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Yeung Siu Yung v The Registrar of Companies & Ors

Court of First Instance
HCMP528/2020, [2021] HKCFI 73, [2021] HKCLC 1, [2021] 1 HKJR 6
William Wong SC
Date of Reasons for Decision: 8 January 2021

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Company Law — bona fide creditor — Genuine claim against a deregistered company — Restore the Company to the Companies Register Application to Court for restoration — Companies Ordinance (Cap 622) s 765(4) — Rules of the High Court (Cap 4A) O 102 r 2

C 公司法 — 善意債權人 — 對註銷公司的真實索償 — 將有關公司恢復列入公司登記冊 — 公司條例(第622章)第765(4)條 — 高等法院規則(第4A章)第102號命令第2條規則

The Applicant met the 2nd Respondent (R2) through a mutual acquaintance in around May 2014 and in reliance of R2's misrepresentations
D made a number of investments and payments to the Company. In November 2017, the Applicant realised that she had been deceived by R2 all along and reported the matter to the Police. In May 2018, the Applicant commenced a High Court Action against R2 and the Company for recovery of the Applicant's money that was deposited into the Company's accounts (High Court Action). Pursuant to s 749 of the *Companies Ordinance* (Cap 622) (the
E Ordinance), the Company was struck off the Companies Register on 31 January 2020 and dissolved on the publication of the relevant notice.

In around March 2020, the Applicant first discovered that the Company had been struck off the Companies Register after the general discovery of documents in the High Court Action. The Applicant applied pursuant
F to ss 765(3) and 765(4) of the Ordinance to restore the Company to the Companies Register.

Held, allowing the application:

1. If there is a genuine claim against a deregistered company and the claimant wishes to bring action against the company, the circumstances
G would have to be very unusual indeed if the court were to refuse to reinstate the company. The *bona fide* creditor should be allowed to pursue his claim in the usual way. (See para 15.)

2. Applying the above legal principles to the facts of the present case, the Applicant has a *bona fide* claim against the Company for receiving her money as a result of the pleaded misrepresentation. Thus, she should be
H allowed to pursue her claim against the Company. In doing so, she is entitled to continue her claim against the Company and if she were able to prove her case and to obtain a judgment against the Company. (See paras 17, 20.)

[Headnote by Kwan Ping Kan]

The following cases referred to in this decision:

- *Lynne Rowlands v the Registrar of Companies & Anor* HCMP1921/2016, [2018] HKCFI 1092, [2018] 5 HKJR 29
- *Re Active System Trading Ltd* HCMP5173/2003, [2004] HKCFI 446, [2004] 3 HKLRD I2
- *Re Cretec Electronics (HK) Ltd* HCMP2647/2014, [2015] HKCFI 686, [2015] HKCA 665

Mr Johnny Kan of Chan Ching Man & Co, for the Applicant

Attendance of the 1st Respondent was excused

The 2nd Respondent, in person, absent

Attendance of the 3rd Respondent was excused

William Wong SC handed down the following reasons for decision of the Court of First Instance.

APPLICATION

1. By an originating summons dated 11 May 2020, the Applicant, pursuant to sections 765(3) and 765(4) of the Companies Ordinance (Cap 622) (the "Ordinance"), applies to restore Clever Brilliant Limited (Company No 1463161) (the "Company"), to the Companies Register.

2. The 1st Respondent, the Registrar of Companies, originally filed an intention to contest these proceedings on 13 May 2020 but subsequently indicated her neutral stance and informed the Court that she does not intend to contest these proceedings on 3 September 2020. The 3rd Respondent indicated his intention not to contest the proceedings on 22 May 2020.

3. The 2nd Respondent filed an intention to contest these proceedings on 5 October 2020 and upon her application, leave was granted to her to file evidence in opposition. Court papers in relation to the substantive hearing were served on the 2nd Respondent. However, the 2nd Respondent chose not to appear for the substantive hearing.

4. At the substantive hearing on 23 December 2020, I made an order to restore the Company to the Companies Register. I now give my reasons.

MATERIAL FACTS

5. It is the Applicant's case that she met the 2nd Respondent through a mutual acquaintance in around May 2014 and in reliance of the 2nd Respondent's misrepresentations made a number of investments and payments to the Company.

6. In November 2017, the Applicant realized that she has been deceived by the 2nd Respondent all along and reported the matter to the Police.

7. In May 2018, the Applicant commenced High Court Action No. 1211 of 2018 against the 2nd Respondent and the Company (including certain

A other defendants) for recovery of, *inter alia*, the Applicant's money that was deposited into the Company's accounts.

8. A Mareva injunction was obtained against the Company as well as other defendants on 23 May 2018, which was amended on 1 June 2018 (the "Injunction Order").

B 9. Pursuant to section 746 of the Ordinance, the Company was struck off the Companies Register on 31 January 2020 and dissolved on the publication of the relevant notice.

10. In around March 2020, the Applicant first discovered that the Company had been struck off the Companies Register after the general discovery of documents in the High Court Action No. 1211 of 2018.

C 11. This Court is informed by the Applicant that the 2nd Respondent is presently facing some criminal charges arising from the same fraudulent actions.

12. In the circumstances, the Applicant makes the present application to restore the Company so as to continue the High Court Action No. 1211 of 2018 against, *inter alia*, the Company.

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LEGAL PRINCIPLES

13. Sections 765(3) and (4), 766(3) and 767(3) of the Ordinance are relevant to the present application.

14. I am persuaded that the Applicant is an interested person under E Section 765(4)(b) of the Ordinance and the application is made within 20 years after the date of the dissolution. The issue is whether discretion should be exercised in favour of restoration.

15. In *Re Active System Trading Limited*, HCMP 5173 of 2003, unreported, 17 May 2004, Tang J (as he then was) at §§11 and 12 said:

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> "11. As is clear from the evidence filed so far on behalf of the parties, whether or not the District Court action had been settled depends on credibility of witnesses. I cannot say that there is not a *bona fide* dispute, and that being the case, I should proceed on the basis that the applicant has a *bona fide* claim against the Company for goods sold and delivered. That is sufficient for the purpose of
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> G section 291AB(2).
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> 12. Mr Cheung has submitted that I must consider whether it is just to do so in all the circumstances. In my opinion, it would be just to do so. *If there is a genuine claim against a deregistered company and the claimant wishes to bring action against the company, the circumstances*
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> H *would have to be very unusual indeed if the court were to refuse to reinstate the company*. The fact that a company may be insolvent is not in my opinion decisive. The *bona fide* creditor should be allowed to pursue his claim in the usual way." (Emphasis added.)

16. In *Re Cretec Electronics (HK) Ltd*, HCMP 2647 of 2014, unreported, 30 January 2015, Lam VP at §9 said:

> "... In that regard, the judge had correctly applied the principles set out in *Re Active System Trading Ltd* HCMP 5173 of 2003, 17 May 2004. In that case, it was held by Tang J (as Tang PJ then was) that for the purposes of reinstatement of a company under section 291AB (the relevant section of the predecessor ordinance to the current Companies Ordinance), it was sufficient that the applicant had a *bona fide* dispute against the company. If there was a genuine claim against a de-registered company, the circumstances would have to be very unusual for the court to refuse to reinstate the company. His Lordship also held that in an application for reinstatement, the court should leave the parties to resolve their substantive differences in the appropriate forum and in the appropriate way."

ANALYSIS

17. Applying the above legal principles to the facts of the present case, I am of the view that the Applicant has a *bona fide* claim against the Company for receiving her money as a result of the pleaded misrepresentation. She should be allowed to pursue her claim against the Company. (See also *Re Marcel Network Ltd*, HCMP 1921 of 2016, unreported, 17 May 2018, *per* Au-Yeung J at §9)

18. I agree that High Court Action No. 1211 of 2018 is still ongoing and it would not be just for the proceedings in that action to be disrupted by the Company being struck off the Companies Register.

19. There is no suggestion of any prejudice to the 2nd Respondent if the Company were to be restored. The bank statements of the Company reveal that it still has money in its accounts in mid-2018 when the Injunction Order was granted. As such, if the Company is not restored to the Companies Register, the Applicant would not be able to continue her claim against the Company in the High Court Action No. 1211 of 2018 to recover her money.

20. The 2nd Respondent argued that restoring the Company serves no good purpose and is totally unnecessary because the Applicant has already got the bank statements of the accounts of the Company and that as the 2nd and 3rd Respondents are defendants in High Court Action No. 1211 of 2018, any further documents can be obtained through the process of discovery in the usual manner. I disagree. The Applicant is entitled to continue her claim against the Company and if she were able to prove her case, to obtain a judgment against the Company. The Applicant is also entitled to trace her monies through the Company's accounts.

A DISPOSITION

21. For all the reasons stated above, I make an order in terms of the draft orders as submitted by the Applicant.

22. Finally, it remains for me to thank Mr Kan for the Applicant for his helpful assistance.

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(William Wong SC)
Deputy High Court Judge

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Lau Siu Hung And Kwok Sin Kwan (Being The Joint And Several Liquidators of Tom IP & Partners, Architects, Engineers & Development Consultants Ltd (In Liquidation)) v P & T International Inc.

B HCCW216/2018, [2021] HKCFI 105, [2021] HKCLC 7, [2021] 1 HKJR 7
Court of First Instance
William Wong SC
Date of Reasons for Decision: 11 January 2021

C *Company Law — Documents — Compel ex-director to provide all the information and documents — Discretion should not be exercised to order the Respondent to file an affirmation which it has already filed*

公司法 — 文件 — 強迫其前任董事提供所有信息和文件 — 不應行使酌處權命令被申請人提交已經提出的確認書

D In 1992, the Respondent (R) and the Company jointly signed an agreement (the 1992 Agreement) with Country Eagle Development Limited for services in respect of a development project in Guangzhou, PRC and reached an agreement in respect of the fee split between R and the Company. There was a dispute amongst the parties under the 1992 Agreement. In or about 2003, the Higher People's Court of Guangdong Province issued a judgment in favour of, *inter alios*, R and the Company (the PRC Judgment). In order to facilitate the execution and enforcement of the PRC Judgment, R and the Company (amongst others) entered into a five-party agreement (FPA) on or about 13 June 2018 for the purpose of setting out the allocation of the execution sum pursuant to the PRC Judgment.

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On 25 September 2020, R filed an Affirmation to provide all the information and documents which it could provide (R's Affirmation), stating that other than what has already been produced, R is unable to provide any further documents or information because it is not in possession of any such requested documents. R's Affirmation includes a copy of the 1992 Agreement, correspondence in 1992 and 1998 in respect of the fee split between R and the Company and letters and board minutes in 2018 concerning the FPA.

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G The Applicants (As) are the Company's joint and several liquidators. As' position is that R still has not provided some outstanding items and issued a summons that an order be made against R and it should be directed to submit to the Court an affidavit containing information and documents relating to the FPA.

H *Held*, dismissing the application:

1. If As are dissatisfied with R's explanation as to why it is unable to provide further information or documents other than those already provided, As could apply for a private examination of R's representative

under s 286B(1)(b) and 286C of the Ordinance. To still ask for an order requiring R to submit a further affirmation is academic and serves no useful purpose. (See para 12.)

2. The Court could not, on the evidence before it, form a view as to whether R lied on oath as to whether and why R was unable to provide further information or documents. If As maintain this view, it is up to them to take out the appropriate applications. (See para 17.)

3. Insofar as it is suggested that the information or documents may be obtained from R's former directors, R does not have the power to compel its ex-directors to provide the relevant information without commencing legal proceedings. On the other hand, s 286B(4) does give power to As to make an application to get information directly from R's ex-directors. (See paras 19–23.)

[Headnote by Kwan Ping Kan]

Mr Lau Siu Hung, one of the Joint and Several Liquidators of Tom Ip & Partners, Architects, Engineers & Development Consultants Ltd (in liquidation), from Sammy Lau CPA Ltd, for the Applicant

Mr Justin Lam, instructed by Jones Day, for the Respondent

William Wong SC handed down the following reasons for decision of the Court of First Instance.

APPLICATION

1. By a summons dated 24 July 2020 (the "Summons"), Lau Siu Hung and Kwok Sin Kwan (the Joint and Several Liquidators of Tom Ip & Partners, Architects, Engineers & Development Consultants Limited (in liquidation) (the "Company")) (the "Applicants") seek, *inter alia*, an order that P & T International Inc. (the "Respondent") do submit to the Court an affidavit containing information and documents relating to a five-party agreement (the "FPA") to which, *inter alios*, the Respondent and the Company were parties.

2. The requests in the Summons relate to the following dealings and transactions:

(1) On or about 9 September 1992, the Respondent and the Company jointly signed an agreement (the "1992 Agreement") with Country Eagle Development Limited for services in respect of a development project in Guangzhou, Guangdong Province, the People's Republic of China and reached an agreement in respect of the fee split between the Respondent and the Company.

(2) There was a dispute amongst the parties under the 1992 Agreement.

A (3) In or about 2003, the Higher People's Court of Guangdong Province issued a judgment in favour of, *inter alios*, the Respondent and the Company in the Action No.379 of 2003 (the "PRC Judgment").

(4) In order to facilitate the execution and enforcement of the PRC Judgment, the Respondent and the Company (amongst others) entered into the FPA on or about 13 June 2018 for the purpose of setting out, *inter alia*, the allocation of the execution sum pursuant to the PRC Judgment.

3. On 25 September 2020, the Respondent filed the Affirmation of Che Kwai Leung Chris to provide all the information and documents which it could provide. This includes, *inter alia*, a copy of the 1992 Agreement, correspondence in 1992 and 1998 in respect of the fee split between the Respondent and the Company and letters and board minutes in 2018 concerning the FPA.

4. The Applicants filed the 4th Affirmation of Lau Siu Hung and stated their position that:

(1) The Respondent has complied with items 1(i), (ii) of Schedule A and item 1, 2(i) and (ii) of Schedule B to the Summons; but

(2) The Respondent still needs to provide item 2 of Schedule A and item 3 of Schedule B, as well as item 1(iii) of Schedule A and item 2(iii) of Schedule B (the "Outstanding Items").

5. The Applicants submit that an order should be made against the Respondent and it should be directed to provide information in relation to the Outstanding Items.

6. At the conclusion of the hearing, I dismissed the Applicant's application for an affidavit in relation to the Outstanding Items and gave brief reasons. I now set out my reasons in detail.

ANALYSIS

7. First, I agree with Mr Lam for the Respondent that Mr Che has stated in very clear terms in his affirmation (§§17, 20 and 21) that, in respect of each of the Outstanding Items, "*other than what [has] already been produced, the Respondent is unable to provide any further documents or information because it is not in possession of any such requested documents*". (Emphasis added.)

8. By a summons dated 21 December 2020, Mr Che filed his second affirmation. In §§9 and 12, Mr Che affirmed that the individuals who were involved in the subject dealings and transactions in June 2018 have already all left the Respondent and "*apart from those individuals, I verily believe that none of the existing employees of the Respondent has any personal knowledge of any information*."

9. The Respondent does not dispute that the Applicants are entitled to rely on Section 286B(1)(c) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap.32 (the "Ordinance") to request for information and documents from the Respondent by requiring the Respondent to submit an affidavit.

10. The Respondent's position is that it has already provided what is sought in the Summons, namely, an affirmation setting out all the required information and documents which the Respondent could provide and confirming that it is unable to provide any further information and documents in response to the Summons.

11. Notwithstanding the Respondent's confirmation in the Affirmation of Che Kwai Leung Chris that it does not have any further information or documents to provide other than those already provided, the Applicants still continue to pursue the Summons in respect of the Outstanding Items which they claim the Respondent has failed to provide.

12. Mr Lam for the Respondent is right that the Applicants' approach is wrong. The Summons seeks an order for the Respondent to submit an affidavit in response to their requests. The Respondents has already provided the Affirmation of Che Kwai Leung Chris. If for some reason the Applicants are dissatisfied with the Respondent's explanation as to why it is unable to provide further information or documents other than those already provided, the Applicants might consider applying for a private examination of the Respondent's representative under Section 286B(1)(b) and 286C of the Ordinance. However, to still ask for an order requiring the Respondent to submit a further affirmation is academic and serves no useful purpose. Mr Lam for the Respondent submitted that the Respondent will simply provide an affirmation which repeats the contents of the Affirmation of Che Kwai Leung Chris. I am of the view that Mr Lam is right.

13. Mr Lau, one of the Applicants, submitted that if this Court makes an order that the Respondent do file an affidavit setting out its knowledge of the Outstanding Items, the Respondent somehow would be able to produce the Outstanding Items. I do not see how that could have happened in view of Mr Lam's submission and the content of the two affirmations of Mr Che Kwai Leung Chris. Mr Lam is right that if it happens, it would mean that Mr Che lied on oath. There is no evidential basis for this Court to make such a speculation.

14. Secondly, Mr Lau submitted that, on a balance of probabilities, the affirmations of Mr Che cannot be believed because in a letter dated 1 September 2020 from the Respondent's solicitors, Messrs. Jones Day, it is stated, *inter alia*, that:

> "...In this connection, we are instructed that the Respondent intends to oppose the Summons generally on the basis, *inter alia*, that the information/documents as sought have already been

A provided or such information/documents have not been in the Respondent's possession."

15. However, in the Affirmation of Che Kwai Leung Chris, the Respondent was able to provide some documents. It shows that the stance of the Respondent is not believable and if ordered, the Respondent might B be able to produce some more documents. Mr Lam for the Respondent submitted that at the time when the letter of 1 September 2020 was written the Respondent was basically under the legal advice of its PRC lawyers and when the present solicitors come on board, they have duly advised and discussed with the Respondent which resulted in the two affirmations which were filed by Mr Che Kwai Leung Chris.

C 16. The Respondent strenuously denies that its explanation as to why it is unable to provide further information or documents is unsatisfactory.

17. At the end of the day, I do not see how this Court could on the evidence before it form a view that the Respondent lied on oath and hence Mr Che's evidence is unbelievable. I agree with Mr Lam for the Respondent D that if the Applicants maintain the said view, it is up to them to take out appropriate applications.

18. If this Court were to order the Respondent to file an affirmation as Mr Lam submitted the Respondent would file an affirmation to say that the Respondent cannot provide any further information and documents which it has already said so in the affirmations of Mr Che. Court orders should not E be made in vain.

19. Thirdly, Mr Lau submitted that the Respondent has the power to demand its ex-directors to provide the relevant information and documents. He submitted that the Respondent's ex-directors owe a fiduciary duty to explain business affairs of the Respondent even though they have resigned. It is correct that the Respondent can make such a request but I am not F convinced that the Respondent has the power to compel its ex-directors to provide the relevant information without commencing legal proceedings.

20. Mr Lam for the Respondent referred this Court to §24/2/8 of *Hong Kong Civil Procedure 2021* Vol 1 which states that:

G "*Documents that are or have been in his power* – These include all documents which, though they are not in his possession or custody, he has a right to obtain from the person who has them – e.g. where he is the owner and has not parted with the right to possession."

21. On the facts of the present case, as confirmed by Mr Lau, the Applicants' case is not that the ex-directors are still in possession of some H documents of the Respondent. There is no evidence to that effect. Indeed, Mr Lau relies on Section 286B(1)(c)(ii) of the Ordinance and not Section 286B(1)(d) of the Ordinance to seek information and/or explanations about the transactions that the Applicants are investigating.

22. Mr Lau has cited no case which shows that the Court can make an order to direct a company to compel its ex-directors to provide information to the Applicants. Further, what if the subject company fails to compel its ex-director to provide such information? It may entail the serious consequence of breaching a court order by the subject company.

23. On the other hand, Section 286B(4) does give power to the Applicants to make an application to get information directly from ex-directors of the Respondent.

24. In the circumstances, I am of the view that discretion should not be exercised to order the Respondent to file an affirmation which it has already filed. It is up to the Applicants to take further appropriate steps or proceedings in their investigation exercise, whether against the ex-directors or otherwise.

DISPOSITION

25. For all the above reasons, this Court will not make any order in respect of the Outstanding Items and will dismiss the rest of the Summons other than the parts that have already been complied by the Respondent.

26. As far as costs is concerned:

(1) The Respondent is to pay the costs of Summons from the date of its issuance up to the filing of the Affirmation of Che Kwai Leung to the Applicants and the said sum is assessed at HK$59,199.00

(2) The Applicant is to pay the costs of the Summons from the date of the filing of the Affirmation of Che Kwai Leung Chris to the Respondent including the costs of the hearing and the said sum is assessed at HK$150,000.00

27. Finally, it remains for me to thank Mr Lau for the Applicants and Mr Lam for the Respondent for their helpful assistance.

(William Wong SC)
Deputy High Court Judge

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Hui Chau Hing & Anor v Hui Chi Sum Water D & Ors

HCMP1605/2020, [2021] HKCFI 205, [2021] HKCLC 13, [2021] 1 HKJR 5
Court of First Instance
William Wong SC
Date of Judgment: 22 January 2021

B

Company Law — Shareholders' dispute — Principles on striking out a winding up relief — No realistic prospect that the Respondents will not be able to buy out the Petitioners' shares — Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) s 177(1)(f) — Companies Ordinance (Cap 622) ss 723–725

C

公司法 — 股東糾紛 — 剔除清盤救濟的原則 — 被申請人無法買斷呈請人股份的現實前景 — 公司(清盤及雜項條文)條例(第32章)第177(1)(f)條 — 公司條例(第622章) 第723至725條

The Petitioner presented a petition for a buyout order, and alternatively a winding up order, in respect of Chuen Chun Co Ltd (the Company). The
D Respondents sought to strike out the winding up relief in the petition.

Held, striking out the winding up relief in the petition:

1. The legal principles on striking out a winding up are as follows:

(1) It is assumed that the particulars and allegations in the petition and the supporting affidavits of the petitioner would be established and the
E conflicts resolved in favour of the petitioner.

(2) The application should be approached with the greatest circumspection, and it is only in a plain and obvious case that the court should exercise its discretion to strike out the petition for winding up or the parts complained of.

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(3) The burden is on the applicant to show that it is plain and obvious that the petition for winding up would fail on the ground there is an alternative remedy available to the petitioner, and that the petitioner is acting unreasonably in seeking to have the company would up instead of pursuing that other remedy.

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(4) Where the company concerned carries on an ongoing and profitable business, is solvent, and has valuable goodwill and know-how, the Court may strike out the winding-up relief in a contributory petition if it considers that there is no prospect of the Court making a winding up order against the company.

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(5) Where a *prima facie* case has been shown that the ability of the respondent to finance any buyout is seriously in doubt, it is hardly "plain and obvious" that winding up relief should be struck out at this stage or that it is unreasonable to insist on seeking a winding up relief.

(6) The question the Court should ask is: is the Court satisfied at this stage of the proceedings and on the evidence before the Court that the claim for a winding-up cannot succeed?

(*Ng Christina v Capella Capital Ltd* [2020] HKCLC 389 applied.) (See para 8.)

2. If the Court is satisfied that the respondent will be able to buy out the petitioner's shares, it is not always necessary for a respondent to adduce evidence in detail as to how they can raise finance to effect the potential buy-out order made by the Court. (See para 9.)

[Headnote by Adrian WL Lee]

The following cases referred to in this judgment:

- *Doneur H.K. Ltd v Four Twenty Co Ltd & Anor* HCCW278/2004, [2005] HKCFI 24, [2005] HKCLC 05-003, [2005] 1 HKJR 9
- *Geng Hua Zhong & Anor v Li Shu Hon & Anor* HCCW403/2017, [2019] HKCFI 1374
- *Kam Kwan Sing v Kam Kwan Lai & Ors* HCCW154/2010, [2012] HKCFI 1672, [2012] 10 HKJR 17, [2012] 6 HKC 246
- *Lei Zi Shen v Tai-Ao Aluminium Group Ltd & Ors* CACV391/2005, [2006] HKCA 249, [2006] HKCLC 06-381, [2006] 6 HKJR 35
- *Ng, Christina v Capella Capital Ltd & Anor* HCCW325/2018, [2020] HKCFI 442, [2020] 2 HKLRD 274, [2020] HKCLC 389, [2020] 3 HKJR 169
- *Re A Company (No 004415 of 1996)* [1997] 1 BCLC 479
- *Re Copeland & Craddock Ltd* [1997] BCC 294
- *Re Forecast Nominee Ltd* HCMP1537/1996, [1996] HKCFI 249, [1996] 4 HKC 12
- *Re M Kirpalani (HK) Ltd* HCCW618/2009, [2010] HKCFI 556, [2010] HKCLC 261, [2010] 6 HKJR 14
- *Re San Imperial Corporation Ltd (No 2)* HCCW26/1980, [1900] HKCFI 32, [1980] HKCLC 80-001, [1980] 5 HKJR 1, [1980] HKC 463
- *Re Sun Light Elastic Ltd* HCCW302/2012, [2013] HKCFI 1670, [2013] 5 HKLRD 1, [2013] HKCLC 643, [2013] 9 HKJR 16, [2014] 1 HKC 362
- *Re Wong To Yick Wood Lock Ointment Ltd* HCCW668/2000, [2001] HKCFI 1290, [2001] 2 HKLRD 683, [2001] HKCLC 01-145, [2001] 4 HKJR 5, [2001] 2 HKC 618
- *Yu Lai Ping Wandy v Chan Kuen & Ors* HCCW1147/1999, [2001] HKCFI 654, [2001] HKCLC 01-295, [2001] 6 HKJR 7
- *West v Blanchet* [2001] 1 BCLC 795

Mr Lawrence Hui and Mr Conan Shek, instructed by N K Tsang & Co, for the 1st and 2nd Petitioners

Mr Chase Pun, instructed by Yu & Associates, for the 1st to 3rd Respondents

The 4th and 5th Respondents were not represented and did not appear.

A William Wong SC handed down the following decision of the Court of First Instance.

APPLICATIONS

1. There are three matters before this Court, namely,

B (1) A petition for a buyout order and alternatively a winding up order in respect of Chuen Chun Company Limited which is the 5th Respondent herein (the "Company") presented on 29 September 2020 (the "Petition");

(2) The Petitioner's Summons for, *inter alia*, amending the title of the Petition from HCMP 1605 of 2020 to HCCW filed on 21 October 2020 (the "Amendment Summons"); and

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(3) The 1st to 3rd Respondents' summons for striking out paragraph 46 and paragraph (2) of the relief in the prayer of the Petition relating to the Petitioner's pray for a winding-up order against the Company (the "Striking Out Summons").

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MATERIAL FACTS

2. The Company is engaged in properties investment and carries on the business of leasing out retail shops for rental income. It has a substantial portfolio of properties. In a letter issued by CBRE dated 18 November 2020, CBRE opined that on an asset-based approach, the fair value of 100% equity value of the Company as at 26 September 2019 is HK$93,630,000. It only has an outstanding bank mortgage with Wing Hang Bank Limited in the sum of around HK$2 million in total.

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3. The shareholding of the Company are as follows:

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(1)	The 1st Petitioner	20%
(2)	The 2nd Petitioner	10%
(3)	The 1st Respondent	20%
(4)	The 2nd Respondent	20%
(5)	The 3rd Respondent	20%
(6)	The 4th Respondent	10%

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4. There is also no dispute that the Company is currently receiving a monthly rental income in the sum of HK$203,000, i.e., HK$2,436,000 annually.

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5. In the Petition, it is pleaded that the Company's affairs are being or have been conducted by the 1st and 2nd Respondents in a manner unfairly prejudicial to the interests of the Petitioners. However, the Petitioners do not seek a winding-up order as their primary relief. The Petitioners' primary

relief is a buy-out order. In paragraph 19 of the 3rd Affirmation of Hui Chi Sum Water D., it is stated, *inter alia*, that: A

> "...For this reason, when the Petitioners in their pre-action letters alleged that we have violated our fiduciary duties as directors of the Company and *demanded us to buy back the 1st and 2nd Petitioners' 20% and 10% shares of the Company at HK$18,000,000 and HK$9,000,000 respectively*, such demands were rejected by our solicitors as instructed by us without hesitation. However, as stated in the same letter (exhibit marked "HCH-4" produced under the 1st Petitioner's 2nd Affirmation) our solicitors did invite the Petitioners to provide justification for the valuation of the Company for our consideration." (Emphasis added.) B C

6. Further, paragraphs 43 to 46 of the Petition read as follows:

> "43. On 24th April 2020, the 1st Petitioner instructed his solicitors to write to Anthony Hui and Water Hui, offering to sell the 1st Petitioner's shares at HK$18,000,000, representing a fair value of his shareholding. D
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> 44. On 11th June 2020, the solicitors representing Anthony Hui, Water Hui and Hui Chi Wa [i.e. the 3rd Respondent] wrote to the 1st Petitioner's solicitors, rejecting the offer.
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> 45. The 1st and 2nd Petitioners are prepared to sell their 6 shares in the Company at a fair value to be determined by an independent valuer appointed by the Court pursuant to Section 725 of the Companies Ordinance (Cap. 622) E
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> 46. *The 1st and 2nd Petitioners do not have any knowledge as to the financial means of the 1st to 4th Respondents. On the assumption that they do not have the financial means to buy the 1st and 2nd Petitioners' shares in the Company, a winding up order would be the only realist relief available.*" (Emphasis added.) F

7. The 1st to 3rd Respondents' case is that the Petitioners are acting unreasonably in seeking a winding-up relief when there is a relief of buy-out available and there is no real possibility or prospect of a winding up order being made by the Court. G

APPLICABLE LEGAL PRINCIPLES

8. In *Ng Christina v Capella Capital Ltd* [2020] 2 HKLRD 274, at §§15-19, this Court has already set out the legal principles on striking out a winding up relief and I repeat the same below: H

> "15. The legal principles in relation to striking out petitions are well established. In *Re Four Twenty Company Limited*, HCCW

278/2004, unreported, 6 January 2005, Kwan J (as she then was) at §5 said:

> "5. There is no dispute as to the approach and principles to be adopted in the strike out application and they may be summarised as follows:
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> (1) It is assumed that the particulars and allegations in the petition and the supporting affidavits of the petitioner would be established and the conflicts resolved in favour of the petitioner (*Re Forecast Nominee Limited* [1996] 4 HKC 12 at 18C; *Re Prudential Enterprises Limited* [2001] 2 HKC 687 at 692D-E).
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> (2) The application should be approached with the greatest circumspection and it is only in a plain and obvious case that the court should exercise its discretion to strike out the petition for winding up or the parts complained of (*Re Wong To Yick Wood Lock Ointment Limited* [2001] 2 HKC 618 at 623I).
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> (3) The burden is on the applicant to show that it is plain and obvious that the petition for winding up would fail on the ground there is an alternative remedy available to the petitioner and that the petitioner is acting unreasonably in seeking to have the company would up instead of pursuing that other remedy (section 180(1A) of Cap.32; *Re Wong To Yick Wood Lock Ointment Limited*, supra at 622I to 623F and 623H and on appeal at [2003] 1 HKC 484 at 487H to 488B)."

16. Where the company concerned carries on an ongoing and profitable business, is solvent, and has valuable goodwill and know-how, the Court may strike out the winding-up relief in a contributory petition if it considers that there is no prospect of the Court making a winding up order against the company. Yuen J (as she then was) in *Re Wong To Yick Wood Lock Ointment Ltd* [2001] 2 HKLRD 683 at 686H-688B insightfully and correctly said:

> "I shall set out briefly the law to be applied. First, a contributory petitioner's claim for a winding-up order is not doomed to fail by reason only that alternative relief has been sought in the petition. However, the court would at the hearing: (a) take into account the fact that there is alternative relief; and (b) assess the reasonableness or otherwise of the petitioner's action in seeking an order for winding-up instead of the alternative remedy....

Notwithstanding the difference in wording, the principle behind both sections is the same – ie that the remedy of winding-up on a contributory's petition is a *remedy of last resort* (*Re San Imperial Corp Ltd (No 2)* [1980] HKC 463 at p.466; *Re A Company (No 004415 of 1996)* [1997] 1 BCLC 479 at p.487) and would not be granted if the petitioner was acting unreasonably in insisting upon it instead of pursuing an available alternative remedy.

The onus is however on the parties opposing the petition to show that there was an available alternative remedy and that the petitioner was acting unreasonably in not pursuing it.

That is the position at the hearing of the petition. *However, there is a Practice Direction in England ([1990] 1 WLR 490) reminding practitioners of the undesirability of including as a matter of course a prayer for winding-up as an alternative to an order under s.459 of the Companies Act 1985 (equivalent to s.168A of the Companies Ordinance) and that "it should be included only if that is the relief that the petitioner prefers or if it is considered that it may be the only relief to which he is entitled."*

The question in the application before me is whether even at the present stage, assuming that the petitioners prove all the facts in the amended petition, there is no real possibility or prospect of a winding-up order being made such that the court should exercise its discretion to strike out the claim for a winding-up order.

As with all applications to strike-out, this application must be approached with *the greatest circumspection. It is only in a plain and obvious case that the court should exercise its discretion to strike-out a claim before it has gone to a full hearing*. Further, in the present case, the same facts are relied upon by the petitioners to justify the claims for a winding-up order and for the relief under s.168A, so there will be little saving in cost or time should the application succeed.

Having said that, if it is clear that there is no real possibility or prospect of a winding-up order being made at the hearing by a court applying s.180(1A), it cannot be just for a company to have the threat of a winding-up order hanging over its head like the Sword of Damocles." (Emphasis added.)

17. Where a *prima facie* case has been shown that the ability of the respondent to finance any buyout is seriously in doubt, it is

hardly "plain and obvious" that winding up relief should be struck out at this stage or that it is unreasonable to insist on seeking a winding up relief. In *Re T-Hero Industrial Company Limited*, HCCW 403/2017, unreported, 29 May 2019, Deputy High Court Judge Le Pichon at §§39-43 said:

> "39. Courts may be prepared to order winding up despite the *possibility* of a buyout, for example, where there is *no evidence of the respondents' financial ability to buyout the petitioners' shares.* In *Re Perfect Trade Limited*, HCCW 1147/1999 (unreported, 1 June 2001), Chu J (as she then was) considered (at §59) that there is no room for making a buyout order in the absence of evidence as to the respondents' financial ability.
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> 40. *West v Blanchet* [2001] 1 BCLC 795 concerned an unfair prejudice petition where a buyout order was sought. The practicality of the offer has to be considered in order to judge whether it is 'reasonable'. Peter Leaver QC observed (at 803c-d) that:
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> > "It would...be too easy for a party to make an offer...which it had little or no realistic possibility of satisfying. In order to be a reasonable offer, there must be a realistic prospect, *a reasonable likelihood, that the offeror will be able to pay the price* likely to be decided upon by the independent expert appointed to value the shareholding."
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> 41. Thus, an offer is not reasonable if the offeror cannot finance it: see French, *Applications to Wind Up Companies*, 3rd Edition at §8.234. Where a *prima facie* case has been shown that the ability of the 1st respondent to finance any buyout is *seriously in doubt*, it is hardly "plain and obvious" that winding up relief should be struck out at this stage or that the petitioners are acting unreasonably in seeking winding up.
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> 42. In *Re M Kirpalani (HK) Ltd*, HCCW 618/2009 (unreported, 23 June 2010), Barma J (as he then was) considered that any uncertainty regarding *the question whether or not the respondents would be able to comply with a buy out order depended on the evidence*. In the present case, the evidence renders it doubtful whether or not that a buyout, if ordered, could be complied with: see *Kirpalani* at §§37-38.

43. In my view, it would be invidious to pre-emptively exclude the option of a winding up order that would otherwise be available in the circumstances of this case." (Emphasis added.)

See also: *Re Yung Kee Holdings Limited*, HCCW 154/2010, unreported, 21 July2010 per Chung J at §21-24.

18. In *Re Sun Light Elastic Ltd* [2013] 5 HKLRD 1 at §§8-9, Harris J comprehensively set out the relevant considerations as follows:

"8. However, the authorities in Hong Kong have shown some difference of approach in practice with some decisions placing more weight on the undesirability of having an unnecessary winding-up petition hanging over a company on the one hand, and on the other on the difficulty of concluding with sufficient certainty at the early stage of proceedings that a winding-up order would never be the appropriate remedy for the court to grant. In *Re Mahr China Ltd* I explained how this divergence of approach should be resolved:

> [14] It seems to me that there is a difference between the decisions in *Re Ranson Motor Manufacturing Co Ltd* and *Re Wong To Yick Wood Lock Ointment Ltd* on the one hand and *Re Prudential Enterprise Ltd*, *Kwong Group Ltd* and *Re Company* on the other. The former places more emphasis on the generally recognised undesirability of having a winding-up petition hanging over the head of an ongoing business and the court's reluctance to wind up companies if some other remedy is available. The latter recognises the possibility that although at the time an application to strike out is made it may appear that a purchase of shares is the inevitable result of the proceedings, unforeseen events may intervene and lead the court ultimately to be persuaded that a winding-up order is the appropriate remedy. For this reason the correct approach is to stay rather than strike out the claim for a winding-up.
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> [15] In my view the way to resolve this difference is to return to the accepted test by which a strike-out application is determined. This was explained as follows by Bingham LJ

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in *Re Copeland & Craddock Ltd* [1997] BCC 294, 300:

> "It has been often and rightly said that the court's jurisdiction to strike out a claim advanced by a plaintiff or a claimant or a petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the claimant is nonetheless entitled to the court's adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed. In this case the judge clearly regarded the plaintiff's claim to wind up this company as one which was unlikely to succeed, but he did not feel that the claim was so manifestly unarguable as to justify him in striking out...I share the judge's view that this claim is unlikely to succeed. I am indeed persuaded that the case is very close to the borderline where striking out would be appropriate. But I am not quite persuaded that the claim is unarguable whatever comes out relevant to the petition on discovery and in the course of oral evidence."

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[16] *I, therefore, ask this question: am I satisfied at this stage of the proceedings and on the evidence before me that the claim for a winding-up cannot succeed?* I am not. I cannot rule out the possibility that it will prove impossible to require the first respondent to purchase the petitioner's shares at a price and on terms that the Court considers reasonable.

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9. In my view what is clear from the authorities is that the court will only grant a winding-up order rather than relief under s.168A if there is good reason to do so. In my view if a winding-up order is to be sought, particularly in

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> the alternative it should only be because the petitioner has a particular reason for doing so. It is not enough simply to say "well one never knows what will transpire". This would be no criteria at all. The petitioner must be able to point to particular matters he is concerned might make a winding-up order the appropriate or only practical relief...." (Emphasis added).

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19. Every case depends on its own facts. There might well be cases where there are advantages to the Petitioner in seeking a winding up order. In *Re Tai-Ao Aluminium Group Limited*, CACV 391/2005, unreported, 22 June 2006, the Court of Appeal at §§15-16 said:

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> "15. In the present case although the judge had started the consideration on the basis that he followed the approach prescribed in section 180(1A) of the Companies Ordinance by considering (assuming the allegations made in the petition to be true) whether there was any real possibility or prospect of a winding-up order being made, he, in effect, tried to decide the matter then and there. That should only be done when the prayer for a winding-up will clearly not succeed. So long as it may succeed, as in any other type of claim, the petitioner is clearly entitled to pursue his claim.
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> 16. Whilst it might be said that *the petitioner was not apparently opposed to a buy-out*, it is not possible, at the moment, to say that he would be acting unreasonably to insist instead on a winding-up of the Company. Indeed, winding-up the Company *might* well be to his advantage. The Company itself is a holding company. Taishan is quite obviously a going concern and any liquidator of the Company would be in a position to dispose of Taishan. *Indeed the petitioner may well wish to buy Taishan from the liquidator*. That would be a different proposition than buying out the shareholders of the Company. Again the judge took the view that there would be a significant risk that a sale by a liquidator would produce a less satisfactory price. That may well be a legitimate consideration when it comes to the final order to be made on the hearing of the petition but, again, at least so far as this case is concerned it is far too early a stage on a strike out to take such a view. It cannot be said that the petitioner's claim for a winding-up order is clearly unsustainable or that

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A he is unreasonable in making such a claim." (Emphasis added.)

See also *Re Yung Kee Holdings Limited* HCCW 154/2010, unreported, 21 July2010 per Chung J at §§18-20."

9. Depending on the facts of the case, it is not always necessary for a B respondent to adduce evidence in detail as to how they can raise finance to buy out a petitioner in the event that a buy-out order is made by the Court. In *Re Chun Yip Holdings Limited*, HCCW 463-470 of 2012 and HCMP 1685, 1686 & 2153, 2154, 2567-2569 of 2009, unreported, 26 March 2015, Harris J. at §§59-60 said:

C "59. So far as payment is concerned, I accept that [the respondents] have provided no evidence of how they anticipate raising finance to pay [the petitioner] in the event that the Court orders them to buy his shares. *However, I also accept that given the financial position of the various companies it is likely that they would be able to raise the finance to buy him out.* However, in my view a stronger objection is the fact D that if the Court orders them to buy [the petitioner's] shares and they do not pay the price once the valuation is complete, *[the petitioner] will be able to look to their interest in the Group, which will in practice be 100%, to satisfy the judgment*. I see no realistic prospect in these circumstances in [the petitioner] being left with an empty E personal judgment. On the contrary [the respondents] will have every reason to raise the finance to pay him.

60. In conclusion, in my view the prayers in the winding-up Petitions have no realistic prospect of success and I make orders in terms of the Respondents' summonses." (Emphasis added.)

F 10. In *Re Wong To Yick Wood Lock Ointment Ltd* (supra), Le Pichon JA at §16 said:

"The 1st respondent owns 45% of the total shareholding of the company. There was uncontradicted evidence that the company is a going concern, solvent and in a sound financial position. For the G year ended 31 March 1999, the audited accounts show net assets of over $51 million with a net profit after tax of $20.9 million. The audited accounts for the year ended 31 March 2000 show net assets of over $69 million with a net profit after tax of $22 million. *In the circumstances, any suggestion that the 1st respondent would not be able to fund a purchase of the petitioners' shares would appear to be lacking* H *in merit.*" (Emphasis added.)

ANALYSIS

11. Applying the above legal principles to the facts of the present case, I am of the view that there is no realistic prospect that even if all the allegations in the Petition were proved to be accurate after trial, the 1st to 3rd Respondents would not be able to buy out the Petitioners' shares if so ordered by the Court to do so.

12. First, the Company is a going concern, solvent and has substantial net assets in the region of HK$70 million to HK$90 million. If the Court were to make a buy-out order against the 1st to 3rd Respondents, apart from the 1st to 3rd Respondents' own personal assets, their shareholding in the Company is also of sufficient value. I do not see they would have any difficulties to raise finance to comply with any buy-out orders that the Court might make. Mr Pun for the 1st to 3rd Respondents submitted that the Company could sell some of its properties or raise finance by mortgages and make distributions amongst its shareholders so that the 1st to 3rd Respondents would have sufficient cash to comply with any buy-out orders. I agree.

13. Mr Hui for the Petitioners submitted that the retail properties are illiquid assets and the Company might have difficulties to sell them in the market within a relative short period of time. Whilst that may be true, I do not see there will be any difficulties for the Company to secure finance on the back of its substantial property portfolio. The Company has only got an outstanding mortgage in the sum of about HK$2 million. The Petitioners' estimate of the value of their 30% shareholding in the Company is about HK$27 million. I find it hard to believe that the Company will have any difficulties to raise sufficient finance so that the Petitioners' shares could be bought out by the 1st to the 3rd Respondents.

14. In any event, as Harris J. said in *Re Chun Yip Holdings Limited* (supra), the Petitioners will be able to look to the 1st to 3rd Respondents' interest in the Company to satisfy any buy-out orders. Hence, I see no realistic prospect, in these circumstances, in the Petitioners being left with an empty personal judgment.

15. Mr Pun also submitted that the Company is receiving HK$203,000 rental income every month, with very few expenses. All the shareholders were paid by the Company every month over a long period of time. Additionally, in 2020, the Company could manage to pay the 1st Petitioner and the 4th Respondent HK$700,000 each.

16. Thirdly, the 1st to 3rd Respondents have made it clear that "*if at the end of the day a buyout order was made by this Honourable Court, we will respect such order and will strive to comply with the order.*"

17. There is no evidence as to why liquidation of the Company is the preferred option or that it would be more advantageous to the Petitioners as shareholders of the Company.

A 18. Fourthly, Mr Hui for the Petitioners submitted that the 1st to 3rd Respondents have not demonstrated willingness to buy out the Petitioners. In fact, they have rejected the Petitioners' offer for their shares to be bought out. However, I agree with Mr Pun for the 1st to 3rd Respondents that the 1st to 3rd Respondents' position is that the Petitioners' complaints are denied and therefore the Petitioners have no rights to demand their shares B to be bought out but if so ordered by the Court after trial, they are ready and willing to buy out the Petitioners' shares.

19. On the facts of the present case, importantly, in view of the financial and assets position of the Company, I do not see a realistic prospect that the 1st to 3rd Respondents will not be able to buy out the Petitioners' shares if C so ordered. In the circumstances, there is no need for a winding up petition to be hanged over the head of the Company unnecessarily.

DISPOSITION

20. For all the reasons stated above, I make the following orders:

D (1) An order in terms of the Striking Out Summons.

(2) A costs order nisi that the Petitioners do pay the costs of and occasioned by the Striking Out Summons forthwith to the 1st to 3rd Respondents, on a party to party basis, to be taxed if not agreed.

E (3) The Amendment Summons is dismissed.

(4) A costs order nisi that the Petitioners do pay the costs of and occasioned by the Amendment Summons forthwith to the 1st to 3rd Respondents, on a party to party basis, to be taxed if not agreed.

F (5) The above costs orders nisi will be made absolute within 14 days of the orders herein unless the parties take out an application to vary the same within the 14 days period.

(6) On the Petition, I make the following directions:

(a) The Petitioners and the Respondents do file and exchange their respective list of documents within 28 days;

G (b) There be inspection of documents within 7 days thereafter;

(c) The Petitioners and the Respondents do file and exchange witness statements within 28 days after inspection of documents;

H (d) The Petition be adjourned for substantive hearing to a date to be fixed but not earlier than 1 June 2021.

21. Finally, it remains for me to thank Mr Hui and Mr Shek for the Petitioners and Mr Pun for the 1st to 3rd Respondents for their helpful assistance.

(William Wong SC)
Deputy High Court Judge

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