquidator could be appointed for the purpose of facilitating a restructuring proposal. Her Ladyship concluded that the Court of Appeal's decision in *Luen Cheung Tai* demonstrated its acceptance that the jurisdiction given to the Court by s.193 of the CWUO was not limited to protecting the assets of a company pending its winding-up and could properly be used to facilitate a rescue of a company. *SK Global* could be distinguished as it was an application to stay enforcement at a time when a winding-up petition had not been issued nor a scheme of arrangement formulated.

Her Ladyship, however, rejected the application for the appointment of a provisional liquidator on the grounds that, among other things, the protection of assets basis for the appointment of a provisional liquidator was not made out and the extent to which provisional liquidators could contribute to a corporate rescue was limited. There was no indication that the Rehabilitation Receivers were not discharging their powers and duties properly for the purpose of protecting the assets of the company and Her Ladyship had no reason to think that the rescue work could not be done effectively, conveniently and at less expense by the Rehabilitation Receivers.[44]

The Court of Appeal dismissed the Petitioner's appeal against Kwan J's decision in *Legend International Resort*. The decision of Rogers V-P 1 was made on the basis that there were no grounds for disturbing Kwan J's decision, as it could not be said that the judge fell into error. His Lordship pointed out that unless there were grounds for holding that the trial judge's discretion had been exercised wrongly, the Court of Appeal could not interfere just because it might exercise the discretion another way.[45]

Rogers V-P did appear to prefer exercising the discretion in a way that was different from the way in which Kwan J exercised her discretion. Kwan J's decision in *Re Legend* appears to be made through a consideration of two alternative bases upon which provisional liquidators could be appointed. The first one was whether there was a need for protecting the company's assets. The second was whether it was appropriate, in the circumstances, to exercise the power to appoint a provisional liquidator simply for pursuing corporate rescue. The latter consideration was based on Her Ladyship's ruling that it was within the jurisdiction of the court to appoint provisional liquidators to explore, formulate and pursue a corporate rescue.[46]

In contrast, Rogers V-P's view was that the primary purpose of appointing provisional liquidators must always be the purposes of the winding-up.[47] This was because the wording of the provisions on the appointment of provisional liquidations compelled the conclusion that such an appointment must be for the purpose of winding-up (in which case there might be a need to preserve the company's assets, which otherwise will be in jeopardy), rather than avoiding winding-up, of the company.[48] His Lordship, however, agreed that provided that the primary purposes existed there was no objection to extra powers, such as those to pursue a corporate rescue, being given to the provisional liquidators.[49]

[44] *Re Legend International Resorts Ltd* [2005] 3 HKLRD 16 at 61.

[45] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at 205.

[46] *Re Legend International Resorts Ltd* [2005] 3 HKLRD 16 at 49.

[47] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at 203–204.

[48] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at 203–204.

[49] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at 203 per Rogers V-P; see also *Re Legend International Resorts Ltd* [2005] 3 HKLRD 16 at 49, *per* Kwan J.

The view that Rogers V-P expressed in *Re Legend* on the appointment of provisional liquidators to pursue corporate rescue has caused some concern among practitioners and critics on the future of using provisional liquidation in Hong Kong as a rescue device.[50] The Consultation Paper on corporate rescue procedure prepared by Hong Kong's Financial Services and the Treasury Bureau in 2009 also justifies the need for a purpose-built corporate rescue procedure on His Lordship's view expressed in *Re Legend* on the limitation of provisional liquidation as a rescue device.[51] The impact of Rogers V-P comments on this matter, however, may have been overestimated. In any event, provisional liquidation will be largely irrelevant if the company continues to be a good go-concern. When the company is financially distressed, where there is little going-concern value to preserve, provisional liquidation would also be hardly relevant.

However, where there is going-concern value to preserve, it would not be difficult to prove a need for protecting corporate assets (as the going-concern value itself can be regarded as corporate assets),[52] which justifies the appointment provisional liquidators even according to the view of Rogers V-P. In Hong Kong, even intangible things such as the company's listing status or its status as a government licensed construction firm are regarded as corporate assets, although they are not listed in the company's balance sheet as assets.

As his Lordship recognized in *Re Legend*:

> "…the difference (between the appointment of a provisional liquidator on the basis that the company is insolvent and that its assets are in jeopardy and an appointment solely for the purpose of enabling a corporate rescue to take place), may, in most cases, be merely a matter of emphasis."[53]

The continuing relevance of provisional liquidation to corporate rescue is illustrated in *Re Plus Holdings Ltd*,[54] which was also decided by Kwan J after *Re Legend*. In this case, Kwan J countenanced the application by a creditor petitioner for the appointment of a provisional liquidator, although one of the purposes of the proposed appointment was to facilitate a corporate rescue. There, the petitioner commenced winding-up proceedings against a Bermudan company listed in the Hong Kong Stock Exchange ("HKEx"). At the end of March 2007, HKEx announced that the company was put into the third stage of delisting procedures and the company would be delisted if no viable restructuring proposal was submitted within five and a half months. The petitioner sought the appointment of provisional liquidators who would be responsible for submitting a viable restructuring proposal.

[50] See Charles D Booth, Stephen Briscoe and Philip Smart, "Corporate Rescue in Hong Kong" in Rodrigo Olivares-Caminal (ed), *Expedited Debt Restructuring: An International Comparative Analysis* (Kluwer Law International BV, The Netherlands 2007) 297, 308–309; Douglas W Arner et al, "Property Rights, Collateral, Creditor Rights, and Insolvency in East Asia" (2007) 42 *Tex Int'l L J* 515, 554; Anil Hargoven, "Shareholders as Creditors in Hong Kong Corporate Insolvency: Myth or Reality?" (2008) 38 HKLJ 685,703.

[51] Financial Services and the Treasure Bureau, Hong Kong SAR, Review of Corporate Rescue Procedure Legislative Proposals: Consultation Paper (Hong Kong, October 2009), 7.

[52] See *Re Fujian Group* [2003] HKEC 1481; see also *Re Plus Holdings Ltd* [2007] 2 HKLRD 725; *Re Tai Kam Construction Engineering Co Ltd* [2005] HKEC 507. Further, see Stewart Smith, "Some Problems in Reorganising Insolvent Companies" in Law Lectures for Practitioners Vol 1983, 227, 241, available at http://sunzi.lib.hku.hk/hkjo/article.jsp?book=14&issue=140006.

[53] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 CA at 203.

[54] *Re Plus Holdings Ltd* [2007] 2 HKLRD 725.

Kwan J's decision in the petitioner's favour was based on Her Ladyship's finding that:

(1) there was clear evidence that the company was insolvent and its most valuable asset, namely its listing status, was in jeopardy;

(2) the management of the company was in disarray and could not be relied on to make a viable proposal;

(3) the matter was urgent;

(4) there was no detriment to the company or its creditors by such appointment; and

(5) although the Securities and Futures Commission and HKEx had adopted a stringent approach to "back door" listing arrangement, her Ladyship did not believe that it would be futile for independent professionals to explore viable methods of restructuring.

Kwan J distinguished *Re Legend International Resorts Ltd*[55] on the basis that in that case, it was not established that the assets were in jeopardy, whereas in the case before her, the primary purpose of the proposed appointment was to protect the company's assets, namely, its listed status.[56] This was notwithstanding that a secondary purpose, namely to facilitate a corporate rescue was also present.

VI. PROCEDURE

Section 193 of the CWUO provides that: **3.006**

> "…the court may appoint a liquidator provisionally at any time after presentation of a winding-up petition".

It is normally assumed in Hong Kong that "presentation" means filing at the Registry and it is certainly prudent to file the petition in advance of an *ex parte* application. In both Australia and England the Court accepts presentation of petition to the Judge hearing an *ex parte* application as sufficient to comply with their similarly worded statutory provisions. In at least two cases in Hong Kong the Court has accepted presentation of a petition to the Judge as complying with s.193 of the CWUO: (i) Mr Justice Hartmann in the case of applications to appoint provisional liquidators over companies in the *HIH Insurance Group;* and (ii) Mr Justice Sakhrani over in the matter of *CSA Absolute Return Fund Ltd,* are these two cases referred to.[57]

Any other conclusion produces potentially serious practical problems as it means that provisional liquidators cannot be appointed at weekends or holidays. However, there is no reported decision on this issue and any appointment prior to filing at the Registry is open to challenge. This makes it desirable in that in the event that an

[55] [2006] 2 HKLRD 192.

[56] *Re Plus Holdings Ltd* [2007] 2 HKLRD 725 at 728.

[57] Unfortunately in neither case are there written judgments containing the judges reasoning, but it is apparent from the dates of issue of the petitions and the dates of the orders that the Judges accepted that they could make orders appointing provisional liquidators prior to filing of a petition.

CHAPTER 6

INVESTIGATIONS, ASSETS, CLAIMS AND REALISATIONS*

Revised and Updated by Ms. Christine Leung

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I. INTRODUCTION

In any liquidation there is a direct link between investigations, assets, claims and realisations. **6.001**

As we shall see below the principal role of the Liquidator is to uncover and realise the assets for the benefit of the creditors. One of the ways in which he uncovers those assets is through his investigation of the affairs of the company with particular reference to the company's accounting records, interviews with directors and other interested persons, correspondence with creditors, etc. *However*, in doing so he will often come across potential claims against third parties including directors, shareholders or associated persons, which may in turn result in additional realisations.

The extent of these links and the manner in which they come to light and are investigated will differ in almost every liquidation. However, what is common to the process is the work which the Liquidator should undertake in every liquidation in order to ensure he uncovers all the assets of the company, and follows up any claims which his investigations may reveal, to maximise realisations.

In addition, the Liquidator has a duty to report to the relevant authorities any matters which in his opinion may be criminal in nature, e.g., fraud. This is further outlined below.

This chapter will firstly consider the circumstances under which Liquidators are appointed as well as their powers to realise the assets of the company and investigate its affairs. It will go on to look at the role of the liquidator in the early stages where he must identify, discover and secure the assets of the company and its accounting records. It will then consider the various strategies which a liquidator may adopt to realise the assets and then the investigations that he will undertake to identify undisclosed or hidden assets, claims that may arise and potential recoveries from antecedent transactions.

The current Companies Ordinance (Cap.622) ("CO" or the "Ordinance") came into operation back on 3 March 2014. The core provisions of the predecessor Companies Ordinance ("predecessor CO") affecting the operation and maintenance of companies have since been repealed. However, the existing provisions relating to the insolvency and winding-up of a company duely remained and this predecessor Companies Ordinance has since been renamed and retitled as the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUO").

On 27 May 2016, the Legislative Council enacted the Companies (Winding-Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 ("the Amendment Ordinance") and this Amendment Ordinance came into operation on 13 Febraury 2017. The Amendment Ordinance seeked to modernize corporate winding-up regime in Hong Kong, increase protection of creditors and further streamline the winding-up process.

This chapter looks at the Amendment Ordinance and its likely effect on the existing corporate winding-up and insolvency regime.

Differing Types of Appointment

As a first step, it is appropriate to consider the circumstances under which the Liquidator, or sometimes a provisional liquidator is appointed, his role in the context of insolvency legislation in Hong Kong, and his general duties and responsibilities as **6.002**

regards investigating the affairs of the company, discovering its assets and realising them for the best benefit of creditors.

Provisional Liquidator (Section 193 of the CWUO)

6.003 This is a Provisional Liquidator appointed by the Court following an application under s.193 of the CWUO. The reason for the application is usually that the petitioner believes there is a danger of dissipation of the company's assets during the period between the date of the presentation of the petition and the date of the hearing. The role of the Provisional Liquidator in this instance will be one of protecting and safeguarding the assets of the company until such time as the court hears the petition and either makes a winding-up order or dismisses the petition. It is generally a role of maintaining the status quo over this period.

Provisional Liquidators may also be appointed under this section for the purposes of facilitating the restructuring of a Hong Kong listed company. However, in these cases, the role of the Provisional Liquidator is not merely to safeguard the assets of the company as such, but rather to facilitate its restructuring often through a Scheme of Arrangement. In this instance a minimal amount of investigation will be performed for the purpose of preparing a "liquidation analysis" in order to demonstrate to creditors that a restructuring, often in the form of as a Scheme of Arrangement will produce a greater return to them than would a liquidation. Nonetheless, the order appointing a Provisional Liquidator in such a case is likely to contain powers to investigate the circumstances surrounding the failure of the company and, if necessary, to report such matters as he thinks fit to the Court.

The Amendment Ordinance added new provisions regarding the termination, resignation and remuneration of Provisional Liquidators. Under s.193(6) of the Amendment Ordinance, the Court may terminate the appointment on application by a provisional liquidator, the Official Receiver, a creditor, a contributory, the petitioner or the company.

Provisional Liquidator (Section 194(1A) of the CWUO)

6.004 This is a Provisional Liquidator appointed pursuant to the provisions of s.194(1A) of the CWUO. This will be a liquidator from a firm on the *rota* for the time being in force operated by the Official Receiver's Office. Immediately upon the making of a winding-up order, the Official Receiver will appoint two office holders from the next firm on the *rota* as Provisional Liquidators, provided he is satisfied that the assets of the company are worth less than HK$200,000.

Contents of Order

6.005 The order appointing a provisional liquidator pursuant to s.193 of the CWUO will be the central authority from which the provisional liquidator's powers will be derived. It is not uncommon for an order appointing a provisional liquidator under s.193 of the CWUO to extend to several pages due to the large number of powers granted to the provisional liquidator by the court. It is ultimately for the court to determine the specific powers that it will grant a provisional liquidator in the order of appointment. However such powers will commonly include the power to take possession of the company's books and records and to perform appropriate investigations, to carry on or close down the business of the company, to take control of subsidiaries of the company

or joint ventures or investments that the company controls, to demand all debts due to the company, employ and dismiss any employees of the company, to discharge any expenses of the company that would be necessary for any ongoing operation of the company's business, to complete or terminate contracts to which the company is a party and to consider and where advisable to commence any actions that may be necessary to recover assets of the company or to protect such assets. Whilst some orders may grant a provisional liquidator the power to dispose of the company's assets it would generally be prudent for a provisional liquidator to seek specific sanction of the court prior to undertaking any substantial sales of the company's assets prior to the court being in a position to determine whether a winding-up order will be made against the company.

As provided in the Amendment Ordinance, it is ultimately the Court's discretion, after taking into case-specific circumstances, to determine the powers, duties and remuneration and to consider any application for the termination of the appointment by resignation or removal.

Court Involvement

6.006 Once the court has made an order appointing a provisional liquidator pursuant to s.193 of the CWUO, its role may well be limited until such time as the winding-up petition is heard. A provisional liquidator will probably return to the court if he requires clarification as to any of his powers or if he wishes to seek the specific sanction of the court in relation to the excise of any of his powers (for example related to asset sales) and also in circumstances where the provisional liquidator may wish to obtain the court's sanction to make various payments on behalf of the company that would otherwise be void pursuant to s.182 of the CWUO.

Liquidator in a Compulsory Liquidation

6.007 This is a Liquidator appointed by the Court. In the case of a Provisional Liquidator previously appointed under s.193 of the CWUO, a Liquidator will then be appointed at a meeting of creditors convened by the Provisional Liquidator. It is usually the same person as the Provisional Liquidator, although it is for the creditors at the meeting to decide upon the identity of the Liquidator. If the resolutions passed at the meetings of creditors and the meeting of contributories are identical, the appointment will be confirmed by the Court as a formality. However, if the resolutions passed by the creditors and the contributories are for different nominations, the appointment will then be subject to ratification by the Court at a determination hearing. Where it is the Official Receiver acting as Provisional Liquidator, he will convene the meeting of creditors. Where no liquidator is nominated by creditors at the first creditors meeting, the Official Receiver will put forward the name of the next firm on the "Panel A" *rota*.

In the case of a Provisional Liquidator appointed under s.194(1A) of the CWUO, where the Provisional Liquidator is satisfied the assets are worth less than HK$200,000, the Liquidator will be appointed pursuant to a Summary Procedure Order application under that subsequent provision of s.227F of the CWUO. No meeting of creditors is held and the Provisional Liquidator automatically becomes Liquidator.

In certain circumstances, a Summary Procedure Order may have been granted on the basis that the Provisional Liquidators were of the opinion that the assets of the company were worth less than HK$200,000. If subsequently it transpires that the assets are worth more than HK$200,000, the Provisional Liquidator will apply to the Court for

an order rescinding the Summary Procedure Order. Following rescission of the order, a meeting of creditors will be convened by the Provisional Liquidator at which creditors will be given the opportunity to vote on the appointment of a Liquidator.

In each of the above cases, the date of the commencement of the liquidation is the date of the presentation of the petition.

Liquidator in a Creditors' Voluntary Liquidation

6.008 This will be a Liquidator appointed as a result of a meeting of creditors convened pursuant to s.241 of the CWUO. The liquidation is deemed to commence on the date on which the resolution to wind up is passed, which in most, if not all, cases will also be the date of the meeting of creditors. A Provisional Liquidator may be appointed on a voluntary basis pursuant to s.228A of the CWUO. The commencement of the liquidation in this instance will be the date on which the Statutory Declaration is filed with the Companies Registry.

Liquidator in Members' Voluntary Liquidation

6.009 This will be a Liquidator appointed by the members of the company pursuant to the provisions of s.235 of the CWUO. The liquidation is deemed to commence on the date of the passing of the resolution to wind-up.

The Role of the Liquidator

6.010 Generally, the role of a Liquidator will be to recover and realise the assets of the company, to investigate the circumstances surrounding the formation, day-to-day operations of the company and to uncover the reasons for its failure. He will also be responsible for complying with various statutory requirements including reporting to the Official Receiver on the conduct of the directors for the purposes of disqualification proceedings. Finally, he will be responsible for adjudicating the claims of creditors and ultimately paying a dividend. Importantly, Liquidators also have a wider function. In *Re Pantmaenog Timber Co Ltd*,[1] the House of Lords held that the role of a Liquidator extended beyond the collection and distribution of company assets to investigating the causes of the company's failure and the conduct of the management of the company in a wider public interest of action being taken against those engaged in commercially culpable conduct.

Per Lord Millett (para 52 at p 173):

> "From the earliest day of the joint stock company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the creditors and contributories. The Cork Committee (Cmnd 8558) observed (in para 192 of its report) that: 'The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society', In consequence insolvency proceedings 'have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them'".

[1] [2004] 1 AC 158.

Professor Goode in *Principles of Corporate Solvency* has also said:

> "Part of the liquidator's job is also to investigate the causes of failure and to take appropriate steps to bring to book any delinquent directors".

Powers of a Provisional Liquidator or Liquidator in a Compulsory Winding-Up

6.011 In the case of a Provisional Liquidator appointed under s.193 of the CWUO, these powers are set out in the order of his appointment. Annexure shows a specimen order giving a wide range of powers which the Court may or may not be prepared to grant, depending upon the particular circumstances of the appointment.

In the case of a Provisional Liquidator appointed under s.194(1A) of the CWUO, these powers are set out in the letter under which he is appointed by the Official Receiver. A copy of the current letter issued by the Official Receiver's Office to Panel T firms is shown at the end of this chapter.

Furthermore, in the case of a Liquidator appointed as a result of a meeting of creditors held pursuant to s.241 of the CWUO, these powers are set out in the previous s.199 and Schedule 25 of the CWUO. Similarly, a Liquidator appointed pursuant to a Summary Order under s.227F of the CWUO, also has the powers as those set out in that s.199 of the CWUO.

It is, however, worth pointing out that an anomaly arises in relation to the powers of the Liquidator appointed as a result of a Summary Procedure Order under s.227F of the CWUO. One of the effects of the summary order granted under the above section is that the Liquidator has all the powers of a "normal" Liquidator, that is the powers given to him by that s.199 of the CWUO, but without the necessity of having to seek the consent of the Court or the committee of inspection to exercise those powers set out in CWUO, s.199(1). Of particular relevance here is the power of the Liquidator to bring proceedings, to make compromises or arrangements with third parties who are indebted to the company, or against whom the company has claims.

The vast majority of compulsory liquidations in Hong Kong are "farmed out" by the Official Receiver to private sector insolvency practitioners on what has become known as the Panel T *rota*. The only exceptions to this are supposed to be cases where it is known that the assets are in excess of HK$200,000, where the liquidated company is a subsidiary of a listed company or where the winding-up order has resulted from a petition arising from a shareholder dispute. In those cases the stated policy of the Official Receiver's Office is that the Official Receiver will remain Provisional Liquidator pending a decision as to whether to convene a meeting of creditors.

In the remaining cases, which comprise the vast majority of compulsory liquidations in Hong Kong, if the assets turn out to the less than HK$200,000, a Provisional Liquidator should, within three months of the date of his appointment, apply to the Court for an order that the company's affairs be administered in a summary manner pursuant to s.227F of the CWUO. Under such an order, the Provisional Liquidator becomes Liquidator of the company and he is able to complete the administration of the case in a summary manner. The purpose of this is to facilitate the efficient and cost effective administration of the liquidation.

In some of these cases the Liquidator may subsequently realise assets in excess of HK$200,000. If that happens he will apply to the Court to rescind the Summary Procedure Order and call meetings of creditors and contributories. The effect of the

rescission of the Summary Procedure Order is that the Liquidator reverts to being a Provisional Liquidator until such time as the meetings of creditors and contributories have been held, the outcome of the meetings has been reported to the Court, and the Court has made an order for the appointment of a Liquidator.

It has been suggested by the Official Receiver that the effect of the rescission of the Summary Procedure Order is that the original Liquidator, appointed as a result of that order, was never actually appointed. Following on from that it has also been argued that any powers exercised by the *first* appointed Liquidator, without the sanction of the Court or a committee of inspection, were in the absence of such sanction, not properly exercised.

The authors of this chapter are of the opinion that until this uncertainty is resolved, in any situation where a Liquidator appointed pursuant to s.194(1A) of the CWUO is purporting to exercise a power which in a "normal" situation would require the sanction of the Court or the committee of inspection, then he should, out of an abundance of caution, obtain that sanction prior to exercising that power.

Under the new regime, the powers of a Liquidator for different types of winding-up procedures will be set out in a new Schedule 25, with the previous s.199 of the CWUO replaced. The Amendment Ordinance also spells out clearly the circumstances where sanction of the Court is required when a Liquidator exercises his power.

What Assets are Available to a Liquidator?

6.012 This section deals with those assets, both physical and non-physical, which typically will be available to a Liquidator for him to realise for the benefit of creditors. Except where specifically stated, these assets will be available to any Provisional Liquidator or Liquidator referred to above.

Physical Assets

6.013 This class of assets can comprise property, motor vehicles, plant and equipment, office furniture and numerous other examples of physical assets which could be owned by a company.

Non-Physical Assets

6.014 Non-physical assets can include intellectual property rights such as trademarks, patents, etc., software developed by the company, accounts receivable due to the company and other intangibles which may have some realisable value, e.g., technical drawings which a purchaser of assets may find useful.

Third Party Assets

6.015 The main type of assets that will generally not be available to a liquidator will be assets held on trust by the Company for others. The liquidator will need to satisfy himself that the assets are indeed trust assets and also whether any transfer of general assets to trust status may not be attacked as either an unfair preference or misfeasance. In many cases it will be necessary for the liquidator to obtain legal advice on the validity of any claim that the assets are subject to a trust. Further, the proceeds of sale of secured assets will not generally be available to a liquidator for ordinary unsecured creditors, except to the extent of any surplus which may arise following the disposal of the asset and the

redemption of the security. The liquidator will of course need to satisfy himself that such security is valid. These issues are addressed further below. Interestingly, another category of asset not available to a liquidator is monies paid into court by a company as a defendant to litigation to protect it on costs. [2]

II. STEPS TO BE TAKEN UPON APPOINTMENT

Securing the Assets and Accounting Records

6.016 Immediately following his appointment the Liquidator must take steps to secure the assets and the accounting records of the company (CWUO, s.197). He must also consider what steps to take to protect the company's tangible and intangible assets. By undertaking this work in a thorough manner at the outset of the administration, the Liquidator can facilitate both the process of realising the assets for the benefit of creditors and the subsequent investigation process, which may result in the discovery of undisclosed assets, claims against directors and third parties and antecedent transactions.

Securing Possession of Premises/Assets

6.017 The work which a liquidator will need to undertake will vary depending upon the nature of his appointment. If he has been appointed at a meeting of creditors convened by the Official Receiver then he can reasonably expect the Official Receiver, in his capacity as Provisional Liquidator, to have taken the appropriate initial steps to secure the assets of the company following the making of the winding-up order.

However, if he is appointed as Provisional Liquidator under s.193 of the CWUO, or has been appointed as a voluntary Liquidator at a meeting of creditors held pursuant to s.241 of the CWUO, then it will be his responsibility to take immediate steps to secure the assets of the company.

The following is not an exhaustive list of the usual steps to be taken, as necessarily every situation will be different. However, it is an indication of the type of issues a liquidator needs to consider to ensure that he protects the position of the creditors. We have assumed for the purposes of this chapter that the liquidator has been appointed at a meeting of creditors, although much the same work will be undertaken by a CWUO, s.193 Provisional Liquidator.

Leasehold Property

6.018 Immediately following his appointment the Liquidator should instruct locksmiths to change the locks to the premises to ensure that there can be no unauthorised access. The Liquidator will normally retain one set of keys to the property, whilst giving a second set to his agent.

The Liquidator will need to retain one set of keys in order that he can gain access to the premises in the early days of the administration. This will usually be to allow his staff to secure, collate and remove the Company's accounting records, to access the premises to deal with creditors who have reservation of title claims in respect of goods

[2] See *Hong Kong Civil Procedure 2018*, (Hong Kong: Sweet & Maxwell, 2017).

supplied and to enable his IT staff to visit the premises to secure and recover the company's computerised accounting and other records.

The liquidator will also conduct land title searches to identify all property owned by the company.

Accounting Records

6.019 It is essential that the Liquidator secure the accounting records of the company immediately following his appointment. In most cases, it will be necessary for the Liquidator to vacate the premises soon after his appointment, particularly if the premises are subject to a short term lease. It is often the case that the landlord will require possession of the property to be handed back within a short time of the Liquidators' appointment.

The Liquidator should ensure that a complete inventory of the accounting records is prepared. The records should then be boxed up and sent to safe storage. The inventory should enable the Liquidator to be able to access specific accounting records from storage without having to recall all the records. For example, if a query arises in relation to accounts receivable, the specific boxes which contain the records relating to those receivables should be capable of being easily identified and recalled.

Within six months of his appointment, the Liquidator will also be required to report to the Official Receiver on the conduct of the directors pursuant to the provisions of the Companies (Report on Conduct of Directors) Regulation (Cap.32J). In preparing his report, the Liquidator will need to consider, amongst other things, whether the company has maintained proper accounting records in accordance with the various provisions in the CO. It will be necessary for a full inventory of the accounting records of the company recovered by the liquidator to be provided in support of any report alleging a failure to keep proper accounting records. Such an inventory is much easier to complete at the start of the administration when the accounting records are still in situ and where often one or more of the accounting staff are available to assist in identifying such records.

At this point, it is worth noting that in some circumstances it may be appropriate to retain one or more of the company's accounting staff to bring the accounting records up-to-date as at the date of liquidation. It will of course be necessary to make payment to the accounting staff for the work undertaken but this can be charged as a necessary expense of the liquidation. This assistance can be particularly invaluable where the company has numerous creditors or accounts receivable as the accounting staff are usually far better able to update the records than are the staff of the liquidator. However, care must be taken if there are any allegations or suggestions of impropriety against any of the staff, as access to the accounting records could give them an opportunity to hide their tracks.

Moreover, it is often the case that the company's accounting staff will have a much wider knowledge of the company's affairs than simply the accounting information to which they are privy. If accounting staff are retained in such circumstances it is useful for the Liquidators' staff to talk with them about the affairs of the company in the hope of obtaining information which may not have been disclosed by the directors. A Liquidator should never lose sight of the fact that former employees of the company, often unhappy as a result of losing their jobs and having lost money, can be an extremely useful source of information about the affairs of the insolvent company.

Employee Records

Careful attention should be paid to recovering the employee payroll records. The Labour Department will require access to these records in order to deal with any claims made by employees under the provisions of the Protection of Wages on Insolvency Fund Ordinance (Cap.380). Moreover, a Liquidator may need to contact employees in order to raise queries with them in relation to his investigations and the general administration of the liquidation. 6.020

Computerised Records

Specific consideration must be given to recovering, securing and safeguarding the company's computerised accounting records and other computer files including spreadsheets, presentations, text documents, emails and any other computerised files which may have been created using standard or turnkey computer software. A liquidator must also be conscious of possible remote access to computers and/or the network when securing the system. 6.021

Ideally, the Liquidator should be able to make a forensic copy of the computerised records. By doing so, he can, at a later date, show that the copy of the records which he has made is a true copy of the records as they existed at the date of his appointment. If he simply makes a backup copy of the records, it would be open to someone to allege subsequently that the records have, in some way, been altered after the backup copy has been made.

In the absence of being able to make a forensic copy, the Liquidator must, at the very least, ensure that a backup copy of all the computerised records is made, that backup copy being stored not in his office but at a separate secure location, such as a bank safety deposit box. It is also usual to make a second backup copy which is available for interrogation by the Liquidators' staff for the purposes of their investigations.

The Statement of Affairs

Pursuant to the provisions of s.190 of the CWUO, the directors of a company must file with the liquidator a Statement of Affairs setting out the whole of the assets and liabilities of the company. Whilst this document, which has to be sworn to by the director(s), is extremely useful, there is unfortunately a tendency in Hong Kong for liquidators to wait for the production of the Statement of Affairs before commencing their detailed investigations into the affairs of the company. 6.022

In the opinion of the authors, the filing of a Statement of Affairs is not an event for which the liquidators must wait before commencing their investigations. It is imperative that in the early stages of the liquidation the liquidators and their staff interview the directors of the company and the senior members of staff in order to ascertain such information as is relevant in relation to the assets and liabilities of the company. Whilst a sworn Statement of Affairs is required to be filed within 28 days, it can often be a number of weeks or even months before the directors are able to file the document. Moreover, in many cases a Statement of Affairs is never filed and in a compulsory liquidation it is necessary for the liquidator to apply for an order that its filing be dispensed with before he can obtain his release.

Summary

6.023 Unfortunately it is frequently the case that directors are unable or unwilling, or sometimes both, to deliver up to the liquidator the accounting records of the company. Needless to say, such a lack of co-operation can severely hinder the liquidator's ability to properly investigate the affairs of the insolvent company. Moreover, the failure to cooperate in this way inevitably leads to the conclusion that the directors, or other persons associated with the company, have something to hide.

Consequently, if the liquidators investigations are hindered in this manner, he may wish to consider making an application to the Court pursuant to the provisions of s.211 of the CWUO for an order that the directors, or any other party who has possession of accounting or other records of the company, deliver them up to the liquidator.

Essential Services

6.024 It is sometimes the case that immediately following his appointment, the liquidator will need to continue to use the company's premises for some time in order to bring the accounting records up-to-date, and on some occasions in order to conduct an orderly sale of the company's assets from the premises.

In those circumstances he will need to deal with the various utilities in Hong Kong. It is usually the case that the utilities will have been given deposits by the Company during the life of the account. However, in view of the company's financial difficulties it is also often the case that the amounts due to the utilities are in arrears.

In an ideal world, the utilities would be prepared to accept the personal undertaking of the Liquidator that he will make payment to them in respect of any amounts arising during the period of his appointment and occupation of the company's premises. However, on some occasions in Hong Kong, the utilities also demand a separate deposit from the Liquidator before agreeing to continue with supply to the premises.

Each case needs to be dealt with on its merits depending upon the individual circumstances.

Freezing Bank Accounts

6.025 The Liquidator should immediately contact by any means of communication to any bank either in Hong Kong or in any other jurisdiction where he is aware the company maintained an account. The bank should be provided with a copy of the order or a resolution relating to the appointment of the Liquidator and should be asked to immediately freeze any account in the name of the company. It is often the case (subject to the bank involved) that a liquidator will freeze the account with regard to withdrawals but keep open the account with regard to deposits. This will ensure that, while no funds can leave the account, any automatic credit transactions or other deposits that the liquidator is unaware of, will still be collected. These should then be transferred to a suspense account and cannot be used by the bank of offset against any amounts due to the bank.

At the same time, the bank should be asked to provide copies of bank statements if the Liquidator has been unable to trace them from the accounting records. If the Liquidator has not had time to check whether he has a full set of bank statements, he should wait until he has been able to do so before requesting copies. Banks in Hong Kong will usually ask for payment for copies of bank statements. Most Liquidators will agree to make payment at a rate based on the agreement presently in force between the Official Receiver's Office and the Hong Kong Association of Banks.

Redirecting Mail

6.026 As soon as possible after his appointment, the Liquidator should apply to the Post Office for an order redirecting all post addressed to the Company at its registered office and at any other addresses of which the Liquidator is aware, to the Liquidators' office.

When redirected post arrives at the Liquidators office it should be reviewed closely. A review of redirected post often results in additional creditor claims coming to light. It can also provide information relating to undisclosed assets or transactions which could result in claims against directors and/or third parties. Any unopened mail at the company's offices should also be closely inspected by the liquidator as the mail frequently brings to the liquidator's attention certain ongoing matters involving the company.

The Liquidator should also arrange for the Company's registered office to be changed to the Liquidators' office. In this way, any documents which should be served on the Company at its registered office, will automatically come to the attention of the Liquidator.

Statutory Records

6.027 It is essential to recover the statutory records of the company, in particular the minutes of any board meetings. A review of these minutes can in many cases provide useful information in relation to the circumstances surrounding significant transactions entered into by the company. However, in many cases in Hong Kong, it is the lack of minutes, of board meetings, that can often be important from an evidential point of view. The existence of board minutes which might support the decision-making process of the directors can often be of assistance to a Liquidator in understanding why directors adopted a particular course of action. However, in the case of most companies in Hong Kong, which are privately owned, it is often the case that meetings of directors, other than statutory annual general meetings, are not properly minuted, or indeed sometimes are not recorded at all. In those circumstances it can be difficult for directors to justify their actions, particularly if there are no minutes to support their decision-making process.

It is important to note that a third party, such as an auditor, cannot claim a lien over the statutory records of a company in liquidation.

Summary

6.028 The key issue in relation to the accounting records and other books and papers relating to the company is to ensure that firstly they are safeguarded immediately following the appointment and secondly that they are easily accessible for the purposes of future investigations and asset realisation programmes.

Securing the Physical Assets

6.029 The work undertaken in securing the physical assets of the company will necessarily vary depending upon the nature of those assets. The following is a brief summary of

those assets typically uncovered by a Liquidator and the steps which a prudent Liquidator should take to secure them.

Insurance

6.030 It is imperative that as soon as possible following his appointment, the Liquidator takes steps to insure the assets of the company. Most Liquidators have standing arrangements with an insurance broker which gives them automatic cover for up to 30 days immediately after the date of appointment. Thereafter, cover is only available provided a proposal is completed showing the details of the specific assets in respect of which cover is required.

Specialist insurance cover may be required in the event that the company is continuing to trade and/or is continuing to sell manufactured products to end users or to third parties who will sell on or to the public.

In Hong Kong, it is relatively infrequent that a Liquidator will continue to trade the operations of the company for any length of time after his appointment as in practice, the manufacturing operations of most liquidated Hong Kong companies are not usually based in Hong Kong, but in the People's Republic of China ("PRC"). However, in the event that it is necessary to continue the trading operations of the company, specialist advice should be sought as to the extent of the insurance cover required in those circumstances.

Plant and Equipment

6.031 The Liquidator should appoint an agent to undertake an inventory of all the company's plant and equipment located either at the company's premises or at other locations within Hong Kong. It is often useful to engage a professional valuer to perform these services as the Liquidator will then not only have an inventory of the Company's plant and equipment, but also an indicative range of values ascribed to the various items which will be of assistance in the subsequent sales process. If assets are located outside Hong Kong, steps should be taken to instruct an agent/valuer in the other jurisdiction(s) to similarly conduct an inventory and valuation of the plant and equipment. The agent in the foreign country should also be instructed to take the necessary steps to ensure that the plant and equipment is adequately secured. Depending on the circumstances it may be appropriate to continue to keep the plant and equipment at the Company's premises, in which case it will be necessary to reach agreement to that effect with any landlord and to ensure that satisfactory security arrangements are put in place. Alternatively, it may be removed to secure premises under the control and supervision of the liquidators agent.

Stock

6.032 The Liquidators' agent should also be asked to undertake an inventory and valuation of the company's stock of raw materials, work in progress and finished goods. In this respect it is important that the Liquidators immediately address the issue of any claims by suppliers of raw materials or other goods who claim to have reserved title to those goods.

Reservation of Title

6.033 The majority of companies that operate in Hong Kong are no longer involved in manufacturing within Hong Kong. Moreover, those companies which are involved in trading goods rarely maintain stocks of those goods. Instead, customers' orders are usually fulfilled by direct shipment from the factory which is frequently situated in the PRC.

Nonetheless the issue of reservation of title is one which still occasionally needs to be addressed by a Liquidator. Whilst there is a good deal of case law, most of which is from the UK and Australia, a Liquidator will as far as possible try to deal with reservation of title claims on a commercial basis rather than incur unnecessary legal costs which will serve only to reduce the eventual recovery for creditors.

The Liquidator will firstly ask the creditor claiming reservation of title to physically attend the company's premises or any other premises where the goods may be situated, to see if they are able to identify the specific goods to which they are claiming title. If the creditor is unable to identify the specific goods the claim is likely to fail at this, the first hurdle.

If the creditor is able to identify the specific goods, and provided that the goods have not been incorporated with other goods to form new products or have not otherwise lost their original identity, it will then be necessary for him to show that he has a valid reservation of title clause contained within his terms of trade. Further, if such a clause can be established, it must be shown to have been properly incorporated into his terms of trade with the company and that the goods which are still in the possession of the company are those goods to which the outstanding invoices relate.

The wording of the Retention of Title ("ROT") clause is critical. Legal title in the goods must be reserved rather than mere equitable title. Quite often ROT clauses fail as by virtue of their wording, they constitute a charge over the goods, which inevitably will not be registered and will therefore be invalid as against a liquidator.

ROT clauses may be specific (relating only to specific goods) or all-monies clauses, which seek to reserve title in goods until all monies owing to the supplier (including monies owed from previous shipments of goods) are satisfied.

If the creditor is able to establish all of the above then it may be that the Liquidator will agree to the release of the goods to the creditor, particularly if the value of the items is not material. However, if the liquidator is in any doubt as to the validity of the claim or if the amounts involved are material then he should take legal advice in the matter.

Nonetheless, there are circumstances where the company may require the raw materials in order to continue manufacturing products, to turn into finished goods to generate value for the company's creditors. In those circumstances, the Liquidator will generally seek an agreement with the creditor whereby, subject to the creditor proving that he has a valid ROT claim, the liquidator will undertake to pay for those goods which are used in the ongoing manufacturing process after the date of the liquidator's appointment.

Steps should be taken to ensure that no new supplies of raw materials or other stocks are accepted by the company following the appointment of the Liquidators. This is except to the extent that they may be required in order to complete work in progress by turning it into finished goods. To the extent that any such goods are accepted and used by the Liquidator, he will be required to pay for them as an expense of the liquidation.

Controls should be put in place to ensure that no goods are dispatched from the factory to customers except with the specific authority of the liquidator or a member of his staff. One of the purposes behind this is to ensure that no goods are sent to customers who already owe money to the company until such time as the liquidator is satisfied that adequate arrangements have been made for payment of the outstanding account. It is also essential to ensure, by having the liquidators staff check that goods are dispatched only to legitimate customers.

Matters in this respect may be complicated by virtue of the fact that, in many cases, goods are not dispatched directly by the company, but are often sent out from the manufacturing facility, usually in the PRC, directly to the customer. In those circumstances, it is necessary to make immediate contact with the PRC factory to place an immediate stay on the dispatch of goods until such time as a Liquidator has been able to examine the various contracts for the supply of goods and satisfy himself that completion of the contracts is in the best interests of the company and thus its creditors. Subject to the circumstances, it may be necessary for a member of the liquidator's staff to visit the PRC factory so that the liquidators can satisfy themselves that proper arrangements are in force for controlling the dispatch of goods to customers.

Completion of Contracts

6.034 It is possible that at the date of liquidation the company will be a party to uncompleted contracts for the supply of goods or services. The Liquidator will need to make an early assessment as to whether he should complete these contracts.

In the case of the supply of goods, the Liquidator will need to establish whether there is a benefit to be gained by the company continuing with the contract and supplying the goods which are the subject thereof. If those goods are already in stock and have been purchased and/or manufactured by the company then it will probably make commercial sense for the Liquidator to continue with the supply contract. However, before doing so he will have to satisfy himself that the arrangements with the customer are such that there will be no danger of non-payment of the account receivable arising as a result of the supply. If the purchaser already has an outstanding account with the company, and particularly if that account is already overdue, the Liquidator may seek payment in advance before the goods are dispatched to the purchaser. In doing so he is simply protecting the interests of creditors.

If the goods are being sent out of Hong Kong, as is often the case, the Liquidator will have to examine the terms of payment under the existing contract for supply. Sales of goods to foreign customers are often conducted with payment being made either by Letter of Credit ("LC") or with funds being sent by telegraphic transfer on the provision of faxed copies of the shipping documents. This issue is addressed in more detail later in this chapter. Whatever the case, the Liquidator should examine the contractual terms to ensure that there is no, or at the very least minimal, prospect of the customer defaulting on payment.

The supply of services usually brings with it added complications. If services are to be supplied by individuals who work for the company it will be difficult for the Liquidator to speak for the availability of those individuals. Indeed, following the appointment of a Liquidator, most employees if not already dismissed, will almost certainly start looking for alternative employment. However, in this situation it may be possible to arrange for the specific employee to reach a separate arrangement, outside

the liquidation, with the purchaser of the services for completion of the contract. This has the potential benefit of enabling the company to avoid any potential claim by the purchaser of services in respect of breach of contract.

To the extent that a Liquidator needs to order goods or services following his appointment, he should ensure that all orders are placed on the Company's letter head and that the letter head clearly shows that the Liquidators have been appointed to the company.

Work in Progress

A Liquidator will need to be extremely careful in dealing with partially completed work in progress at the date of his appointment. For the purposes of this chapter we have ignored the issue of construction related work in progress which is worthy of a book in itself. 6.035

Work in progress will usually fall into one of two categories. The first is the production of generic products which the customer can ultimately obtain from other sources. In respect of these types of products the Liquidator will need to assess the extent to which the products have already been completed, the cost of completion and whether they will be capable of being completed and delivered within the timeframe set out in the original contract for supply. Provided the selling price of the products will be in excess of the cost of completion, and for this purpose there should be included the material costs, labour costs and any associated overheads, then in most cases the Liquidator will proceed to complete the work in progress. However, before doing so, he must satisfy himself that the purchaser still wishes to proceed with the contract for supply and is prepared to pay the previously agreed price. Depending upon the circumstances, the Liquidator may try to amend the terms of the contract by requiring that payment being made prior to delivery. From a practical point of view the liquidator is less likely to continue a contract for supply if it is for a long period than if it is a one-off contract or is for a short term. The longer the period of the contract, the greater is the danger of unforeseen circumstances resulting in losses arising, which will have the effect of depleting the assets available to the creditors.

In reaching his decision, the liquidator must also take into account the time costs he is likely to incur in supervising ongoing trading. In most circumstances there is little point in continuing trading operations, with its inherent risks of financial loss, if any "profit" generated is eroded by the additional costs arising as a result of the supervision of such trading by the staff of the liquidator. The only circumstances where the liquidator will be able to justify trading losses is where, with good reason, he anticipates being able to sell the business as a going concern and that the difference between the break up value of the assets and their going concern value is equal to or greater than the potential trading losses.

If there is a secured creditor with a fixed and floating charge, the liquidator must be conscious of the position of the preferential creditors. They are entitled to the proceeds of the floating charge realisations before any floating chargeholder. If, by continuing to trade, he depletes those assets, he may find himself liable to reimburse the preferential creditors for any lower dividend distribution they receive as a consequence of his decision to continue trading.

The *second category* of work in progress is that where the product has been designed for the specific end user and will be of no use to anyone else. Thus, even if the

goods are completed, if the purchaser refuses to take delivery, there will be no prospect of recovering anything from any third party.

In this situation, the Liquidator will again review the cost of completion as above, but at a very early stage should seek written confirmation from the purchaser that he will still take delivery of the completed product at the agreed price. Contracts such as this are often quite high in value and frequently the goods manufactured and supplied are subject to a warranty supplied by the manufacturer. It is therefore not unusual for the purchaser to demand a discount in return for taking delivery of the finished goods as the Liquidated company will not be in a position to support the warranty. This problem can often be alleviated, at least to a certain extent, by finding a third party who, for a fee, will be prepared to support the warranty. The Liquidator will need to make a commercial decision as to whether to proceed with completion of the contract. In reaching his decision he will also need to take into account any other contracts being undertaken for the same customer and any amounts already due by that customer in respect of goods previously supplied. i.e. the possibility of damages claims for breach of contract arising as a result of non-completion of work in progress which the purchaser may then set off against other accounts payable to the company. All these factors will need to be taken into account by the Liquidator.

Accounts Receivable

6.036 It is frequently the case that one of the major classes of assets of a company are its accounts receivable. If so, it is essential that the Liquidators take immediate action to protect and recover them.

It has often been the case in recent years that such accounts receivable have been subject to charges in favour of banks that provide the company in liquidation with financing on either specific matters or, more generally, for the purpose of working capital. The various banks have traditionally claimed that such accounts receivable are subject to fixed charges in their favour and, as such, the proceeds would not be available to satisfy preferential payments to creditors such employees of the company, prior to being used to discharge the secured debt. This area of law has recently been the subject of considerable uncertainty. However in the landmark decision of the House of Lords in *National Westminster Bank plc v Spectrum Ltd*, [3] it has been determined that in most circumstances secured creditors may not hold fixed charges over accounts receivable but rather such charges are more appropriately described as floating charges.

The main issue, in determining whether a charge is fixed or floating in nature will be the extent of control that the charge holder is able to excise over the secured assets and, conversely, the ability of the company granting the charge to deal with those assets without the secured creditor's consent in the ordinary course of business. However financial creditors will now need to revisit their lending policies in light of the issue having now being resolved.

The first step is to ensure that the company's accounts receivable ledger has been brought up to date. It is only then that the Liquidator is likely to have a full picture of the accounts receivable position.

It is often the case with companies in Hong Kong that accounts receivable are due from other jurisdictions such as Europe and the USA. If the company has a substantial

[3] [2005] 3 WLR 58.

accounts receivable ledger it is often appropriate to retain a member of the company's accounting staff specifically to assist the Liquidator with the collection process, particularly in the period soon after the appointment. Certain members of staff will often have a relationship with customers which will enable them to effect recoveries in a more efficient way than would the Liquidator or his staff, particularly in the early stages of a liquidation. Former members of staff will also be able to more easily deal with queries raised by customers in respect of the timing of deliveries, quality and quantity issues and other detailed aspects of the delivery process. If it is left to the Liquidators' staff, who inevitably will not have the detailed knowledge to deal with such queries, they will need to spend time researching each individual query, and often will need to speak to former staff, thus delaying further the collection process and increasing its cost. Once the Liquidator has dismissed all the remaining members of staff he will be on his own in terms of discovering information to deal with queries raised by customers. Former staff will often be prepared to continue to assist the Liquidator, but in general terms the Liquidator cannot place reliance on being able to obtain information from them once they have left.

In the case of a substantial accounts receivable ledger, the retention of one or more members of the company's staff may continue for a period of weeks. During that period, as well as dealing with the account receivable collections, the staff should be instructed to prepare a file for each outstanding account receivable containing all the supporting documentation. This will further assist the liquidator in the collection process when the accounting staff are no longer available.

The Liquidator should diligently pursue all accounts receivable dealing as speedily as possible with any queries raised by customers. However, once those queries have been dealt with, if the customer is not prepared to pay, the Liquidator should instruct solicitors to pursue the customers. This may necessitate instructing legal advisers in a foreign jurisdiction and the Liquidator will often need to make payment in advance to foreign solicitors. The Liquidator will also need to make himself familiar with the general legal framework for the collection of accounts receivable in foreign jurisdictions in order that he is able to make the necessary commercial decisions as to whether to pursue collection procedures by legal means or otherwise.

Letters of Credit

6.037 In many cases, where goods are sold into foreign jurisdictions, arrangements are made for the customer to pay using 'Letters of Credit'. A letter of credit is in effect a promise, by a bank upon whom the letter of credit is drawn, to pay the amount due by the customer upon receipt of the goods. Generally, the amount due on the letter of credit will not be payable until the goods have been released by the foreign customs to the purchaser who has been able to check the goods for quality and quantity. However, as soon as the purchaser has provided written acceptance of the goods, i.e. he is satisfied with the quantity and quality of the goods shipped, the company will be able to submit the letter of credit to the paying bank who will then remit the funds to the company's bank. Further, suppliers in some industries, such as the oil industry, selling oil by the container ship, require what are referred to as Stand-by Letters of Credit ("SBLC"). SBLC's are, in effect, irrevocable promises to pay the supplier and are not subject to the inspection and/or confirmation of quantity or quality of the cargo delivered.

CHAPTER 10

LIQUIDATION COSTS*

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I. INTRODUCTION

10.001 There has been much literature in Hong Kong on the question of liquidation costs, usually relating to liquidators' remuneration and solicitors' fees.

This chapter however is not concerned specifically with liquidators' remuneration and solicitors' fees, which are of course two important issues, but is about liquidation costs in general. This chapter seeks to look at costs in general as relates to all types of liquidations and even receiverships.

In essence, as has been discussed in this publication, there are three types of liquidations:

(1) a compulsory winding-up or liquidation, through the court;

(2) a creditors' voluntary winding-up or liquidation; and

(3) a members' voluntary winding-up or liquidation - this is not an insolvent situation.

As a preliminary matter, it is of course important to appreciate the developments that have occurred as a consequence of the coming into effect of the current Companies Ordinance (Cap.622) ("CO"). These developments do not, however, have any bearing on the question of liquidation costs, as the provisions relating to winding-up will continue to remain in the predecessor Companies Ordinance, which has been retitled the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUO"). The CWUO came into effect at the same time when this current CO came into operation on 3 March 2016.[1] Accordingly, this chapter on liquidation costs remains unaffected by the advent of this CO.

II. COSTS IN A COMPULSORY WINDING-UP OR LIQUIDATION

10.002 The starting point in relation to the costs in a compulsory winding-up is to examine the statutory framework relating to costs in a compulsory winding-up or liquidation as set out in the CWUO and in the Companies (Winding-Up) Rules ("CWUR"). This is further supplemented by the extensive case law in Hong Kong as well as other common law jurisdictions (in particular England and Wales) which have interpreted how the statutory provisions apply in various cases.

A compulsory winding-up or liquidation is a winding-up by the court. This is the type of liquidation that commences with the presentation at court of a petition, resulting in a winding-up order being made by the court. Thus, unlike any other liquidation, the jurisdiction of the court is invoked, and in principle the administration of the liquidation will be supervised by the court. As mentioned elsewhere in this book in more detail,[2] it could be that the company in question is insolvent or it could be, for example, that the

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[1] Further amendments to the winding–up provisions taking place under the Modernisation of Corporate Insolvency Law exercise will be effected by way of amendments to the CWUO rather than by way of a re–write. See Law of Companies in Hong Kong (Sweet & Maxwell, 2013), p.17.

[2] See Chapter 4 of this text.

company's shareholders have fallen out, resulting in one of the shareholders issuing a petition to wind-up the company on just and equitable grounds.[3] Most cases however are commenced on the basis that the company is insolvent, or cannot pay its debts as they fall due.[4]

Prior to the winding-up order being made, joint and several provisional liquidators may have been appointed under s.193 of the CWUO. After the winding-up order is made, there may be other developments within the administration of the liquidation, such as the liquidation being converted to a creditors' winding-up under s.209A of the CWUO, or being dealt with in a summary manner under s.227F of the CWUO. The specifics of these sorts of developments are dealt with in more detail in other chapters of this book but this chapter attempts to deal with the repercussions on costs.

Costs Incurred by the Petitioner in Issuing a Winding-Up Petition

10.003 It goes without saying that during the course of issuing a winding-up petition, the petitioner will of course have his own legal costs to bear, which will be a matter of contract between the petitioner and his legal advisers. In addition, the petitioner will have to incur the following expenses on the issuing of the winding-up petition:

(1) The Court issuance fee, currently HK$1,045.00.[5]

(2) A deposit to be paid to the Official Receiver, currently in the amount of HK$12,150, "for the purpose of covering the fees and expenses to be incurred by the Official Receiver".[6] It should be borne in mind that after the presentation of the petition, the Official Receiver may at any time seek from the Court an order that a further sum be deposited for such purposes;[7] and

(3) The fees to advertise the petition, usually paid to one English language newspaper and one Chinese newspaper.

If an application is to be made to appoint a provisional liquidator under s.193 of the CWUO, then the petitioner will have to pay an additional deposit to the Official Receiver of HK$3,500 "towards his fees and expenses ... in connection with such appointment".[8]

General Rule as to Costs in Compulsory Winding-Up Petitions

10.004 In the first place, it must be remembered that proceedings commenced by way of a winding-up petition, whatever the grounds for the petition, are Court proceedings (unlike a creditors' voluntary winding-up or a members' voluntary winding-up). As Order 62, rule 3 of the Rules of the High Court (Cap.4A) ("RHC") makes clear, a party is only entitled to recover costs of or incidental to any "proceedings"[9] by an "order of the Court."

[3] Section 177(1)(f) of the CWUO .
[4] Section 177(1)(d) of the CWUO.
[5] High Court Fees Rules (Cap.4D), Schedule 1.
[6] Rule 22A(1) of the CWUR.
[7] Rule 22A(2) of the CWUR.
[8] Rule 28(1A) of the CWUR.
[9] By virtue of Order 62, r 2(1) of the Rules of the High Court (Cap.4A) ("RHC"), subsequent Order 62, r 3 of the RHC applies to all proceedings in the Court, including therefore winding-up proceedings.

Accordingly, as with any other Court proceedings, the issue of costs is always a matter in the discretion of the Court. Section 52A(1) of the High Court Ordinance (Cap.4) ("HCO") makes this clear:

> "(1) Subject to the provisions of rules of Court, the costs of and incidental to all proceedings in the Court of Appeal in its civil jurisdiction and in the Court of First Instance, including the administration of estates and trusts, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid".

The court has, in other words, full power and complete discretion to determine by whom and to what extent costs are going to be paid in order to ensure that justice is done in each individual case. Hence in *Re Criterion Gold Mining Co*,[10] Kay J roundly rejected any rule constraining the Court's discretion as to costs, stating:[11]

> "I object extremely to have it said that a hard and fast rule has been laid down by the Court as to costs in any case, because I think that in the matter of costs the Court ought to exercise its discretion in each individual case."

Notwithstanding the apparently wide discretion of the Court as regards costs, such discretion is ultimately a judicial discretion and must accordingly be exercised on certain fixed principles in the absence of special circumstances. In other words, the discretion must be exercised according to rules of reason and justice rather than private opinion or benevolence, and must be justifiable.[12]

The Petitioner

Where a Winding-Up Order is Made

10.005 Generally, where a winding-up order is made, a successful petitioner will get an order for his costs.[13] This essentially applies the general rule that costs follow the event, as embodied in Order 62, r 3(2) of the RHC:

> "(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings (other than interlocutory proceedings), the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

It is for the petitioner's solicitors to draft a standard order (assuming the matter is uncontested and only the petitioner appears) and that will include a provision for costs at the end of the order in the following terms (or something equivalent):

[10] (1889) Ch D 145.
[11] *Re Criterion Gold Mining Co* at 148.
[12] See *Hong Kong Civil Procedure 2018* (Hong Kong: Sweet & Maxwell Asia, 2017), §62/2/6.
[13] Although of course the court has the discretion to make a different order.

"And it is ordered that the Petitioner's costs of the said Petition be taxed and paid out of the assets of the said company".[14]

The petitioner's taxed costs are normally payable out of the assets of the company as an expense of the liquidation. This is borne out in the English case of *Re Humber Ironworks Co*,[15] in which Lord Romilly expressed the view that a successful petitioner and the company ought to be paid out of the estate; but that if a personal charge is made against a director or shareholder which justifies his appearance, and the charge is disproved, his costs will be paid by the petitioner; and if several people appear to ask for an order to wind-up the company, then the court should allow, out of the estate, one set of costs amongst them and they must arrange between themselves in what manner they are entitled to such costs. Reference may also be made to *Re Bostels Ltd*, where Pennycuick J explained that the petitioner ought to have its taxed costs paid out of the assets of the company because the winding-up remedy:

"…enures for the benefit of the creditors as a whole and the costs of the petition fall upon the assets available for distribution amongst the creditors as a whole".[16]

However, where a creditor who successfully petitions for the compulsory winding-up of a company includes in his petition allegations which are wholly irrelevant for the purpose of obtaining a winding-up order and which are included for purely tactical reasons, it has been held that he is precluded from recovering costs attributable to such matters.[17]

An issue arises where, in the course of the hearing of a winding-up petition, the parties agree to settle the dispute by way of a consent order. In such circumstances there may be an argument as to which party is entitled to the costs of the petition. In *Re Chinese United Establishments Ltd*,[18] the company made an open offer to purchase the petitioners' shares on the second day of the hearing of the winding-up petition which resulted in a consent order disposing of the matter. The petitioners subsequently sought costs of the petition on the basis that they had obtained what they had sought all along, namely a buy-out of their shares (or alternatively, a winding-up order). Rogers J agreed and ordered the company to pay the petitioners' costs. His Lordship said:

"In my view, I consider that the Petitioners are entitled to their costs on the very simple footing that they have, in effect, gained by these proceedings that which they had to come to court to get. If this open offer had been made earlier, perhaps when the petition were presented, or in lieu of evidence being filed by the Respondents, or at any other time, then of course the Petitioners would not have had to proceed with their petition, or if they had done so, would have done so at their own peril as to costs."

[14] As per Form 14 of the CWUR.
[15] (1866) LR 2 Eq 15.
[16] [1968] Ch 346 at 351F.
[17] *Re A & N Thermo Products Ltd* [1963] 1 WLR 1341.
[18] (unrep., HCCW 391/1994, 5 October 1995).

The decision of Rogers J was subsequently affirmed by the Court of Appeal. See *Chinese United Establishments Ltd v Nice Gain Enterprises Ltd*.[19]

A similar approach was adopted by Recorder Jat SC in *Morley v Kwan Wo San*.[20] There the parties settled the action during the course of trial but were unable to agree on costs. The Recorder approached the question of costs as follows:[21]

"… It seems to me that to hold that in the absence of agreement or an application to discontinue the action, the parties must go to trial in order to resolve any outstanding questions of costs would be contrary to the overriding objectives enshrined in RHC Order 1A rules 1 and 2 … I consider that the right approach in this case is to adopt a broad brush approach, substantially the same as what Rogers J did in *Re Chinese United Establishments Ltd* and as approved by the Court of Appeal."

In *Famous Marvel Co Ltd v Conversant Group Ltd*,[22] Queeny Au-Yeung J considered that the proper starting point was to ask which party had succeeded. Only where it was unclear which side had succeeded was it necessary for the court to consider the substantive issues:

'There is no dispute that even if a case is settled except as to costs, the Court still has power to determine which party should be liable for costs. There is no tradition for there to be "no order as to costs" in such a scenario. I am guided by the following principles in deciding costs:

(i) The Court is to decide if the party seeking costs has substantially obtained the relief sought in the litigation. See *Re Chinese United Establishments Ltd* (unrep., HCCW 291/1994, 5 October 1995), Rogers J (as he then was), approved later in CACV 214/1995 …;

(ii) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the Court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties. See *Brawley v Marcynski (No 1)* [2003] 1 WLR 813;

(iii) The Court will first consider if it is in a position to say what the likely outcome after trial would have been. If it is not in a position to do so, the order may well be no order as to costs. See *Brawley v Marcynski (No 1)* [2003] 1 WLR 813, at para.18, Longmore LJ; followed in *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2004] FSR 150;

(iv) The Court may permit parties to adduce evidence on the question of costs …;

[19] (unrep., CACV 214/1995, 24 April 1996).
[20] (unrep., HCA 4366/2003, 30 December 2009).
[21] At §§33, 41.
[22] (unrep., HCA 2153/2009, 29 October 2012).

(v) A broad brush can be taken by referring to all matters already laid before the Court, e.g. pleadings, correspondence, witness statements, transcripts of evidence and the terms of the settlement order. See *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2004] FSR 150, at para.9; *Morley v Kwan Wo Wan* (unrep., HCA 4366/2003, 30 December 2009); and

(vi) The objective is to do justice between the parties without incurring unnecessary Court time and consequently additional cost. See *Brawley v Marcynski (No 1)* [2003] 1 WLR 813."

On the other hand, there is a line of authority that supports the view that where a winding-up petition settles mid-hearing, it will still be necessary for the petitioner to continue the proceedings for the purposes of obtaining costs, albeit that the issues on such a trial would be "extremely limited". See *Ta Tung China & Arts Ltd v Fontana Restaurant Ltd*.[23] In the case of *Re Super Deluxe International Ltd*,[24] Kwan J endorsed the approach taken by the Court of Appeal in *Ta Tung* and ordered a hearing to cross-examine witnesses for the purposes of costs of the petition.

In *Re Lucky Ford Industrial Ltd*,[25] Harris J considered the above authorities and sought to elucidate the proper approach to cases of this sort. His Lordship said:[26]

> "The court has a discretion on how to deal with costs of any matter. In my view the following principles emerge from a consideration of the cases in the light of the underlying objectives of the Rules of the High Court stated in O.1A r.1, which pursuant to O.1A r.2 the court shall seek to give effect to when exercising its powers since April 2009. Decisions handed down before April 2009 have to be read in the light of the changes introduced by the Civil Justice Reforms, which require the court to give more weight to considerations of economy and expedition than had hitherto been the case…
>
> If judgment is entered for relief sought by a petitioner pursuant to a consent order, as was the case in *Re Chinese United Establishments Ltd* (unrep., HCCW 291/1994, 5 October 1995), or the respondent has withdrawn his objection to the relief sought by a petitioner resulting in judgment in his favour, costs will follow the event…
>
> The position is more complex where a case has settled and where the terms of settlement do not involve the court granting any relief and the petitioner only obtains something substantive under the terms of an agreement. That appears to have been the case in *Re Super Deluxe International Ltd*, (unrep., HCCW 186/200) which was decided in 2003…
>
> Having regard to Order 1A, rule 1 of the RHC, the correct approach to determining costs in cases which do not involve the court granting substantive relief is for the court first to consider the terms of settlement and assess whether the petitioner has obtained substantially what he sought in his petition. If he did it will not be necessary or appropriate for the court to consider evidence and arguments directed to the merits of the case and whether or not the petitioner would have been successful if the petition had gone to trial. The petitioner will be treated as having been successful and entitled to his costs…
>
> There may be cases in which it is not clear from the terms of settlement whether it can fairly be said that the petitioner has been substantially successful. In such cases the court will have to determine whether it is probable that the petitioner would have been substantially successful. This may require a consideration of the merits of the case, but this process should be as economical as is consistent with the court's duty to decide the issue fairly."

[23] [1999] 1 HKLRD 404 at 407F–G per Godfrey JA; 407A per Mortimer VP.
[24] (unrep., HCCW 186/2001, 3 June 2003).
[25] [2013] 3 HKLRD 550.
[26] At §§11–15.

The position following Harris J's decision above in *Re Lucky Ford Industrial Ltd* would therefore seem to be that, where the relief granted by the court is that sought by the petitioner pursuant to a consent order, then the petitioner will have obtained substantially what it sought and costs will follow the event. However, where the terms of settlement do not involve the court granting any relief, then the court will have to examine the terms of settlement and consider whether the petitioner has obtained substantially what he sought in his petition. Whatever investigative process the court undertakes however, it will be an economical one which is consistent with its duty to consider considerations of expedition under Order 1A of the RHC.

Where the opposition is grounded in a dispute between the shareholders it may be that some part or the whole of the costs should be paid by the shareholders. Note the case of *Re New Bright Footwear Manufactory Ltd*,[27] where in this case a petition was presented against two companies based on the just and equitable ground. Whilst the Official Receiver conceded that there was no mutual confidence and that a winding-up order was warranted, it argued that the entire matter involved personal disputes and that it was not its function to resolve such allegations and counter allegations. The court noted the Official Receiver's anxiety and made the winding-up order but gave special directions, empowering the Official Receiver to refer all matters to an independent barrister and appointed by him as his agent with costs to be paid out of the company's assets or, if insufficient, to seek costs on account of estimated reimbursements from the petitioner and second respondent personally in equal shares.

Where a successful petitioner obtains costs against the company, it would seem that such costs ought not to be set-off against any debts owed by the petitioner to the company. In *Re General Exchange Bank*,[28] a winding-up order was made on the petition of a shareholder who was subsequently made a contributory. Notwithstanding the debts owed by the shareholder to the company, the shareholder was held entitled to costs without set-off. On its face, this decision would appear to conflict with the usual rule that a set of costs ordered to be paid by the defendant under one order should be set-off against another set of costs due from the same defendant under another order. However, this departure from the general set-off rule would appear to be explicable on the basis that, in contrast to non-winding-up cases, costs incurred in winding-up proceedings are not incurred for the exclusive benefit of a single person but rather for the benefit of all general unsecured creditors.

[27] (unrep., HCCW 199/1982, 28 March 1983).
[28] (1867) LR 4 Eq 138.

The amount of the successful petitioner's solicitor's bill which is to be paid as an expense of the liquidation of the company is normally taxed on a party and party basis. Presumably, however, if the company is itself the petitioner, then any amount disallowed in this taxation will nevertheless be a debt owed by the company to the solicitor for which the solicitor may prove in the liquidation, subject to taxation as between solicitor and client. In this respect, see *Re C B and M (Tailors) Ltd*,[29] which related to the costs of a company's solicitor where the company was not petitioning but was ultimately found solvent. The solicitor was held allowed to submit a proof for the balance (subject to taxation if required by the liquidator) on a solicitor/client basis.[30]

Substitution of the Petitioner

10.006 Where a petitioner has been substituted under rule 33 of the CWUR and a winding-up order is made on that basis, the general rule is that the substituted petitioner will get an order for the costs of the petition and the original petitioner will get an order for its costs of presenting the petition (i.e. paying the court fee on its issuance) and advertising the petition.[31]

As explained by the court in *Re Bostels Ltd*,[32] this approach is explicable by reason that the original petitioner's expenses incurred in presenting and advertising the petition are considered to be "conducive to obtaining the winding-up order" for the benefit of the general unsecured creditors and accordingly should take prior to the claims of such unsecured creditors. It follows therefore that if the original petitioner incurs expenses unnecessary to the making of the winding-up order, such costs will not be recoverable.[33]

Following this case of *Re Bostels Ltd*,[34] it is also well-established that the original petitioner's costs will normally be ordered to be paid out of the assets of the company as an expense of the liquidation. This is so even if the original petitioner does not appear at the hearing — whether in the capacity of a supporting creditor or otherwise. Hence in *Re Castle Coulson and MacDonald Ltd*,[35] the court held that although the original petitioner dropped out of the litigation when the substituted petitioner came in, the "mouth of the court" was not "closed merely because an actual order was not made in [his] favour … at a time when he was a party".[36] The court further held that where a company is wound up at the behest of a substituted petitioner, the "usual" compulsory order made ought to contain an express provision entitling the original petitioner to seek its expenses in respect presenting and advertising the petition as costs of the petition.

The English position as regards substitution of the petitioner has been applied in Hong Kong.[37] In particular, in *Re Hon Seng Engineering Ltd*,[38] the original petitioner withdrew from the winding-up proceedings after the company adduced evidence

[29] [1932] 1 Ch 17.
[30] See also §10.009 below.
[31] *Re Bostels Ltd* [1968] Ch 346.
[32] [1968] Ch 346 at 352B–C.
[33] A possibility that was plainly envisaged by Pennycuick J in *Re Bostels Ltd*: see also [1968] Ch 346 at 352D.
[34] [1968] 1 Ch 346.
[35] [1973] Ch 382.
[36] At 386E.
[37] See *Re Datacom Wire & Cable Co Ltd* [2000] 1 HKLRD 526 at 529F–G; 531E–F per Le Pichon J.
[38] [2001] 3 HKLRD 63.

supporting the existence of a clearly disputed debt. At the same time however, another creditor successfully applied to be the substituted petitioner, which led to a question of costs as between the original petitioner and the company. Citing *Re Bostels Ltd*[39] with approval, Yuen J ordered the original petitioner to bear the costs of the company save for the petitioner's costs of presenting and advertising the petition, which were to be costs of the petition. This was so because on the facts of the case, it was clear that had it not been for the substitution, the petition (as originally formulated) would have been dismissed on the basis of the disputed debt. It was therefore only fair that the original petitioner bear such wasted costs.[40]

Where the Winding-Up Petition is Dismissed

10.007 Where the petition is dismissed, if it is dismissed on its merits, the unsuccessful petitioner will have to pay the costs of the company[41] and of any contributories and creditors (one set for each group) opposing the petition. Hence in *Re Humber Ironworks Co*,[42] the court held that as a matter of principle, where a petition is dismissed, the petitioner should be ordered to pay the costs of the company opposing the petitioner and anyone else "against whom a personal charge is made by the petition and who appears and disapproves such charge and is otherwise free from blame".

However, if the petitioner is acting reasonably, there may be no order as to costs. Indeed in *Re Humber Ironworks Co*[43] itself, Lord Romilly MR took the view[44] that, owing to the peculiar circumstances of the case, the costs of the petition did not "come within the ordinary rule" and the petition ought to be entitled to his costs out of the state. It is therefore readily apparent that acting "reasonably" at all times is of paramount importance.

Where creditors' petitions are concerned, the nature of the debt and whether it is disputed has an important bearing on the question of whether a petitioner has acted "reasonably". For instance, in *Re Bylamson & Associates (Enterprises) Ltd*,[45] Jones J dismissed a winding-up petition brought on grounds that the company was unable to pay its debts as they fell due when clear evidence was adduced showing that the debt was disputed on substantial grounds. In the result, the court had no hesitation in ordering the petitioner to pay the company's costs.

Conversely, where it is plain on the face of the petition that the debt is not disputed on substantial grounds — such as where the creditor is a judgment creditor — and the petition is dismissed only because of the intervention of creditors who oppose the making of an order, the petitioner will not normally be taken to have acted "unreasonably"[46] and the court will be inclined to make no order as to costs.[47] The

[39] [1968] 1 Ch 346.
[40] See, in particular, §§20–21.
[41] See *Re Bylamson & Associates (Enterprises) Ltd* [1983] 1 HKC 510; and *Re Mandarin Resources Corp Ltd* [1989] 1 HKC 393.
[42] (1866) LR 2 Eq 15.
[43] (1866) LR 2 Eq 15.
[44] At n 17.
[45] [1983] 1 HKC 510.
[46] Subject to the points discussed below.
[47] See, e.g., *Re RW Sharman Ltd* [1957] 1 WLR 774; *Re Jakab Industries Pty Ltd* (1982) 6 ACLR 784.

rationale for adopting such an approach was explained by Wynn-Parry J in *Re RW Sharman Ltd* in the following terms:[48]

> "… where a judgment creditor presents a petition and is only deprived of what otherwise would be his right by the circumstance that an overwhelming majority of the creditors or a majority of the creditors oppose the petition, I find it difficult to see how, as a matter of principle, the practice is justified in not merely depriving the petition of his costs but ordering him to pay costs himself. I agree with counsel for the petitioning creditor that it is too late to review the practice with a view to seeing whether or not the petitioner should have his costs, but I have come to the conclusion that, at any rate as regards a judgment creditor in the position of the petitioning creditor in this case, the fair practice would be that in dismissing the petition the court should make no order as to costs."

Numerous courts have subsequently applied the principles set out by Wynn-Parry J in *Re RW Sharman Ltd*.[49] In *Re Sklan Ltd*,[50] a judgment creditor petitioned the winding-up of the company on the basis of an undisputed debt. Subsequently, the petition was dismissed by consent upon an undertaking that the company would be put into voluntary liquidation, but not before numerous negotiations for the sale of the company's business and adjournments of the hearing of the winding-up petition. Pennycuick J held that no order as to costs be made given that the petitioner's debt had never been disputed and that he had acted reasonably throughout. Similarly, in *Re Jakab Industries Pty Ltd*,[51] a judgment creditor petitioned for the winding-up petition but subsequently sought a dismissal of the petition when it became clear that the majority of creditors opposed it. Needham J dismissed the petition with no order as to costs given that the petitioner had acted reasonably in abandoning the petition when it became clear it would not succeed.

In *Re East Kent Colliery Co Ltd*,[52] a winding-up petition was also dismissed with no order as to costs because nearly all the creditors opposed it and there was a scheme of reconstruction being prepared.

The rule that an unsuccessful petitioning creditor will not be condemned in costs if he acts reasonably applies to all creditors, not just a judgment creditor. As observed by Pennycuick J in *Re Sklan Ltd*,[53] whilst a judgment creditor is in a particularly strong position since his debt cannot be challenged, a creditor who has not obtained judgment is in an equally strong position "provided that his debt is not disputed," so that the rule that no order as to costs be imposed should apply equally to non-judgment creditors.

A petitioner will, however, be taken to have acted unreasonably if, despite having a clear basis for presenting a petition, he had known that the petition was virtually bound to fail. In *Re AE Hayter and Sons (Porchester) Ltd*[54] a judgment creditor was so held to have acted unreasonably because he had commenced winding-up proceedings in

[48] [1957] 1 WLR 774 at 777.
[49] See, e.g., *Re Sklan Ltd* [1961] 1 WLR 1013; see also *Re Riviera Pearls Ltd* [1962] 1 WLR 722; *Re Clutha Leathers Ltd* (1987) 4 NZCLC 64.
[50] [1961] 1 WLR 1008.
[51] (1982) 6 ACLR 784.
[52] (1914) 30 TLR 659.
[53] [1961] 1 WLR 1013 at 1015.
[54] [1961] 1 WLR 1008.

circumstances where he knew the other creditors would oppose the proceedings and agree instead to a voluntary winding-up. After the petitioning creditor eventually consented to the dismissal of the petition — but not after having presented the petition — the court ordered him to pay the opposing creditors' costs. Equally, in *Re Riviera Pearls Ltd*,[55] the company was in voluntary liquidation when a judgment creditor presented a petition to wind-up the company. As the petitioner had not filed any evidence explaining the reasonableness of his conduct, Pennycuick J dismissed the petition and ordered him to pay costs. His Lordship opined:

> "The company is in voluntary liquidation and where that is the position it must be for the creditor who petitions for compulsory winding-up to show some reason beyond the mere existence of his debt why the court should make a compulsory order. In the present case no evidence of any description has been filed on behalf of the petitioning creditor except a formal affidavit verifying the petition. The petitioning creditor now accepts the position that the petition must be dismissed owing to the opposition of other creditors of greater value. In the absence of any further evidence I shall order the petitioning creditor to pay the costs of the petition."

See also the case of *Re Chapel House Colliery Co*,[56] where the court held that a petition should not be presented when it is clear that it cannot produce any result in the way of payment of debts and that a petitioner with knowledge of the same would be penalised in costs.

A further illustration of a petitioner acting "unreasonably" can be seen in *Re Mandarin Resources Corp Ltd*.[57] There in that case, the petitioner had the benefit of an order for costs against the company. With that order, the petitioner then issued a letter of demand to the company giving 24 hours' notice for payment, failing which the petitioner would take such action as would be necessary. Despite the company's solicitor writing back immediately and admitting liability but requesting an extension of time for payment to be made, the petitioner proceeded to commence winding-up proceedings when payment was not forthcoming the following day. When the parties eventually mutually agreed to dismiss the petition, Jones J awarded costs to the company. In so doing, his Lordship noted that the demand for payment within 24 hours was "wholly unreasonable" and that, in the absence of the company being provided a reasonable time to make payment, evidence of inability to pay (and hence insolvency) had not been established. In the circumstances, the petitioner's conduct in proceeding to present the winding-up petition amounted to an abuse of process and ought to be made to pay the company's costs.

In exceptional circumstances, where the petitioner is not at fault in instituting proceedings, an unsuccessful petitioner may even be awarded costs against the company.

In *Re Arrow Leeds Ltd*,[58] a petition to wind-up the company was presented by a judgment creditor and initially unopposed by other creditors but it was adjourned on a

[55] [1962] 1 WLR 722.
[56] (1883) 24 Ch D 259.
[57] [1989] 1 HKC 393.
[58] [1986] BCLC 538.

couple of occasions at the request of the company. When it came before the court again for the third time, a majority of the company's creditors opposed it and accordingly the petitioner agreed to have the petition dismissed. However, as the petitioner had acted reasonably in prosecuting the proceedings and the opposition of the majority of the creditors had only been manifested at the third hearing, it was held in all the circumstances that the company should pay the petitioner's costs.

In *Re M McCarthy and Co (Builders) Ltd (No 2)*,[59] the company which sought to be wound-up had been incorporated with the same name as a company which had earlier been struck off the register, and apparently by the people who controlled the old company. The petitioner was a creditor of the old company who did not realise that the new company was a different entity. The petition was not surprisingly dismissed but Brightman J ordered the new company to pay the petitioner's costs.

In *Re Lanaghan Bros Ltd*,[60] the court ordered the company to pay the petitioning creditor's costs on dismissing the petition as the company had allowed the creditor to obtain judgment by default and had not disputed the debt, nor had the judgment been set aside until after the petition was presented. Accordingly, the petitioner could not really be faulted for the action that he took.

Where the petitioning creditor's debt is paid prior to the hearing of the winding-up petition and no winding-up order is sought, different considerations apply. In summary, the position appears to be that, provided the petition has been advertised, the petitioner will be awarded the costs of the petition as well as any interim applications from the company[61] given that, as the debt has been paid, the petitioner is to be regarded as having effectively succeeded.[62]

In *Re Shusella Ltd*,[63] the court made clear that the practice whereby the court will dismiss a petition for a compulsory winding-up of the company (even if the company does not appear) with an order for costs if the petitioner has received payment of its debt will only apply where all the material provisions of the CWUR have been complied with, including those relating to the advertisement of the petition. Where however there is a failure to advertise the winding-up petition, the court will not exercise its discretion to dispense with the advertisement and where there is a failure to comply with the rules and the petition is stuck out, no order as to costs in favour of the petitioner may be made.

The matter of *International Factors (Singapore) Pty Ltd v Speedy Tyres Pty Ltd*[64] was a case where the unsuccessful petitioner obtained his costs even though only part of the debt was paid and the balance clearly disputed. There, a petition for winding-up was presented and thereafter, part of the debt was paid and the petition was dismissed by consent. In ordering the company to pay the petitioner's costs, the court held that the party who is in default of payment occasioning the proceedings should generally pay the petitioner's costs. The court also rejected the company's arguments that the petition had not been valid due to a change in law and that a fresh demand ought to have been issued, finding instead that the petitioner should not be penalised merely because it embarked on the wrong procedure.

[59] [1976] 2 All ER 339.
[60] [1977] 1 All ER 265.
[61] *Re Alliance Contract Co* [1867] WN 218; *Re Ryan Developments Ltd* [2002] 2 BCLC 792.
[62] *Re Nowmost Co Ltd* [1996] 2 BCLC 492.
[63] [1983] BCLC 505.
[64] (1991) 5 ACSR 250.

Having said that, a petitioner should bear in mind that the court process is not meant to be used as a debt collection tool.[65] Accordingly, if the petition is used as an unnecessarily heavy-handed way of obtaining payment, the court may make no order as to part of the costs notwithstanding that the debt has been paid. In *Re Edric Audio Visual Ltd*,[66] a petition to wind-up was served on the debtor two weeks after judgment without any other notice being served. Although the debt was paid four days later, the judge considered that the petitioning creditor should not have gone ahead with the petition without giving the debtor notice of the default judgment and ordered the petitioner to pay the company's costs. On appeal, the court overturned the first instance judge's decision, holding that it was a wrong exercise of judicial discretion to order a petitioning creditor to pay a debtor's costs merely because he acted over-hastily and presenting a petition without giving a debtor notice of a default judgment signed against him.

Similarly, if the petitioner is too heavy-handed, the court may make no order as to *all* of the petitioner's costs, as in *Re Great Barrier Reef Flying Boats Pty Ltd*.[67] In that case, a firm of solicitors in dispute with their client for a relatively small amount of fees issued a statutory demand and eventually a winding-up petition. The dispute was settled shortly after the petition was presented. The court considered that whilst the solicitors had a right to commence the winding-up proceedings, they had clearly used the process to press a recalcitrant client and the use of the winding-up procedure was unnecessary given the small amount of the debt.[68] In the result, the court held that no costs were to be awarded to the petitioning solicitors.

In the situation where there are two petitioning creditors and the first petitioner no longer seeks a winding-up order and asks for his petition to be dismissed, the traditional position (prior to the introduction of rule 33 of the CWUR) was for the first petitioner to pay the costs of the opposing creditors as well as (possibly) the costs of both supporting and opposing creditors and contributories and the company itself.[69] Where however, the second petitioner presents a petition knowing that an earlier petition has already been presented he may well be liable to pay the costs of the petition, unless the first petitioner is found to have been acting *male fide* or in collusion with the company, in which case the first petition will be dismissed with costs. It is therefore advisable for a second petitioner to give notice in writing to the first petitioner to bring the petition on for hearing, failing which he will seek to be substituted as petitioner for the first petitioner under rule 33 of the CWUR.

Indemnity Costs

10.008 In recent years, there has been judicial emphasis on deterring would-be petitioners from taking the severe step of issuing winding-up petitions (which could cause potentially serious adverse consequences for a company) for purely tactical reasons in the absence of clear grounds for winding-up. The deterrence of this "high-risk strategy" has

[65] See, for example, *Re Bylamson & Associates (Enterprises) Ltd* [1983] 1 HKC 510, above.
[66] (1981) 125 SJ 395.
[67] (1982) 6 ACLR 820.
[68] The minimum statutory figure on which petition could be issued under the relevant law was $100 and the solicitors were seeking $522.02. They eventually accepted $436.92.
[69] See *Re Patent Cocoa Fibre Co* (1876) 1 ChD 617 (opposing creditors); see also *Re Peckham etc Tramways Co* (1888) 57 LJ Ch 462 and *Re British Electric Street Tramways* [1903] 1 Ch 725 (supporting and opposing creditors and contributories); *Re AE Hayter and Sons (Porchester) Ltd* [1961] 1 WLR 1008 (the company).

manifested itself in what appears to be an increasing trend of courts ordering costs on an indemnity basis where parties have unreasonably brought or opposed winding-up petitions.

The starting point is of course that the court has a virtually unfettered discretion to award indemnity costs, the only constraining factor being the requirement that taxation on an indemnity basis must be "appropriate". So, for instance, where winding-up proceedings have been commenced by the unsuccessful party in bad faith and/or for an ulterior motive so as to constitute an abuse of process, this may likely be a candidate for an award of taxation of costs on an indemnity basis. See *Overseas Trust Bank Ltd v Coopers & Lybrand (A Firm)*;[70] see also *Choy Yee Chun v Bond Star Development Ltd*.[71]

But it is equally clear that indemnity costs are not limited to cases of bad faith. This was emphasised in *Sung Foo Kee Ltd v Pak Lik Co*,[72] where the Court of Appeal considered the relevant English authorities and held that the courts' power to award costs on an indemnity basis was not limited to cases of deception or underhanded conduct or where the proceedings were brought with an ulterior motive or for an improper purpose.[73] As the Court of Appeal opined:[74]

> "Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'".

Reference may also be made to *Re Travel Products Europe Ltd*,[75] where To J summarised the principles relating to the award of indemnity costs in winding-up proceedings as follows:

> "The party seeking costs on indemnity basis has to show special or unusual features which would justify a taxation over and above the common fund basis. Examples of such special or unusual features are that the proceedings were scandalous or vexatious; or were initiated or prosecuted by the unsuccessful party maliciously, for an ulterior motive, in an oppressive manner or a manner as to constitute an abuse of the process of the court or an affront to the court … If a litigant has caused costs to be incurred irrationally or out of all proportion as to what is at stake, indemnity costs may also be ordered."

[70] [1991] 1 HKLR 177 at 183B–C per Godfrey J.
[71] [1997] HKLRD 1327.
[72] [1996] 3 HKC 570.
[73] See 575C–576B, citing *Disney v Plummer* (unrep., 16 November 1987) and *Macmillan Inc v Bishopgate Investment Trust Ltd* (unrep., 10 December 1993).
[74] At 576B–C per Godfrey JA, citing *Macmillan Inc v Bishopgate Investment Trust Ltd* (unrep., 10 December 1993) per Millett J.
[75] (unrep., 20 September 2011, HCCW 301/2010).

In other words, indemnity costs may be justified where a party has unnecessarily presented or opposed a winding-up petition in circumstances where there was no clear basis for doing so. This is particularly true given that the issuance of a winding-up petition is considered a significant step with serious implications for a company.[76] Hence, where a winding-up petition is brought in a situation where the debt is *bona fide* disputed on substantial grounds so that the petitioner has no *locus* to present the petition as a creditor, this may constitute an abuse of process.[77] Such a situation may accordingly justify indemnity costs if the court, considering all the circumstances of the case, takes the view that, for instance, the petitioner was well aware of the existence of the disputed debt on substantial grounds and yet chose to present a winding-up petition without any (or very little) warning to the company. See *Re A Company (No 00751 of 1992) ex p Avocet Aviation*.[78]

In *Re Hyundai Engineering & Construction Co Ltd*,[79] a winding-up petition was struck out on the basis of the existence of a *bona fide* dispute of the debt on substantial grounds and the question arose as to the proper costs order to make. In ordering the petitioner to pay costs on an indemnity basis, Kwan J rejected the unsuccessful petitioner's submissions that winding-up proceedings were merely "ordinary hostile litigation" which did not warrant costs on an indemnity basis. Her Ladyship said:[80]

> "I do not agree that a petition to wind-up a company is ordinary litigation. The implication of such a petition on a company is tremendous. If the petitioner knows of the basis which makes it improper for the petition to be brought, the petitioner should not be allowed to use "high-risk strategy" without any penalty …"

On the facts of the case, Kwan J considered that the petitioner had brought the winding-up petition without any warning letter or service of a statutory demand to the company in order to "catch the company by surprise" and inflict upon it "maximum damage". Such conduct, in the light of amount of the debt in the context of the large size of the business of the company, warranted an award of costs on an indemnity basis.[81]

Each case must however turn on its facts and the court will only exercise its discretion to award costs on an indemnity basis on a careful consideration of all of the circumstances of the case.[82] Hence in *Re Hempstone Ltd*,[83] Harris J, whilst expressing his sympathy for the petitioner's position, did not feel able to order indemnity costs without a detailed analysis of the evidence of the case (which was not available).

Conversely, in *Re Three Wise Monkeys Ltd*,[84] Harris J had no qualms about ordering indemnity costs on the basis of clear evidence that the underlying work which founded the claim for payment by the petitioner (and hence the winding-up petition) took place not in Hong Kong but in the United Kingdom, thereby nullifying any basis for issuing the winding-up petition in Hong Kong in the first place. For other recent cases where an

[76] *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71 at §8; *Re Three Wise Monkeys Ltd* (unrep., HCCW 323/2011, 28 November 2011) at §5.
[77] *Mann v Goldstein* [1968] 1 WLR 1091.
[78] [1992] BCLC 869.
[79] [2002] 2 HKLRD 71.
[80] *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71, at §8.
[81] *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71, at §11.
[82] *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71, at §7.
[83] (unrep., HCCW 279/2010, 1 September 2011).
[84] (unrep., HCCW 323/2011, 28 November 2011).

unsuccessful petitioner was visited with a costs order on an indemnity basis, see *Re Rightop Investment Ltd*,[85] *Re Duncan Interior Ltd*[86] and *Re SNE Engineering Co Ltd*.[87]

It follows from the recent authorities discussed above that the courts have little hesitation in ordering costs on an indemnity costs if it is satisfied on the evidence that the winding-up procedure has been improperly used for tactical reasons and merely to exert commercial pressure. A prudent would-be petitioner should therefore ensure that there are strong justifications for issuing winding-up petitions before taking such drastic steps.

The Company

Where a Winding-Up Order is Made

10.009 The company's costs of preparing for and appearing at the hearing of a successful winding-up petition are normally ordered to be paid as an expense of the liquidation.[88] This is indirectly illustrated by the New Zealand case of *Re Gibbons Radio and Electrical Ltd*[89] where the court indicated that it was empowered to assess the quantum of costs at the hearing provided it was reasonable, thereby avoiding the need for taxation.

However, the company's assets available for distribution to its creditors should not be expended unjustifiably in opposition to a winding-up petition. In the event this occurs, the court has jurisdiction and may order that the company's costs are not to be paid out of its assets in the liquidation and instead:

(i) order that the company's costs be paid by the person who instigated the company's opposition; and/or

(ii) order that the company's costs are not to be paid until all unsecured creditors have been paid in full.

The first type of order concerns the court's power to order the person who instigated the company's opposition to pay its costs.[90] Following the 2009 Civil Justice Reforms, the Hong Kong courts now have the jurisdiction to make third-party costs orders pursuant to the (new) s.52A(2) of the HCO.[91] In short, provided the non-party is joined to the proceedings for the purposes of costs only and is given a reasonable opportunity to attend the hearing,[92] the court may now make a costs order against it. However, such an order is only made in exceptional circumstances, such as where the third party is considered to be the "real party" interested in the outcome of the litigation. See *Metalloy Supplies Ltd v MA (UK) Ltd*.[93]

In *Re Aurum Marketing Ltd (in liquidation)*,[94] the Court of Appeal held that the sole director and shareholder of the company ought to personally bear the costs of the

[85] [2003] 2 HKLRD 13.
[86] (unrep., HCCW 10/2009, 20 April 2009).
[87] (unrep., HCCW 308/2012, 6 August 2013).
[88] *Re Humber Ironworks Co* (1866) LR 2 Eq 15; *Re Bostels Ltd* [1968] 1 Ch 346, at p 350.
[89] [1962] NZLR 353.
[90] *Re a Company (No 004055 of 1991)* [1991] 1 WLR 1003.
[91] HCO, s.52A(2); see also para.10.018 below.
[92] RHC, O 62, r 6A(1).
[93] [1997] 1 WLR 1613 at 1619 per Millett LJ.
[94] [2000] 2 BCLC 645.

petitioner and the company on the basis that he had operated a swindle through the company and had been resisting the winding-up order not in the interests of the creditors or the company but his own.[95] See also the case of *Abdul Aziz Essa v Capital Globe Ltd*,[96] which is further considered below.

The second type of order that a court is empowered to make where the company has unjustifiably opposed the winding-up petition is also known as a "*Bathampton Order*"[97] and prevents the company from obtaining its costs of the petition until all of the unsecured creditors have been paid in full.[98]

In *Re Bathampton Properties Ltd*[99] (the case for which the order is named), a petition to wind-up a company was presented on the basis of an unpaid loan. The court held that there was no defence and the company was ordered to be wound-up. Subsequently, the company asked for its costs to be taxed and paid out of the assets of the company notwithstanding that it had actively opposed the petition. Brightman J held that, although it would be right for the costs order to reflect the fact that the company's costs had been increased by its unsuccessful and unjustifiable opposition, by the same token, the order should also reflect the invariable practice of the court to allow as costs of the petition the costs of a company appearing to consent to a winding-up order. Therefore, the costs of the company of the petition down to and including the time when it could have consented to the order were ordered to be taxed and paid out of the assets of the company. Thereafter, in the exercise of the court's discretion, the company's costs were not to be paid out of the assets of the company in priority to the payment in full of all unsecured creditors of the company.

The upshot of *Re Bathampton Properties* is that a prudent firm of solicitors acting on behalf of a company which is potentially insolvent ought to consider seeking an indemnity from one or more of the shareholders or directors of the company before embarking on a path of opposing the winding-up petition.[100] Otherwise, such a firm may find itself out of pocket, particularly in the light of the possibility of wasted costs order made against it under Order 62, rule 8 of the RHC. *Bathampton Orders* have been considered and made in Hong Kong. See, e.g., *Re Capital Globe Ltd*,[101] where DHCJ Pow SC made an order *nisi* that the costs of the company (which had been procured by one of its directors to conceal relevant evidence and unjustifiably oppose the winding-up petition) incurred in opposing the petition not be paid until all of its unsecured creditors have been paid in full.

If the company intends to defend a winding-up petition, it may be appropriate for an application to be made to the court pursuant to s.182 of the CWUO in the period between the presentation of the petition and the hearing for specific approval of expenditure by the company in relation to the winding-up. It must, however, be noted that this would appear to fall foul of the general rule that it is in principle improper for the company's money to be expended on disputes between shareholders; see *Re CG &*

[95] *Re Aurum Marketing Ltd (in liquidation)* [2000] 2 BCLC 645 at 652h–653d per Mummery LJ.
[96] [2012] 6 HKC 472.
[97] *Re Bathampton Properties Ltd* [1976] 1 WLR 168; *Re Travel Products Europe Ltd* (unrep., HCCW 301/2010, 20 September 2011) at §5.
[98] *Secretary of State for Trade and Industry v Liquid Acquisitions Ltd* [2003] 1 BCLC 375.
[99] [1976] 1 WLR 168.
[100] *Re Bathampton Properties Ltd* [1976] 1 WLR 168 at 175F per Brightman J.
[101] (unrep., HCCW 422/2010, 8 July 2011).