CACV 58/2016

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

COURT OF APPEAL

CIVIL APPEAL NO. 58 OF 2016

(ON APPEAL FROM HCCW NO. 337 OF 2015)

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IN THE MATTER OF the

*Companies (Winding Up and*

*Miscellaneous Provisions)*

*Ordinance* (Cap. 32)

and

IN THE MATTER OF Allied

Weli Development Limited (formerly known as Hennabun Capital Group Limited)

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BETWEEN

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|  | Penta Investment  Advisers Limited | Petitioner |
|  | and |  |
|  | Allied Weli Development Limited  (formerly known as  Hennabun Capital Group Limited) | Respondent |

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Before: Hon Cheung, Kwan and McWalters JJA in Court

Date of Hearing: 11 July 2017

Date of Judgment: 11 July 2017

Date of Reasons for Judgment and Decision on Costs: 18 July 2017

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|  | REASONS FOR JUDGMENT |  |
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Hon Cheung JA :

Harris J ordered the winding up of Allied Weli Development Limited (formerly known as Hennabun Capital Group Limited) (‘the Company’) based on the petition of the Petitioner pursuant to section 327 of the *Companies (Winding Up And Miscellaneous Provisions) Ordinance*, Cap 32 (‘the *Ordinance*’). The Company appealed. We dismissed the appeal at the conclusion of the hearing. I now give reasons for our judgment.

**Background**

1 The Company is registered in Hong Kong as a registered non-Hong Kong company under the *Companies Ordinance* (Cap 32)on 5 December 2002 with its principal place of business in Hong Kong. The Company was incorporated in the British Virgin Islands. The Company stated it changed its management on 6 August 2015, moved its place of registration to the Marshall Islands and the Company’s management and business are being conducted in Taiwan and/or the Marshall Islands.

1. The events leading to the petition for winding up took place before the Company’s move to the Marshall Islands and they are stated in the re-amended petition as follows :
   1. 1) In June 2011, Mascotte Holdings Limited (‘Mascotte’), a shareholder of the Company which is listed on the Stock Exchange of Hong Kong Limited (‘SEHK’), sought to raise capital by way of a placement of 5,000,000,000 new shares of HK$0.10 each (the ‘Placing’). One of the Company’s Hong Kong subsidiaries, Chung Nam Securities, acted as a sub‑placing agent in relation to the Placing.
   2. 2) On 24 June 2011, a placing commitment letter was entered into between the Petitioner and Chung Nam Securities pursuant to which the Petitioner, on behalf of the funds which it managed, agreed to subscribe for 550,000,000 new shares in Mascotte at the subscription price of HK$0.40 per share for a total consideration of HK$222,437,600 (the ‘subscription’). The Subscription was completed on 14 July 2011.
   3. 3) In connection with the subscription, also on 24 June 2011, the Company and the Petitioner entered into a deed of guarantee (the ‘Deed’) whereby the Company agreed to, among other things, pay to the Petitioner an amount equivalent to the difference between : (i) HK$0.50 times the number of Mascotte shares held by the funds managed by the Petitioner on the 180th day after the completion of the Subscription (i.e. 10 January 2012) which the Petitioner elected not to continue to hold (the ‘Disposal Shares’) and (ii) the gross proceeds from the sale of the Disposal Shares (the ‘Guaranteed Amount’). Under Clause 7 of the Deed, the Company was required to pay the guaranteed amount to the Petitioner within five business days of the disposal of the Disposal Shares.
   4. 4) Since 10 January 2012, the Petitioner corresponded with the Company notifying the Company of the number of Disposal Shares in accordance with Clause 4 of the Deed and requesting the provision of instructions for the disposal of the Disposal Shares. By way of a letter dated 6 February 2012, the Company, through its solicitors, Lam & Co., asserted that it was not bound by the Deed and refused to give instructions for the disposal of the Disposal Shares or to pay the Guaranteed Amount to the Petitioner as required by the Deed.
2. On 11 September 2012, the Petitioner commenced proceedings against the Company under High Court Action number 1656 of 2012, claiming for the guaranteed amount due under the Deed or, alternatively, damages for the Company’s breach of the Deed (‘the Proceedings’).
3. On 14 October 2014, Chow J found for the Petitioner on liability and on 21 January 2015, he assessed the damages that the Company has to pay the Petitioner at HK$210,366,488 together with interest. The Company’s appeal against the judgments was dismissed by this Court on 23 July 2015. Application for leave to appeal to the Court of Final Appeal was dismissed by this Court on 11 December 2015. The Company renewed its leave application before the Court of Final Appeal and the Court was informed by Mr Manzoni SC for the Petitioner that it was later withdrawn.
4. On 24 July 2015, the Petitioner issued a statutory demand to the Company to repay the judgment sum and interest at HK$225,927,801.69 together with post judgment interest up to the date of the statutory demand at HK$9,111,389.70 (‘the judgment debt’).
5. The Company failed to pay the judgment debt and the Petitioner presented the petition on 29 October 2015 which was subsequently amended and later re-amended on 5 and 6 January 2016.
   1. **Section 327**

1 The relevant parts of section 327 are as follows :

‘ (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Ordinance, ...

(3) The circumstances in which an unregistered company may be wound up are as follows :

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) ......’

1. The Court of Final Appeal in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501 (the ‘*Yung Kee* case’) at paragraph 19 recognized that in respect of unregistered foreign companies, the most appropriate jurisdiction in which to wind up a company is the jurisdiction where it is incorporated. However, it held that the jurisdiction to wind up the foreign company by the Hong Kong Court under section 327(1) can be founded where the three core requirements summarised by Susan Kwan J (as she then was) in *Re Beauty China Holdings Ltd* [2009] 6 HKC 351, 355-6, are satisfied :
   1. 1) there had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;
   2. 2) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and
   3. 3) the Court must be able to exercise jurisdiction over one or more persons in the distribution of the Company’s assets.
   4. **Connection with Hong Kong**
   5. The only issue before Harris J was on the connection of the Company with Hong Kong. As apparent from the decision of the Judge, it was argued that the Court should not exercise its discretion to wind up the Company because the matters relied on as demonstrating a substantial connection with Hong Kong, whilst being capable of constituting a substantial connection, appear on the face of the petition to have occurred between about 2012 and 2014. Counsel who appeared for the Company (not Mr Tom Ng who only appeared in this appeal) argued that it is necessary to show a current connection with Hong Kong and the matters relied on being historical in nature are not capable of doing so. Harris J was not impressed with the argument. He held that :
   6. ‘ It seems to me clear that there is no substance to this point. I’m satisfied that the contents of the petition justify the court exercising its discretion to wind up the Company on the grounds of insolvency so that its affairs can be thoroughly investigated. It doesn’t seem to me the fact that the matters which are relied on by the petitioner as demonstrating sufficient connection with Hong Kong may have ceased at about the time the petitioner commenced the proceedings that led to the judgment on which the petitioner relies to prove insolvency necessarily means there is insufficient connection between the Company and Hong Kong to justify this court exercising its discretionary jurisdiction to wind the company up. What is necessary is for the petitioner to demonstrate that there is sufficient connection to justify a winding‑up at the time the petition is heard. Precisely when the matters giving rise to a connection occurred is in itself irrelevant.’

**The grounds of appeal**

* 1. The three grounds of appeal are :
  2. 1) Harris J having left open the possibility that ‘the matters which are relied on by the Petitioner as demonstrating sufficient connection with Hong Kong may have ceased at about the time the Petitioner commenced the proceedings that led to the judgment on which the Petitioner relies to prove insolvency’, erred in winding up the Company solely on the alleged need to investigate its affairs.
  3. 2) Harris J wrongly exercised his discretion to wind up the company domiciled in the Marshall Islands given that the Hong Kong Court can render assistance to foreign liquidators and there is no justification for the Hong Kong Court to wind up the Company.
  4. 3) Harris J wrongly exercised his discretion to wind up in circumstances where the Petitioner was the only creditor in the jurisdiction. The winding up was without benefit to other creditors.

**First ground**

**1) Substantial connection**

1 I will deal with the issue of substantial connection first.

1. In my view Harris J is clearly right on this issue, otherwise the statutory scheme would be totally unworkable if shortly before the presentation of the petition, a foreign company would decamp from Hong Kong (like the Company in this case) despite its previous substantial connection and plead the lack of connection at the time of petition for the Hong Kong Court to found its discretionary jurisdiction. As Mr Manzoni submitted, it is not necessary to have the matters which give rise to the connection present at the time of the petition. In other words, the connection once established, remains even after the matters giving rise to that original connection have ceased to exist. In this case, the substantial connection is demonstrated by the following :
   1. 1) the Company, until its recent departure, has its principal place of business in Hong Kong, as confirmed in its 2009 Audited Accounts. Further the Company’s management, including past directors and its company secretary, were based and resided in Hong Kong,
   2. 2) the Company’s ultimate parent company, Freeman Financial Corporation Ltd is a company listed on the SEHK and principally engaged in the provision of services in the financial services sector in Hong Kong,
   3. 3) the Company is an investment holding company which has more than 20 wholly‑owned subsidiaries which either were incorporated in Hong Kong or have their principal place of operation in Hong Kong. Among these subsidiaries, six are licensed by the Securities and Future Commission (‘SFC’) to carry on regulated activities in Hong Kong such as advising on securities, dealing in securities and futures contracts, advising on corporate finance and asset management and employ Hong Kong based staff as responsible officers,
   4. 4) The Proceedings and the outstanding judgment debt arose from the Company’s breach of the Deed. The Deed was entered into by the Company in connection with the Placing which was
   5. i) undertaken by Mascotte, a shareholder of the Company listed on the SEHK, to raise capital in the Hong Kong capital market;
   6. ii) in part underwritten by Chung Nam Securities, a Hong Kong‑incorporated wholly‑owned subsidiary of the Company which is licensed by the SFC to carry on Type 1 and Type 6 regulated activities (i.e. dealing in securities and advising on corporate finance), as a sub-placing agent in the context of the Placing;
   7. 5) the Deed is governed by Hong Kong law and provides for the irrevocable submission by the Company and the Petitioner to the non-exclusive jurisdiction of the Hong Kong Courts; and
   8. 6) the Deed was executed in Hong Kong by its Hong Kong permanent managing director on behalf of the Company and the Company’s corporate seal was affixed by its staff member in Hong Kong.
2. As demonstrated by *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43, where the company had once traded in the United Kingdom, but had ceased to do so, the Court still made an order winding up the company on the ground that the existence of its prior trading gave rise to a sufficient current connection to the United Kingdom to justify the insolvency regime being engaged. Nourse J at page 48 C to D found jurisdiction on, among other things, ‘that the company did carry on business in England and Wales’.
3. It is not necessary to address the issue of the Company further submitting to jurisdiction after its change of management and domicile by its application for leave to appeal to the Court of Final Appeal.
   1. **2) Matter to investigate**
4. There is a preliminary matter I would address first. The Company’s own case before Harris J was that the management and business changed in August 2015 and this happened after the Proceedings that took place before Chow J and the appeal before this Court. Harris J was not accurate on the timing in that regard. But nothing turns on the issue of timing.
5. Despite the rather cryptic wording of the first ground of appeal, Mr Ng confirmed that the only point he wished to take was that Harris J had erred to order winding up solely on the need to investigate.
6. Mr Ng referred to *Re China Medical Technologies, Inc* [2014] 2 HKLRD 997 in which the Court observed that the benefits of investigation in that case ‘are not of themselves a reason for the Court to exercise its discretionary jurisdiction to grant a winding‑up order’. Mr Ng also referred to *Re Insigma Technology Co Ltd*(HCCW 224/2013, 15 October 2015) where the suggestion that ‘another benefit of a winding‑up order would be a liquidator’s ability to investigate the Company’s activities’ was found to be speculative on the facts of that case and submitted that in the present case the alleged benefits to be derived from investigation are also speculative because the alleged benefits are particularly immaterial when, on the Company’s case, the management and business of the Company had been conducted from Taiwan and/or the Marshall Islands since 6 August 2015 and there were no assets within the jurisdiction.
7. I disagree with Mr Ng. The Company has never properly explained why there should be a sudden change of management and domicile after this Court dismissed its appeal in July 2015. The Company is part of a large group of companies with substantial operation in Hong Kong. The Court of Final Appeal has authoritatively stated that the presence of assets within the jurisdiction is not necessary. In any event, there is evidence which suggests dissipation of the assets of the Company. It was stated in the Company’s 2009 Audited Accounts the Company had total net assets of HK$800,879,210 for the financial year ended 31 December 2009 and paid Hong Kong profits tax for the financial years ended 31 December 2008 and 31 December 2009. Yet, the Company said it has no assets in Hong Kong. The Liquidators’ report of 2016/2017 further showed that on 3 October 2016, the Liquidators were provided with the past financial statements of the Company by its former Hong Kong auditors, Jonten Hopkins CPA Limited (the ‘former Auditors’). Contained within the records was the 2014 Financial Statements. The 2014 Financial Statements disclosed HK$909,260 of current liabilities/creditors of the Company as at 31 March 2014. This huge change within the course of five years called for investigation as to the whereabouts of the assets. In my view there clearly is a proper basis to investigate the affairs of the Company.
8. Mr Ng argued that the second core requirement of benefit to the petitioner creditor is absent. In my view the investigation is tied up with the issue of benefit to the Petitioner. The test is whether there is a reasonable prospect of benefit. As the Court of Final Appeal had made clear in the *Yung Kee* case that :
   1. ‘ 24. In our view the question in the case of a creditor’s petition is whether there is a sufficient connection between the company and this jurisdiction to justify the court in ordering a company to be wound up despite the fact that it is incorporated elsewhere; and that in deciding that question the fact that there is a reasonable prospect that the petitioner will derive a sufficient benefit from the making of a winding‑up order, whether by the distribution of its assets or otherwise, will always be necessary and will often be sufficient. (emphasis added)
9. Earlier the Court held that :
   1. ‘ 22. ...it is sufficient that the petitioner will derive significant benefit from a winding-up order in the local jurisdiction even though the company is incorporated elsewhere.’
10. In my view where there is proper basis to investigate, then one can safely say that the second core requirement of benefit to the petitioner creditor can also be satisfied.
11. It is of note that Harris J had not really gone into the issues (which were never argued before him) whether despite the change, there was ground to investigate and whether it would benefit the Petitioner. To argue in an appeal from a discretion that Harris J had erred on these matters when they were not even raised before, does not accord with the principles on how such appeals are to be conducted. It is necessary to state once again that when this Court is hearing an appeal on discretion, it is not the duty of this Court to exercise the discretion afresh. Rather this Court will only interfere if the discretion was wrongly exercised in the first place such as the discretion was made contrary to principle, or relevant matters had been ignored or irrelevant matters had been taken into account. If an important point had not even been argued before, then it cannot be said that Harris J had ignored this factor and had wrongly exercised his discretion.
12. Mr Ng further argued that what the Petitioner was essentially trying to achieve is to indirectly enforce the judgment debt and to indirectly conduct debtor’s examination, after referring to the Petitioner’s attempt to conduct debtor’s examination under Order 48, rule 1. This is also not a point relied upon below. In any event this is a bad point as the Court of Final Appeal pointed out in the *Yung Kee* case at paragraph 26 that ‘creditors seek a winding‑up order against their debtor in order to obtain payment in or towards satisfaction of their debts’. It is a legitimate interest to do so.

**Second ground**

**Alternative forum**

1 Mr Ng referred to *Applications To Wind Up Companies* 3rd Edition by Derek French, paragraph 1.210 which states :

* 1. ‘ The court will not order the winding up of a foreign company if winding up can be carried out adequately in the jurisdiction of incorporation, especially if the assets in the jurisdiction of the court in which winding up is sought are very small compared with those in the jurisdiction of incorporation.’

and also *Dicey, Morris and Collins on The Conflict of Laws* Fifteenth Edition Volume 2 at paragraph 30−055 which states :

‘ In cases in which a sufficient connection is shown to exist, the jurisdiction thus established is said to be subject to the question of whether there is any other forum in which it would be more appropriate for the winding-up to take place. It is not, however, a prerequisite for the making of an order that there be no such jurisdiction, but, rather, that the appropriateness of any other jurisdiction is a factor to be taken into account in deciding whether to make an order to wind up a foreign company.’

1. Mr Ng argued that in view of the Hong Kong Court’s jurisdiction to give assistance to foreign liquidators, there is simply no necessity for the Hong Kong Court to wind up the foreign company. Instead, the Petitioner should have petitioned in the place of incorporation. The provision of assistance by Hong Kong to foreign liquidation order can be gathered from cases such as *Re Rennie Produce (Aust) Pty Ltd* (HCMP 1640/2016, 26 August 2016); *The Joint Official Liquidators of A Co v B* [2014] 4 HKLRD 374; *Bay Capital Asia Fund, LP v DBS Bank (Hong Kong) Ltd* (HCMP 3104/2015, 11 May 2016), at paragraph 4; *The Joint Provisional Liquidators of BJB Career Education Company Limited v Xu Zhendong* [2017] 1 HKLRD 113 and *Re G Ltd* [2016] 1 HKLRD 167.
2. Accordingly, Mr Ng argued that the petition should have been presented in the Marshall Islands and if liquidators are appointed in the Marshall Islands, they can then seek recognition and assistance in Hong Kong. Indeed, while the Marshall Islands liquidators may seek a winding‑up order in Hong Kong if necessary and appropriate, it appears that the mere need to seek information in Hong Kong *per se* would not justify such a winding‑up order.
3. Again this is not a point taken before. The presence of substantial connection with Hong Kong clearly displaces the factor of alternative forum for the purpose of winding up of a foreign company. None of the cases cited by Mr Ng showed that the Hong Kong Court should defer exercising its power of winding up and should only assume a secondary role of assisting foreign liquidation. The cases cited by Mr Ng only showed how the Hong Kong Court should respond when request for assistance was made when a foreign liquidation was in place. Any contrary view will undermine the statutory scheme of winding up foreign companies under section 327 of the *Ordinance* which received the sanction of the Court of Final Appeal in the *Yung Kee* case.
4. Further, in order for this point to be taken, expert evidence would be required on the law of insolvency in the Marshall Islands and Hong Kong because the power to render assistance is limited to rendering assistance in respect of matters which could be done under the relevant domestic law : see the Privy Council decision of *Singularis Holdings Ltd* *v PricewaterhouseCoopers* [2014] UKPC 36 where it is held that the power at common law to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers by ordering the production of information in oral or documentary form which was necessary for the administration of a foreign winding up is not available to enable them to do something which they could not do under the law by which they had been appointed.

**Third ground**

**Benefit to other creditors**

1 Mr Ng argued in his written submission that it is not sufficient if the Petitioner is the only creditor to benefit from the winding‑up order. He relied on *Re Insigma Technology Co Ltd* (HCCW 224/2013, 15 October 2015) where Harris J at paragraph 22 said :

* 1. ‘ However, what Alstom [the Petitioner] seeks to do is to obtain a winding up order in Hong Kong over an active company incorporated and listed in another jurisdiction. There are no creditors domiciled or resident in Hong Kong. The Company has, relative to its activities generally, little connection with Hong Kong and neither does Alstom. The application does not seem to be a genuine attempt to engage the Hong Kong insolvency regime for the protection of the Company’s creditors. It seems to be a means to put pressure on the Company.’

1. He now accepts that there are other creditors of the Company.
2. Again this point was not raised below. In any event, this is a point without substance. I have already referred to paragraphs 22 and 24 of the *Yung Kee* case where the Court of Final Appeal addressed the benefit to the Petitioner creditor. There is no authority that more than one creditor is needed in the jurisdiction. The only restraint imposed by the Courts is that in the context of the third core requirement, namely, ‘the Court must be able to exercise jurisdiction over one or more persons in the distribution of the company’s assets’ is in situations where a foreign creditor submits to Hong Kong jurisdiction and presents the petition. Harris J in *Re China Medical Technologies Inc* [2014] 2 HKLRD 997 stated that :
   1. ‘ 47. A creditor cannot satisfy the third requirement by simply presenting the petition.  The creditor must be subject to the court’s jurisdiction by doing virtue of “something more”, such as by being an employed or otherwise resident within the jurisdiction, by virtue of obtaining the benefit of a judgment debt within the jurisdiction, by being registered under Part XI of the Companies Ordinance and having a place of business within the jurisdiction.’
3. Mr Ng’s reliance on *Re Insigma Technology Co Ltd* is misplaced. The Petitioner there submitted to the Hong Kong jurisdiction to present the petition. That was the only connection shown which was held to be insufficient for the third core requirement.
4. Mr Manzoni had submitted that on a proper reading of the Court of Final Appeal judgment in *Yung Kee* case, even that would not necessarily make it inappropriate to wind up the company, as the *Yung Kee* case identifies that the only relevant question is the statutory question of whether there is a sufficient connection. The three core requirements are just discretionary matters, and no individual one of them is mandatory. To construe the position otherwise is to render the three core requirements as jurisdictional and not discretionary and this would be contrary to *Yung Kee* case. But as he had submitted that he did not need to go that far for the purpose of this appeal, it is not necessary for me to address this argument.

**Conclusion**

Accordingly the appeal was dismissed.

**Decision on Costs**

**1) Indemnity costs**

1 The Petitioner asks for costs of the appeal to be borne by the Company to be taxed on an indemnity basis. In *In the matter of S Y Engineering Company Limited*CACV 1896/2001, Le Pichon JA stated at paragraph 20 that indemnity costs are appropriate where a company unsuccessfully appeals from a winding‑up order.

1. In my view the case justified the making of an indemnity costs order. I will order the Company to bear the costs of the appeal to be taxed on an indemnity basis.
   1. **2) Payment of costs by funder of the appeal**
2. Mr Manzoni also submitted that the Company’s appeal must have been funded by a non party and asks for costs against the funder.
3. Section 52A(2) of the *High Court Ordinance* (Cap 4)(‘the *Ordinance*’) empowers the Court to order a non party to pay costs :
   1. ‘ Without prejudice to the generality of sub-s.(l), the Court of Appeal or the Court of First Instance may, in accordance with the rules of court, make an order awarding costs against a person who is not a party to the relevant proceedings, if the Court of Appeal or the Court of First Instance, as the case may be, is satisfied that it is in the interests of justice to do so.’
4. The Court has the ancillary power to order a party to proceedings, or the solicitors who had been on the record for that party, to disclose to the other party the names of those who have financed the litigation. Where a power exists to grant a remedy there must be, inherent in that power, the power to make ancillary orders to make the remedy effective (see *Abraham* *v.* *Thompson* [1997] 4 All E.R. 362, CA): *Raiffeisenzentralbank* *Osterreich* *AG* *v. Crossseas Shipping Ltd* [2003] EWHC 1381 (Comm), Morrison J. (paragraph 62/6A/10 of *Hong Kong Civil Procedure* 2017, Vol 1.
5. I will order the Company and the Company’s solicitor (and the Company’s solicitor is willing to do so) to provide the name and address of the party who instigated the appeal on behalf of the Company (‘the funder’) within three days of this day. Upon the information being provided, the funder will be joined, without further order, as a party to the proceedings for the purposes of costs only and that person be at liberty to attend a hearing at which the Court shall consider the matter further.
6. I will further order the Petitioner to file and serve a statement of costs on the Company and the funder within seven days from the date of this order; and the Company and the funder are to file and serve a statement of objections, if any, within seven days thereafter.

Hon Kwan JA :

I agree with the Reasons for Judgment and Decision on Costs of Cheung JA.

Hon McWalters JA :

I agree with the judgment of Cheung JA.

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| (Peter Cheung) | (Susan Kwan) | (Ian McWalters) | |
| Justice of Appeal | Justice of Appeal | Justice of Appeal | |
|  | | |

Mr Charles Manzoni SC, instructed by Linklaters, for the Petitioner

Mr Tom Ng, instructed by Lam & Co, for the Respondent

Kirkland & Ellis, for the Liquidators, absent