the winding-up order.[9] A director might also be appointed as a special manager with such powers as determined by the court on application by the Official Receiver where the Official Receiver is liquidator of the company.[10]

Effect of Acting Outside of Powers

1.002 Where the directors act outside of their powers, the act will not be binding on the company.[11] There may be a possibility that a third party who deals with the company without knowledge of the appointment of the provisional liquidator or the winding-up could rely on the directors' ostensible authority,[12] although ostensible authority would not be applicable where notice of the order for the appointment of the provisional liquidator or for the winding-up has been advertised in accordance with Companies (Winding-Up) Rules (Cap.32H, Sub.Leg.) (CWUR), r.36.[13] The liquidator could, however, adopt and ratify the acts of the directors.[14]

Directors Engaged as Employees

1.003 Employees are dismissed from the date of publication of the order for winding-up, and accordingly a director employed under a service contract[15] would be dismissed from his position as employee[16] and may claim in the winding-up for any entitlements due in such capacity as employee.[17] As to the rights of such directors to claim compensation for termination of their engagement as employees, see [1.008]. The liquidator may, however, allow the employment of some or all the company's employees to continue if the liquidator carries on the business of the company.[18]

Whether Directors Cease to Hold Office

1.004 Although the directors may lose their powers and executive directors are dismissed as employees, it is not entirely clear whether the directors actually cease to hold office as directors. There are indications in the English Court of Appeal decision of *Measures Brothers Ltd v Measures*[19] that the office of director is vacated automatically upon the winding-up, although it does not appear that the decision actually turned on that issue.[20] That approach, however, was accepted in a South African

http://www.pbookshop.com

---

9 *Re Diamond Fuel Co* (1879) 13 Ch D 400, 404–405; *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640; *Re Reprographic Exports (Euromat) Ltd* (1978) 122 SJ 400.

10 CWUO, s.216.

11 *Bolognesi's Case* (1870) 5 Ch App 567.

12 *Cf, Re a company (No 006341 of 1992), ex p B Ltd* [1994] 1 BCLC 225, 230.

13 *Re Mawcon Ltd* [1969] 1 WLR 78.

14 *Re Mawcon Ltd* [1969] 1 WLR 78.

15 See *Re Beeton & Co Ltd* [1913] 2 Ch 279.

16 *Re General Rolling Stock Co* (1866) LR 1 Eq 346 (advertisement of the winding-up order is to be treated as notice by the liquidator of termination of the employment); *Re Oriental Bank Corp, ex p Guillemin* (1884) 28 Ch D 634; *Golsing v Gaskell* [1897] AC 575, HL; *Fowler v Commercial Timber Co* [1930] 2 KB 1; *Re Standard Salt & Alkali Ltd* [1934] SASR 168; *Re Mawcon Ltd* [1969] 1 WLR 78; *Re Peck Winch & Tod Ltd* (1979) 130 NLJ 116.

17 *Re Beeton & Co Ltd* [1913] 2 Ch 279 (director who was also engaged as employee entitled to claim preferential payments due to employees under Companies (Consolidation) Act 1908 s.209 (*cf* Cap.32, s.265)).

18 *Re English Joint Stock Bank, ex p Harding* (1867) 3 Eq 341; *Re Herald Newspaper of Otago* (1889) 7 NZLR 484; *Re Associated Dominions Assurance Society Ltd* (1962) 109 CLR 516; *Re Oriental Bank Corp* (1886) 32 Ch D 366; *Reid v Explosives Ltd* (1887) 19 QBD 265.

19 [1910] 2 Ch 248. See also *McAteer v Mullen* [2008] NI Ch 12; *Park Associated Developments Ltd v Kinnear* [2013] EWHC 3617 (Ch) [2].

20 The issue before the Court of Appeal was whether the company in liquidation could by injunction enforce a restraint of trade covenant against the director, in circumstances where the employment of the director ceased upon winding-up. Buckley LJ, in dissent, had held that as the director vacated office upon the winding-up, then in

decision,[21] and in addition, Canadian cases have held that, following the appointment of the liquidator, the directors are not under fiduciary duties so that they are free to purchase the company's property from the liquidator.[22]

However, in *Madrid Bank Ltd v Bayley*,[23] Blackburn J (with whom Shee J agreed) had held that on a winding-up, although the directors no longer have control over the management of the company, nothing in the companies legislation required the directors to cease to be officers of the company, and accordingly the directors in that case were required to answer interrogatories under relevant statutory provisions requiring "officers" of a body corporate to answer interrogatories in an action to which the body corporate is a party. Australian courts have, upon reviewing the various English and overseas decisions, subsequently held that the weight of authority supports the view that the directors are not automatically removed from office upon a winding-up, but simply have their powers suspended.[24]

In *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd*,[25] Young J stated that the Canadian cases do not proceed on the basis that the directors have ceased to hold office, and can be explained on the basis that, because the company is adequately protected by an independent liquidator on a winding-up, it is not necessary to impose on the directors all the usual fiduciary obligations when dealing with the liquidator. In *McAusland v Deputy Commissioner of Taxation*,[26] French J had also held that the legislative scheme (in relevant respects comparable to the Hong Kong legislation) requires nothing more than a cessation of the powers of the directors on a winding-up, and further that the legislation, in allowing for a stay or termination of the winding-up, would be consistent with a mere suspension of power rather than an automatic vacation of office, as this militates against the unnecessary inconvenience of having to reappoint the directors should the winding-up proceedings be stayed or terminated.

In *GW Electronics Co Ltd v Toshiba Electronics Asia Ltd*,[27] the Court of First Instance accepted that powers revert to the directors upon a stay of the winding-up, though the court did not deal specifically with the issue of whether there had been a vacation of office when winding-up was ordered.

---

accordance with the contract, the director would be restrained from competing against the company for a seven-year period following vacation from office (especially [1910] 2 Ch 248, 256). The majority had held against the company, but the ratio of the majority was simply that the company would be denied equitable relief because it was unable to perform its side of the bargain by continuing the employment of the director. Of the majority judges, Cozens-Hardy MR did not comment on whether the director vacated office, but Kennedy LJ did state that the director was displaced from his office. Whether the director actually ceased office was not an issue though (as noted by Joyce J in the first instance decision in *Measures Brothers v Measures* [1910] 1 Ch 336, 345) and it appears that the analysis in the Court of Appeal judgments would not have depended on whether the winding-up automatically led to the office of director being vacated or simply led to the director's employment under the contract being automatically terminated.

21 *Attorney General v Blumenthal* 1961 (4) SA 313.

22 *Re Mabou Coal and Gypsum Co* (1894) 27 NSR 305, which affirmed *Chatam National Bank v McKeen* (1895) 24 SCR 348; *Holmstead v Annable* (1914) 18 DLR 3.

23 (1866) LR 2 QB 37.

24 *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd* (1990) 8 ACLC 1011, 2 ACSR 766; *Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532, 541–543; *McAusland v Deputy Commissioner of Taxation* (1994) 12 ACLC 78, 12 ACSR 432.

25 *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd* (1990) 8 ACLC 1011, 2 ACSR 766, 768.

26 *McAusland v Deputy Commissioner of Taxation* (1994) 12 ACLC 78, 12 ACSR 432, 449. Gummow J (with whom Sheppard J agreed on this issue) decided the relevant issue on a different basis, but was willing to assume that the "suspension of powers" approach to be correct for the purposes of that case.

27 [2018] HKCFI 2443.

Assistance in the Liquidation and Examination of Directors

Assistance in the Liquidation

1.005 Upon a provisional liquidator being appointed or upon a winding-up order being made, the directors must allow the provisional liquidator or liquidator to take custody and control of all the property of the company.[28] Directors or former directors, if required by the provisional liquidator or liquidator, must within 28 days of the appointment of the provisional liquidator or the date of the winding-up order (as the case may be) submit to the provisional liquidator or liquidator a verified statement of the company's affairs in accordance with CWUO, s.190.

Section 190 was amended by the Companies (Winding-Up and Miscellaneous Provisions) (Amendment) Ordinance (14 of 2016), effective 13 February 2017, such that, *inter alia*, for any director or former director who has not made a statement of affairs, the provisional liquidator or liquidator may require the director or former director to submit a "supplementary affidavit" stating that the person concurs in the statement of affairs that had been submitted by the other directors or company secretary.[29] The supplementary affidavit may be qualified, for example, to state that the maker of the affidavit is not in agreement with the maker of the statement in respect of some particular matter.[30]

After a winding-up order is made, the liquidator may order officers of the company to deliver, convey, surrender or transfer any money, property or books and papers in their hands to which the company is *prima facie* entitled.[31] The directors may also need to attend on the Official Receiver, provisional liquidator or liquidator to answer questions and to give information both before and after the submission of the statement of affairs.[32] Where required, the directors might also be summoned before the court under s.286B and 286C of the CWUO to be examined in relation to the promotion, formation, trade, dealings, affairs or property of the company, or to produce any books and papers in their custody or power relating to the company.[33] Failure to deliver the company's property and books to the liquidator or for concealing or providing false information about the company may lead to criminal liability.[34]

Public Examinations

1.006 Directors might also be required to be publicly examined before the court under s.286A of the CWUO. In addition, under CWUO, s.168IA, where the Official Receiver has made a report that in his opinion a *prima facie* case exists against a director that would render him liable to a disqualification order under Part IVA of the CWUO,[35] the court may, on application by the Official Receiver, require the director to attend before the

[28] CWUO, s.197.
[29] CWUO, s. 190(2A).
[30] CWUO, s.190(2B).
[31] The liquidator is delegated with the court's power to require delivery of property under the CWUO, s.211; see also CWUO, s.226(c), and CWUR, r.67.
[32] CWUR, rr.39(2) and 41.
[33] Section 286B and 286C of the CWUO are discussed in more detail in Chapter 6.
[34] Under the CWUO, ss.271 and 272.
[35] See "Disqualification of directors" at [1.065].

court to be publicly examined as to the conduct of the business of the company or as to his conduct and dealings as a director.

Fiduciary Duties

Scope of Application of Duties: Effect of Winding-Up

1.007 As discussed above, it is not entirely clear whether directors vacate office upon a winding-up or merely have their powers suspended. However, even if the directors have not vacated office, it is clear that the directors would not be subject to any duties to act bona fide in the interests of the company or to act for proper purposes or to act with due care, skill and diligence, for the reason that the directors can no longer exercise powers on behalf of the company. In addition, the directors may purchase the company's assets from the liquidator without being subject to restrictions arising from any fiduciary duties.[36] But it is also clear that, whether or not the directors are treated as having vacated office, they would not be able to use information properly regarded as trade secrets belonging to the company, since such a restriction applies even after a director has left office.[37] So, for example, in *Measures Brothers Ltd v Measures*,[38] where, at a time when winding-up of the company was imminent, the director had made copies of lists of the company's customers for later use in his own business after the winding-up order was made, Joyce J held that the director's actions in taking the lists amounted to a breach of duty to the company and ordered the director to deliver back those lists to the company.[39]

In non-winding-up cases, the courts have accepted that the corporate opportunity doctrine still applies where a director has resigned from the company, where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.[40] It is not clear how far this principle applies in the winding-up situation though. There is a New Zealand authority which indicates that a company cannot prevent a director from exploiting a corporate opportunity where the company had terminated the director's employment.[41] On this analysis, and if the winding-up has led to the director vacating office, then it could be said that the company has terminated the director's position and thus the directors are entitled to exploit the corporate opportunity and it matters not whether the company had acted voluntarily or involuntarily in the termination.[42] In any event, the continuing fiduciary obligations

http://www.pbookshop.com

[36] *Re Mabou Coal and Gypsum Co* (1894) 27 NSR 305, which affirmed *Chatam National Bank v McKeen* (1895) 24 SCR 348; *Holmested v Annable* (1914) 18 DLR 3; *Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532.
[37] See *Kishimoto Sangyo Co Ltd v Akihiro Oba* [1996] 2 HKC 260, CA; *Measure Bros Ltd v Measures* [1910] 1 Ch 336; *Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532.
[38] *Measure Bros Ltd v Measures* [1910] 1 Ch 336. See also *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd* (1990) 8 ACLC 1011, 2 ACSR 766, 768.
[39] This aspect of the decision of Joyce J at first instance was not challenged on appeal.
[40] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371; see also *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Kishimoto Sangyo Co Ltd v Akihiro Oba* [1996] 2 HKC 260, CA.
[41] *Plateau Equipment Ltd v Marsden* (1991) 5 NZCLC 67,096.
[42] See *Measure Bros Ltd v Measures* [1910] 2 Ch 248. But *cf Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532, 543–544.

of directors who have left office do not go so far as to prevent a director from using his own accumulated knowledge, skill and experience for his own profit, nor from preventing the director from cultivating his own commercial relationships with the company's suppliers and customers,[43] provided that the use of the company's contacts does not involve taking away confidential customer lists or committing to memory of such information.[44]

If the directors are not treated as having vacated office though, the conceptual analysis as to the scope of application of the corporate opportunity doctrine would be different from the above. *Prima facie*, if the directors are still in office, in principle it would appear that they would still be subject to the general duties preventing them from exploiting corporate opportunities belonging to the company, at least where the liquidator is carrying on, or may still carry on, the company's business. Ordinarily, it seems that where a corporate opportunity has come to the directors by reason of their position as directors, they are restrained from diverting corporate opportunities to themselves on the basis that they have acquired or became aware of the opportunity as representatives of the company and accordingly the opportunity belongs in equity to the company.[45] This rationale would equally be applicable in the period during winding-up where the liquidator may still pursue the corporate opportunity for the benefit of the company's creditors and shareholders, since the opportunity can be said to belong to the company. On this approach then, the director cannot exploit a corporate opportunity which came to the director by reason of and in the course of the position of director.[46]

However, it is submitted that the directors would not be precluded from exploiting a business opportunity which came to the director in a "private" capacity following the commencement of winding-up or from otherwise competing with the company during the winding-up.[47] In the period when the company is being wound up, there is arguably no conflict of interest at all where the directors no longer exercise any powers over the company and where they are no longer responsible for the company's assets or business. Furthermore, although cases such as *Industrial Development Consultants Ltd v Cooley*[48] indicate that ordinarily a director is not permitted to exploit any opportunity which is of concern and relevance to the company, notwithstanding that the director only became aware of the opportunity in a private capacity, it may be that this principle is not applicable in the winding-up context. It appears that the rationale for that principle is that the directors are under duties of good faith to act in the interests of the company and thus are under an obligation to pass on the information about the business opportunity which may be of relevance to the company.[49] However, it could be argued that this rationale is not applicable during a winding-up, since the directors

[43] *Kishimoto Sangyo Co Ltd v Akihiro Oba* [1996] 2 HKC 260, CA; *Kao Lee and Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113.
[44] *Measure Bros Ltd v Measures* [1910] 1 Ch 336; *Robb v Green* [1895] 2 QB 315, CA (Eng); *Sanders v Parry* [1967] 1 WLR 753; *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] IRLR 491, CA (Eng).
[45] See *Cook v Deeks* [1916] 1 AC 554.
[46] *Cf Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532, 543–544.
[47] *Cf Measure Bros Ltd v Measures* [1910] 2 Ch 248.
[48] [1972] 2 All ER 162; see also *SEA Food International Pty Ltd v Lam* (1998) 16 ACLC 552; *Bhullar v Bhullar* [2003] BCC 711.
[49] [1972] 2 All ER 162, 173–174.

are no longer under any obligations to manage the company's business and to act in the interests of the company.

Voluntary Winding-Up

Powers of Directors and Position of Directors Engaged as Employees

1.008 The passing of a resolution[50] for the voluntary winding-up of the company does not in itself affect the powers of directors; however, pursuant to the CWUO, those powers would cease upon the appointment of the liquidator.[51] The directors' powers can continue though if sanctioned, in a voluntary winding-up, by the company in general meeting or the liquidator[52] or in a creditor's voluntary winding-up, by the committee of inspection or the creditors if there is no such committee.[53] Where the directors have acted outside their powers, the transaction would ordinarily be invalid;[54] however, it may be that where the resolution for winding-up was neither registered nor advertised, a third party dealing with the directors could rely on the directors' ostensible authority in binding the company if the third party did not know and had no means of knowing that the resolution had been passed.[55] Where the directors have acted without authority, it is always possible for the liquidator to adopt and ratify the directors' acts.[56]

It appears that although the directors' powers may cease upon the appointment of the liquidator, the directors nonetheless still remain in office.[57]

As to whether executive directors are automatically dismissed from their position as employee, the law is not entirely settled. *Re Imperial Wine Co, Shireff's Case*,[58] Lord Romilly MR stated that the resolution to wind up the company puts to an end the employment of the company's manager. However, in *Midland Counties Bank v Attwood*,[59] Warrington J considered that the *Shireff's Case* was not binding authority for that principle on the basis that it was *obiter* only and held instead that the voluntary liquidation does not in itself result in the dismissal of the company's employees. Voluntary winding-up was treated as being different from compulsory winding-up in that in the former the liquidator simply acts as an officer of the company, while in the latter, there is a change in the personality of the employer in the sense that the liquidator in control of the company is an officer of the court.[60] In *Fowler v Commercial Timber Co Ltd*,[61] Greer LJ of the English Court of Appeal suggested though, in *obiter*, that where the company is insolvent, the resolution for voluntary winding-up would, just as much as a compulsory winding-up, automatically put to an end the employment of the company's managers and other employees. It has been suggested that the

[50] CWUO, s.228.
[51] CWUO, s.235(2) (members' voluntary winding-up) and s.244(2) (creditors' voluntary winding-up).
[52] CWUO, s.235(2).
[53] CWUO, s.244(2).
[54] *Bolognesi's Case* (1870) 5 Ch App 567.
[55] *Re A Company (No 006341 of 1992) ex p B Ltd* [1994] 1 BCLC 225, 230.
[56] *Re Mawcon Ltd* [1969] 1 WLR 78.
[57] *Midland Counties District Bank Ltd v Attwood* [1905] 1 Ch 357; see also Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2001) para.[7.33].
[58] (1872) 14 Eq 417.
[59] [1905] 1 Ch 357; see also *McEvoy v Incat Tasmania Pty Ltd* (2003) 130 FCR 503; 46 ACSR 392, [7].
[60] This position is criticised in Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet and Maxwell, 2001) p 312, *cf* Robert Pennington, *Pennington's Corporate Insolvency Law* (Butterworths, 2nd ed 1997) 102.
[61] [1930] 2 KB 1.

http://www.pbookshop.com

resolution for winding-up can be treated as resulting in the employee's dismissal in such a situation, and possibly in other situations as well, where the resolution and the surrounding circumstances indicate that the company is unable or unwilling to carry out its obligations under the employment contract.[62]

Where there is a dismissal of the director-cum-employee, whether the director is entitled to compensation for early termination depends on the proper construction of the terms of the employment contract. Where the contract between the director and the company is constituted by the articles only, then there is an implied term that the employment is conditional on the continued existence of the company and accordingly the director is not entitled to damages for the termination following winding-up. However, where, apart altogether from the articles, the company and the director have entered into an independent agreement, such a term will not usually be implied into the contract, and the director would be entitled to claim for breach of contract if there has been early termination (such as where the period of service was for a fixed term that has not yet expired).[63]

Role and Assistance in the Liquidation

1.009 Where a members' voluntary winding-up is proposed, the directors must issue a certificate of solvency in accordance with CWUO, s.233 within the five weeks immediately preceding the date of the passing of the resolution for winding-up or on that date but before the passing of the resolution. Where a creditors' winding-up is proposed, a meeting of creditors must be summoned for a day not later than 14 days after the day on which there is to be held the members' general meeting (at which the resolution for winding-up is to be proposed) and the creditors' meeting must be properly advertised in accordance with CWUO, s.241. The directors must cause a statement of the affairs of the company together with a list of the creditors and their claims to be laid before the creditors' meeting, and one of the directors must be appointed by the board to preside at that meeting.[64]

A copy of the resolution for winding-up must be forwarded to the Registrar within 15 days after the passing of the resolution,[65] and notice of the resolution must be advertised in the Gazette within 15 days of the resolution.[66] If there is a breach of either of these requirements, the company and responsible officers are liable to a fine.[67]

The liquidator would be entitled to take control of the company's assets in accordance with the liquidator's powers and functions[68] and accordingly the directors would need to deliver up to the liquidator the property and books of the company in their custody or control. The provisions in ss.271 and 272 of the CWUO imposing criminal liability for failure to do so or for providing false information to the liquidator are applicable, being provisions which apply to every type of winding-up.[69]

[62] See *Re T N Farrer Ltd* [1937] Ch 352; Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet and Maxwell, 2001) 312–313; Keith J Bennetts, "Unfair Dismissal Proceedings in Company Liquidation and Receivership" (1990) 8 C&SLJ 158, 162.
[63] *Re NT Farrer Ltd* [1937] Ch 352; see also *Fowler v Commercial Timber Co Ltd* [1930] 2 KB 1.
[64] CWUO, s.241(3).
[65] CO, s.622.
[66] CWUO, s.229(1). Upon commencement of the Companies (Winding-Up and Miscellaneous Provisions) (Amendment) Ordinance (14 of 2016), the time period is changed to 15 days.
[67] For contraventions of CO, s.622, "responsible persons" (as defined in CO, s.3) would be liable. For contraventions of CWUO, s.229(1), "officers in default" (as defined in CWUO, s.351(2)) would be liable.
[68] See CWUO, ss.197, 199, and 251.
[69] See CWUO, ss.271 and 272.

Fiduciary Duties

1.010 The directors' usual fiduciary duties will continue to the extent that the directors continue to have management powers, but even where the directors no longer exercise any management powers, they might still be subject to certain fiduciary duties (see the discussion above of the directors' fiduciary duties in the context of compulsory winding-up).

Receivership

General

1.011 The appointment of a receiver does not result in the directors ceasing to hold office.[70] The directors would still be required to comply with their statutory duties, for example their statutory obligation[71] to prepare financial statements,[72] as well as their fiduciary duties under the general law, although those duties will be qualified by reason and to the extent of the receiver's control of the company.[73] For example, a director could not be called to account for a failure to pursue an asset which was in the possession and control of the receiver with the same diligence as the director would, where the company is not in receivership.[74] As the directors remain in office, they can do what the receiver requires them to do as such holders of office.[75]

The appointment of the receiver would also have an impact on the powers of the directors, which are reduced in inverse proportion to the powers of the receiver.[76] To ascertain the scope of the directors' powers, it is accordingly necessary to first identify the extent of the powers of the receiver from the court order or charge instrument under which the receiver was appointed. Where the receiver was appointed by the court to collect, get in and receive the whole of the assets of the company, it has been held that the appointment of the receiver effectively deprives the directors of all powers of management.[77] Where the receiver was appointed privately pursuant to a charge, the receiver would have power as a receiver or as a receiver and manager over the assets that are subject to the charge, in accordance with the terms of the debenture or charge instrument, and such powers can be exercised by the receiver without the concurrence of the directors.[78] Thus, the directors will generally have no role to play in relation to the charged assets.

[70] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 819, CA (Eng); *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541; *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569; see also *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWLR 782, 790.
[71] See CO, s.379.
[72] See *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301.
[73] See *Re Geneva Finance Ltd* (1992) 7 ACSR 415, 420; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638, [1328].
[74] *Re Geneva Finance Ltd* (1992) 7 ACSR 415, 421.
[75] *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569. In that case, the court made orders, on application by the receivers, for the directors to pass board resolutions for the execution of powers of attorney giving the receivers power to take action for and on behalf of the company to identify and preserve the assets of the company and to investigate dispositions of the company's assets during the receivership period. The receivers considered that it was necessary for the directors to take such action as it would otherwise be difficult for them to act for and on behalf of the company in the PRC due to complexities in obtaining recognition of their authority as receivers under PRC law.
[76] See, eg *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWLR 782, 790.
[77] *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569; see also *Australian Industry Development Corp v Co-operative Farmers and Graziers Direct Meat Supply Ltd* (1978) 3 ACLR 543; *Moss Steamship Co Ltd v Whinney* [1912] AC 254, 260.
[78] *M Wheeler & Co Ltd v Warren* [1928] Ch 840; *Re Scottish Properties Pty Ltd* (1977) 2 ACLR 264.

http://www.pbookshop.com

However, the scope of the receiver's powers must be seen in the context of the receiver's functions, as those powers are in a sense ancillary to the purpose of the appointment.[79] It has been said that the function of the receiver is to realise the security for the benefit of the chargee[80] and further that it is only within the scope of the assets which are covered by the charge and only insofar as it is necessary to apply those assets in the best possible way in the interests of the chargee that the receiver has a real function.[81] The directors, then, would not be permitted to take any action which would interfere with the proper discharge of the receiver's function to gather in and realise the charged assets for the chargee.[82] The corollary is that, where necessary, the directors would be able to exercise their ordinary powers provided that they do not prejudice the legitimate interests of the receiver and the chargee in the realisation of the assets.[83] Thus, for example, even though a receiver is appointed to take control over the whole of the company's undertaking, the directors would still be able to exercise their powers to inspect the company's documents provided that, in doing so, they do not impede the receiver in the proper exercise of his functions and they do not impinge prejudicially upon the position of the debenture holder by threatening or imperilling the assets which are subject to the charge.[84]

Although the management powers of directors might be reduced upon the appointment of a receiver, the directors are still entitled to their remuneration as allowed by the articles.[85]

Dealing with Assets and Management of the Company's Business

1.012 The directors cannot deal with and dispose of the charged assets without the assent of the receiver[86] (unless the receiver has abandoned the asset[87]). The receiver has a function only with respect to the assets covered by the charge though, and so the directors would have powers over the other assets of the company.[88] Where the charge is only in respect of certain specific assets, the directors would maintain their management powers over the company's business, subject only to the restriction that they no longer have control over the charged assets. However, where the charged assets comprise all of the company's undertaking, the directors' management powers would generally cease. Nonetheless, even in relation to the property covered by the charge, if the receiver chooses to ignore some asset or decides that it would be unprofitable from the

[79] *Emsworth v Emsworth* [1978] HKLR 506, CA; *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541.

[80] *Emsworth v Emsworth* [1978] HKLR 506, CA; *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541.

[81] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 819, CA (Eng); *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541.

[82] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 819, CA (Eng); *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541.

[83] *Re Geneva Finance Ltd* (1992) 7 WAR 496, 7 ACSR 415, 10 ACLC 668; *Re Gold Pleasure Industrial Co Ltd* [2006] 4 HKC 398, 403; see also *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd* (2006) 60 ACSR 217 (director entitled to oppose winding-up application on behalf of company).

[84] *Re Geneva Finance Ltd* (1992) 7 WAR 496, 7 ACSR 415, 10 ACLC 668; *Re Gold Pleasure Industrial Co Ltd* [2006] 4 HKC 398, 403; see also *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301; *Oswal v Burrup Fertilisers Pty Ltd* (2013) 295 ALR 708.

[85] *Re South Western of Venezuela (Barquisimeto) Railway Company* [1902] 1 Ch 701.

[86] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 821, CA (Eng).

[87] *Re Geneva Finance Ltd* (1992) 7 WAR 496, 7 ACSR 415, 430, 10 ACLC 668.

[88] See *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541; *Emsworth Ltd v Howard William Burdett* [1978] HKLR 506, 508, CA; *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 819, CA (Eng); *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWR 782; *Re Geneva Finance Ltd* (1992) 7 WAR 496, 7 ACSR 415, 10 ACLC 668.

point of view of the chargee to pursue it, the directors would still have the power and may indeed be under a duty to exploit it, if it has value, so as to bring it to a realisation which may be fruitful for others with an interest in the asset (ie the shareholders and other creditors of the company).[89] Such power could only be exercised, though, if there is no prejudice or detriment to the chargee.[90]

Commencing Proceedings on Behalf of the Company

1.013 The directors have the power to take action on behalf of the company to challenge the validity of the appointment of the receiver or the validity of the charge pursuant to which the receiver was appointed.[91] Also, the directors could commence proceedings in the name of the company against the receiver in relation to the receiver's misconduct.[92] It has been expressly stated that the basis of the directors' powers in the latter situation is that the right of action is not an asset subject to the charge.[93] The same reasoning should also be applicable in the first situation.[94]

It is also generally accepted now that where a right of action is within the scope of the charge, but the receiver has decided not to pursue it, it is open to the directors to pursue that right of action without the consent of the receiver.[95] Such a right of action might be one which is against the chargee itself[96] or it may be against third parties.[97] The leading case is the decision of the English Court of Appeal in *Newhart Developments Ltd v Co-operative Commercial Bank Ltd*,[98] where the directors were able to commence proceedings on behalf of the company against the debenture holder for breach of contract. However, the directors can only exercise such power if there is no prejudice or detriment to the appointing debenture holders in their capacity as debenture holder.[99] Thus, where the receiver is of the view that the proceedings are not worth pursuing and that the company would incur costs, leading to the corpus of assets available to the debenture holders being diminished, the receiver could take steps to prevent the directors from pursuing the action.[100] In *Newhart*, that problem did

[89] See *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 820, CA (Eng).

[90] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, CA (Eng); *Re Geneva Finance Ltd* (1992) 7 WAR 496, 7 ACSR 415, 10 ACLC 668.

[91] *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWLR 782; *Deangrove Pty Ltd (Receivers and Managers Appointed) v Commonwealth Bank of Australia* (2001) 108 FCR 77; *Ernst & Young v Tynski Pty Ltd* (2003) 47 ACSR 433. It appears, however, that an indemnity for costs would be required from the directors if the receiver or chargee so requests; see also *Ernst & Young v Tynski Pty Ltd* (2003) 47 ACSR 433, [26].

[92] *Watts v Midland Bank plc* [1986] BCLC 15.

[93] *Watts v Midland Bank plc* [1986] BCLC 15, 21.

[94] In setting out the principle that the directors could commence proceedings in such a situation, Street J in *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWR 782 did not expressly rely on this reasoning though. His Honour justified the principle on the basis that it would be absurd to contemplate the receiver having the power to institute proceedings to challenge the very debenture to which he owes office (210).

[95] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, CA (Eng); *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541.

[96] For example, *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, CA (Eng).

[97] See *Li Lai Fun v Centro-Sound Ltd* [1986] 1 HKC 541; see also *Ernst & Young v Tynski Pty Ltd* (2003) 47 ACSR 433.

[98] [1978] QB 814, 819, CA (Eng).

[99] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 820–821, CA (Eng). While the action against the debenture holder would obviously affect the debenture holder's interests detrimentally, that detriment is not relevant for the purposes of this principle, as the principle here is simply protecting the debenture holder's legitimate interests in the charged assets; see further, *Sutton v GE Capital Commercial Finance Ltd* [2004] 2 BCLC 662.

[100] *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, 820–821, CA (Eng).

http://www.pbookshop.com

its affairs; namely whether or not the company is insolvent. In *Re Comtowell Ltd*,[79] Le Pichon J (as she then was) found that if a petitioner establishes a *prima facie* case that a company's affairs require investigation, that in itself is a reason for making a winding-up order under the just and equitable ground. In *Comtowell*, the company had not filed annual returns for five years, had failed to have prepared proper audited accounts and there appeared to be deficiencies in the last seven years' financial statements.

In the post-*Enron* era of improved notions of good corporate governance and accountability, there is a recognisable shift in attitude by both insolvency practitioners and, it is suggested, the judiciary that the investigation into the cause of a company's financial collapse in the public interest is becoming more and more recognised as an end in itself and not simply a method of collecting in potential assets of the company in the form of causes of action against errant directors and the like.

IV. THE WINDING-UP PROCESS—THE LAW AND PROCEDURE

The Petition and Who May or May Not Petition

4.024 Winding-up proceedings are commenced by the presentation of a petition by the company itself, a creditor (which includes a contingent or prospective creditor), a contributory (or a contributory's trustee in bankruptcy or personal representative) or by any number of these parties together or separately, or by the Securities and Futures Commission (SFC).[80] If the presentation of winding-up petition is an abuse of process, the court can grant a *quia timet* injunction to restrain its presentation.[81] However, great circumspection must be exercised in doing so, as the right to petition for winding-up is essentially a right conferred by statute, and a would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds. It is an abuse of process to present a petition where there was a genuine and serious cross-claim based on substantial grounds against the petitioner greater or equal to the petitioner's debt or where there was a triable defence to the underlying claim.

Petitioning Creditor

4.025 By far the most common parties to commence winding-up proceedings in respect of a company are unpaid creditors in respect of a liquidated sum. Winding-up proceedings are a class remedy and a petitioning creditor is, in fact, petitioning in his own right and as a representative of a class comprising all creditors. A petitioning creditor is entitled to a winding-up order *ex debito justitiae* (as of right).[82] As a consequence, once a creditor has presented a petition he will not automatically be entitled to withdraw a petition or have it dismissed if, for example, the Company settles the petitioning creditor's claims. The Court will have to be satisfied that, irrespective of the views of the petitioner, the interests of all creditors to the Company are preserved.[83]

[79] [1998] 2 HKLRD 463.
[80] See s.179 of the CWUO; see also s.212(1)(b) of Security and Futures Ordinance (Cap.571) (SFO).
[81] *Re Sinom (Hong Kong) Ltd* [2009] 5 HKLRD 487.
[82] *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327, 331–332.
[83] See also the discussions on the wishes of the creditors and contributories and substitution of petitioner below, also see r.33 of the CWUR.

Not all parties that are due sums from a company are considered to be creditors for the purposes of petitioning for the winding-up of that company. For example, where a party is owed funds as a shareholder he is not entitled to rely on his debt due to him in his capacity as a shareholder for the purposes of issuing a petition. The subordination of funds due to members to debts due from the company to creditors is set out in s.170(1)(g) of the CWUO. The character of the debtor determines whether that party may issue a petition against a company. The Bermudan courts have considered the Bermudan equivalent of s.170(1)(g) of the CWUO (which is s.158(f) of the Bermudan Companies Act 1981) and found that a holder of redeemable preference shares who has served a redemption notice (and, therefore, is due redemption proceeds from the company) does not have *locus standi* to wind-up that company.[84] The redemption price which becomes due from the company is not a free standing debt but due to the petitioner qua shareholder/member/contributory of the company and as such cannot confer standing on the shareholder to petition as a creditor.

A secured creditor is entitled to present a petition. While in practice secured petitioning creditors plead the security and provide an estimate for its value and allow the petition to proceed in respect only of the unsecured portion of the debt, this is not a legal requirement and failure to plead the security will not invalidate or otherwise undermine the security held (compare with the failure of a secured creditor to give credit for security in a proof of debt filed in a liquidation[85]). A secured creditor who is fully secured (which is to say, the value of the security held exceeds the amount of the debt due) may well be met by opposition from the Company to the grant of a winding-up order on the basis that the Company may not be insolvent (on the balance sheet test) or the Court should properly exercise its discretion in not granting a winding-up order as the creditor is not in financial jeopardy given he can look to his security for full repayment outside of the liquidation.

In considering the position of a secured creditor, the Court will disregard "third party" security which is to say security provided to the petitioning creditor in respect of the petitioning debt but provided by a party other than the Company.[86]

A contingent or prospective creditor can petition for the winding-up of a company but the Court will not hear the petition until it is satisfied that: (i) the creditor has given security for costs in such sum as is, in the Court's view, reasonable; and (ii) as a preliminary matter, the petitioner has established a *prima facie* case for a winding-up order to be granted.[87] These two conditions should be determined in advance of the hearing of the petition but the Court will often consider the issue as the first item of business at the hearing of the petition itself.[88]

Foreign companies who are petitioners may be required to give security for costs of the petition proceedings.[89] A company itself in liquidation, acting through its liquidators or provisional liquidators, can petition on its own behalf for the winding-up of another company and this is commonplace in group-liquidations where companies already in liquidation petition for the winding-up of related companies either in their

[84] *Saturn Petrochemicals Holdings Ltd v Titan Petrochemicals Ltd* [2013] SC (Bda) 43 Com.
[85] See the discussion in respect of secured creditors' proofs of debt.
[86] *Re K & R Wong Construction Co Ltd* [1998] 2 HKC 364.
[87] Section 179(1)(c) of the CWUO.
[88] *Re Fitness Centre (South East) Ltd* [1986] BCLC 518.
[89] See the commentary on security for costs.

http://www.pbookshop.com

capacity as a contributory of the target company or as a creditor in respect of intra-group accounts.[90]

Petitioning Contributories

4.026 A contributory is defined[91] as:

> … every person liable to contribute to the assets of a company in the event of its being wound up … .

In the sense of a contributory petitioner, for all practical purposes this means a shareholder of a target company. A contributory is not entitled to present a winding-up petition unless: (i) the Company has no members; or (ii) the shareholder was either an original allottee of shares or has been a registered shareholder for at least six months during the 18 months preceding the presentation of the petition or is a personal representative of a deceased shareholder.[92] These provisos are intended to prevent abuse by ensuring that only shareholders who have held shares for a reasonable period can petition or are holding those shares subject to the testamentary obligations in respect of a deceased shareholder.[93]

In addition to the limited circumstances outline above, a shareholder may have standing to petition for the winding-up of a company in which he is a member where there is a liability due from the company to the shareholder, which does not arise from the company/shareholder relationship but from a creditor/debtor relationship. As discussed in relation to *Saturn Petrochemicals Holdings Ltd v Titan Petrochemicals Ltd*,[94] the line between shareholder/creditor may not be clear.

The entitlement of a contributory to present a petition is a statutory right which cannot be abrogated by the terms of a company's Articles of Association[95] nor through the use of a shareholders' agreement.[96]

The Company as Petitioner

4.027 The Company itself can petition for its own winding-up. The decision is made by a special resolution of the shareholders in general meeting (unless the Company's Articles of Association provide that the board of directors are suitably empowered).[97]

Application of the Companies (Winding-Up) Rules (Cap.32H, Sub.Leg.)

4.028 The Rules provide a substantial body of procedural rules and apply to every winding-up under the CWUO as far as it is practicable unless limitations are afforded in the CWUR itself. Therefore, the RHC do not directly apply to insolvency proceedings.[98] However, the CWUO and CWUR are not, in themselves, exhaustive in terms

[90] See the discussion on group liquidations.
[91] Section 171(1) of the CWUO.
[92] Section 179(1)(a) of the CWUO.
[93] See, however, the case *Ng Yat Chi v Max Share Ltd* (1997–1998) 1 HKCFAR 155, where it was held that these provisos did not apply to a petition brought by a contributory's trustee in bankruptcy.
[94] [2013] SC (Bda) 43 Com.
[95] *Re Greater Beijing Region Expressway Ltd* [1996] 4 HKC 807.
[96] *Yuk Wah Ho v Gao Jia Ren* [1999] 3 HKLRD 862.
[97] Section 177(1)(a) of the CWUO.
[98] RHC, O.1, r.2.

of procedure. Order 102 of the RHC is used to regulate those applications and matters under the CWUO as are covered by that Order. Rule 210 of the CWUR also applies to winding-up matters the rules and practice of the High Court when the CWUR is silent on a procedural matter.

Winding-up proceedings are not ordinary litigation and care must be taken to observe the proper practice and procedure.[99]

Use of Forms in the Appendix of the CWUR

4.029 The forms in the Appendix to the Rules must be used as far as they are applicable, otherwise parties choosing to use different types of forms or overly prolix versions may be penalised with costs.

Form and Content of the Petition

4.030 Every petition issued must be in the form of Forms 2 or 3,[100] with such variations as may be required.[101]

Form 2 deals with the normal petition for winding-up and is by far the form most commonly used. The petitioner will need to state the following facts:

(1) The name and the date of incorporation of the Company being wound-up;

(2) The registered office of the Company;

(3) The share capital of the Company, the number of shares in the Company as are paid up capital or capital credited as paid up;

(4) The objects of the Company (as most companies have extensive objects clauses, as a matter of practice petitioners simply state the first few paragraphs of the Company's objects together with any objects peculiar to the Company and "such other objects as are set out in the Memorandum and Articles of Association"[102]);

(5) The petitioner must set out the facts relied upon to found the relief sought (eg, the failure to pay a debt within 21 days of demand); and

(6) For petitions concerning overseas companies, the petitioner must set out his reliance on the jurisdictional criteria set out in s.327 of the CWUO, and demonstrate the satisfaction of the three core requirements for the court to exercise its discretion to wind-up foreign companies.[103]

Form 3 deals with petitions issued by an unpaid creditor on a simple contract. In addition to the matters mentioned above, Form 3 requires the petitioner to state that the Company has failed and neglected to pay its debts as and when due and that the Company is insolvent and unable to pay its debts.

[99] *Re X10 Ltd* [1989] 2 HKLR 306 (HC).
[100] For petitions that are brought by a minority shareholder, these are now set out in the schedules to the CO.
[101] CWUR, r.22.
[102] As to the status of existing companies' memorandum of articles, see CO, s.98.
[103] *Armada (Singapore) PTE Ltd (Under Judicial Management) v Grand China Logistics Holding (Group) Co* [2013] HKCU 2216.

http://www.pbookshop.com

Petitions filed by a shareholder seeking relief for unfair prejudice (repealed and now superseded by ss.724–725 of the CO were previously made in Form 3A). Form 3A now been superseded by the form provided in the Schedule of the Companies (Unfair Prejudice Petitions) Proceedings Rules (Cap.622L, Sub.Leg.) (Unfair Prejudice Rules) and the principles applicable to these applications are further set out in this Subsidiary Legislation. The Unfair Prejudice Rules draw a distinction between petitions presented under s.724(1) or 724(3) of the CO seeking relief for unfair prejudice that do not also contain an application for relief by way of winding-up under s.177(1) or 327(3) of the CWUO, and those applications that do include winding-up alternative relief.

Petitions falling into the former category are subject to the terms of the Unfair Prejudice Rules. The Unfair Prejudice Rules provide that the petition must specify the grounds on which it is presented and the terms of any order sought by the petitioner.[104]

Petitions that include winding-up as alternative relief to the application under s.724(1) or 724(3) of the CO remain subject to the CWUO and to the Unfair Prejudice Rules to the extent that *they are not inconsistent* with the CWUO.[105] A petition citing relief for unfair prejudice and winding-up must be in the form of Form 2 contained in the Appendix to the Unfair Prejudice Rules.[106]

Presentation and Filing of the Petition

4.031 When presenting the petition to court, the petitioner must comply with the following:

(1) Attend the Official Receiver's office and pay a deposit (currently HK$11,250) for the purpose of covering the fees and expenses to be incurred by the Official Receiver. The cheque is to be made out to "The Government of the HKSAR". This must be a solicitor's cheque and cannot be cash or a personal cheque. If the deposit is not enough to cover the fees and expenses incurred by the Official Receiver, he will be entitled to payment out of the proceeds of the assets of the Company[107] but, in practice, will look to the petitioner to supplement the deposit. In the event that the pre-winding-up order expenses of the Official Receiver exceed the amount of the deposit, the Official Receiver will apply to the Court under r.22A(2) of the CWUR for the petitioner to lodge a further sum with the Official Receiver to cover his expenses. This application will be made after an informal approach has been made to the petitioner to top-up the deposit. If there are sufficient assets, the petitioner will be refunded this deposit as part of his taxed costs of the petition.

(2) Once the deposit is paid to the Official Receiver, the petitioner must then pay a court fee for the presentation of the petition (currently HK$1,045) and then pass the petition to the Registrar of the Court for filing. The Registrar will

[104] Unfair Prejudice Rules, r.4(1).
[105] Unfair Prejudice Rules, r.2(b).
[106] Unfair Prejudice Rules, r.2(c).
[107] Rule 22A of the CWUR.

appoint a time and place for the hearing for the petition, which is written on the backsheet of the petition and sealed copies are then made.[108]

(3) A petition is simply a factual account; therefore, every petition for the winding-up of a Company must be verified by an affidavit and this must be sworn after the petition is signed and filed within four days of the filing of the petition.[109] This affidavit shall be *prima facie* evidence of the statements of fact in the petition. If the petitioner is a corporation, the verifying affidavit must be sworn by the director, secretary or other principal officer.[110]

A petition should relate to only one company, even if the companies are in a group. Separate petitions should be presented with respect to each company and directions sought for these petitions to be heard together.[111]

Service of Petition

4.032 The RHC[112] provide that, unless the Court otherwise directs, a petition which is required to be served on any person must be served on him not less than seven days before the day fixed for the hearing of the petition. Service must be effected in the same way as a writ as with service out of the jurisdiction.[113]

All documents filed by the petitioner must be served on the Official Receiver and the Chief Bailiff within 24 hours of filing at court.[114] In practice, the Official Receiver usually requires three copies of the petition and the Chief Bailiff requires five copies of the petition. The petition must also be served at the registered office of the Company.[115] The Company's registered office is to be taken from the Companies Registry's records even if it has in fact changed.[116]

If the Company does not have a registered office, then it must be served at its principal or last known principal place of business. If the Company does not have a principal place of business, then it must be served on any member, officer or servant of the Company.

If there are no members, officers or servants, then the petition should be left at the registered office and/or principal place of business or by serving it on such member, officer, or servant of the Company as the court may direct.

Service of the petition should be made on business days and during normal working hours.[117] An affidavit of service of the petition should be filed and it should identify the person with whom a petition has been left if applicable.

[108] Rule 23 of the CWUR.
[109] Rule 26 of the CWUR.
[110] Rule 26 of the CWUR. In *Re Che Shing Engineering (HK) Ltd* (HCCW 608/2003, [2003] HKEC 1145, 15 September 2003), a manager of a company was regarded as "other principal officer" for the purposes of r.26 of the CWUR and he was able to swear an affidavit verifying petition so there was no irregularity.
[111] *Re a Co* [1984] BCLC 307.
[112] Order 9, r.4(2) of the RHC.
[113] Orders 10 and 11 of the RHC, but also see *Re Sunni International Ltd* [2014] 5 HKLRD 558 in which it was held that when applying for leave to serve a winding-up petition out of the jurisdiction on a foreign company unregistered in Hong Kong, an applicant need not satisfy the requirements under paras.(a)–(p) of O.11, r.1(1) of the RHC. Rather the applicant is required to demonstrate a good arguable case that the company has a sufficient connection to Hong Kong, and that there is a serious issue to be tried on the merits.
[114] Rule 23A of the CWUR.
[115] Rule 25 of the CWUR.
[116] *Re Golden Dragon Land Development Ltd* (HCCW 236/1999, 12 July 1999), where Le Pichon J (as she then was) approved the *dicta* of Hoffmann J (as he then was) in *Re Garton (Western) Ltd* [1989] BCLC 304.
[117] Practice Direction 3.1, Part II, para.4.

http://www.pbookshop.com

If the Company is already in voluntary liquidation, the petition should be served upon the liquidators appointed.

In Hong Kong, the use of secretarial companies is commonplace. If the registered office of the Company is at an office of a secretarial company, the service agent/clerk should, as a matter of good practice:

(1) establish whether the office is the registered office or principal place of business of the Company;

(2) establish the capacity of the secretarial company *vis-a-vis* the Company and whether they are authorised to accept service for the Company;

(3) enquire of the person receiving the service agent his or her name and, if he/she refuses to give it to you, make a note of it. Ask whether he/she is the employee of the Company or just an employee of the secretarial company;

(4) request the person receiving the service agent to acknowledge service by chopping and/or signing on a copy of the service letter or the back page of the petition; and

(5) prepare and file an affidavit of service making reference to all of the above matters.

If no one accepted service of the petition on behalf of the company at its registered address, or if the registered address (where the petition was served) belongs to a secretarial company, the petitioner may want to proactively serve the petition on the company's shareholders and directors before applying for the Registrar's Certificate (see [4.034]), given the Court will likely direct it to do so in any event. In the petitioner's affirmation of service, retrospective leave can be sought for the additional service undertaken. This procedure can help avoid the unnecessary delay in the petitioner's application for the Registrar's Certificate, which will arise if the additional service is carried out only when directed by the Court.

No time limit is stipulated for effecting service of the petition although, practically, the date of the first hearing of the petition will represent the date by which, absent good reason, service ought to be affected. Late service of the petition may cause inconvenience to the Company but if the Company cannot identify any real prejudice that cannot be overcome by an adjournment, the late service of the petition cannot, in the proper exercise of the court's discretion, be a ground for dismissing the petition.[118]

Advertisement of the Petition

4.033 The petitioner must advertise a notice of the petition in the Gazette and in one circulating English newspaper (in English) and one circulating Chinese newspaper (in Chinese)[119] at least seven days before the hearing of the petition.[120] The court has discretion to extend or abridge the time for advertisements. A master of the High Court has the jurisdiction to strike out a petition for failure to advertise.[121]

[118] *Re Wellead Construction and Engineering Co Ltd* (HCCW 730/2000, [2000] HKEC 1272, 27 November 2000).
[119] Practice Direction 3.1, Part II, paras.2.1–2.3.
[120] Rule 24 of the CWUR.
[121] *Re Aim Investments (Holdings) Ltd* [2004] 2 HKLRD 201.

Where the only relief sought in a petition are ss.724–725 of the CO (ie, winding-up relief is not sought), the Unfair Prejudice Rules apply to these petitions and do not include requirements that the petition be advertised.

Contents of the Advertisement

4.034 The advertisement should state the date of the hearing of the petition, the name and address of the petitioner and his solicitors. It should also contain a note stating that any person intending to appear at the hearing of the petition should send a notice of his intention before six o'clock in the afternoon on the day before the hearing of the petition[122] otherwise the advertisement will be irregular.

If the petitioner does not advertise the petition, the petition will be removed from the file and the hearing vacated.

In *Re Hon Seng Engineering Ltd*,[123] a petitioner petitioned for the winding-up of a Company and advertised the petition. The first petitioner withdrew his petition and subsequently a second petitioner applied for and was substituted as petitioner. The Company contended that the substituted petitioner should have re-advertised the petition. It was held that the identity of the petitioner was not relevant for the purposes of advertising the petition because creditors of the Company would have been informed of the fact of the winding-up hearing and would attend hearing regardless of the identity of the petitioner.

The primary function of the advertisement is to notify creditors of the fact of the class action having been commenced so they could have their voice heard as members of that class; it is not to simply inform the world at large of the particulars of a particular piece of litigation.

Registrar's Certificate

4.035 The petitioner has to obtain a certificate of compliance from the Registrar prior to the making of a winding-up order,[124] the so-called Registrar's Certificate.

Once the advertisements are published, the petitioner makes an appointment with the Registrar for a meeting to obtain a Registrar's Certificate. As a matter of practice, the meeting is with the Registrar's clerk and this will usually take place on Mondays at 9:30 am at the Registrar's office on the second floor of the High Court.[125] At that meeting, the Registrar's clerk will go through the notices and gazette to ascertain whether the advertisements are compliant and all pre-hearing procedural steps have been properly attended to.

Petitioners should take to the meeting the original and copies of all of the advertisements and Gazette notices. If the petition is presented by a company through its liquidators and/or provisional liquidators take also notices of appointment and company searches as to the registered office of the petitioning company.

Common requisitions raised by the Registrar include whether service of the statutory demand or petition was on a business day and during normal working hours, identifying the persons with whom the petition has been left.[126] If these requisitions

[122] Rule 30 of the CWUR.
[123] [2001] 3 HKLRD 63.
[124] Rule 29 of the CWUR.
[125] Practice Direction 3.1, Part II, para.3.2.
[126] Practice Direction 3.1, Part II, para.4.

http://www.pbookshop.com

are not properly dealt with prior to the first hearing before the Master in charge of the Bankruptcy and Winding-Up Court and no Registrar's Certificate has been granted as at this hearing but, prior to that hearing, all outstanding issues are dealt with satisfactorily, the Master may be prevailed upon to issue a Registrar's certificate at the first hearing and immediately afterwards, make a Winding-Up order.

Persons Entitled to Copy of the Petition

4.036 Every creditor or contributory shall be entitled, upon payment of the prescribed copying charges, to be furnished by the solicitor of the petitioner with a copy of the petition within 24 hours of a request being made.[127]

Additionally, every person who has been a director or officer of a company which is being wound-up, shall be entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted shall be entitled on payment of a fee to inspect the file of proceedings and to take copies or extracts from any document therein, or to be furnished with such copies or extracts upon the prescribed payment of copying charges.[128]

Additionally, *any* person upon payment of a prescribed fee is entitled to search and obtain a copy of all originating process filed with the court's registry, which will include a petition.[129]

Affidavits Verifying and in Opposition to the Petition

4.037 As discussed above,[130] an affidavit verifying a petition must be sworn after the petition is executed and filed within four days after the presentation of the petition.[131] The affidavit verifying the petition should be sworn by someone with personal knowledge of the facts in the petition. It is not appropriate for a solicitor to make it.[132]

Affidavits in opposition to the petition must be filed within seven days (or such longer time as the court might direct) from the date on which the affidavit verifying the petition is filed and a notice of the filing of an affidavit in opposition should be given to the petitioner on the day on which the opposing affidavit is filed.[133]

An affidavit in reply to an affidavit filed in opposition to a petition shall be filed within three days of the date on which notice of the filing of the opposing affidavit is received by the petitioner.

Petitions founded solely on ss.724–725 of the CO need not be verified by an affidavit. This reflects the position at common law regarding applications for unfair prejudice before s.168A of the predecessor Ordinance was repealed and superseded.[134]

[127] Rule 27 of the CWUR. Payment of 75 cents per folio of 72 words is payable.
[128] Rule 16 of the CWUR; again, 75 cents is charged per folio of 72 words.
[129] Order 63, r.4 of the RHC.
[130] See [4.030].
[131] Rule 26 of the CWUR.
[132] *Cheong Yip Finance (Hong Kong) Ltd v Moscow Narodny Bank Ltd* [1979] HKLR 558 (CA).
[133] Rule 32 of the CWUR. In a number of judgments, eg, *Re Grand China Shipping (Hong Kong) Co Ltd* [2013] 4 HKLRD 1, Harris J has repeatedly emphasised that companies intending to oppose a winding-up petition should comply with r.32 of the CWUR. If evidence in opposition is not filed at a sufficiently early stage, the Court may decide to make a winding-up order as in the ordinary course instead of adjourning the matter.
[134] *Re China Corp* [2003] 2 HKLRD 905.

Notice of Intention to Appear

4.038 Every person intending to appear at the hearing of the petition should serve on the petitioner and/or its solicitors a notice of that person's intention to appear at the hearing of the petition before 6 pm on the day before the hearing.[135]

Where no notice of intention to appear has been filed the hearing is considered an uncontested one and it is not necessary for the petitioner to attend the hearing.[136] The judge or master will announce in open court that a winding-up order has been made. This procedure is designed to reduce costs of the petitioner and to streamline the process. It is advisable to attend the hearing, notwithstanding it is uncontested, if there are any matters which ought to be brought to the Court's attention, for example, proof of insolvency is being established other than by non-payment following demand. It is also a matter of courtesy, to be exercised at the discretion of the petitioner or its solicitors, to write to the Court explaining that no opposition has been filed and that the petitioner will not attend the hearing.

Failure to give such notice disentitles the person wishing to appear from being allowed to do so without special leave of the court[137] although, in practice, if a properly authorised representative appears for the Company at the hearing of the petition without having given proper advance notice, the Court will be inclined to hear that person.[138] If the petitioner is not in attendance (because of his understanding that the petition is uncontested) and opposition is raised at the hearing, the hearing of the petition will be adjourned by the Master to the Companies Judge and the petitioner informed.

http://www.pbookshop.com

List of Persons Appearing on the Petition

4.039 Prior to the hearing of the petition, the petitioner or its solicitors shall prepare a list of names and addresses of those persons who gave notice of intention to appear and this List should be handed to the Court on the day of the hearing of the petition.[139] The list ordinarily sets out the capacity of the party intending to appear (be they a creditor, contributory or so forth), the quantum of their interest in the liquidation (being the amount of debt owed to them or the number of shares held by them) and an indication of the position they intend to adopt in relation to the petition (ie, do they support or oppose the grant of a winding-up order).

Security for Costs

4.040 The court has a discretion to order a person in the "position of the Plaintiff" in a action or other proceedings in the Court of First Instance to give security for costs.[140] "Proceedings" here is wide enough to include any matter in which the jurisdiction of the Court is invoked by originating process and includes a Winding-Up petition.[141] As a general rule, an application for security for costs pursuant to O.23, r.1 of the RHC may be granted in proceedings that will result in a final but not an interlocutory

[135] Rule 30 of the CWUR.
[136] Practice Direction 3.1, Part III, para.1.
[137] Rule 30 of the CWUR.
[138] See *Re Forever Best Engineering Ltd* [2001] HKCU 534.
[139] Rule 31 of the CWUR.
[140] Order 23 of the RHC.
[141] *Re Unisoft Group (No.1)* [1993] BCLC 528.

II. WHO IS A CREDITOR FOR THE PURPOSE OF COMMENCING THE WINDING-UP PROCESS?

Issuing a Winding-Up Petition

7.004 A creditor can only instigate the compulsory winding-up process.[4] The creditor usually does this as a method of seeking repayment. However, it has been observed that the Companies Court is not to be used as a debt collection agency.[5] The reason is that winding-up differs from other debt enforcement processes because it is a class remedy. This means that, once the process has been instigated, it is no longer merely a private matter between the company and the creditor. Other parties are involved.[6] If a supporting creditor appears on the petition, it can be substituted as petitioner if the original petitioning creditor withdraws.[7] Substitution is even permitted if the substituting petitioner would not itself have been able to present a petition at the time the petition was originally presented.[8] The views of the majority of the creditors may therefore be taken into account by the Court in considering whether a winding-up order should be made.[9]

In *Re Chyau Fwu Investment Ltd*,[10] Mayo J made the point that a petitioning creditor who cannot get paid a sum presently payable has, against the company, a right *ex debito justitiae* to a winding-up order. However, this right is qualified in that it is not the creditors' individual right, but his right as a representative of a class. In this respect, the views of the majority of the creditors as to whether a winding-up order should be made must be taken into account, although the making of a winding-up order still remains at the discretion of the Court.[11]

A creditor is given *locus standi* (capacity) to instigate the winding-up process by presenting a winding-up petition pursuant to s.179(1) of the CWUO. This s.179(1) of the CWUO extends *locus standi* to contingent and prospective creditors, and it is well established that where a creditor assigns his debt then the assignee may continue as petitioner in his place; see *Perak Pioneer Ltd v Petroliam Nasional Bhd* [1986] AC 849.[12] The definition of "creditor" in this section includes "any contingent or prospective creditor or creditors". "Creditor" is not otherwise defined except in inclusive terms in the Companies (Winding-Up) Rules (Cap.32H, Sub.Leg.) (CWUR),[13] where the word is defined to include a corporation and a firm of creditors in partnership.

Note that a fully secured creditor is of course perfectly entitled to present a petition and in so doing is not deemed to have surrendered his security; see *Moor v Anglo-Irish*

[4] The "creditors' voluntary liquidation" is so named, not because the creditors instigate the process, but because they can decide, at the first meeting of creditors, who is to be appointed as liquidator.

[5] See *Re Company* [1894] 2 Ch 349; see also *Re McGreavy* [1950] Ch 269. But see *Re Yueshou Environmental Holdings Ltd* (HCCW 142/2013, [2014] HKEC 1178), [11]–[12].

[6] *Re Esquire Electronics Ltd* [1996] 3 HKC 309.

[7] CWUR, r.33; see *Cypress House Capital Ltd v Hua Han Health Industry Holdings Ltd* [2019] HKCFI 1826, [55]–[58].

[8] *Perak Pioneer Ltd v Petroliam Nasional Berhad* [1986] AC 849, where the creditor was an assignee; see also *Re Hin-Pro International Logistics Ltd* [2016] 5 HKLRD 282, [18].

[9] CWUO, s.287(1).

[10] [1986] HKLR 374; see also *Re Goldcone Properties Ltd* [2000] 2 HKLRD 16, 54H-55B; *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* [2017] 4 HKLRD 84, [29]; *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449, 466–467.

[11] *Re Kam Kuen Construction Co Ltd* [2002] 3 HKC 547; see also *Re Planet Toys (HK) Ltd* [2011] 2 HKLRD 101.

[12] See also *Re Hin-Pro International Logistics Ltd* [2016] 5 HKLRD 282, 291–292.

[13] CWUR, r.2.

Bank (1879) 10 Ch D 681. But to the extent that he is able to enforce his right to realise charged assets to recover sums due, his views may be given less weight than those of unsecured creditors whose interests may be better served by allowing the company to remain in business.

A debt need not be enforceable by action for a person to be considered a creditor for the purposes of presenting a petition. In *Re North Bucks Furniture Depositories Ltd*,[14] an English case, a company was indebted for unpaid rates to a local authority. The authority could present a petition, even though the authority was only entitled to enforce the outstandings by distress, not Court action. The judge held that, for petitioning purposes, the term "creditor" includes every person entitled to prove in a winding-up.[15]

For the purposes of having capacity to present a winding-up petition, a creditor can therefore be defined as any person owed a valid debt,[16] whether actual, contingent or prospective. The claim need not be liquidated nor currently due. This can be contrasted with the specific requirements a creditor has to meet to deem the company insolvent through issuing a petition based on what is known as a "statutory demand", being a written demand in prescribed form for a debt immediately due and payable and equal to or exceeding HK$10,000, delivered to the registered office of the company (s.178(1) of the CWUO). However, the statutory demand is merely an evidentiary device for the purpose of proving insolvency. Section 178(1) of the CWUO does not operate to prevent a creditor who is unable to issue such a demand, from issuing a petition and seeking an order on other evidentiary grounds.

http://www.pbookshop.com

Contingent or Prospective Creditors

7.005 A petitioner need not necessarily be in a position immediately to enforce his debt. Section 179(1) of the CWUO specifically entitles *contingent* and *prospective* creditors to petition but with the added safeguard of requiring a preliminary hearing at which the contingent or prospective creditor's *prima facie* case is made out and such security for costs as the Court thinks reasonable has been given.[17]

As mentioned above, s.179(1) of the CWUO allows for a petition to be presented in respect of "contingent" or "prospective" debts. The purpose of s.179(1) is to permit a *bona fide* creditor owed, for example, future rents, or an amount due on a bill of exchange not yet matured, to instigate the winding-up process without having to wait until maturity of the obligation.

A "contingent creditor" is "a person towards whom, under an existing obligation, the company may (but will not necessarily) become subject to a present liability on the

[14] (1939) Ch 690.

[15] A contrast can be drawn with garnishors, who may sue the garnishee, but not present a winding-up petition unless judgment has been obtained; see *Re Combined Weighting & Advertising Machine Co* (1885) 32 Ch D 373. See also *Re Grande Holdings Ltd* [2013] 4 HKLRD 353, where it is suggested *obiter* that a creditor who is not entitled to enforce a foreign revenue or penal claim in Hong Kong would nevertheless be entitled to present a winding-up petition.

[16] A petition cannot be founded on an illegal debt: *Re South Wales Atlantic Steamship Co* (1875) 2 Ch D 763 nor on a statute barred debt: see *Re Karnose Property Trust Ltd* [1989] 5 BCC 14.

[17] CWUO, s.179(1)(c).

happening of some future event or at some future date".[18] Whether or not a person is a contingent creditor depends on the circumstances applicable at the time the petition is heard.[19] If the contingency cannot arise in the event of winding-up, it is artificial to characterise the creditor as a contingent creditor. The correct analysis is that for the purposes of s.179(1) of the CWUO, he is not a creditor at all and the claim should not be characterised as a contingency debt.[20]

A "prospective creditor" is one whose debt will become due in the future as a matter of certainty.[21] An example of a prospective creditor is provided in *Bicoastal Corp v Shinwa Co Ltd*,[22] where the creditor was an actual creditor in respect of a debt on a foreign judgment, and also a prospective creditor in respect of accrued but unpaid royalties.

Unlike other creditors, contingent or prospective creditors must comply with s.179(1)(c) of the CWUO, which provides that:

> ...the court shall not give a hearing to a winding-up petition presented by contingent or prospective creditor until such security for costs has been given as the court thinks reasonable and until a prima facie case for winding-up has been established to the satisfaction of the court.

The section therefore introduces two separate criteria: (1) the requirement for security for costs, and (2) a *prima facie case* for a winding-up order. There will need to be a preliminary hearing to establish that these two criteria have been met.[23] The date for determining whether the criteria have been met is the date of the hearing, rather than the date of the petition.

In addition, where a contingent or prospective creditor seeks to present a winding-up petition, then the Court shall not hear the petition *until* the petitioner has established a *prima facie* case and given such security for costs as the Court thinks reasonable in a preliminary hearing (s.179(1)(c) of the CWUO).The failure to satisfy this mandatory procedural requirement will not necessarily be fatal, however, if the court in its discretion decides to constitute the winding-up proceedings as the preliminary hearing.

Lord Hoffmann held in *Re Fitness Centre (South East) Ltd*[24]:

> That would not necessarily be an insuperable procedural bar, because I suppose that I could constitute these proceedings as the preliminary hearing, and then if I formed a view which was favourable to the petitioner as to the question of security for costs and a prima facie case, I could then go on immediately to the hearing of the petition.

[18] *Re Williams Hockley Ltd* [1962] 1 WLR 555, 558 (Pennycuick J), cited in *Re Universal Dockyard Ltd* [2004] 1 HKLRD 935, [25].

[19] *Re Humberstone Jersey Ltd* [1977] 74 LS Gaz 711, considered by the English Court of Appeal in *TSB Bank plc v Platts* [1998] 2 BCLC 1.

[20] *Re Golden Gate International Kindergarten and Nursery Ltd* [2018] HKCFI 641; see also *Re Lehman Brothers International (Europe)* [2017] UKSC 38, [2017] 2 WLR 1497.

[21] *Re SBA Properties Ltd* [1967] 1 WLR 799.

[22] [1994] 1 HKLR 65 (CA).

[23] *Storegate Securities Ltd v Gregory* [1980] 1 Ch 576, 579.

[24] [1986] BCLC 518, 520C.

Secured Creditors

7.006 Section 179(1) of the CWUO does not restrict a fully secured creditor from presenting a winding-up petition. A secured creditor who presents a petition is not deemed to have elected to have surrendered his security (in contrast to the position of a fully secured creditor after winding-up, who will be deemed to have surrendered his security if he proves for his debt).[25] However, the secured creditor may be restrained from exercising any power of sale under the security pending the hearing of the petition.[26]

Miscellaneous Issues on Petitioning Creditors

7.007 The executor of a creditor can present a petition before the grant of probate, provided probate is granted prior to the hearing.[27] Foreign petitioners will usually be required to give security for costs.[28]

In *Re Hin-Pro International Logistics Ltd*,[29] the Court of Appeal had to decide whether there was jurisdiction to grant leave to amend a creditor's winding-up petition to include debts that had accrued *after* its presentation. The Court of Appeal affirmed the lower court's decision that the Court does have such jurisdiction. The reasoning in the UK decision of *Re Richbell Strategy Holdings Ltd*[30] was followed, namely that the public interest has to be considered in a creditor's winding-up petition.

This is also consistent with numerous existing principles such as:

(1) any creditor of the company can give notice to appear in a creditor's petition without having to show an interest in the matter;

(2) the Court is not compelled to give effect to the consent by both the company and the creditors to dismiss the petition;

(3) the Court may substitute as petitioner any creditor; and

(4) a petition can rely on a future debt in presenting a winding-up petition if it can be shown that a *prima facie* case that a company is insolvent and should be wound up.[31]

[25] *Re Fitness Centre (South East) Ltd* [1986] BCLC 518.

[26] See *Moor v Anglo-Italian Bank* [1879] 10 Ch D 681; see also *Re IJ Langreb Ltd* ([1996] CWU No 377 of 1996, 9 December 1996); *Re Kensland Realty Ltd* (HCCW 581/2001, 10 September 2001).

[27] *Re Masonic and General Life Assurance Co* [1885] 32 Ch D 373; see also *Re Honeycool Refrigeration & Engineering Co Ltd* [2009] 1 HKLRD 447.

[28] Companies Ordinance (Cap.622) (CO), s.905; see also *Re Scisys-W Ltd* ([1984] CWU No 322 of 1984). See also *Daniel Isaac Henri Mimoun v Dragon Concept HK Ltd* (HCCW 434/2012, 15 July 2015).

[29] [2016] 5 HKLRD 282.

[30] [1997] 2 BCLC 429.

[31] *Re Hin-Pro International Logistics Ltd* [2016] 5 HKLRD 282, [14].

http://www.pbookshop.com

the meeting, a notice must be sent by post to every person appearing to be a creditor of the company.[48]

A resolution shall be deemed to be passed when a majority in value of the creditors present personally or appointed by proxy, and voting on the resolution, have voted in favour of the resolution.[49] A meeting may not act for any purpose except the election of the chairman, the proving of debts and the adjournment of the meeting, unless there are present at least three creditors entitled to vote or three contributories, or if the number of creditors entitled to vote or contributories do not exceed three, all the creditors entitled to vote or all the contributories.[50] The precise rules governing creditors voting by proxy are contained in rr.131–141 of the CWUR.

Section 287 of the CWUO Meetings

Other Provisions as to Creditors' Meetings

7.010 In a members' voluntary winding-up, if the liquidator is at any time of the opinion of the company will not be able to pay its debts in full within the period stated in the certificate of insolvency, he must summon a meeting of the creditors for a date not later than 28 days after the day on which the liquidator formed that opinion, send notices of the meeting to the creditors at least 7 days before the date on which the meeting is to be held and cause the notice to be advertised once in the Gazette and at least once in an English newspaper and a Chinese newspaper circulating in Hong Kong. At anytime before the date on which the meeting is to be held, the liquidator must, as the creditors may reasonably require, provide to them free of charge with any information concerning the company's affairs so required. The liquidator must prepare and lay before the meeting a full statement of the position of the company's affairs. The liquidator must also attend and preside at the meeting. At this meeting, the creditors may appoint another liquidator in place of the existing one, and fix his remuneration and may appoint a committee of inspection.[51] On the day when the meeting is held the winding-up becomes a creditors' voluntary winding-up and thereafter the provisions in CWUO on voluntary winding-up apply accordingly.[52]

In a creditor's voluntary winding-up which continues for more than one year, the liquidator is obliged to summon a meeting of creditors at the end of the first year from the commencement of the winding-up and for each succeeding year.[53] In the voluntary winding-up, a final meeting of creditors must also be held as soon as the affairs of the company are fully wound up, for the purpose of laying an account of the winding-up before the creditors.[54]

Section 287 of the CWUO Meetings

7.011 In any winding-up, by s.287 of the CWUO, there is a general power of the Court to have regard to the wishes of the creditors or contributories of the company, if proved to it by sufficient evidence. To this end, the Court may, if it thinks fit, for the purpose

[48] CWUR, r.114.
[49] CWUR, r.119.
[50] CWUR, r.123.
[51] CWUO, s.237A.
[52] CWUO, s.237B.
[53] CWUO, s.247; this is subject to the exception under CWUO, s.247(1A).
[54] CWUO, s.248.

of ascertaining those wishes, direct meetings of creditors to be called, held and conducted in such manner as the Court directs.[55] For such meetings, regard must be had to the value of each creditor's debt.[56]

This procedure, as considered a class remedy, where there is any clash of opinion among creditors, the Court will look carefully at the quality of creditors supporting and opposing a winding-up petition, possibly ordering a meeting of creditors (s.287 of the CWUO). Also, note that r.125 of the CWUR prohibits a creditor of an unliquidated debt or a contingent debt from voting at any meeting of creditors; see *Re Grande Holdings Ltd* [2015] 1 HKLRD 755.

The views of creditor who happen to be, or are associated with, the debtor company's owners or directors will attract little or no weight; similarly, the views of secured creditors will attract less weight than those of the unsecured creditors; see *Re Chyau Fwu Investment Ltd* [1986] HKLR 374; see also *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633.

However, where in the context of a later scheme of arrangement, the debtor company can satisfy the Court that the support of such special interest creditors would not inevitably be discounted at a later hearing to sanction a proposed scheme and the Court can in addition be persuaded that there are reasonable prospects of the scheme obtaining the required support, the Court will not rush to make a winding-up order and allow creditors proper opportunity to consider the scheme; see *Re APP (Hong Kong) Ltd* [2005] 1 HKLRD 272.

But as s.287 of the CWUO only requires the Court to "have regard" to the wishes of the creditors, this gives the Court discretion as to whether or not those wishes should be followed. How, generally, does the Court approach of the exercise of its discretion under this section?

In *Re Poole, ex p Cocks*,[57] an English case decided under a similar provision in the Bankruptcy Act as then applicable, the Court directed a trustee in bankruptcy to act against the wishes of the creditors' meeting. The reason was that it was not possible to say that some of the creditors were acting for the benefit of all creditors, and the resolution may have been passed for indirect or collateral purposes. The approach, therefore, is that the expressed wishes of the creditors' meeting should be perceived to be in line with what is best for the creditors as a whole, rather than of one particular, even dominant, interest group.

This approach has been endorsed in Hong Kong in decisions involving s.287 of the CWUO, which is usually invoked prior to the winding-up by a creditor or a group of creditors seeking to approve the making of an order.

In *Re Chyau Fwu Investment Ltd*,[58] the petitioning creditor was secured by a mortgage over the debtor company's leasehold interest in a commercial building. Although the security was not enough to cover the petitioner's claim by the time the petition was issued, it still had significant value. Certain funds raised by the company from the petitioner and other creditors, meanwhile, had been passed to associated company with an interest in a substantial development. Opposing creditors, who were in the majority, argued that if the associated company recovered on this development, there would be

[55] CWUO, s.287(1).
[56] CWUO, s.287(2).
[57] (1882) 21 Ch D 397.
[58] [1986] HKLR 374.

http://www.pbookshop.com

The proof of debt form must contain:

(1) the name and address of the creditor;

(2) the total amount of his claim as at the date of the winding-up order;

(3) whether or not that amount includes uncapitalised interest;

(4) particulars of how and when the debt was incurred;

(5) particulars of any security held, including the date it was given and the value which the creditor puts on it;

(6) the name and identity of the person signing the proof (if other than the creditor himself); and

(7) the signatory's means of knowledge of the facts.

The proof must refer to relevant documents to substantiate the claim, and such documents, or copies, must be submitted with the proof.[73] In the case of negotiable instruments, the originals must be produced prior to the proof being admitted.[74] The Official Receiver, or liquidator to whom the proof is sent, may call for any document not already submitted, or other evidence believed necessary to substantiate the claim or any part of it.[75]

If he thinks it necessary, the Official Receiver or liquidator can require the proof of debt to be verified by an affidavit (also in a prescribed form).[76]

Time for Submitting and Dealing with Proof

7.015 In accordance with s.217 of the CWUO, in a compulsory liquidation, the Court has power to fix a date by which creditors must submit their proofs of debt.

Section 217(2) of the CWUO states that:

> …any creditor who has not proved his debt or claim on or before the date fixed … shall be excluded from the benefit of the distribution made next after that date and from the benefit of any previous distribution.

The effect of this is that a creditor may prove his debt at any time during the liquidation process but will be excluded from the benefit of any dividends paid before his proof has been submitted. By s.226(e) of the CWUO, the Court's power to fix the date for the submission of proofs is delegated to the liquidator.

By r.93 of the CWUR, the liquidator, in any winding-up, may from time to time fix a certain date "which shall be not less than 14 days from the date of notice" on or before which the creditors of the company are to prove their debts or claims, and to establish any title they may have to priority under s.265 of the CWUO.[77] As with previous s.217 of this CWUO, any creditor who fails to submit a proof will be excluded from the benefit of the distributions.

[73] CWUR, r.82.
[74] CWUR, r.91.
[75] CWUR, r.94.
[76] CWUR, r.83; the prescribed form is CWUR, Form 63B.
[77] Priority claims under CWUO, s.265.

If a proof is lodged late, it cannot be excluded simply on that ground from the next distribution to be made.[78]

A liquidator is under a duty to ensure that any person who may have a right to make a claim in the liquidation has an opportunity to do so. The liquidator should therefore take appropriate measures to inform all potential creditors about the liquidation. The liquidator must give notice in writing of the date by advertisement in a newspaper. In a compulsory winding-up, the liquidator must notify every person mentioned in the statement of affairs or supplementary affidavit as a creditor and who has not proved his debt, and to every person mentioned in the statement of affairs or supplementary affidavit as a preferential creditor whose claim to be a preferential creditor has not been established and is not admitted. In any other winding-up, the liquidator must give notice to the last known address or place of business of each person who, to the knowledge of the liquidator, claims to be a creditor or preferential creditor, and whose claim has not been admitted.[79]

In a compulsory winding-up, subject to the power of the Court to extend the time, a liquidator should, within 28 days of receiving a proof which has not previously been dealt with, in writing either admit or reject it, wholly or in part, or require further evidence in support of it. This rule is subject to the requirement that a liquidator, where he has given notice of intention to declare a dividend, must, within 14 days after the date mentioned in the notice as the latest date by which proofs must be submitted, examine and in writing admit or reject or require further evidence and support, of every proof of debt which has not already been dealt with.[80]

The written communication from the liquidator takes the form of a notice stating that the proof has been accepted, and for how much (with any portion rejected also enumerated), or that the proof has been rejected. Where all or part of the proof is rejected, the liquidator should set out a succinct statement of the reasons.[81]

In deciding whether to admit or reject a proof of debt, the liquidator must require some satisfactory evidence that the debt is a real debt.[82] In this respect, the liquidator is acting in a quasi-judicial capacity.[83] This principle was examined by the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien*.[84] In that case, Brennan and Dawson JJ said that acting in a quasi-judicial capacity meant that the liquidator had to act according to a standard no less than the standards of a court or judge, reflecting the liquidator's function to distribute the assets amongst the persons "truly entitled". This entitles the liquidator to take into account all relevant factors, enabling them to ascertain what is a "true liability of the company".

In compulsory winding-up, on the first day of each month, every liquidator other than the Official Receiver must forward to the Registrar of Companies, a list of all proofs received by him during the preceding month, stating which have been admitted, rejected or stood over, and the proofs admitted or rejected must be filed with the Registrar.[85]

[78] See *Dickey v Ballantine* [1939] SC 783.
[79] CWUR, r.93.
[80] CWUR, r.104
[81] CWUR, r.94; CWUR, Form 65.
[82] See *Re van Laun* [1907] 1 KB 135; see also *Ex p Chatterton* [1907] 2 KB 23.
[83] *Re Britton & Millard Ltd* [1957] 107 LJ 601.
[84] (1990) 169 CLR 332, cited in *Re Moulin Global Eyecare Holdings Ltd* (HCCW 470/2005, [2008] HKEC 923).
[85] CWUR, r.101.

http://www.pbookshop.com

Appeals

7.016 Any creditor who is not satisfied by the decision of the liquidator in respect of a proof may make application to the Court to reverse or vary the liquidator's decision. Subject to the Court's power to extend time, the time limit for making an application is 21 days from the date of service of the notice of rejection.[86] In a compulsory liquidation, if the liquidator receives a notice of appeal, he must file the proof with the Registrar, with a memorandum setting out the basis of his disallowance of the proof. This must be done within three days after receiving the notice.[87]

The appeal is effectively a new hearing; the Court must decide the rights of the applicant in the light of all the evidence and not merely express a view as to whether the liquidator was right or wrong in rejecting the proof on the evidence then available to the liquidator when rejecting the proof.[88]

Rule 24 of the Proof of Debts Rules (Cap.6E, Sub.Leg.), which by virtue of s.264 of this CWUO applies to a liquidator's adjudication of a proof, provides that:

> The trustee shall not be personally liable for any costs in respect of the rejection by him in whole or in part of any proof unless it is proved to the satisfaction of the court that he has acted *mala fide* or with gross negligence.

So unless there was bad faith or gross negligence, the applicant's costs and the liquidator's costs were to be paid out of the assets of the company with, if necessary, a direction that the applicant's costs were paid in priority to the liquidator's costs of the appeal.[89]

The question arises as to the position of a creditor in a voluntary winding-up where the liquidator does not require submission of a proof of debt or claim, but a creditor feels he may have been wrongly excluded. In these circumstances, it is submitted that a creditor would be entitled to take it upon himself to file a proof of debt in accordance with r.80 of the CWUR. The liquidator would then be obliged to deal with the proof within the time stipulated by the CWUR and, if it was then rejected, the creditor would have the right of appeal, as described above.

Expunging a Proof

7.017 If a liquidator thinks that a proof has been improperly admitted, the Court may, on the application of the liquidator, and after notice to the creditor, expunge the proof or reduce its amount.[90] The Court may also expunge or reduce the amount of a proof upon the application of a creditor or contributory if the liquidator declines to interfere in the matter.[91] The logic of creditors and contributories being able to make the application is that the level of each creditor's claim will affect the ultimate return to all other creditors (or contributories).

---

[86] CWUR, r.95.

[87] CWUR, r.102.

[88] See *Re Kentwood Construction Ltd* [1960] 1 WLR 646; see also *Alan CW Tang, Joint and Several Trustee in Bankruptcy of the Estate of Lo Siu Fai Louis v John J Toohey, Joint and Several Liquidator of Global March Ltd* [2005] 4 HKC 51; *Active Base Ltd v Roderick John Sutton* (HCCW 470/2005, [2008] HKEC 923), [51].

[89] See *Re Tsz Wan Shan Ltd* [2010] 4 HKLRD 291.

[90] CWUR, r.96.

[91] CWUR, r.97.

The application to expunge may be made at any time, although a creditor may be able to retain the benefit of any dividend already received.[92] Nevertheless, if on successfully expunging or reducing the amount of the proof, it is anticipated that there are future dividends which are to be paid to creditors, the liquidator will be entitled to require the creditor to give credit for the initial overpayment of dividend.[93]

Regulating Orders

7.018 Where a regulating order has been made, in the case of a bank, any creditor who is a depositor shall be deemed to have proved his debt unless and until the Official Receiver or liquidator by notice in writing requires a formal proof of debt.[94]

V. CLAIMING IN THE LIQUIDATION: WHAT CLAIMS CAN BE PROVED OR CLAIMED?

http://www.pbookshop.com

7.019 A major effect of the winding-up is that all obligations of the company crystallise and can, in theory, be proved for, even if such claims are due in the future, subject to a contingency, or (unlike claims filed for the purpose of attending a first creditors' meeting) of uncertain value. As has already been mentioned, these claims can be made at any time whilst the winding-up process is underway. The right to prove is set out in s.263 of the CWUO which states:

> In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Ordinance of the law of bankruptcy)[95] all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

The effect of this section is to summarise the claims which can be admitted, but drawing a distinction between a solvent and an insolvent winding-up. In an insolvent winding-up, the section makes the "law of bankruptcy" applicable so the Bankruptcy Ordinance (and relevant subsidiary legislation) becomes relevant. This will, where applicable, be referred to in the discussions below.

The general propositions set out in s.263 of this CWUO have been further codified in the CWUR, other provisions of the Companies Ordinance (CO) (and the Bankruptcy Ordinance (Cap.6), where relevant) and by case law. Taken together, these provisions and precedents determine the specific circumstances in which claims are

---

[92] *Re Tait* (1882) 21 Ch D 537; see also *Re Lehman Brothers Commercial Corp Asia Ltd* (HCCW 441/2008, 27 March 2014).

[93] See *Re Searle, Hoare and Co* [1924] 2 Ch 325, 328; see also *Re Lehman Brothers Commercial Corp Asia Ltd* [2014] 3 HKLRD 448.

[94] CWUO, s.227A–227E.

[95] CWUO, s.264, makes the Bankruptcy Ordinance (Cap.6), s.34 also applicable as to what debts are provable. the Bankruptcy Ordinance (Cap.6), s.34 is the relevant section dealing with the nature of claims which are generally admissible to proof.

admissible, how such claims should be valued and which claims must be excluded. The following paragraphs examine these specific circumstances.

Periodical Payments

7.020 A person who is entitled to periodic payments, such as rent, may prove for a proportionate part of a payment due from the time when the last part of the payment became due up until the day on which the winding-up commences, as if the liability accrued on a daily basis.[96] In the case of claims for rent, if the liquidator remains in occupation of premises let to the company, the landlord can claim rent for the continuing period of occupation from the company or the liquidator.[97]

Interest

7.021 As a general rule, where interest is payable on a claim, and has accrued prior to the "appropriate date" in respect of the winding-up, it can be proved for.[98] However, consideration must be given to the precise circumstances in which the claim arose in order to determine whether, and how far, such pre-liquidation interest can be claimed.

Where the interest is specified in an agreement, the creditor can claim at the agreed rate until the "appropriate date".[99] Where a debt is an amount certain due by virtue of a written instrument, and payable at a certain time, but the interest is not "reserved or agreed for", then interest may be claimed from the date when the debt became payable up until the "appropriate date" at the rate specified in s.49 of the High Court Ordinance (Cap.4) (HCO).[100] Where there is no written instrument, then interest may only be claimed if the creditor served a written demand on the company including a claim for interest from the date of demand.[101]

Interest for the period after the company goes into liquidation is not provided for, but can be paid out on a dividend if any surplus remains after payment of proved debts and the taxed costs of the petition. In these circumstances, interest becomes payable at whichever is the higher as between the rate specified under s.49 of the HCO and the rate applicable to that debt apart from the winding-up. This is to avoid the situation where there may be a surplus, but a creditor would be restricted to the statutory rate (in accordance with r.88 of the CWUR) although his contracted rate may be higher.[102]

In the UK decision of *Lomas v Burlington Loan Management Ltd*,[103] the Court provided detailed analysis as to how post-liquidation statutory interest was to be calculated under r.2.88 of the UK Insolvency Rules 1986 (which is similar to s.264A of CWUO in Hong Kong). Certain large creditors put forward competing arguments for the method of calculating the statutory interest. Given the huge amount of principal

[96] CWUR, r.87.
[97] CWUR, r.87.
[98] CWUR, r.88. In a compulsory liquidation, the "appropriate date" is the date of the winding-up order, or where the company has by special resolution resolved the company be wound up by the Court, the date of such resolution. In a voluntary liquidation, the "appropriate date" is the date of the resolution.
[99] CWUR, r.88.
[100] CWUR, r.88.
[101] CWUR, r.88.
[102] CWUO, s.264A. The section, which was introduced in 1997 by the Companies (Amendment) Ordinance (No 3 of 1997), is not restrospective in effect; see also *Re Setaffa Investments Ltd* [1998] 2 HKLRD 236 (CFI).
[103] [2015] EWHC 2269 (Ch); judgment upheld by the Court of Appeal in [2017] EWCA Civ 1462.

outstanding, there were large sums at stake. The Court laid down, *inter alia*, the following principles:

(1) To establish whichever is the higher between the usual judgment rate and the rate applicable to that debt apart from the winding-up, one compares the *total amounts* of interest that would be payable under r 2.88(7) based on each method of calculation (such as compounding), rather than between only the numerical rates themselves;[104]

(2) Where a proved debt comprises two or more separate debts, some bearing different or no interest rates, the different aspects of the composite debt can be considered as independent debts and their interest rates compared individually against the judgment rate;[105]

(3) When the rate applicable is the judgment rate, the interest is payable on a simple instead of compound basis;[106]

(4) The equitable presumption established in *Bower v Marris* that, when a debt carries interest, the law will apply any payment against the debt first to discharge outstanding interest and only secondly to discharge principal, does not apply to the calculation of statutory interest under the UK Insolvency Rules 1986. The entitlement under r.2.88 of the UK Insolvency Rules 1986 was a purely statutory one. Rule 2.88(7) operated on the assumption that the debts proved had been paid, whereas an application of the principle in Bower produced the result that the proved debts were treated as if they had not been paid, or paid in full;[107]

(5) In the case of future and contingent debts, interest was payable under r.2.88(7) of the UK Insolvency Rules 1986 from the date of liquidation, not from the date, if any, on which any such debt fell due for payment in accordance with its terms;[108]

(6) The words "the rate applicable to the debt apart from the administration"[109] in r.2.88(9) of the UK Insolvency Rules 1986 did not include interest on a judgment entered after the commencement of the administration nor did they include interest at a rate which would have been applicable to a judgment entered after the commencement of the administration but which was not in fact entered;[110] and

(7) The calculation of a currency conversion claim should not take into account the statutory interest paid to the relevant creditor.[111]

[104] [2015] EWHC 2269 (Ch), [27]–[29].
[105] [2015] EWHC 2269 (Ch), [27]–[29].
[106] [2015] EWHC 2269 (Ch), [17]–[18].
[107] [2015] EWHC 2269 (Ch), [134]–[152]; see also *Bower v Marris* [2017] EWCA Civ 1462, [20]–[38].
[108] [2015] EWHC 2269 (Ch), [184]–[225]; see also *Bower v Marris* [2017] EWCA Civ 1462, [50]–[59].
[109] Or "liquidation" in the Hong Kong case.
[110] [2015] EWHC 2269 (Ch), [171]–[183]; see also *Bower v Marris* [2017] EWCA Civ 1462, [60]–[69].
[111] [2015] EWHC 2269 (Ch), [226]–[231].

http://www.pbookshop.com

appeared to have no authority. Despite such circumstances, the Hong Kong solicitors still continued to resist the petition. The court ordered that the Hong Kong solicitors' purported representation of the company be vacated for want of duly authorised instructions. This was also because the Official Receiver was the liquidator of a major shareholder subsidiary company effectively controlling the entire shareholders voting power in the company, and he had supported the petition.

It was held that the solicitors warranted that they had authority to act, and were therefore in breach of that warranty. Even though they were innocent of fraud or *male fides*, they were nonetheless liable for all costs incurred by the petitioner owing to their persistence in opposing the petition.[199] Costs are of course always a matter of the Court's discretion, and in this case it was incumbent on the Official Receiver to alert the solicitors as to the possible significance of the winding-up proceedings which they did not do quickly enough. As a result, costs were awarded against the solicitors personally in respect of proceedings following notification by the Official Receiver.

The Securities and Futures Commission

10.022 In *Re MKI Corp Ltd*,[200] the Securities and Futures Commission (SFC) presented a public interest petition to wind-up a company on just and equitable ground. However, following the company's successful rescue operation, the SFC was satisfied as to the future running of the company and consented to the dismissal of the petition. Subsequently, the SFC was awarded costs of the petition. This was because that the court was of the view that there were sufficient grounds to warrant the presentation of the petition as winding-up would have been inevitable if the rescue operation had been unsuccessful. In so holding, Rogers J was guided by the principles elucidated in cases such as *Re Highfield Commodities Ltd*;[201] *Re Walter L Jacob & Co Ltd*;[202] and *Re Xyllyx (No 2)*.[203]

In particular, his Lordship was influenced by the following factors:[204]

(1) Winding-up an active company is a serious step and the person seeking to do so must establish sufficiently weighty reasons for so doing;

(2) The SFC had itself nothing to gain from a winding-up order and in this regard it was acting in what might be regarded as a method of law enforcement;

(3) To present a petition, therefore, the SFC was acting at public expense and in what it saw as the public interest;

(4) The question of costs should be approached by asking the question "was the petition properly presented by the SFC"; and

(5) The fact that the petition might in the end not be successful was not determinative of the question of costs particularly as here the petition was dismissed by consent, the circumstances relating to the company having wholly changed.

---

[199] See *Yong v Toynbee* [1910] 1 KB 215.
[200] [1996] 1 HKC 200.
[201] [1985] 1 WLR 149.
[202] [1989] 5 BCC 244.
[203] [1992] BCLC 378.
[204] *Re MKI Corp Ltd* [1996] 1 HKC 200, 202H–203B.

III. SECURITY FOR COSTS

Security for Costs in Winding-Up Cases

Generally

10.023 The normal rules of Court relating to security for costs in litigation matters also apply in winding-up proceedings, so that it may be possible to obtain an order for security for costs under s.905 of the CO (which in effect recites s.357 of the predecessor CO) or under O.23, r.1 of the RHC if the petitioner in winding-up proceedings is a limited company or a foreign party.

Section 905 of the CO provides that:

(1) This section applies where –

(a) a company is a plaintiff in an action or other legal proceedings; and

(b) it appears, by credible testimony, to the court having jurisdiction in the matter that there is reason to believe the company will be unable to pay the defendant's costs if the defendant succeeds in the defence.

(2) Without limiting the powers of the court under any other Ordinance, the court may –

(a) require sufficient security to be given for those costs; and

(b) stay all proceedings until the security is given.

Order 23, r.1 of the RHC further provides:

(1) Where, on the application of a defendant to an action or other proceeding in the Court of First Instance, it appears to the Court:

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

http://www.pbookshop.com

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

These provisions of O.23 of the RHC are stated to be without prejudice to the provisions of any enactment which empowers the Court to require security to be given for the costs of any proceedings, such as s.905 of the CO.

The grounds on which the court may order security for costs under O.23 of the RHC are those stipulated in r.1(a)–1(d). It is only when a case comes under one of those grounds that the court will have a discretion as to whether to grant an order for security for costs.

In an application under s.357 of the predecessor CO (which principles clearly applies to an application under s.905 of the CO), what an applicant must demonstrate before the discretion to order security for costs arises was succinctly summarised by Chan PJ in *Akai Holdings Ltd v Ernst & Young*:[205]

> The wording of s.357 [of the predecessor CO] is reasonably clear. It gives the court the power and the discretion to make an order for security for costs if three conditions are satisfied: (i) the party ordered to provide security is a plaintiff in an action or legal proceedings; (ii) it is a company with limited liability; and (iii) there is credible evidence to support the belief that if it loses in the action at the end of the day, it will not be able to pay the costs of the successful defendant.

Upon satisfaction of the conditions set out in s.905 of the CO or O.23, r.1 of the RHC, as the case may be, the Court would consider all the circumstances of the case to determine whether to grant an order for security for costs. When considering whether to exercise the discretion, the principles on which the Court will act are generally identical for an application made under s.905 of the CO or O.23, r.1 of the RHC.

The "Plaintiff" for the Purposes of Security for Costs

10.024 The words "action or other proceedings", and "other legal proceedings", referred to in O.23 of the RHC and s.905 of the CO, respectively, are wide enough to include any matter in which the jurisdiction of the Court is invoked by originating process. This would therefore include a petition.[206]

In *Re Unisoft Group (No 1)*,[207] a case was brought under s.726 of the UK Companies Act, the equivalent of Hong Kong's s.357 of the predecessor CO. A dispute arose over the types of action in which security for costs can be ordered. It was held that the phrase "other legal proceedings" refers to any matter in which the jurisdiction of the court is invoked by an originating process other than a writ and the word "Plaintiff" indicates not a person who would be conventionally described as a plaintiff but covers a person who has invoked the jurisdiction of the court by whatever originating process he has selected. Accordingly it was held that s.726 of the UK Companies Act covers proceedings commenced by an unfair prejudice petition. Thus, the question of who is

[205] (2009) 12 HKCFAR 376, [18].
[206] See also Hong Kong Civil Procedure 2019, 23/3/2
[207] [1993] BCLC 528.

a "Plaintiff" for the purpose of providing security for costs is a question of substance not form.[208]

In *Re Pretoria Pietersburg Railway Co (No 2)*,[209] the company passed a resolution for voluntary winding-up and appointed liquidators. An originating summons was issued in the winding-up against the liquidators by a creditor of the company in Holland (for declaration that he was entitled to prove in the winding-up). The liquidators issued a summons asking that the claimant, being out of the jurisdiction of the court, pay security for costs and that in the meantime all proceedings be stayed. It was held that where a creditor residing out of the jurisdiction applies in a voluntary winding-up for a declaration that he is entitled to prove in the winding-up, the Court has jurisdiction to order security for costs and indeed that wherever a person outside the jurisdiction comes forward in a winding-up, voluntary or otherwise, the ordinary practice of the Court as to ordering security for costs is applicable.

Specifically in the context of a winding-up, a liquidator may be required to adjudicate upon a number of proofs of debt. Where a creditor seeks to appeal against a rejected proof of debt, the liquidator may apply for security for costs of the appeal. In *GFN SA v Bancredit Cayman Ltd*,[210] three creditors appealed against their rejected proof of debts by the liquidators, and in the process the liquidators applied for security for costs of the appeal. At first instance, the application was dismissed, as the judge held that an appeal against a rejection of proof was not an action or other legal proceedings within the meaning of O.23 of the RHC. On appeal to the Privy Council, it was that the state of indebtedness of the company provides a new factual platform in which new substantive issue may arise. Accordingly, it was held that commencement of litigation to resolve these issues would constitute commencement of "proceedings" for the purposes of O.23 of the RHC.[211]

Section 905 of the CO applies to all limited companies irrespective of whether or not it happens to be suing as plaintiff with a natural person as co-plaintiffs, and the inability of the plaintiff company to pay the defendants' costs is a substantial factor in the court's decision whether to order security for costs. While the court must not allow s.905 of the CO to be used as an instrument of oppression, it must equally not allow an impecunious company to put unfair pressure on a prosperous company.[212]

The Court may order a plaintiff company in liquidation to give security for costs, even though it is one of two or more plaintiffs, especially where there is a comparatively small overlap between its own claims and those of the other plaintiffs.[213] In *Dongguan Harris Plastic Products Co Ltd v Chan Dai Chung*,[214] there were two plaintiffs, a PRC company and a Hong Kong company. However, the PRC company had incorporated the Hong Kong company to facilitate its business operation in Hong Kong. It was held that the Defendant was entitled to security for costs against both the Plaintiffs. The Court could order security for costs against the PRC company as it did

[208] See also *Brand Farrar Buxbaum LLP v Samuel–Rozenbaum Diamond Ltd (No 2)* [2003] 1 HKLRD 600, 606A (Ma J, as he then was).
[209] [1904] 2 Ch 359.
[210] [2010] Bus LR 587.
[211] *GFN SA v Bancredit Cayman Ltd* [2010] Bus LR 587, [27] (Lord Scott); see also *Re Legend International Resorts Ltd* (HCCW 1139/2004, 8 February 2011).
[212] *Pearson v Naydler* [1977] 1 WLR 899.
[213] *John Bishop (Caterers) Ltd v National Union Bank Ltd* [1973] 1 All ER 707.
[214] [2001] 3 HKLRD K4, CFI.

http://www.pbookshop.com

not have any assets within the jurisdiction which the defendant might have recourse to in the event that orders for costs were made against it. It was also held that as a general rule of practice, where a foreign plaintiff sued jointly with a local plaintiff, security for costs would not be ordered against that foreign plaintiff. However, here, it was immaterial that two companies had brought an action jointly because the Hong Kong company was merely a vehicle for the PRC company's business as it acted as the PRC company's agent and had no independent businesses of its own. Also, it appeared on the evidence that the Hong Kong company in any event had no assets which could satisfy the defendant's costs if the defence was successful. Thus security for costs was ordered under s.357 of the predecessor CO.

But note that a respondent in a cross-petition cannot be required to pay security for costs as he is a party exercising his right to defend himself. There is an established rule that where a counterclaim can properly be regarded as a defence, the counterclaiming defendant ought not to be required to give security for costs unless there are exceptional circumstances which would make it just to do so. See *Smarking International Ltd v Lau Chi Keung George* (HCA 17616/1998, 20 September 1999), aff'd on appeal (CACV 306/1999, 8 March 2000) and *Neck v Taylor* [1893] 1 QB 560. See also *Hong Kong Civil Procedure*[215] and the comments of Kwan J in *Re Worldwide International Enterprises Ltd.*[216] There must, of course, be proximity between the petition and cross petition. In any event, even if ordering security for costs against a counterclaiming defendant, a discount may be given on the costs to take into account inevitable overlap in costs, even if the skeleton bill on the face of it may seem to take that into account (as per Sakhrani J in *Smarking*), and if the overlap of the issues is so substantial then the discount given may make it meaningless for an order for security to be made, and thus security may not be ordered. See *Re Worldwide International Enterprises Ltd.*[217]

Similarly, a petitioner cannot ask the court to order security for costs against any other person who has a right to appear on the hearing of the petition, but who resides outside the jurisdiction.

In *Re Percy and Kelly Nickel, Cobalt, and Chrome Iron Mining Co*[218] a creditor petitioned to wind-up the company and the petition was opposed by certain shareholders residing in Paris who filed affidavits in opposition and also applied to have the petitioner cross-examined. It was held that a shareholder of the company who resides out of the jurisdiction and appeared to oppose a petition for the winding-up of the company cannot be required to give security for costs. A defendant who was brought before the Court has a right to take any proceedings to defend himself without being called on to give security.

Furthermore, in *Re Co-operative Development Funds of Australia Ltd*[219] the Attorney General for South Australia presented petitions to wind-up certain societies after inspectors' reports. When the petitions came before the court, a contributory filed a Notice of Intention to Appear. He was holding ordinary shares in each of the societies and was also the chairman and director of each society, and he challenged

[215] Hong Kong Civil Procedure 2019, Vol 1, [23/3/8].
[216] (HCCW 162/2004, 12 May 2004, [2005] HKEC 240, CFI).
[217] (HCCW 162/2004, 12 May 2004, [2005] HKEC 240, CFI).
[218] (1876) 2 Ch D 531.
[219] (1977) 2 ACLR 284.

the petition and the report of the inspectors. One issue here was whether the contributory should be required to give security for costs. The contributory was a resident of Tasmania and therefore lived outside the jurisdiction of the Supreme Court of South Australia. Again, it was made clear that a shareholder of the company who resides out of the jurisdiction and appears to oppose a petition cannot be required to give security.

Ordinarily Resident Out of the Jurisdiction

10.025 A petitioner who resides outside the jurisdiction may be required to give security for costs.[220] In *Re Royal Bank of Australasia, ex p Latta,*[221] the petitioner, in Scotland, was a shareholder who petitioned to wind-up a bank. Security was ordered as a preliminary condition prior to the hearing. In *Re Home Assurance Association (No 2)*[222] the petitioner was a judgment creditor in Scotland, out of the jurisdiction, seeking the compulsory winding-up of an association and again on the application of the respondents was ordered to give security for costs.

In *Re Silver Tech Enterprise Ltd,*[223] there was an application for security for costs by a company that was subject to a winding-up petition. The petitioner was ordinarily resident out of the jurisdiction with neither a place of business nor any assets in Hong Kong. Thus, per Kwan J:

> ... the court would usually exercise its discretion to order security for costs to be given, in the absence of any circumstances that would make it unjust to do so.

Having said that, security being ordered when a party is out of the jurisdiction is not an inflexible or rigid rule, and should only be ordered if it is just to do so in all the circumstances of the case, just as it is in other litigation matters.

In *Re Greater Beijing Region Expressways Ltd (No 3),*[224] a Hong Kong case, where a party petitioned to wind-up the company which was an unregistered company. An attempt was made to strike-out the petition but was unsuccessful, following which the company sought security for costs under O.23, r.1(a) of the RHC claiming that the petitioner was not "ordinarily resident" in Hong Kong. The issues in the case were whether the petitioner was "ordinarily resident" in Hong Kong for the purposes of the petition, and how the Court should exercise its discretion. For the purposes of O.23, r.1(a) of the RHC, ordinary residence is to be determined by reference to the location of the central management control of the company. There was therefore no jurisdiction to order security in this case. Even if the petitioner were an ordinary resident outside of Hong Kong, the Court would not exercise its discretion by ordering security for costs. The Court noted that it is no longer an inflexible rule that a foreign plaintiff shall provide security for costs. This particular case was not one where the normal rules regularly applied and in all the circumstances, it was neither just nor right to order security. The court has to strike a balance between what would be too oppressive to the petitioner and what would give the company a measure of security.

[220] See also generally, *Hong Kong Civil Procedure 2019*, 23/3/4
[221] (1850) 3 De G & Sm 186.
[222] (1871) LR 12 Eq 112.
[223] (HCCW 883/2004, 1 March 2005).
[224] [2000] 3 HKC 608.

http://www.pbookshop.com

Other Grounds under O.23, r.1 of the RHC

10.026 In *Re Sturgis (British) Motor Power Syndicate Ltd*,[225] a petitioner who refused to give his address was ordered to give security for costs.

If a shareholder holds his share on trust for the benefit of another, he is treated as a nominal petitioner for the purposes of an application for security for costs (*Ng Yat Chi v Max Share Ltd and Avion*,[226] a case where security was ordered).

Foreign Corporate Plaintiffs Suing in Hong Kong

10.027 Where a company is formed and incorporated outside of Hong Kong, there is no jurisdiction for the Court to order security for costs against such company under s.357 of the predecessor CO. This is the case even if the company is registered in Hong Kong under Part 16 of the CO as having a place of business in Hong Kong. As was held by the Court of Final Appeal in *Akai Holdings Ltd v Ernst & Young*,[227] s.357 of the predecessor CO must be read and construed in conjunction with the definition of "company" under s.2(1) of the predecessor CO.[228]

It is therefore impermissible to read s.357 of the predecessor CO as extending to non-Hong Kong companies, as to do so would be to ignore the plain statutory definition of "company" which amounts to an unjustified judicial usurpation of legislative power.

In reaching this conclusion, Chan PJ noted in *obiter dicta* the need for the Hong Kong courts to have power to order foreign corporate plaintiffs suing in Hong Kong to provide security for costs in appropriate circumstances, particularly given the increase in the number of foreign companies registering in Hong Kong in recent years. To address the problem, his Lordship suggested that this could be achieved by amending O.23, r.1 of the RHC along the lines adopted in r.25.13(2)(c) of the English Civil Procedure Rules 1998 (CPR).

Under the current CO, this problem has now been met head on with the introduction of that s.905. That section expressly provides the court with power to order security for costs in respect of "a company incorporated outside Hong Kong" where it appears that: "there is reason to believe the company will be unable to pay the defendant's costs if the defendant succeeds in the defence". There can therefore no longer be any doubt as to the court's jurisdiction to order security in circumstances where the company is not incorporated in Hong Kong.

Previously, there was also some debate as to whether the lacuna in the law could be addressed by reliance on the court's case management powers. Order 1B, r.1 of the RHC gives the court wide case management powers and relevantly provides as follows:

> (1) The list of powers in this rule is in addition to and not in substitution for any powers given to the Court by any other rule or practice direction or by any other enactment or any powers it may otherwise have …
>
> …
>
> (3) When the Court makes an Order, it may—
>
> (a) *make it subject to conditions, including a condition to pay a sum of money into court*; and
>
> (b) specify the consequences of failure to comply with the order or a condition.
>
> (4) Where a *party* pays money into court following an order under paragraph (3), the money is security for any sum payable by *that party to any other party* in the proceedings. (*emphasis added*).

The powers under O.1B, r.1(1), and 1(3)–1(4) of the RHC are identical to the court's general powers of management under r.3.1(1), (3) and (6A) of the CPR.

In *Huscroft v P&O Ferries Ltd*,[229] Moore-Bick LJ explained the nature of these case management powers and the approach of the court in exercising such power as follows:

> 17. In particular, rule 3.1(3) is deliberately drafted in quite general terms and I think that this court should be reluctant to lay down any hard and fast rules about the circumstances or manner in which the power can be exercised. Experience shows that cases are infinitely variable and the rule does not place any limit on the nature of the conditions that may be imposed or the circumstances in which the power may be invoked, other than providing that a condition may be imposed as an adjunct to an order. However, two matters seem to me to provide support for the view that the power to attach conditions to an order is intended, as Mr. Myerson (counsel for the claimant in the case) submitted, *to enable the court to exercise a degree of control over the future conduct of the litigation*. The first is the existence of rule 3.1(5), which is clearly intended to give the court power to punish a party who without good reason fails to comply with the established procedural code, including the pre-action protocols. Although such an order may well have a beneficial influence on the future conduct of the litigation, it is directed more to what has gone on in the past than what will go on in the future. To that extent it is quite different in nature from a condition of the kind contemplated by rule 3.1(3) which, combined with a sanction for failure to comply, usually of a stringent nature, is designed to control the future conduct of the party on whom it is imposed. The second is the language of the rule itself. *The very fact that it allows the court to make an order subject to conditions is sufficient to show that the rule is concerned with the basis on which the proceedings will be conducted in the future,* and that remains the case even when the condition is imposed in order to make good the consequences of some kind of previous misconduct…
>
> 19. …I do not think that the power to attach a condition to an order can be exercised only if there is a history of repeated failures to comply with orders of the court or the party in question is not conducting the litigation in good faith. I do think, however, that before exercising the power given by rule 3.1(3) *the court should identify the* purpose *of imposing a condition and satisfy itself that the condition it has in mind represents* a proportionate and effective means *of*

[225] (1885) 53 LT 715.
[226] [1996] 4 HKC 284, 285G–286A.
[227] (2009) 12 HKCFAR 376.
[228] Now s.2(1) of the CO.

[229] [2011] 1 WLR 939, [17], [19].

http://www.pbookshop.com

achieving that purpose having regard to the order to which it is to be attached. (emphasis added)

In *Huscroft v P&O Ferries Ltd*,[230] Moore-Bick LJ explained the nature of these case management powers and the approach of the court in exercising such power as follows:

> The principles governing the exercise of the powers under the equivalent rule of Order 1B, rule 1(3) of the RHC (Cap.4A) have also been canvassed in *Ali v Hudson*[231] and may be summarised thusly:
>
> 1. It would have to be an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;
> 2. An order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise demonstrating a want of good faith;
> 3. An order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding; and
> 4. For this purpose, good faith consists of "a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in accordance with the overriding objective": *Olatawura v Abiloye*.[232] Further, it would be sufficient if "there is something in the conduct of the party that gives rise to suspicion that they may not be bona fide and the court thinks the other side should have some financial security or protection"; see also *Mealey Horgan plc v Timothy Horgan*.[233]

In the earlier case of *Olatawura v Abiloye*,[234] the English Court of Appeal upheld the decision of a district judge to order security pursuant to r.3.1(3) of the CPR and held[235] that the district judge was entirely justified in finding the circumstances to be appropriate for security to be ordered on the basis of three reasons:

(1) the claim was found to have very limited prospects of success;

(2) the claimant had been conducting the case in a "wholly unreasonable" way and was set to continue doing so; and

(3) the claimant was not permanently resident in England so that enforcement of any adverse costs order was likely to prove more than usually difficult.

[230] [2011] 1 WLR 939, [17], [19]. *Huscroft* was subsequently applied in *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2016] EWHC 2241 (Comm) (Flaux J), [10]–[12]; see also *Lazari v London & Newcastle (Camden) Ltd* [2013] EWHC 97 (TCC) (Akenhead J), [22]–[25]; *Allen v Bloomsbury Publishing Ltd* [2011] EWHC 770 (Ch) (Kitchen J), [32]–[33]. Furthermore, see the earlier case of *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2002] CP Rep 21 (Clarke LJ) as to whether there was a compelling reason for making the defendant either pay the judgment debt or secure it as a condition of permitting it to proceed with the appeal.

[231] [2004] CP Rep 15, [40] (Clarke LJ).

[232] [2003] 1 WLR 275, [25] (Simon Brown LJ).

[233] (24 May 1999), [8C-D] (Buckley J).

[234] [2003] 1 WLR 275.

[235] *Olatawura v Abiloye* [2003] 1 WLR 275, [27].

However, in the light of s.905 of the CO, which has been drafted to expressly cover companies incorporated outside Hong Kong, the question whether the Hong Kong courts may use their case management powers to grant security for costs in respect of foreign corporate plaintiffs with places of business in Hong Kong may now be more academic than real.

Inability to Pay

10.028 The fact that a company is in liquidation is *prima facie* evidence (and therefore subject to evidence to the contrary) that it is unable to pay the costs, unless there is evidence to the contrary (*Northampton Coal Iron & Waggon Co v Midland Waggon Co*; *Pure Spirit Co v Fowler*[236]). In any event, the application for security must be supported by an affidavit which credibly and reasonably shows the inability of the company to pay the costs of the successful defendant.[237]

The plaintiff being in liquidation is not the only way to demonstrate the plaintiff's inability to pay. The court is not entitled to ignore, for example, the unchallenged evidence of an accountant as to a company's present ability to pay the costs of an action.[238]

In certain circumstances, it may also be possible to demonstrate a plaintiff's inability to pay on circumferential evidence. In *Mau I Business Centre Ltd v Tenford Holding Ltd*,[239] the Court opined that:

> It is not uncommon that an applicant for security for costs may not be in a position to adduce direct evidence on the financial status of the plaintiff company. However, certain information regarding the plaintiff company may constitute "reason to believe" that it will be unable to pay the defendant's costs if successful in its defence. The court is sometimes prepared to accept there is a *prima facie* case (or a reasonable inference can be drawn) that the threshold under s.357 of the predecessor CO has been met by referring to factors such as the following:
>
> (1) The plaintiff is a shelf company with a nominal amount of paid up capital;
>
> (2) The plaintiff company has been established for the purpose of entering into the transaction which is the subject matter of the dispute;
>
> (3) The plaintiff does not have an actual registered address (apart from the address of the secretarial company); and
>
> (4) The plaintiff, other than entering into the transaction as stated in subparagraph (2) above, does not ordinarily carry on any business.

See also *Tufnell Investment Ltd v Thosowin Properties Ltd* [1985] 2 HKC 14; *Hong Kong National Ltd v Nice Port Enterprise Ltd* (HCA 16100/1998, 24 January 2000); and *Asia Shiny Ltd v Leung Kai Yuen* (HCA 1322/2005, 8 June 2006).

Whatever form of evidence (direct or inferential) is relied upon, an applicant for security for costs has to show that the company would not (as opposed to may not) be able to meet its debts if an order for costs is made against it. This question has to

[236] (1890) 25 QBD 235.

[237] See *Hong Kong Civil Procedure 2019*, 23/3/14.

[238] *Kim Barker v Aegon Insurance Co (UK) Ltd* (The Times, 9 October 1989, CA).

[239] (DCCJ 731/2008, 26 August 2008).

http://www.pbookshop.com

be answered at the time of the application,[240] though the court can take into account evidence of what was to be expected in the future before any order is made.[241]

In circumstances where a company appeals against a winding-up order, it may be ordered to give security for costs.[242] This may be the case even though there may be sufficient assets in the company to pay the costs. The liquidation in this case was *prima facie* evidence of insolvency, and the court did not want to encourage frivolous appeals.

Power to Order Security Is Discretionary

10.029 However, the fact that the plaintiff would be unable to pay the costs of the defendant if the defendant were successful is not necessarily the end of the matter. The court has a discretion under s.905 of the CO, just as under O.23, r.1 of the RHC, whether to order security for costs having regard to all the circumstances of the case, refer to the following: *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd; Perfect Best Ltd v Yip, Tse & Tang (a firm)*; and *Centre Optical (Hong Kong) Ltd v Jardine Transport Services (China) Ltd & Pronto Cargo Inc (third party)*.[243]

The court may exercise its discretion to order security: "if, having regard to all the circumstances of the case, the court thinks it just to do so". The court is bound to consider the circumstances of each case, and, in the light of those circumstances, determine whether and to what extent or for what amount the petitioner /may be ordered to provide security for costs.[244]

The circumstances which the court might take into account include (but not limited to) the following:

(1) whether the claim is bona fide and not a sham;

(2) whether there is a reasonably good prospect of success;

(3) whether there are any relevant admissions that money is due;

(4) whether there is an "open offer" of a substantial amount;

(5) whether the application for security was being used oppressively, for example, so as to stifle genuine action;

(6) whether want of means has been brought about by any conduct by a relevant party; and

(7) whether the application for security is made at a late stage of the proceedings.

In *Taiwan Fu Hsing Industrial Co Ltd v E Bon Building Materials Co Ltd*,[245] Deputy Judge B Fung noted that:

> The relevant principles on security for costs are set out in the judgment of Peter Gibson LJ in *Keary Development Ltd v Tarmac Construction Ltd* [1995] BCLC 395, 400g to 401h, [1995] 3 ALL ER 534, 539–540, as adopted and summarized in *Wing Hing Provision, Wine & Spirits Trading Co v Hanjin Shipping Co Ltd* [1998] 2 HKC 461 per Godfrey JA (as he then was) at 539–540:
>
> (1) The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances;
>
> (2) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security;
>
> (3) The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and the defendant finds himself unable to recover costs from the plaintiff in due course;
>
> (4) In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure;
>
> (5) The court may order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal sum; it is not bound to order a substantial amount"; and
>
> (6) Before refusing to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence. The court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested parties. It is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation.

[240] [2003] 1 HKLRD 600, CFI.

[241] *Re Unisoft Group (No 2)* [1993] BCLC 532.

[242] *Re Photographic Artists' Co-operative Supply Association* (1883) 23 Ch D 370.

[243] *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd; Perfect Best Ltd v Yip, Tse & Tang (a firm)* [1973] 2 All ER 273; *Centre Optical (Hong Kong) Ltd v Jardine Transport Services (China) Ltd & Pronto Cargo Inc (third party)* (HCCL 146/1999, [2001] HKEC 588). See also generally, *Hong Kong Civil Procedure 2019*, 23/3/3.

[244] See for example the comments of Kwan J in *Re Worldwide International Enterprises Ltd* (HCCW 162/2004, 12 May 2004).

[245] (HCA 849/2004, [2005] HKEC 1193, CA); see also *Hummingbird Music Ltd v Dino Acconci* (HCA 836/2007).

Merits of the Case

10.030 An important matter for the court's consideration before making an order for security is the likelihood of the petitioner's succeeding, and so the court will have to take into account the merits of the case. This does not, however, mean that the court will embark upon a detailed examination of the respective cases of the parties unless: (i) the case is sufficiently simply; and (ii) it could be demonstrated one way or another that there is a high probability of success or failure. The principles in relation to whether the Court will take into account the merit of an intended claim was summarised by Harris J in *Re Dayuan International Limited*,[246] where he said:

> 3. The power to order security is discretionary, but it will normally be granted if one of the 4 categories of case specified in the sub-rule [of Order 23 rule 1] are

[246] (HCCW 103/2015, 23 December 2016).

http://www.pbookshop.com

shown to apply unless the plaintiff, or in this case the petitioner, can demonstrate that there is a high probability of the claim succeeding. However, this exception presupposes that the claim is sufficiently simple that it can fairly readily be demonstrated to the court on an interlocutory application that is not be its nature concerned with the merits of the substantive issues, that the petitioner is likely to succeed and it would thus be unfair to impose on him the burden of providing security. As Rogers VP put it in *Sunchase International Group (China) Ltd v Vincor Group of Companies (Investment) Ltd*:

> "It is not the function of the court, when faced with an application for security for costs, to make a preliminary run at deciding the ultimate success or failure of the claim. The Judge has approached this on the basis that the plaintiffs have a bona fide claim. He has also approached it on the basis that the defendants have a bona fide defence. Mr. Wong today today says that the Judge should have come to the additional conclusion that the plaintiffs had a substantial chance of success. I do not see that that was the Judge's function in a case like this. In a simple case that may be so, but here the defendants are contesting the plaintiff's claim and there is no way that the Judge could resolve that contest at this stage."

Once it is demonstrated that the case is a simple one that the Court ought to examine the merit, it also falls to be shown that the plaintiff or the petitioner has a high probability of success that carries a high threshold. In *Re Silver Tech Enterprises*,[247] Kwan J opined that:

> ... it must be borne in mind that the threshold of demonstrating the probability of success in this situation is very high indeed. As was mentioned by the court in a number of instances, the practice of going into the merits of the case in an application of this kind is to be deplored, unless it can be clearly demonstrated one way or other there is high probability of success or failure (*Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 [423B–F]; *Leslie Fay Companies, Incorporation trading as Breckenridge Sportswear Division v Cheerio Ltd* [1990] 1 HKC 463; *Re Kwong Hing International (Holdings) Ltd*, HCCW No. 409 of 1999, 6 October 1999, Sakhrani J).

In *Porzelack KG v Porzelack (UK) Ltd*[248], Sir Nicholas Browne-Wilkinson VC (as he then was) said:

> This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time. Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of

[247] (HCCW 883/2004, 1 March 2005).
[248] [1987] 1 WLR 420, 423D–F.

> success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

Security by an Undertaking to Pay Costs

10.031 Where the undertaking of a party or his solicitor to pay the whole or a specified proportion of the costs of a specified sum in lieu of security for costs is accepted by the other party, there is no need for any application to the Court.

Where such an undertaking is given and is accepted in lieu of security for costs, it lasts as long as there is no final judgment from which an appeal lies.[249]

Security by Payment into Court

10.032 A common way in which to order security for costs is to require a specified sum to be paid into Court within a specified period. This saves a great deal of costs and trouble, as compared with requiring security by bond or guarantee. Sometimes parties will agree to place money into a joint account, or into a solicitors account with an undertaking not to use the money.

The Court cannot order a solicitor (after an action is dismissed with costs and money paid into Court by the plaintiff has been paid out) to refund such money on the subsequent reversal of the order for dismissal.[250] See *Hood Barrs v Crossman & Prichard*,[251] which held that where a solicitor paid costs payable to the client and pursuant to an order of the Court, with knowledge that an appeal against that order was pending, he cannot on its reversal be ordered personally to repay the costs paid to him, where there has been no misconduct and no undertaking to repay.

Where a party has been compelled to pay money into court as security for costs, that money cannot be looked upon as property recovered or preserved so as to enable the Court to give the solicitor of the party paying in a charging order upon it for the amount of his costs.[252]

Security by Bond

10.033 Security for costs may in special cases be ordered to be given by bond and is usually given by bond with two sureties, though one obligor is sufficient. The bond has usually to be approved by the master, but is given to the person requiring the security.

Time for Making an Application for Security

10.034 An order for security may be made at any stage of the proceedings; see *Re Smith*;[253] see also *Arkwright v Newbold*; *Martano v Mann*; *Lydney and Wigpool Iron Ore Co, v Bird*.[254]

[249] *Hawkins Hill Co v Want* (1893) 69 LT 297.
[250] *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 Ch D 85.
[251] [1897] AC 172.
[252] *Re Wadsworth* (1885) LR 29 Ch D 517.
[253] (1896) 75 LT 46, CA.
[254] (1886) 33 Ch D 85; (1883) 23 Ch D 358.

http://www.pbookshop.com

Where a defendant fails to observe a time limit imposed by the Court to apply for security for costs, unless the failure amounts to procedural abuse or causes prejudice to the plaintiff, a defendant should not be deprived of the opportunity to apply for security for costs. There is a difference between procedural default and procedural abuse; see *Lessy Sarl v Pacific Star Development Ltd.*[255]

Amount of Security

10.035 As regards the amount of security, the Court can order any amount. It need not be substantial provided it is more than nominal; see *Roburn Construction Ltd v William Irwin (South) & Co Ltd.*[256] The amount should be for the probable amount of costs, but of course the amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. If security is sought, the Court will be faced with an estimate made by a solicitor of the costs likely to be incurred in the future, normally in the form of a draft skeleton bill of costs, sometimes prepared by a law costs draftsman. In all likelihood, the costs already incurred or paid will be only a fraction of the security sought by the applicant.

It is therefore very helpful for the Court to see the estimated costs in the form of a skeleton bill of costs (cited with approval by Lane J. in *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction*[257]). It is for the applicant to place materials before the Court to enable the Court to come to a view on the quantum to be ordered as security. If the applicant fails to discharge this obligation, no amount can be ordered notwithstanding that a right for security has been established (*Pete (Dr) Fashions Co Ltd v C&C Textiles Corp*[258]):

> Sufficient security or security that in all the circumstances of the case is just does not mean complete security. In *Innovare Displays v Corporate Broking Services*,[259] a defendant sought a sum of £147,000 by way of security and the judge ordered only £10,000, the Court of Appeal declined to interfere as the judge had correctly taken into account that the delay by the defendant in making the application had deprived the plaintiff of time to collect the security and that the plaintiff's strong and genuine claim would be stifled by ordering a larger sum. Indeed, it is only in rare cases that the Court of Appeal would interfere with the exercise of the discretion of the judge below (*Cal-Trade Pte Ltd v Mindo Commodity Trading Co Ltd*[260]).

It is to be noted that when reviewing the skeleton bill of costs, the Court will not necessarily look at the bill line by line, rather it will adopt a "broad brush" approach. See the judgment of Stone J. in *Daimler Chrysler Services China Ltd v Harbour Union Investments Ltd & Falcoln (1998) Co Ltd (Third Party).*[261]

---

[255] [1997] HKLRD 1248.
[256] [1991] BCC 726.
[257] [1974] 3 All ER 715, 720.
[258] (CACV 188/1996, [1997] HKLY 557, CA).
[259] [1991] BCC 174, CA.
[260] [1989] 2 HKC 112.
[261] ([2004] HKEC 1439, 7 May 2004, (CFI)).

Where the claim of someone who may be required to give security for costs, whether under the RHC or under the s.357 of the predecessor CO, is countered by a cross-claim put forward by the defendant, the amount by which such cross-claim exceeds the claim has to be treated as a counterclaim and therefore he cannot be ordered to give security for costs. Accordingly, in such a case the appropriate amount of security must be determined by having regard to the fact that the defence goes to the whole of the plaintiff's claim while disregarding the excess of the defendant's claim over the plaintiff's claim; see *Smarking International Ltd v Lau Chi Keng George*; see also *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction.*[262]

Security for costs is not necessarily confined to future costs, but can cover, when applied for promptly, costs already incurred; see the cases of *Brocklebank v King's Lynn Steamship Co*; *Massey v Allen*; and *Procon (Great Britain) Ltd v Provincial Building Co Ltd.*[263]

The amount of security awarded may be increased later as allowed under *Sturla v Freccia*; and *Republic of Costa Rica v Erlanger.*[264] There is no rule that the court will not grant more than two applications for security; see *Merton v Times Publishing Co.*[265]

Failure to Comply with an Order for Security for Costs

10.036 The power to dismiss an action for default by a plaintiff in complying with an order for security for costs derives from the inherent jurisdiction of the Court and applies as much to an order for security made under s.905 of the CO as to one made under O.23, r.1 of the RHC. The Court has power to dismiss the action where it is satisfied that:

(1) the action is not being pursued with due diligence;

(2) there is no reasonable prospect that the security will be paid; and

(3) the time limit prescribed by the Court for the giving of security has been disregarded.

Note the cases of *Speed Up Holdings Ltd v Gough & Co (Handly) Ltd*; and *Multi Sky Ltd v Hong Kong Chinese Insurance Co Ltd.*[266]

Further indulgence may be granted to a plaintiff that failed to comply with an order to pay security. In *Multi Sky Ltd v Hong Kong Chinese Insurance Co Ltd*,[267] indulgence was granted on the considerations of incurred costs, delay and the interests of justice in settling claims.

Return of Security

10.037 Just as a defendant may from time to time make further applications for security in the light of changed circumstances, so a plaintiff may be entitled to apply for variation or discharge of an order previously made if his circumstances have changed. Whether

---

[262] *Smarking International Ltd v Lau Chi Keung George* [1999] 4 HKC 669; *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715.
[263] [1994] 1 WLR 557, CA.
[264] (1879) 12 Ch D 807.
[265] (1931) 48 TLR 34.
[266] *Speed Up Holdings Ltd v Gough & Co (Handly) Ltd* [1986] FSR 330; *Multi Sky Ltd v Hong Kong Chinese Insurance Co Ltd* [1994] HKC 108.
[267] *Speed Up Holdings Ltd v Gough & Co (Handly) Ltd* [1986] FSR 330; *Multi Sky Ltd v Hong Kong Chinese Insurance Co Ltd* [1994] HKC 108.

http://www.pbookshop.com

the Court will accept such an application will depend on the circumstances, the nature of the order previously made and any other material considerations. A plaintiff cannot seek to have an order against him for security for costs varied or set aside by producing fresh evidence about his affairs at the date of the order. If however, he can show a material change of circumstances since the date of the order, he may apply for variation or discharge of the order. Whether such an application will be allowed depends on the circumstances and is a matter of discretion to be exercised by the Court. See *Gordano Building Contractors v Burgess*.[268]

IV. WHEN AND HOW THE COSTS RELATING TO A WINDING-UP ORDER ARE PAID

10.038 It is possible that at some point during the course of liquidation, the liquidators will request the petitioning creditor's solicitors (and the company's solicitors as well, though this rarely happens in practice) to submit a claim for their costs. In reality, there may be quite some time into the administration (possibly years) before these costs are finally paid, if at all. This is because there will be quite some work for the liquidators to complete before they would be able to consider paying dividends to the creditors. This is especially so given that there will usually be very little funds left in the administration. However, any money is left in the administration, the petitioning creditor's solicitors will often be asked to submit their costs, which would take priority to other payments that the liquidator has to make.

Rule 179 of the CWUR states the order of priority of costs payable out of the assets of the company. It can be seen that the payment of the taxed costs of the petition ranks very high indeed: second in the list below. The Rule states:

> (1) The assets of a company in a winding-up by the court, remaining after payment of the fees and expenses properly incurred in preserving, realizing or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs, and expenses as the court may allow to a liquidator appointed in such voluntary winding-up shall, subject to any order of the court, be liable to the following payments, which shall be made in the following order of priority, namely:
>
> **First -** The fees, percentages and charges payable to, or costs, charges and expenses incurred by or authorised by, the Official Receiver, whether acting as Official Receiver or liquidator, including the costs of any person properly employed by him.
>
> **Next -** The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court but excluding the interest on such costs.
>
> **Next -** The remuneration of and any fees, disbursements and expenses properly incurred by the special manager (if any).

[268] [1988] 1 WLR 890, CA.

> **Next -** The costs and expenses of any person who makes or concurs in making, the company's statement of affairs.
>
> **Next -** The taxed charges of any shorthand writer appointed to take an examination: Provided that where the shorthand writer is appointed at the instance of the Official Receiver, the cost of the shorthand notes shall be deemed to be an expense incurred by the Official Receiver in getting in and realising the assets of the company.
>
> **Next -** The necessary disbursements of any liquidator, other than the Official Receiver, appointed in the winding-up by the court or under the Ordinance, other than expenses properly incurred in preserving, realising or getting in the assets heretofore provided for.
>
> **Next -** The costs of any person properly employed by any liquidator, other than the Official Receiver, appointed in the winding-up by the court or under the Ordinance.
>
> **Next -** The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to the approval of the Official Receiver.
>
> (2) No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons, other than payments for costs and expenses incurred and sanctioned under rule 43, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the Registrar. The taxing officer shall satisfy himself before passing such bills or charges that the employment of the solicitor or other person in respect of the matters mentioned in the bills or charges has been duly sanctioned:
>
> Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person other than a solicitor employed by him where such costs and charges are within the scale usually allowed by the court and do not exceed the sum of $3,000.
>
> (3) Nothing contained in this rule shall apply to or affect costs which, in the course of legal proceedings by or against a company which is being wound up by the court, are ordered by the court in which such proceedings are pending or a judge thereof to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable.

V. LIQUIDATIONS CONVERTED UNDER S.209A OF THE CWUO

10.039 Section 209A of the CWUO was originally introduced into Hong Kong legislation in 1984 and gives the Court power to order a compulsory winding-up be "converted" into a creditors' voluntary winding-up. The provision derives from a recommendation of

http://www.pbookshop.com