HCCW 108/2015
[2018] HKCFI 555

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 108 OF 2015

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Chapter 32 of the Laws of Hong Kong

and

IN THE MATTER of China Solar Energy Holdings Limited (formerly named Rexcapital International Holdings Limited)

Before: Hon Harris J in Chambers
Date of Hearing: 18 August 2017
Date of Decision: 20 March 2018

D E C I S I O N

Introduction

1. The court may permit provisional liquidators to pursue a corporate restructuring, provided they are appointed on such

conventional grounds as the need to preserve the debtor's assets. Provisional liquidators ("**PLs**") were appointed to China Solar Energy Holdings Limited ("**Company**") on asset preservation grounds, and they were given restructuring powers. *Ex hypothesi* the PLs' current sole remaining function is to complete the Company's restructuring. Should the PLs be discharged?

2. This is the issue before the court, arising out of a summons issued by Ankang Ltd ("**Ankang**") on 10 February 2017 ("**Ankang's Summons**") for, *inter alia*, the winding-up of the Company and the discharge of the PLs.

Background to the Company's Provisional Liquidation

3. The Company is incorporated in Bermuda and listed on the Hong Kong Stock Exchange ("**HKSE**"), but trading in the Company's shares has been suspended since 13 August 2013. HKSE has placed the Company into various stages of the delisting procedure since January 2015. The Company is now in the final delisting stage.

4. The Company has been in financial distress at least since January 2015. On 26 March 2015, Crown Master International Trading Co Ltd ("**Crown Master**") presented a winding-up petition against the Company due to its inability to answer a statutory demand for payment of a sum in excess of HK$36 million, which represented the outstanding principal of certain convertible notes issued by the Company.

5. On 12 June 2015, Crown Master assigned its debt to Ankang, and on 18 January 2016 Ankang was substituted as the Petitioner in place of Crown Master.

6. Also on 12 June 2015, Ankang became the holder of approximately 14.6% of the Company's shares and replaced the Company's board of directors. Ankang's shareholding was increased to 16.9% in July by exercising rights under the convertible notes.

7. On 21 August 2015, on the Company's application, the Company was placed into provisional liquidation and the PLs were appointed. The Company's application for provisional liquidation was supported by Ankang.

8. The Company was placed into provisional liquidation on the basis that the PLs were needed to:

(a) safeguard the Company's assets (including the Company's listing status) which were in jeopardy, and

(b) investigate certain suspicious transactions entered into by the Company.

9. The Company's listing status was said to be in jeopardy because:

(a) the Company was in the process of being delisted;

(b) the Company had failed once to submit a resumption proposal;

(c) the Company would be delisted by July 2016 unless HKSE received satisfactory resumption proposals which addressed a number of issues, including:

(i) the Company's compliance with the listing requirement of having a sufficient level of operations or assets of sufficient value to warrant the continued listing of the Company's shares;

(ii) the Company's investigation into certain allegations and complaints received by HKSE about the Company's operations and directors, disclosure of the findings of such investigation, and any remedial steps;

(iii) the Company's publication of all outstanding financial results and addressing any audit qualifications;

(iv) the Company putting in place adequate financial reporting procedures and internal control systems to meet the requirements of the listing rules.

10. Pursuant to the terms of the order of appointment ("**Order**"), the PLs were granted a range of powers, including the following restructuring powers:

> *Para 4(11) of the Order*
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> "to consider and, if thought to be in the best interests of creditors of the Company, to enter into discussions and negotiations for and on behalf of the Company or the Subsidiaries, for purpose of, restructuring the Company and the Subsidiaries' business and operations, restructuring or rescheduling the Company's indebtedness, or for sale of the Assets, including, as deemed appropriate, to draft, with a view to implementing, a scheme of arrangement to be entered into between the Company and its creditors, and to call meeting of shareholders and/or creditors and to do all things necessary to facilitate such actions including a review (and/or take into their custody or under their control where deemed necessary) of all

> the books, records, property and things inaction [*sic*] to which the Company is or appears to be entitled wherever situate provided that any such proposed restructuring, rescheduling or sale shall not be binding on the Company until approved by the Court."

The Company's Restructuring Exercise

11. From the outset, the PLs intended to procure a restructuring with a view to the Company resuming the trading of its shares. Ankang was one of the potential investors in discussions with the PLs to explore how the Company could be restructured.

12. On 17 December 2015, the PLs entered into an exclusivity agreement with another investor, Happy Fountain Limited ("**Happy Fountain**"), to progress the potential restructuring which might involve Happy Fountain injecting a profit-making business into the Company in order to facilitate the Company's resumption of trading.

13. The evolution of the Company's restructuring exercise through the PLs' operation is in brief as follows:

(a) On 21 December 2015, the Company submitted a resumption proposal prepared by Happy Fountain to HKSE. On 29 January 2016, HKSE rejected the proposal. After two rounds of review by HKSE, the rejection was confirmed in August 2016.

(b) On 7 September 2016, the Company submitted a second resumption proposal prepared by Happy Fountain to HKSE. On 26 September 2016, HKSE responded with some

comments on the areas that needed more work in order to comply with the listing requirements.

(c) On 14 February 2017, in light of HKSE's comments, the Company submitted a third resumption proposal prepared by Happy Fountain to HKSE. This resumption proposal was prepared on a reverse take-over basis. Further comments were received from HKSE.

(d) On 15 September 2017, the Company submitted a new listing application to HKSE.

(e) On 16 March 2018, the Company announced that the re-listing application submitted in September 2017 had lapsed on 15 March 2018. The Company and its professional advisers are working towards the resubmission of a new listing application to HKSE.

14. The PL's current primary task is to complete the restructuring exercise. If the resumption proposal is successful, all the Company's creditors will be paid in full. Otherwise, the Company's creditors are unlikely to obtain any substantial recovery.

15. Although Ankang was supportive of the Company's application for provisional liquidation in August 2015, it is now against the Company's restructuring deal being conducted with Happy Fountain.

Procedural Background

16. Although this decision is concerned with Ankang's Summons only, it may be helpful to set out the procedural history leading

up to today's decision. The procedural evolution is in summary as follows:

(a) Upon the receipt of a letter from Ankang's solicitors dated 15 November 2016, the PLs first learnt of Ankang's opposition to the Company's current restructuring attempt. The letter questioned the PLs' authority to enter into certain agreements needed for the restructuring. Ankang's Summons was then issued in February 2017.

(b) In view of Ankang's Summons and in light of the Company's revised resumption proposal to HKSE, the PLs took out two summonses dated 22 February 2017 and 21 March 2017 ("**PLs' Summonses**") seeking the court's approval of the PLs' entry into various restructuring agreements.

(c) On 27 February 2017, Ankang's Summons and the PLs' Summonses came before me. I ordered that the PLs' Summonses be adjourned to be dealt with by Anthony Chan J and Ankang's Summons be adjourned for argument.

(d) On 30 March 2017, Anthony Chan J granted the relief sought in the PLs' Summonses.[1] On 14 June 2017, Anthony Chan J dismissed Ankang's application for leave to appeal against that decision.[2]

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1 *Re China Solar Energy Holdings Ltd* [2017] 2 HKLRD 1074.

2 *Re China Solar Energy Holdings Ltd* [2017] HKEC 1240.

17. This decision is solely concerned with one part of Ankang's Summons, namely the discharge of the PLs. Ankang's Summons is opposed by the PLs, the Company and Happy Fountain.

Ankang's Submissions

18. Ankang's arguments for discharging the PLs may be summarised thus:

(a) Because the decision in *Re Legend International Resorts Ltd* [3] holds that provisional liquidation cannot be permitted when the sole or primary function of the provisional liquidators is to carry out business or debt restructuring, the current provisional liquidation of the Company (being solely or at least primarily concerned with the corporate or business restructuring of the Company) is a misuse of the provisional liquidation regime.

(b) The PLs cannot be heard as saying that they are needed to protect the Company's asset in the form of its listing status. This is because a company's listing status is not an asset. Further, using provisional liquidation to protect a company's listing status means using provisional liquidation for the purpose of restructuring. Restructuring means avoiding winding-up and is contrary to *Legend* which holds that provisional liquidation must be for the purpose of a winding-up, and not for the purpose of avoiding a winding-up.

These submissions will be assessed in turn below.

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[3] [2006] 2 HKLRD 192.

Provisional Liquidation — Commencement Criteria

19. After the presentation of a winding-up petition and before the making of a winding-up order, the jurisdiction to appoint provisional liquidators arises under section 193 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("**CWUMPO**").

20. The power to appoint a provisional liquidator is a broad and general one in the sense that, provided the jurisdictional conditions in section 193 are met, the section imposes no limitations upon, nor does it prescribe, the criteria to be adopted by the court when considering an application for such an appointment.[4]

21. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. As the exercise of that power may have serious consequences for the company, "a need for the exercise of the power must overtop those consequences".[5]

22. As a result, the court applies the long-established two-fold approach when asked to appoint a provisional liquidator to a trading company. Before the court would be willing to make the appointment, the court would need to be satisfied that (i) it is likely that, on the hearing of the petition, a winding-up order will be made ("threshold

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4 *Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116; [2012] STC 186 at [75].

5 *Re Highfield Commodities Ltd* [1985] 1 WLR 149, 159.

requirement"), and (ii) in the circumstances of the case it would be right that a provisional liquidator be appointed ("discretionary requirement").[6]

23. The threshold requirement need not detain us here. However, the discretionary requirement merits some elaboration. Case-law suggests that the discretionary requirement is closely associated with the functions of a liquidator, which are two-fold, namely (a) administration of the insolvent estate, and (b) investigation:

> "The principal function of the liquidator of a company is to carry out the winding up of its affairs by collecting the assets and distributing them among the creditors with a view to the ultimate dissolution of the company. But his functions are not confined to this…
>
> This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Furthermore such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company." [7]

> "[A liquidator's functions] are twofold: (i) to collect the assets of the company, settle its liabilities and distribute its surplus funds amongst its creditors; and (ii) to investigate the causes of the company's failure and the conduct of those concerned in its dealings and affairs... The first of these functions is primarily of concern to the company's creditors and shareholders; the second serves a wider public interest in enabling the authorities to take appropriate action against those guilty of misconduct in relation to the company." [8]

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6 *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719 at [12]; *Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116; [2012] STC 186 at [76]-[77]; *Re Parkwell Investments Ltd* [2014] EWHC 3381 (Ch); [2015] 1 Bus LR 40.

7 *Re Pantmaenog Timber Co Ltd* [2003] UKHL 49; [2004] 1 AC 158 at [51] and [64].

8 *Joint & Several Liquidators of Kong Wah Holdings Ltd v Grande Holdings Ltd* (2006) 9 HKCFAR 766 at [23].

24. Mirroring the functions of a liquidator, case-law confirms that the discretionary requirement can be satisfied only if there is a need to safeguard against the risk of dissipation of the company's assets or if there is a need for independent investigation:

> "The usual basis on which such an appointment is sought is because of a risk of jeopardy to the company's assets, namely the risk of their dissipation before the winding up order is made, with the consequence that their collection and rateable distribution between the company's creditors will be frustrated. Such risk does not refer to (or only to) 'dissipation' in the sense in which that word is ordinarily used in the context of freezing orders, that is a deliberate making away with the assets so as to frustrate the enforcement of a future judgment; it includes any serious risk that the assets may not continue to be available to the company…
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> The circumstances justifying the appointment of a provisional liquidator are not, however, confined to jeopardy of this particular nature. In cases in which there are real questions as to the integrity of the company's management and as to the quality of its accounting and record-keeping function, it will be an important part of a liquidator's function to ensure that he obtains control of its books and records so that he can engage in all necessary investigations of its transactions. These will or may include investigations of those who have been managing the company with a view to considering the bringing of claims against them; and the consideration of whether any of the company's directors ought to be the subject of a report to the Secretary of State to the effect that it appears to the liquidator that they were unfit to be concerned in the management of a company. Such a report might then lead to an application to the court for their disqualification. If there is any risk that, pending the hearing of the petition, records may be lost or destroyed, that will also found the basis for the appointment of a provisional liquidator, who will be able immediately to secure them and commence his own inquiries into the affairs of the company and the conduct of its management." [9]

Granting Restructuring Powers to Provisional Liquidators

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[9] *Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116; [2012] STC 186 at [99]-[100]. See also *Tsoi Kwong Shi v Asia Fortune Media Group Ltd* [2016] HKEC 823 at [3.23].

25. The circumstances and factors needed to satisfy the discretionary requirement above explain why "[t]he main function of a provisional liquidator appointed prior to the determination of the winding up petition is to preserve the assets of the company where these are at risk",[10] although this is not his only function in all circumstances.

26. It is well established that where the circumstances warrant the appointment of provisional liquidators, the provisional liquidators may be granted powers to explore and facilitate a restructuring of the company. Of course whether such powers should be granted and the scope of the powers would depend on the particular circumstances such as the existence of creditor support.[11]

27. In fact, restructuring is in many circumstances consistent with the provisional liquidator's duty to preserve assets:

> "[P]rotection of the company's assets, which the provisional liquidator is bound to afford, does not necessarily involve keeping all its offices open. As counsel for the provisional liquidator submitted, *a reduction of the company's liabilities is the correlative of the protection of its assets*."[12] (*Emphasis added.*)

28. Therefore, granting restructuring powers to provisional liquidators may often be a corollary of the grounds for appointing provisional liquidators, rather than something that is extraneous or antithetical to the grounds for appointing provisional liquidators. Indeed

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10 *Re MF Global Hong Kong Ltd* [2015] 2 HKLRD 325 at [13].

11 *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719 at [12]; *Re Plus Holdings Ltd* [2007] 2 HKLRD 725; *Re China Solar Energy Holdings Ltd* [2016] HKEC 487 at [25].

12 *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, 1112.

the present case is a good example, for reasons that will be apparent below.

Implications of Re Legend International Resorts

29. As mentioned above, the mainstay of Ankang's argument is its interpretation of the *Legend* decision. It may be helpful to set out the key passages in *Legend* that form the plank of Ankang's argument:

> "The law on the appointment of provisional liquidators at present is contained in section 192 and the following sections and it is clear on the wording of those sections that the appointment of a provisional liquidator must be for the purposes of the winding-up. Provided that those purposes exist there is no objection to extra powers being given to the provisional liquidator(s), for example those that would enable the presentation of an application under section 166. There is, nevertheless, a significant difference between the appointment of provisional liquidators on the basis that the Company is insolvent and that the assets are in jeopardy and the appointment of the provisional liquidators solely for the purpose of enabling a corporate rescue to take place. The difference, may, in most cases, be merely a matter of emphasis, but in the final analysis the difference exists.
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> Another way of putting the same point is that a scheme of arrangement may well be a viable alternative to winding-up. If it proves to be so, the winding-up will cease and the scheme will take effect. The power of the court under section 192 is to appoint a liquidator or liquidators for the purposes of the winding-up not for the purposes of avoiding the winding-up. Whatever benefits may be said to arise and however convenient it may be said to be for the court to be able to appoint provisional liquidators for other purposes it seems to me that primary purpose of appointing provisional liquidators must always be the purposes of the winding-up. Restructuring a company is an alternative to a winding-up." [13]

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[13] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at [35]-[36].

30. The heart of Ankang's argument focuses on these words in *Legend*: "*the appointment of a provisional liquidator must be for the purposes of the winding-up*".

31. In my view, Ankang's argument amounts to a misreading of *Legend*. Reading the decision as a coherent whole, it is clear that *Legend* was merely reaffirming the conventional commencement criteria for provisional liquidation rehearsed at some length above, and it does not sustain Ankang's proposition, for these reasons:

(1) To begin with, "purpose" is a protean concept and its meaning must depend on the context.[14]

(2) When the Court of Appeal said provisional liquidation "*must be for the purposes of the winding-up*", it could not have meant to say that the intended result of provisional liquidation must be a winding-up. Otherwise, this would contradict the Court of Appeal's own endorsement of the practice that when provisional liquidators were appointed on asset preservation grounds, they could be granted restructuring powers. The intended result of the restructuring exercise would be the avoidance of winding-up.

(3) By "*for the purposes of the winding-up*", the Court of Appeal must be understood as referring to matters associated with a winding-up. Those matters would include asset preservation, asset collection and rateable distribution of assets in the event of a winding-up. This would be an orthodox explanation of the provisional liquidation regime.

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[14] *Hayes v Willoughby* [2013] UKSC 17; [2013] 1 WLR 935 at [9].

(4) The law has never been that provisional liquidation is meant to lead to a winding-up. The law has always been that provisional liquidation is meant to ensure that the operation of a winding-up would not be frustrated, if there is a winding-up:

> "If there is a risk of assets being dissipated — that is made away with other than by the rateable distribution amongst all the company's creditors at the date of presentation of the winding-up petition — there must be a good case for the court appointing its own officers … to try and get in and secure the assets so that *if, at the end of the day, the company is put into compulsory liquidation*, … then there will be assets available and they will not have been dissipated." [15] (*Emphasis added.*)

(5) In fact, it is precisely because the Court of Appeal was throughout concerned with the conventional grounds of provisional liquidation that it went on to say "*[o]nce it is appreciated that the [c]ompany is running the casino on a day-to-day basis there are, probably, grounds for suggesting that some creditors may be being preferred to others. There, thus, may well be legitimate grounds for arguing that the assets of the [c]ompany are in jeopardy.*" [16]

(6) Therefore, when the Court of Appeal said provisional liquidation cannot be "*solely for the purpose of enabling a corporate rescue to take place*" and "*[r]estructuring a company is an alternative to a winding-up*", the Court of Appeal was merely emphasising that, where the matters associated with a winding-up are absent, in particular where the company's assets are not in jeopardy, it would not be appropriate to order a provisional liquidation, despite the

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[15] *Re a company (No 003102 of 1991), ex parte Nyckeln Finance Co Ltd* [1991] BCLC 539, 542.
[16] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at [48].

company's general need for a restructuring. There are in fact many cases of debt restructuring where the company's assets are not in jeopardy. For example, such debt restructuring could take the form of a consent solicitation, whereby a bond issuer solicits consents from its bondholders to the adoption of amendments to the indenture governing the issuer's debt securities in exchange for the issuer's payment to the consenting bondholders of a consent fee or other form of consideration.[17] The Court of Appeal in *Legend* was certainly not saying that, because a successful restructuring would obviate the need for a winding-up, restructuring must be incompatible with provisional liquidation.

(7) In the circumstances, *Legend* does not, as Ankang's argument suggests, dictate this wholly counter-intuitive scenario: Where provisional liquidators were properly appointed on asset preservation grounds and granted restructuring powers, once they have completed their asset preservation efforts, they must abandon their restructuring efforts so that the company becomes more likely to fail and be wound up.

(8) Properly understood, not only does *Legend* not commit itself to such counter-intuitive consequences, *Legend* permits the completion of the provisional liquidators' restructuring endeavours. The conventional grounds for appointing provisional liquidators are essentially to protect the interests of all creditors as a whole.[18] Permitting the provisional

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[17] *Azevedo v Imcopa Importação, Exportação e Indústria de Óleos Ltda* [2013] EWCA Civ 364; [2015] QB 1.

[18] *Re Easy Carry Ltd* [2016] HKEC 2621 at [7].

> liquidators to conclude the restructuring would further protect creditors' interests, as the present case amply demonstrates. Forcing the provisional liquidators to jettison the restructuring midway could undo their previous efforts, wasting the associated costs which were incurred in accordance with *Legend*, to the detriment of creditors as a group. In my view *Legend* cannot sensibly be read as supporting a consequence which is inimical to creditors' interests and inconsistent with the inclusion of the power to restructure in the first place.

32. Ankang was keen to remind the court of its role: While Hong Kong does not yet have a statutory corporate rescue regime, "*the court should not attempt to extend the statutory law [on provisional liquidation] albeit for expediency*".[19] This is true, but it is also not the court's role to emasculate the statutory law, which in my view is the consequence of Ankang's argument:

(1) Prior to a winding-up petition, a company may use the statutory scheme of arrangement regime to restructure its debts with a view to avoiding a winding-up.

(2) After a winding-up order, the provisional liquidators may use the statutory scheme of arrangement regime to restructure the company's debts with a view to getting the winding-up permanently stayed, thereby avoiding the substantive effect of the winding-up.[20]

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[19] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at [33].
[20] *Re Grande Holdings Ltd* [2016] HKEC 1130.

(3) However, between the winding-up petition and winding-up order, the very same provisional liquidators (albeit properly armed with restructuring powers) may not restructure the company's debts just because they have completed the other tasks for which they were appointed and a successful restructuring would avoid a winding-up. This seems to be a bizarre outcome.

(4) It has long been accepted that it is legitimate for the court, where practicable, to assess the likely practical consequences of adopting each of the opposing statutory interpretations, not only for the parties in the individual case, but for the law generally. If one construction is likely to produce absurdity, inconsistency or inconvenience, that may be a factor telling against that construction.[21] "The appointment of provisional liquidators is a statutory power given to the court."[22] Ankang contends that, as a result of *Legend*, cause has been shown for the removal of the PLs under section 193(6) of CWUMPO. But I can see no hint in the statutory regime that the provisional liquidators' appointment is to be restricted in the manner suggested by Ankang in order to increase the likelihood of a winding-up, which is likely to be destructive of the creditors' collective interests. Terminating the provisional liquidators' appointment in the manner suggested by Ankang would seem inconsistent with the overarching purposes of section 193, namely, that the company's assets are protected and their value maintained. Causing the assets to be expended on provisional liquidators' fees and then

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[21] *Patterson v Ministry of Defence* [2012] EWHC 2767 (QB); [2013] 2 Costs LR 197 at [18]; *WH Newson Holding Ltd v IMI Plc* [2012] EWHC 3680 (Ch); [2013] Bus LR 599 at [22].

[22] *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 at [33].

rendering the expense valueless seems to me to be inconsistent with any sensible interpretation of section 193.

33. Ankang's contention also does not seem to be supported by post-*Legend* case-law. Consider, for instance, the following remarks by the Court of Appeal on the role of provisional liquidators:[23]

> "The main function of a provisional liquidator appointed prior to the determination of the winding up petition is to preserve the assets of the company where these are at risk. As the petition may ultimately be resolved without a winding up order being made, it is no part of his function to liquidate the company and realise its assets for the purpose of distribution on a pari passu basis to its creditors. That said, there may be circumstances in which it will be necessary for such a provisional liquidator to realise some of the assets of the company – for example, where that is required in order to secure or preserve them. *If, exceptionally, assets are realised by such a provisional liquidator, he will simply hold them pending the resolution of the winding up petition*, and will, depending on the outcome of the petition either return them to the control of the company and its management (if the petition is dismissed) or pass them on to the provisional liquidator or liquidator of the company (if a winding up order is made)." (*Emphasis added.*)

34. If Ankang were correct, immediately after the provisional liquidator secures the company's assets, his appointment must be terminated if the winding-up petition is likely to be dismissed (say, because the provisional liquidator's asset preservation efforts have returned the company to solvency). Holding the assets pending the dismissal of the winding-up petition, according to Ankang's logic, must be impermissible because the provisional liquidator would no longer be in office "*for the purposes of the winding-up*". However, as *MF Global* demonstrates and approves, although the provisional liquidator may have

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[23] *Re MF Global Hong Kong Ltd* [2015] 2 HKLRD 325 at [13].

fully secured the company's assets, he may continue to exercise his restructuring powers pending the resolution of the winding-up petition.

35. It follows therefore that Ankang's call for termination of the PLs on the basis that the PLs are currently primarily engaged in the Company's restructuring stems from a misconstruction of *Legend*, does not comport with the statutory regime, and appears to be inconsistent with post-*Legend* case-law.

Drawing the Strands Together

36. Although Ankang concedes that the PLs here were properly appointed and granted restructuring powers, it may be helpful to explain why the concession is correct.

37. The PLs were appointed on the conventional asset preservation grounds. One of the assets that were in jeopardy and thus sought to be safeguarded by the appointment of the PLs was the Company's listing status. However, though Ankang supported the Company's application for provisional liquidation in August 2015, it now takes exception to the notion of the Company's listing status being an asset of the Company for the purposes of provisional liquidation.

38. Ankang advances two arguments in this connection:

(a) The Malaysian decision in *Yeoh Eng Kong v Dato' Nik Ismail Bin Nik Yusoff*[24] held that a company's right to the listing status is largely contractual and more appropriately

[24] 2016 MLJU 529.

described as being dependent on its compliance with the listing requirements. A listed issuer cannot sell or transfer its listing status. A transfer could be implemented if done as part of a corporate restructuring, but it must be accompanied by regulatory approvals. The listing status thus does not per se belong to the company, the shareholders or any other party to start with. The listing status cannot validly be stated to be the property of the company.

(b) A company usually loses its listing status upon liquidation. Thus if a provisional liquidation is to preserve the company's listing status, his role will be to pursue a restructuring. But a provisional liquidator cannot be appointed solely to pursue a restructuring, according to *Legend*. It follows that the notion of a company's listing status being an asset in jeopardy to justify the intervention of provisional liquidation is contrary to *Legend*.

39. With respect, the Malaysian decision does not seem to be comprehensively reasoned and is of little persuasive value. The position in Hong Kong as a matter of principle and authority is as follows:

(1) The listing rules operate as a contract between the listed issuer and HKSE. HKSE has been given the power to make rules under section 23 of the Securities and Futures Ordinance (Cap 571) for such matters as are necessary or desirable for (i) the proper regulation and efficient operation of the market which it operates, (ii) the proper regulation of its exchange participants and holders of trading rights, and (iii) the establishment and maintenance of compensation arrangements for the investing public. When a company is

listed, it undertakes and contracts with HKSE to comply with the listing rules.[25]

(2) Thus a listed issuer has a bundle of contractual rights and obligations under the listing rules. The company's listing status is a 'chose in action', which is an expression used to describe "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession".[26] The fact that the company may not assign the listing status is irrelevant because some choses in action are incapable of assignment.[27]

(3) A company's listing status is akin to a non-transferable stock exchange membership which is nonetheless an asset of the member. In *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd*,[28] in the context of the application of the anti-deprivation principle to the London Stock Exchange ("**LSE**") membership which allows members to access LSE's facilities for dealing in quoted securities, Neuberger J (as he then was) said:

> "Cases which would more frequently occur are those where the right or property subject to the deprivation provision has no value, or (in many cases) if it is incapable of assignment, or depends on the character or status of the owner. In such cases, a deprivation provision would, as I see it, normally be enforceable in the event of the insolvency of the owner. If the *asset* has no value, or if it is incapable of transfer, then it could scarcely be said to be to the detriment of the creditors of the owner if he was deprived of the *asset*. Similarly, if the ownership of the *asset* depends on the personal characteristics of the owner, it is difficult to see how objection could be taken

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25 *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234.

26 *Torkington v Magee* [1902] 2 KB 427, 430.

27 *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149; [2012] QB 640 at [8].

28 [2002] 1 WLR 1150 at [110].

> to a power to take away the *asset*, not least because it would be inherently unsuitable to be retained for the benefit of his creditors. An example which springs to mind would be membership of a club. Coming closer to the facts of the present case, the loss of membership of a financial institution, such as a stock exchange, where one has failed to meet one's debts or has gone bankrupt cannot, in my view, be said to fall foul of the principle. Membership of such an exchange turns on the personal attributes and acceptability of a particular individual, and expulsion of [*sic*] the grounds of not honouring financial obligations (or, indeed, insolvency) would seem to be almost an inevitable incident of membership." (*Emphasis added.*)

(4) Therefore, the fact that a company's contractual right in the form of a listing status is not distributable as such to its creditors on its insolvency does not show that the listing status is not the company's asset.

(5) Many authorities have referred to a company's listing status as the company's asset, although they have not considered in any detail a listing status' legal attributes and character.[29]

40. Ankang's second argument premised on *Legend* can be disposed of swiftly because it is predicated on the same false interpretation of *Legend* explained above.

41. Ankang's objection appears to be this:

(a) Without restructuring, a financially distressed listed company will likely be wound up and a winding-up will likely lead to the company losing its listing status.

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[29] For example, *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363; *Re Albatronics (Far East) Co Ltd* [2002] 4 HKC 99; *Re I-China Holdings Ltd* [2004] HKEC 1844; *Re Plus Holdings Ltd* [2007] 2 HKLRD 725; *Re Plus Holdings Ltd* [2008] HKEC 2397; *Re China Medical and Bio Science Ltd* [2009] HKEC 2679.

(b) If a company's listing status can be treated as a corporate asset in jeopardy to justify the appointment of provisional liquidators, then appointing provisional liquidators to a listed company to save the listing status by way of restructuring will be always possible. This would mean ordering provisional liquidation solely for restructuring purposes, contrary to the *Legend* prohibition.

42. In my opinion, this objection is invalid because it assumes that, just because a winding-up will likely lead to a loss of the company's listing status, the listing status is in jeopardy for provisional liquidation purposes. This assumption is false. It has never been the law that a potential loss of assets solely consequent upon a winding-up means the assets are in jeopardy and this jeopardy can support the appointment of provisional liquidators. For example, it has never been the law that provisional liquidators could be appointed to save a company's contracts from being terminated, just because the contracts contain *ipso facto* clauses which permit the contractual counter-parties to terminate the contracts upon the company's winding-up. The present case illustrates this.

43. The Company's listing status was in jeopardy because of various accounting and management irregularities the Company had failed to explain to HKSE prior to the appointment of the PLs, which had caused HKSE to commence the delisting procedure. In considering an application for provisional liquidation, the court will consider such conventional matters as:

> "whether there are real questions as to the integrity of the [c]ompany's management and/or as to the quality of the [c]ompany's accounting and record keeping function, whether there is any real risk of dissipation of the [c]ompany's assets and/or any real need to take steps to preserve the same, whether there is any real risk that the company's books and records will be destroyed and/ or any real need for steps to be taken to ensure that they are properly preserved and maintained (which may be so where, for example, there is clear evidence of fraud or almost irrefutable evidence of chaos), [and] whether there is any real need for steps to be taken to facilitate immediate inquiries into the conduct of the [c]ompany's management and affairs and/or to investigate and consider possible claims against directors." [30]

44. Accordingly, the PLs were justifiably appointed on orthodox grounds to rectify the various irregularities and to preserve the listing status. Given the PLs' mandate to preserve the listing status, it was logical to grant restructuring powers to the PLs, especially in view of the strong creditor support for this course of action. However, the PLs were not appointed for the purpose or principal purpose of a restructuring.

45. The restructuring process initiated by the PLs is now in its final stages. Unless constrained by authority, I would be loath to force the restructuring to fail by suddenly withdrawing the PLs' powers, to the detriment of all creditors. As explained above, in my view the law does not prescribe such a perverse result.

46. I should add, for completeness, that Ankang's interpretation of *Legend* belies significant impracticability. One only has to ask the questions to appreciate the practical difficulties. For example, how does one determine when exactly a provisional liquidator has finished securing the company's assets such that the provisional liquidator's remaining role

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[30] *Re SED Essex Ltd* [2013] EWHC 1583 (Ch); [2014] BCC 628 at [16].

is about restructuring only? Where exactly is the demarcation between asset preservation and restructuring in relation to a company's listing status, when securing the listing status will doubtless involve some restructuring mechanism? These practical difficulties suggest that Ankang's interpretation of *Legend* is erroneous.

Issue Estoppel

47. The Company, the PLs and Happy Fountain argue that Ankang is estopped *per rem judicatam* from raising the *Legend* issue a second time: the contention now being advanced by Ankang is inconsistent with the earlier decision by Anthony Chan J on 30 March 2017.[31]

48. Issue estoppel is a well-established part of the law of *res judicata*. In order for an issue estoppel to arise, three conditions need to be satisfied:

(i) the same question must previously have been decided;

(ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and

(iii) the parties to the prior judicial decision (or their privies) must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised (or their privies).[32]

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[31] *Re China Solar Energy Holdings Ltd* [2017] 2 HKLRD 1074.

[32] *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch); [2014] STC 1761 at [152]; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160.

49. Ankang's argument based on *Legend* here is almost identical to that raised before Anthony Chan J and thus Ankang's attempt to re-litigate the *Legend* issue is certainly within striking distance of activating issue estoppel. Nevertheless, on balance, I am of the view that issue estoppel should not bar Ankang from raising the *Legend* point again for these reasons:

(1) It is often difficult to ground an estoppel on a ruling made by the court on an interlocutory matter.[33] The rules relating to *res judicata* in interlocutory matters are also less stringent than those generally applicable.[34]

(2) For issue estoppel to apply, there must be a distinct determination of the court on an issue in sufficiently clear and precise terms.[35] However, when permitting the PLs to enter into the restructuring agreements, Anthony Chan J probably did not have to determine the *Legend* point conclusively against Ankang. In fact, his Lordship purported to deal with the *Legend* point very briefly in view of Ankang's subsequent application to discharge the PLs based on *Legend*.[36] Therefore arguably Anthony Chan J did not make a final conclusive determination on the *Legend* point.

Conclusion

50. Ankang's reliance on *Legend* to discharge the PLs and derail their restructuring endeavours is misconceived in principle. Consistent

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33 *Mullen v Conoco Ltd* [1998] QB 382, 390391.

34 *Buildtech Ltd v Hung Wan Construction Co Ltd* [2012] HKEC 227 at [13].

35 *Buildtech Ltd v Hung Wan Construction Co Ltd* [2012] HKEC 227 at [13].

36 *Re China Solar Energy Holdings Ltd* [2017] 2 HKLRD 1074 at [23].

with their mandates and functions, the PLs should be afforded the opportunity to execute the Company's current re-listing proposal.

51. I therefore dismiss Ankang's application to discharge the PLs and make a costs order *nisi* that Ankang pays the PLs and certificate for two counsel.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Jose-Antonio Maurellet SC, Mr John Hui and Mr Jonathan Chan, instructed by Cheung & Yip, for the petitioner

Mr John Scott SC and Mr Wong Chao Wai Brian, instructed by Kenneth C C Man & Co, for the company

Mr Clifford Smith SC and Mr Alexander Tang, instructed by Haldanes, for the provisional liquidators

Mr Patrick Chong, instructed by Robertsons, for Happy Fountain Limited, an investor

Chiu & Partners, for the opposing contributories Mr Larm Cheung Hon Peter and Mr Lo Chun Kit, was absent

Guantao & Chow, for the opposing contributories Mr Chong Cheng Keat Patrick, Ms Shi Yu Han and Mr Yang Mao, was absent

Attendance of the Official Receiver was excused