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]

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[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] *Ibid.*

[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 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.

That approach, however, was accepted in a South African 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,

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[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.

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

[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.

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 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

[50] CWUO s.228.
[51] *Ibid.*, s.235(2) (members' voluntary winding-up) and s.244(2) (creditors' voluntary winding-up).
[52] *Ibid.*, s.235(2).
[53] *Ibid.*, 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) [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 & Maxwell, 2001) 312, *cf* Robert Pennington, *Pennington's Corporate Insolvency Law* (Butterworths, 2nd ed 1997) 102.
[61] [1930] 2 KB 1.

The most significant (and most regularly relied upon) deeming provision is s.178(1)(a) of the CWUO, where the company does not pay on a statutory demand. This is essentially a statutory recognition of the "cash-flow" proof of insolvency. While a petitioner may rely on this s.178(1)(a) for the purposes of demonstrating insolvency, it remains a matter for the Court's discretion whether or not it will make a winding-up order.[34]

Bona Fide Disputed Debt

4.012 A winding-up petition may be struck out if there is a genuine *bona fide* dispute as to the validity of the debt. If the debt is substantially in dispute, the winding-up process would be an abuse of the process of the court.[35]

A debt is substantially in dispute if there is any reasonable ground for disputing the existence of the debt.[36] The test that the Court applies is:

> … whether the debt was genuinely disputed on substantial grounds.[37]

The Company bears the burden of proving that such a dispute exists.[38] Precise and believable evidence is needed to establish that there is a *bona fide* dispute of substance as to the debt[39] and the courts will ignore disputes that are based on frivolous or fanciful grounds.[40]

The Companies Court may well dismiss a petition as an abuse of process if the Court is being used as a debt collection agency or if the petition is brought to bring unwarranted pressure to bear upon a debtor or as a summary form of dispute resolution. In the context of a creditor's petition, to hold that the debt owing as a result of that court order was substantially disputed was tantamount to denying effect to a valid existing court order.

Dispute as to Liability

4.013 The dispute as to the debt must be a *bona fide* genuine dispute as to *liability*; a dispute as to the precise sum that is owed does not necessarily render the petition in jeopardy if the non-disputed portion of the debt exceeds the statutory threshold of HK$10,000.

A common dispute that arises is as to whether the sum is a debt or an investment. In *Re Dragon Cheer Investment Ltd*,[41] the petitioner petitioned for a debt of HK$2.1 million, asserting that the sum was a loan to the Company. The petitioner's claim was supported by a receipt signed by the Company for the sum, which stated that the sum represented a loan. However, the Company claimed that the sum was actually an investment by the petitioner in the Company, for which the Company had issued shares in return. Applying the test in *Re ICS Computer Distribution Ltd*,[42] the Court

[34] *Bozell (Asia) Holdings Ltd v CAL International Ltd* [1997] HKLRD 1, 7.
[35] See *Re Par Excellence Co Ltd* [1990] 2 HKLR 277; see also *Bicoastal Corp v Shinwa Co Ltd* [1994] 1 HKLR 65.
[36] *Re Par Excellence Co Ltd* [1990] 2 HKLR 277.
[37] *Re Safe Rich Industries Ltd* (CACV 81/1994, [1994] HKEC 534).
[38] *Re Hawkins Development Ltd* (HCCW 215/2007, [2009] HKEC 1366).
[39] *Re Dragon Cheer Investment Ltd* (HCCW 276/2006, [2007] HKEC 1208).
[40] *Perak Pioneer Ltd v Carrian Holdings Ltd* [1984] HKLR 349.
[41] (HCCW 276/2006, [2007] HKEC 1208).
[42] [1996] 1 HKLR 181.

decided that the Company's evidence contained many gaps and inconsistencies, and was therefore not sufficient to make out a *bona fide* dispute of substance in relation to the petitioned debt. The Court dismissed the Company's application.

Cross-Claims

4.014 If the company responds to the creditor's petition by asserting a cross-claim which is equal to or in excess of the creditor's claim, the court has an unfettered discretion over whether to grant the winding-up order or dismiss the petition.[43]

The cross-claim must be genuine and serious, and exceed the amount of the debt on which the winding-up petition is based.[44]

The court will consider:

(1) the connection between the debt and the cross-claim (if any);

(2) whether the cross-claim action is pending or merely contemplated;

(3) any delay in determining the cross-claim;

(4) the age of the debt and the cross-claim; and

(5) the nature and extent of any dispute in relation to the cross-claim.[45]

There is no need for the debtor to demonstrate an inability to litigate a cross-claim, but the delay in pursuing a cross-claim must not be such as to throw real doubt on the genuineness of the cross-claim.[46]

In exceptional circumstances, a winding-up order may be upheld despite the existence of a cross-claim. These may include allegations of serious misconduct and asset stripping[47] or other public policy reasons justifying a liquidation under court supervision.

Set-offs will be treated in the same way as cross-claims. If the set-off is of substance and exceeds the amount of the petitioned debt, the court can be expected to dismiss or stay the winding-up petition.[48]

Arbitration Agreement

4.015 If the debt is covered by an arbitration agreement between the petitioner and the company, the position is different. In *Re Southwest Pacific Bauxite (HK) Ltd*,[49] Harris J departed from the earlier Hong Kong authorities and adopted a pro-arbitration approach:

(1) if a company disputes the debt relied on by the petitioner;

(2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

[43] *Re Keen Lloyd Resources Ltd* [2004] 2 HKC 33.
[44] *Re Unibo Trading* (HCCW 733/2005, [2006] HKEC 240).
[45] *Re Finbo Engineering Co Ltd* [1998] 2 HKLRD 695.
[46] See Kwan J in *Re Landune International Ltd* [2005] 4 HKLRD 46.
[47] *Re Zhuang PP Holdings Ltd* (CACV 288/2005, [2006] HKEC 1066).
[48] *Re City Top Engineering Ltd* [2006] 2 HKLRD 562.
[49] [2018] 2 HKLRD 449.

(3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) and files an affirmation in accordance with r.32 of the Companies (Winding-Up) Rules (Cap.32H, Sub. Leg.) demonstrating this;

the petition should generally be dismissed.

In that case, Harris J dismissed the petition because the company disputed the debt and required the dispute to be resolved in accordance with the arbitration clause in the agreement that gave rise to the debt in question.

His Lordship considered there may be exceptional cases in which it will be appropriate to stay the petition instead of dismissing it, for example:

(1) if a creditor can demonstrate a *prima facie* case for a winding-up and a risk of misappropriation of assets or some other matter, which would normally justify the court appointing provisional liquidators pending determination of the arbitration; and

(2) circumstances which justify early presentation of a petition in order to engage the referral back provisions in s.184(2) of the CWUO, because of substantiated concerns that there had been fraudulent preferences or to engage the avoidance provisions in s.182.

Question of Striking Out the Winding-Up Petition

4.016 In *Re Hyundai Engineering & Construction Co Ltd (No 2)*,[50] Kwan J held that the question as to whether or not a company had a genuine and *bona fide* dispute goes to show the petitioner's *locus standi* to present a petition.

If a *bona fide* dispute is established, then the winding-up petition ought to be struck out. The Companies Court should not embark on a trial to determine the validity of the debt:

> The [winding-up] petition is therefore dismissed or "taken off the file" unless there are unusual circumstances about the case or the issues involved can be disposed of very simply. (*Re ICS Computer Distribution Ltd* [1996] 1 HKLR 181, 182J).

Reasons for this include: (1) first, it is undesirable that a company should have a petition hanging over its head while involved in complex litigation; and (2) second, a petition may put great pressure on the company concerned, and could force it to end the proceedings in an unjust settlement.

If no such dispute can be shown by the company (the onus of proof being on the company), the petition will subsist and the company can then plead a lack of insolvency.

Adjourning the Petition

4.017 In appropriate cases, the Court can adjourn the petition to allow the parties to resort to ordinary litigation to resolve any dispute as to the debt. This would be a rare

[50] [2002] 2 HKLRD 354.

circumstance as it is generally unsatisfactory to have a winding-up petition remain live against the company given the very significant consequences following the presentation of the petition (see, eg ss.182 and 183 of the Winding-Up Ordinance) although this may be a viable option if the petition has not yet been advertised.

Resolving the Dispute within the Winding-Up Proceedings

4.018 In certain situations, instead of dismissing the petition, the Companies Court will exercise its judicial discretion to deal with the dispute in the winding-up proceedings. The Court might be willing to exercise this discretion in cases when the dispute is straightforward; if the question of whether a dispute is substantial cannot be determined without, at the same time, determining the dispute itself;[51] if other questions arising in the winding-up proceedings which, by their determination, have the consequential effect of determining the dispute as to the debt or if the result of dismissing the petition would deprive the petitioning creditor of a remedy.[52] Having said this, the Companies Court has adopted an increasingly robust approach in recent years and has been prepared to entertain reasonably complex cases which is, once it is submitted, a welcome merger of the various roles of the Court of First Instance. This sentiment remains subject to the proviso that the winding-up jurisdiction should not be invoked lightly but reserved for genuine applications for the winding-up of a company, albeit the determination of the dispute as to the underlying debt requires a more in-depth judicial review.

A perhaps extreme example of the Court determining the merits of opposition raised as to the validity of a debt is provided by a bankruptcy case which is, it is suggested, analogous to winding-up proceedings in respect to determination of a dispute as to the petitioning debt. In *Re Wong Kong Ming, ex p Hong Kong and Shanghai Banking Corp Ltd*, Kwan J heard the cross-examination of four witnesses in a five-day trial in respect of a debtor's opposition to the grant of a bankruptcy order on grounds including the debt was genuinely disputed and there was a counterclaim of a greater amount than the petitioning debt.[53]

Form of the Demand

4.019 The 2016 Amendment Ordinance introduced a prescribed form of statutory demand for the purpose of invoking the deemed insolvency provisions provided by s.178(1)(a)(i) of the CWUO.

The requirements of the prescribed form of statutory demand are set out in r.3B and 3C of the CWUR.

Every statutory demand issued must be in the form of Form 1A of the CWUR and it must:[54]

(1) state the amount of the debt, and the consideration for the debt, or if there is no such consideration, the way in which the debt arises;

[51] In *Re Legend International Resorts Ltd (No 2)* [2006] 3 HKLRD 270, the question was whether the petitioner had *locus standi* to bring the petition as it was argued the petitioner was not a creditor of the company. It was held that it was a matter of discretion for the court as to how far the question of a disputed debt should be investigated and that the court make a summarily determination of the issue.

[52] *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572 (CA).

[53] (HCB 3869/1999, [2001] HKEC 940).

[54] CWUR r.3B(1)(2).

Main Object of the Company Has Failed

4.021 Where the main object or substratum for which the company has been incorporated has failed the Court might exercise its jurisdiction to wind-up the company.[65] A company will only be wound up on a just and equitable ground if it can be shown that the actual substratum of the company has gone.[66] This is an exceptionally rare ground relied upon and it might be expected to become more so given recent changes to the law effectively doing away with objects clauses for companies.

Company Formed to Carry Out Fraud or Illegal Business

4.022 As a natural reflection of the equitable nature of this ground of winding-up, companies formed to carry out unlawful activities are amenable to being wound-up. Given that a petitioner must have some connection with the Company through ownership/control or a relationship founded on debt, the pool of parties wishing to bring to the attention of the Court such a recalcitrant company is perhaps in practice limited to those government and regulatory authorities who are entitled to present a petition.[67]

Quasi Partnerships

4.023 If a company has been incorporated on the basis of a relationship between the parties of mutual trust, understanding and confidence, a complete breakdown of that relationship can found the basis for winding-up on the just and equitable ground.

Any discussion on the development of this jurisdiction starts with the House of Lords' seminal decision in *Ebrahimi v Westbourne Galleries*,[68] where Lord Wilberforce, while specifically preserving the generality of the circumstances in which the Court can exercise its discretion under the just and equitable ground, set out what he described as typical elements which one might find with a company susceptible to a winding-up on this basis. These typical elements were expressed to include:

> … (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has converted into a limited company; (ii) an agreement, or understanding that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.[69]

It is this latter element that perhaps applies to the greatest degree in Hong Kong particularly given the wide-spread occurrence of family-owned groups of companies,

[65] *Re German Date Coffee Co* (1882) 20 Ch D 169, where Jessel MR said: "the shareholders have a right to say … 'we did not enter into a partnership on these terms' … it was not a general partnership to make a substitute for coffee from dates, but to work a particular patent, as this particular patent does not exist, and cannot now exist, they are entitled to say that the company ought to be wound up".

[66] *Re Kitson & Co Ltd* [1946] 1 All ER 435, the principal function for which the company was incorporated had been achieved but it nevertheless continued to have a viable business within the terms of its objects and consequently, its substratum was not gone.

[67] See, eg, ss.179(1)(d), 179(1)(e) and 179(2) of the CWUO.

[68] [1973] AC 360.

[69] *Ebrahimi v Westbourne Galleries* [1973] AC 360, 379.

where family disharmony leads to steps being taken to bar certain family members from playing a part in the management of the company and there are insufficient measures available within the companies constitutional documents or agreements between shareholders to allow a straightforward sale and move on. In *Re Mak Shing Yue Tong Commemorative Association Ltd*,[70] a company which operated as a Tong was wound-up as there had been a total loss of trust and confidence following restrictions being placed on membership.

The Court will not refuse to make a winding-up order on the just and equitable ground simply because some other remedy is available to the petitioner unless the Court is satisfied that the petitioner is acting unreasonably in not pursuing that other remedy.[71] A petitioner, therefore, need not pursue remedies under s.168A of the predecessor CO as now ss.724–725 of the CO[72] will provide adequate remedies to redress that which founds the complaint. The Court will not, however, wind-up a company on the just and equitable ground if the petitioning shareholder has not availed himself of all internal methods to seek a remedy, for example, by resorting to share buy-out provisions in the Articles of Association or shareholders' agreement/joint venture agreements. Of course, the availability of other remedies may well impact on the Court's exercise of its discretion in considering whether or not to wind-up the company up on the just and equitable ground; more so if the company is solvent.[73] It may not be unreasonable for a petitioning shareholder to seek redress under ss.724–725 of the CO if the internal mechanism available to him is itself unreasonable.[74]

Management deadlock in quasi-partnership companies is a common example of the breakdown in mutual trust and confidence; as is the exclusion of a party from management when that party has a legitimate expectation to participate meaningfully in management.[75]

As an equitable jurisdiction, the petitioner must come to the Court with "clean hands"[76] which marks a distinction between the remedy offered a disgruntled shareholder by the just and equitable winding-up ground and other remedies he may wish to pursue by way of a petition under ss.724–725 of the CO, where there is no overriding requirement that a petitioner comes to Court with clean hands.[77] With that said, in *Yeung Bun v Brio Technology International Ltd*, Le Pichon J (as she then was) found that the need for "clean hands" was not an absolute and overriding requirement but only applied in circumstances where the petitioner's misconduct was causative of the breakdown in the relationship underlying the quasi-partnership.[78]

Within the Court's jurisdiction to wind-up a company if it is just and equitable to do so is the jurisdiction to wind-up a company in order to facilitate investigations

[70] [2005] 4 HKLRD 328.

[71] CWUO s.180(1A).

[72] The Court has not yet considered the equivalent sections of the CO, and for present purposes, the existing authorities decided under s.168A of the predecessor CO remain relevant.

[73] *Re Swee Kheng Properties Ltd* (HCCW 468/1994, [1995] HKEC 1061).

[74] *Re A Co (No 00330 of 1991) ex p Holden* [1991] BCLC 597, where it was considered not unreasonable for a shareholder to pursue the UK equivalent of s.168A for a Court ordered valuation of his shares even though the company's articles provided a valuation mechanism because the internal mechanism itself was unreasonable.

[75] See, eg, *Re Quality International Ltd* [1964] HKLR 669; see also *Re Cirtex Co Ltd* [1987] 3 HKC 21.

[76] See *Re Cirtex Co Ltd* [1987] 3 HKC 21; see also *Re Shiu Fook Co Ltd* [1989] 2 HKC 342; *Re Trocadero Ltd* [1988] 2 HKLR 443.

[77] *Re London School of Electronics Ltd* (1986) Ch 211.

[78] [2000] 2 HKLRD 218.

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 happening of some future event or at some future date".[20] Whether or not a person is a contingent creditor depends on the circumstances applicable at the time the petition is heard.[21] 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 contingent debt.[22]

A "prospective creditor" is one whose debt will become due in the future as a matter of certainty.[23] An example of a prospective creditor is provided in *Bicoastal Corp v Shinwa Co Ltd*,[24] 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 normally ought to be a preliminary hearing to establish that these two criteria have been met (although in practice parties often neglect to raise this point).[25] 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*:[26]

> 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.

[20] *Re Williams Hockley Ltd* [1962] 1 WLR 555, 558 (Pennycuick J), cited in *Re Universal Dockyard Ltd* [2004] 1 HKLRD 935, [25].
[21] *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.
[22] *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.
[23] *Re SBA Properties Ltd* [1967] 1 WLR 799.
[24] [1994] 1 HKLR 65 (CA).
[25] *Stonegate Securities Ltd v Gregory* [1980] 1 Ch 576, 579.
[26] [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). However, the secured creditor may be restrained from exercising any power of sale under the security pending the hearing of the petition.[27]

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.[28] Foreign petitioners will usually be required to give security for costs.[29]

In *Re Hin-Pro International Logistics Ltd*,[30] 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 Strategic Holdings Ltd*[31] 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.[32]

[27] 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).
[28] *Re Masonic and General Life Assurance Co* (1885) 32 Ch D 373; see also *Re Honeycool Refrigeration & Engineering Co Ltd* [2009] 1 HKLRD 447.
[29] 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).
[30] [2016] 5 HKLRD 282.
[31] [1997] 2 BCLC 429.
[32] *Re Hin-Pro International Logistics Ltd* [2016] 5 HKLRD 282, [14].

III. POSITION OF CREDITORS AFTER A WINDING-UP ORDER HAS BEEN MADE OR A RESOLUTION TO WIND UP HAS BEEN PASSED

First Creditors' Meetings

7.008 In a compulsory winding-up, after the making of a winding-up order, the provisional liquidator[33] must summon separate meetings of creditors and contributories (shareholders) for the purpose of determining whether an application should be made to court to appoint a liquidator.[34] As regards the first creditors' meeting, the question arises as to which creditors are eligible to attend and vote.

After the provisional liquidator has given due notice of the first meeting,[35] a creditor must lodge with the liquidator a proof of debt within the time stipulated in the notice, unless the creditor is not required to prove by any direction given under the CWUR. The requirement does not apply to any voluntary liquidation meeting.[36] The provisional liquidator should also send a summary of the statement of the company's affairs to any creditor mentioned in the statement.[37] It is then up to the chairman of the meeting to admit or reject the proof for the purpose of voting. The test which the chairman should apply is whether, on balance, the claim against the company is established and if so, in what amount.[38] In such assessment, the benefit of doubt should be resolved in favour of the creditors submitting the proof. Rule 128 of the CWUR provides that if the chairman is in doubt as to whether a proof should be admitted, he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained. In other words, if it is plain or obvious that a claim is good, the chairman must admit it. If it is plain or obvious that it is bad, he must reject it. If there is a question of doubt, he shall admit it but mark it as objected to.[39]

There is a right of appeal.[40] On appeal, the Court is not deciding whether the liquidator made a reasonable decision but is carrying out an independent assessment of whether or not the proof should be admitted or rejected on the basis of the evidence before the Court; however, the test adopted by the Court is the same. The task of both a liquidator and the Court at this stage does not involve determining whether or not the debt claimed is payable, but whether on a macroscopic assessment it seems probable that the debt is payable and accordingly the proof should be admitted for voting purposes. The assessment should be undertaken in a practical way mindful of the fact that at the early stages of a liquidation when the assessment for voting purposes is most likely to arise, it will normally be undesirable that excessive, and thus expensive, time is spent on scrutinising a proof.[41] Where it is found that the liquidator had wrongfully refused to allow a creditor to vote for his full entitlement either because the chairman had rejected the proof or because he had admitted it in part, the Court would usually order a new meeting on the basis of the principle of creditor democracy, with a direction as to whether the appellant creditor's claim should be admitted at a certain value.[42]

Creditors cannot vote in respect of any unliquidated or contingent debt,[43] nor any debt the value of which is not ascertained, nor any debt secured by a bill of exchange or promissory note, unless he is willing to treat the liability of every person who is liable on the note or bill prior to the company, as security, and to estimate the value of such security for the purpose of voting (but not dividend), and to deduct such amount from his proof. A debt is regarded as liquidated if it is capable of actual calculation.[44] This includes a pre-ascertained contractual liability where the amount due is to be ascertained in accordance with a contractual formula and the sum reached by the formula does not have to be indisputable.[45]

A secured creditor must only vote in respect of the unsecured portion of his debt, and to this extent, he must place a value on the security in his proof or statement of debt; if a creditor votes in respect of the whole of his debt, he shall be deemed to have surrendered his security unless the Court, on application, is satisfied that the omission to value the security has arisen from inadvertence.[46] A liquidator may, within 28 days after a proof or statement has been so used in a meeting, require the creditor to give up the security at the estimated value plus 20 percent. Where a creditor has valued his security, he may, at any time before being required to give it up, correct the valuation by a new proof and deduct it from his debt, but in such circumstances, the additional 20 percent premium is not payable.[47]

Other Provisions as to Creditors' Meetings: General

7.009 The CWUR also set out the general requirements as to meetings for creditors and contributories during the ongoing winding-up process. In any winding-up, the liquidator may from time to time, subject to the provisions of the CWUO, and under control of the Court, call and conduct a meeting of the creditors or contributories.[48] The liquidator must give not less than seven days' notice of the time and place in the gazette and in one

[33] In practice, the Official Receiver, in accordance with CWUO s.194(1)(a) unless another person has been appointed provisional liquidator by CWUO s.193.

[34] CWUO s.194(1)(b). There is an exception for summary cases under CWUO s.227F.

[35] CWUR r.109; CWUR, Form 18.

[36] *Ibid.*, r.124(2).

[37] *Ibid.*, r.111; pursuant to CWUR r.2, the statement of the company's affairs is the statement of the company's assets and liabilities and the affidavit verifying the statement which the directors and secretary are required to prepare pursuant to CWUO s.190.

[38] *Re Days International Ltd* [2014] 1 HKLRD 20; see also *Re STX Pan Ocean (Hong Kong) Co Ltd* [2014] 5 HKLRD 581, 592.

[39] *Emery v UCB Corporate Services Ltd* [1999] BPIR 480, citing *Re A Debtor (No 222 of 1990)* [1992] BCLC 137; *GMI Technology Inc v East China Digital Technology Ltd* (HCMP 2036/2016, [2017] HKEC 1713), [11].

[40] CWUR r.128.

[41] *Re Days International Ltd* [2014] 1 HKLRD 20, [10]; *Re Grande Holdings Ltd* (HCCW 177/2011, 5 November 2014), [6]–[7]; *Re Grande Holdings Ltd (No 3)* [2015] 1 HKLRD 765, 768–770. See also *Adlon Ltd v Eileen Sale (as Liquidator of Kingstons Investment Ltd) & Derek Taylor* [2015] EWHC 1619 (Ch), [154], [157]–[163]; *GMI Technology Inc v East China Digital Technology Ltd* (HCMP 2036/2016, [2017] HKEC 1713), [12].

[42] *Re Power Builders (Surrey) Ltd* [2010] BCC 11, 19C–19F; *HM Revenue & Customs v Maxwell* [2012] BCC 30, [57]–[59]; *GMI Technology Inc v East China Digital Technology Ltd* (HCMP 2036/2016, [2017] HKEC 1713), [14].

[43] CWUR r.125.

[44] *Bright Islands Corp v Joachim Chao* [2002] 2 HKLRD 97; see also *Re Pan Sino International Holding Ltd* (HCCW 144/2009, 27 May 2010); *Re Grande Holdings Ltd (No 1)* [2015] 1 HKLRD 743, 750–751; *Re Grande Holdings Ltd (No 2)* [2015] 1 HKLRD 755, 758–759.

[45] *Re Grande Holdings Ltd* [2016] 1 HKLRD 435, 452–457 [6.2]–[6.12]; see also *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449, [35].

[46] CWUR r.126.

[47] *Ibid.*, r.127.

[48] *Ibid.*, r.112.

or more local paper, and, not less than seven days before appointed with the meeting, a notice must be sent by post to every person appearing to be a creditor of the company.[49]

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.[50] 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.[51] The precise rules governing creditors voting by proxy are contained in rr.131–141 of the CWUR.

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 seven 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.[52] 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.[53]

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.[54] 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.[55]

Meetings under Section 287 of the CWUO

7.010 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

[49] CWUR r.114.
[50] *Ibid.*, r.119.
[51] *Ibid.*, r.123.
[52] CWUO ss.237A, 243.
[53] *Ibid.*, s.237B.
[54] *Ibid.*, s.247; this is subject to the exception under CWUO s.247(1A).
[55] *Ibid.*, s.248.

to it by sufficient evidence. To this end, the Court may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of creditors to be called, held and conducted in such manner as the Court directs.[56] For such meetings, regard must be had to the value of each creditor's debt.[57]

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.[58]

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.[59]

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.[60]

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*,[61] 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*,[62] 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 sufficient funds for it to repay the debtor company. Mayo J held that each case must be decided on its own facts.

[56] CWUO s.287(1).
[57] *Ibid.*, s.287(2).
[58] See *Re Grande Holdings Ltd* [2015] 1 HKLRD 755.
[59] See *Re Chyau Fwu Investment Ltd* [1986] HKLR 374; see also *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633.
[60] See *Re APP (Hong Kong) Ltd* [2005] 1 HKLRD 272.
[61] (1882) 21 Ch D 397.
[62] [1986] HKLR 374.

it would be wrong to compare the position of the unsecured creditors with or without a validation order:

> In my judgment, this suggested approach is misconceived. In *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 is authority for the proposition that if, or at least to the extent that, the unauthorised disposition has reduced the assets available to the unsecured creditors in the liquidation, it ought not to be validated. The case is not authority for the proposition that if the assets available in the winding-up would be greater if an *ex post facto* validation order were not made than if one were made then the validation order should not be made. If that had been thought by the court to be a correct proposition, then not only would the bank have had to repay to the liquidator the amount of the loss made by the company in carrying on business between presentation of petition and winding-up order, but it would also have had to repay the full amount of all payments out of the company's bank accounts. Those payments were certainly dispositions. Except to the extent of the business loss, the payments had not reduced the assets available in the winding-up. If the full amount had been repaid, leaving the bank as an unsecured creditor for the sum repaid, the dividend recoverable by the other unsecured creditors would certainly have been increased.

Also, in so doing, the transferee and the bank would be put in a manifestly inequitable position:

> The discretion vested in the court under section 227 to validate dispositions that would otherwise, by reason of the section, be void, is not fettered by any statutory criteria. The discretion should not be exercised so as to permit an unauthorized disposition to reduce the assets available for unsecured creditors. But, subject thereto, it should in my judgment, be exercised so as to enable equity to be done as between the unsecured creditors, on the one hand, and the claimants under the unauthorised disposition, on the other hand.

In *Re Sugar Properties (Derisley Wood) Ltd*,[257] a winding-up petition was presented against a company. The shares of the company in two racehorses had been charged in favour of another company. There was some doubt as to the validity of this charge. The company sought an order that the disposition of the shares not to be avoided in the event of a winding-up order being made. But for the concern about the validity of the charge, Mervyn Davies J quite readily accepted that the sale was in the benefit of those interested in the value of the assets of the company:

> Those interested are the creditors of the company, that is to say not only ACE but also the other creditors, whether secured or unsecured, and the contributories. Those interested are more likely to be benefited if the company now receives an immediate certain cash sum that can, I think, be accepted as a fair price, than by holding on to the shares with all their features of uncertainty in so many respects.

[257] [1988] BCLC 146.

In *Re Leric International Ltd*,[258] a validation was granted regarding the sale of property, as the proceeds were to be paid to secure creditors and so the interests of unsecured creditors had not been prejudiced, and if the application for validation had been prior to the sale it would have been granted.

To Enable a Company to Defend Itself Against a Winding-Up Order

9.063 In *Re Surplus Trader Ltd*,[259] the question before Barma J was in what circumstances should the court grant a validation order which has the effect of enabling a company to use its assets to defend itself against a winding-up petition. The position of an insolvent company is different from that of a solvent company carrying on business.

In the case of an insolvent company, in general it would not be possible to form anything other than a very provisional view as to the merits of the petition or the opposition to it. In the exceptional cases where it can be shown either that the company has a very strong prospect of resisting the petition or that a winding-up order is virtually certain to be made, this is a matter which can be taken into account. Thus the court has to ask itself whether the making of the validation order is likely to be in the interests of the companies' creditors as a whole. For instance, there might be cases where the amount of the assets available for expenditure are so large and the impact of a validation order so small so far as the creditors are concerned that it would be appropriate to grant the validation order.[260] See *Re AIM Investments (Holdings) Ltd*,[261] where the court granted a variation of a *Mareva* injunction to enable a company to fund its defence of the *Mareva* injunction and associated winding-up proceedings and granted a validation order in respect of such payments.

Pre-Petition Debts

9.064 Payment of a pre-petition debt is the sort of disposition which s.182 of the CWUO or its equivalent provision seeks to avoid as it *prima facie* reduces the assets available for distribution to the creditors of a company, and it inevitably confers an advantage on one creditor over the other. In the absence of some special circumstances making such a course desirable in the interest of the creditors generally, the court shall grant no validation order.[262] This can be seen from the decision of Harman J in *Re Western Welsh International System Buildings Ltd*:[263]

> Mr Wilkie presses me that I have an unfettered discretion under section 227 – so, according to the terms of the section, I have. Nonetheless, the exercise of that discretion in this court is conducted upon well-known and, I hope, well-settled principles. They are: firstly, that it is the prime duty to ensure, so far as possible, that all creditors of a company are paid *pari passu*. Secondly, a company is only allowed to make dispositions post-presentation, if, upon the evidence, either the

[258] [2009] 2 HKLRD 238.
[259] [2005] 4 HKLRD 436.
[260] See *Re AIM Investments (Holdings) Ltd* [2004] 2 HKLRD 201, where the court granted a variation of a *Mareva* injunction to enable a company to fund its defence of the *Mareva* injunction and associated winding-up proceedings and granted a validation order in respect of such payments.
[261] (HCCW 64/2004, 2 February 2004).
[262] *Denney v John Hudson & Co Ltd* [1992] BCLC 901 (CA).
[263] (1985) 1 BCC 99, 296.

Good Faith

9.065 Good faith, even if being established, may not by itself enough to justify the court to grant a validation order.[270] In *Re J Leslie Engineers Co Ltd*,[271] Oliver J was fully aware of the fact that there was absence of actual knowledge on the part of the recipient:

> In the circumstances, I do not see my way to exercising my discretion to sanction what was clearly a preferential payment made with the company's money – a payment furthermore which, so far as the available evidence goes, seems clearly to have been intended by Mr Hadrys to be preferential. It seems to me that to allow payments made in these circumstances to stand simply because the creditor preferred does not know that he is being preferred, would be to defeat the whole purpose of the section.

Likewise, in *Denney v John Hudson & Co Ltd*,[272] in determining the question whether a validation order should be granted, Fox LJ, even though he was satisfied that there was no knowledge on the part of the recipient and that there was nothing to suggest that the company or its directors were consciously acting in bad faith towards the other unsecured creditors, he nevertheless found it necessary to consider other questions like first, whether the parties were acting in the ordinary course of business; and second, whether the relevant transactions were likely to be for the benefit of the creditors generally.

In *Re Luen Cheong Tai Construction Co Ltd*,[273] A Cheung J (as he then was) held that it is not the law that knowledge of the presentation of a winding-up petition in a retrospective validation situation is by and of itself fatal to the validation application, although the absence of knowledge of the petition at the material time is a relevant and indeed a "very powerful factor" to be considered in relation to the exercise of the court's discretion under s.182 of the CWUO. *A fortiori*, a mere suspicion of knowledge on the part of the applicant of the presentation of the petition was not by and of itself fatal to the validation application.

Related Doctrines

Practitioners should also note the anti-deprivation principle or *pari passu* principle, which can also affect the validity of post-liquidation transfer.

> where the anti-deprivation rule has applied, it has been an almost invariably expressed element that the party seeking to take advantage of the deprivation was intending to evade the bankruptcy rules; but that where it has not been applied, the good faith or the commercial sense of the transaction has been a substantial factor. By contrast, in the leading *pari passu* principle case, *British Eagle* [1975] 1 WLR 758, it was held by the majority that it did not matter that the clearing transaction was a sensible commercial arrangement not intended to circumvent the *pari passu* principle.

[270] *Ibid.*, 901, 905 (CA).
[271] [1976] 1 WLR 292.
[272] [1992] BCLC 901, 905–906.
[273] [2004] 1 HKLRD 735, [8].

See the Court of Appeal decision in *Re Hsin Chong Construction Co Ltd*,[274] which upheld the first instance decision in *Re Hsin Chong Construction Co Ltd*.[275]

Voidable Disposition Under s.60 of the Conveyancing and Property Ordinance (Cap.219)

Section 60 of the Conveyancing and Property Ordinance (Cap.219) provides: 9.066

(1) Subject to sub-ss.(2) and (3), every disposition of property made, whether before or after the commencement of this section, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors.

In *Tradepower (Holdings) Ltd v Tradepower (HK) Ltd*,[276] Ribeiro PJ considered the operation of s.60 of Cap.219 and comprehensively reviewed the Rule in *Freeman v Pope* (the Rule). The intent to defraud creditors required by s.60 of Cap.219 is a matter of fact to be inferred from the evidence as a whole. Such an inference can be justified, *inter alia*, by cases falling within the Rule. Under the Rule, if it is objectively shown that a disposition of property unsupported by consideration is made by a disponor when or so as to become insolvent, resulting in current or future creditors being clearly subjected at least to a significant risk of being unable to recover their debts in full, there would, subject to wholly exceptional circumstances not presently anticipated by the courts, inevitably be grounds to infer an intent to defraud creditors. Where the Rule did not operate, whether due to the presence of valuable consideration or the absence of insolvency or relevant detriment to creditors, these being facts for objective determination, an actual intent to defraud creditors had to be shown as an inference properly to be drawn on the available evidence.[277]

The threshold for the applicant to satisfy is a high one.[278]

For a recent application of this s.60 in the bankruptcy context, see *Osman Mohammed Arab v Lam Ying Lung Alan*.[279]

As to limitation period, in *Hill v Spread Trustee Co Ltd*,[280] the court held that a claim under s.423 of the Insolvency Act 1986 by a trustee in bankruptcy for the

[274] [2020] 1 HKLRD 316.
[275] [2019] 3 HKLRD 367.
[276] (2009) 12 HKCFAR 417; see also *New China Hong Kong Group Ltd v Ng Kwai Kai* [2011] 5 HKLRD 216.
[277] *Osman Mohammed Arab v Ng Shui Ching Irene* (HCA 311/2014, 5 December 2017).
[278] *Wong Ka Sek v Kwok Sin Man Kat* [2020] HKCFI 1502 (Deputy Judge Maurellet SC).
[279] (HCA 653/2011, 29 July 2016).
[280] [2007] 1 WLR 2404.

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

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

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

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

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

> There may be cases in which it is not clear from the terms of settlement whether it can fairly be said that the petitioner has been substantially successful. In such cases the court will have to determine whether it is probable that the petitioner would have been substantially successful. This may require a consideration of the merits of the case, but this process should be as economical as is consistent with the court's duty to decide the issue fairly."

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

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

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

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

clear grounds for winding-up. The deterrence of this "high-risk strategy" has manifested itself in what appears to be an increasing trend of courts ordering costs on an indemnity basis where parties have unreasonably brought or opposed winding-up petitions.

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

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

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

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

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

In other words, indemnity costs may be justified where a party has unnecessarily presented or opposed a winding-up petition in circumstances where there was no clear basis for doing so. This is particularly true given that the issuance of a winding-up petition is

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

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

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

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

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

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

Conversely, in *Re Three Wise Monkeys Ltd*,[84] Harris J had no qualms about ordering indemnity costs on the basis of clear evidence that the underlying work which founded the claim for payment by the petitioner (and hence the winding-up petition) took place not in Hong Kong but in the United Kingdom, thereby nullifying any basis for issuing the winding-up petition in Hong Kong in the first place. For other recent cases where an unsuccessful petitioner was visited with a costs order on an indemnity basis, see *Re Rightop Investment Ltd*,[85] *Re Duncan Interior Ltd*[86] and *Re SNE Engineering Co Ltd*.[87]

[76] *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71, [8]; *Re Three Wise Monkeys Ltd* (HCCW 323/2011, 28 November 2011), [5].
[77] *Mann v Goldstein* [1968] 1 WLR 1091.
[78] [1992] BCLC 869.
[79] [2002] 2 HKLRD 71.
[80] *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71, [8].
[81] *Ibid.*, [11].
[82] *Ibid.*, [7].
[83] (HCCW 279/2010, 1 September 2011).
[84] (HCCW 323/2011, 28 November 2011).
[85] [2003] 2 HKLRD 13.
[86] (HCCW 10/2009, 20 April 2009).
[87] (HCCW 308/2012, 6 August 2013).

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

The Company

Where a Winding-Up Order is Made

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

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

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

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

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

In *Re Aurum Marketing Ltd (in liquidation)*,[94] the Court of Appeal held that the sole director and shareholder of the company ought to personally bear the costs of the petitioner and the company on the basis that he had operated a swindle through the company and had been resisting the winding-up order not in the interests of the creditors or the company but his own.[95] See also the case of *Abdul Aziz Essa v Capital Globe Ltd*,[96] which is further considered below.

[88] *Re Humber Ironworks Co* (1866) LR 2 Eq 15; *Re Bostels Ltd* [1968] 1 Ch 346, 350.
[89] [1962] NZLR 353.
[90] *Re a Company (No 004055 of 1991)* [1991] 1 WLR 1003.
[91] HCO s.52A(2); see also paras.10.018–10.019 below.
[92] RHC, O.62 r.6A(1).
[93] [1997] 1 WLR 1613, 1619 (Millett LJ).
[94] [2000] 2 BCLC 645.
[95] *Re Aurum Marketing Ltd (in liquidation)* [2000] 2 BCLC 645, 652h–653d (Mummery LJ).
[96] [2012] 6 HKC 472.

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

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

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

If the company intends to defend a winding-up petition, it may be appropriate for an application to be made to the court pursuant to s.182 of the CWUO in the period between the presentation of the petition and the hearing for specific approval of expenditure by the company in relation to the winding-up. It must, however, be noted that this would appear to fall foul of the general rule that it is in principle improper for the company's money to be expended on disputes between shareholders; see *Re CG & L Investment Ltd*;[102] see also *Re Crossmore Engineering Ltd*;[103] *Re Core Pacific-Yamaichi International (HK) Ltd*.[104]

In *Re Wyatt Estates Ltd*,[105] petitions were brought to wind-up two companies on just and equitable grounds on the basis of a shareholders' dispute. The companies applied

[97] *Re Bathampton Properties Ltd* [1976] 1 WLR 168; *Re Travel Products Europe Ltd* (HCCW 301/2010, 20 September 2011), [5].
[98] *Secretary of State for Trade and Industry v Liquid Acquisitions Ltd* [2003] 1 BCLC 375.
[99] [1976] 1 WLR 168.
[100] *Re Bathampton Properties Ltd* [1976] 1 WLR 168, 175F (Brightman J).
[101] (HCCW 422/2010, 8 July 2011).
[102] [1992] 2 HKLR 23.
[103] [1989] BCLC 137, 138 (Hoffmann J).
[104] (HCCW 804/2003, 17 October 2003), [47] (Barma J).
[105] [1993] 1 HKLR 107 (CA); [1992] 1 HKC 78 (CA).

As to the question of costs, Sir RT Kindersley VC, affirming the decision of *Re Humber Ironworks Co*,[120] stated the proper approach in the following terms:

> "Where a petition is presented, and shareholders and creditors appear to support the petition, and an order for winding-up is made thereon, then the shareholders who support the petition ought not to have separate sets of costs, but all are to have one set of costs only among them, and likewise all the creditors who appear to support the petition are to have but one set of costs among them. That is what I understand to be the rule of the Master of the Rolls [in *Re Humber Ironworks*], and, if so, I concur in it to that extent, where the petition succeeds. But where the petition is dismissed with costs, I confess it appears to me right, upon the same principle, that the shareholders and creditors who have appeared to oppose the petition should respectively have one set of costs among them, that is, one set of costs to the shareholders, and one set to the creditors."

The above approach has subsequently been followed in, for instance, in the cases of *Re Peckham Tramways Co*[121] and *Re Bostels Ltd.*[122] The limit of one set of costs for the entire group of supporting creditors and supporting contributories respectively is adopted to discourage appearances merely for the sake of making costs, and also, when the petition succeeds, to protect the assets of the company in as much as the costs that come out of those assets.[123]

In order to ensure that allowance is made for the costs of a supporting creditor who attends the hearing, the supporting creditor's solicitors should ask the court for costs and ensure that the petitioner's solicitors, when drafting the order, take that into account. In such a case, the order will reflect the fact that the solicitors for the supporting creditor appeared at the hearing of the winding-up petition, and the end of the order will state:

> "And it is ordered that the Petitioner's costs and the costs of supporting creditors named in the Schedule hereto of the said Petition be taxed and paid out of the assets of the said company".

Otherwise, the supporting creditor will not be entitled to any costs and will have to go to some trouble to amend the order. As stated above, no party is entitled to recover costs except under an order of the court.[124]

Secured creditors are as entitled to costs as unsecured creditors: a secured creditor does not have to elect between resting on the security and part in the liquidation until after the winding-up order is made.[125]

[120] (1866) LR 2 Eq 15.
[121] (1888) 57 LJ Ch 462, 463 (Chitty J).
[122] [1968] Ch 346.
[123] *Re Peckham, etc, Tramways Co* (1888) 57 LJ Ch 462, 463 (Chitty J).
[124] See RHC, O.62 r.3(1).
[125] *Re Carmarthenshire Anthracite Coal and Iron Co* (1875) 45 LJ Ch 200.

Supporters who instruct the same solicitors as the petitioner or the company are not allowed separate costs, and solicitors instructed in such circumstances should not instruct counsel to represent the supporters in addition to counsel instructed to represent the petitioner.[126]

Where the Winding-Up Petition is Dismissed

Supporters of an unsuccessful petition are not entitled to costs.[127] If leave is granted at the hearing of a petition for the petition to be withdrawn, then no order will be made for the costs of those appearing to support the petition. In *Re Jablochkoff Electric Light and Power Co Ltd*,[128] a shareholder sought to wind-up a company but before the matter came on for hearing, an arrangement was reached between the petitioner and the company and the petition was withdrawn. Crucially, the supporting shareholders also consented to the withdrawal of the petition. The court held that there was no authority to give costs to the shareholders who appeared to support the petition. **10.012**

It is wise therefore for those supporting a winding-up petition (whether they are contributories or creditors) to make it clear that they will only give their consent to the withdrawal of the petition on condition that their costs are paid. In *Re Nacupai Gold Mining Co*,[129] a petition to wind-up the company was presented by a creditor, but prior to the hearing the petition and company agreed to the dismissal of the petition. In contrast to those shareholders in *Re Jablochkoff*, the shareholders here objected to the dismissal or withdrawal of the petition save on terms that their costs be paid. Chitty J granted costs to the supporting shareholders, holding that it would be most unfair to shareholders if they came to court in response to the advertisement of a petition in order to support the petition and then to turn around and deny them their costs. In particular, his Lordship distinguished *Re Jablochkoff* because that was a case where shareholders had intended to support the petition but then consented to its withdrawal or dismissal, whereas in this case, the shareholders had not consented except on terms that their costs be paid.

The case of *Re Criterion Gold Mining Co*[130] reaffirmed the position that there is no general rule that when a petition for the winding-up of a company is withdrawn by a petitioner, shareholders and creditors appearing (whether supporting or opposing) are entitled to a separate set of costs, and that the court in the exercise of its discretion will have regard to the circumstances of each particular case. Here the winding-up petition was withdrawn after an arrangement had been reached between the petitioners and the company, and it was ordered that shareholders appearing to oppose the petition would be allowed only one set of costs.

Kay J emphasised that the matter of costs is always to be exercised in the court's discretion in each individual case. The court concluded that because the petition was dismissed, there were obviously grounds for giving costs but the most the court could do is to give one set of costs between the two.[131]

[126] *Re Military and General Tailoring Co Ltd* (1877) 47 LJ Ch 141; see also *Re Brighton Marine Palace and Pier Co Ltd* (1897) 13 TLR 202.
[127] *Re Humber Ironworks Co* (1866) LR 2 Eq 15.
[128] (1833) 49 LT 566.
[129] (1885) 28 LR Ch D 65.
[130] [1889] LR 41 Ch D 146, 149.
[131] See also *Re Bathampton Properties Ltd.*