HCCW 198/2016

[2025] HKCFI 2335

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 198 OF 2016

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IN THE MATTER of Everglory Energy Limited (錦恒能源有限公司) (Company No. 1794202)

and

IN THE MATTER of Sections 723 to 725 of the Companies Ordinance, Cap 622

and

IN THE MATTER of Sections 177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32)

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BETWEEN

SHIH-HUA INVESTMENT CO., LTD	Petitioner
and	
ZHANG AIDONG （張愛東）	1st Respondent
MOTIVI POINT CONSULTANT LIMITED	2nd Respondent

EVERGLORY ENERGY LIMITED （錦恒能源有限公司）	3rd Respondent
and	
EVERGLORY PETROCHEMICAL LIMITED	1st Intervener
EVERGLORY (MACAU) INTERNATIONAL CO., LIMITED	2nd Intervener

Before: Hon Ng J in Chambers

Date of Hearing: 16 September 2024

Date of Decision: 30 May 2025

DECISION ON COSTS

Introduction

1. On 12 June 2024, this court, after hearing solicitors for the Petitioner and Counsel for the 1st and 2nd Respondents, ordered that:

(1) Leave be granted to the 1st and 2nd Respondents to withdraw their Striking Out Summons dated 10 May 2024, subject to argument on costs.

(2) Leave be granted to the Petitioner to discontinue the Amended Winding-up Petition ("**A Petition**") as per its Discontinuance Summons dated 6 June 2024, subject to argument on costs.

(3) The parties are directed to file and serve affirmations for the purpose of argument on costs only within 6 weeks.

(4) The parties are directed to fix a date before a judge for argument on costs only, with 2 hours reserved.

2. This is the hearing of the parties' submissions on costs.

3. For the purpose of this 2-hour costs only hearing, Bundles A, B, C prepared by the Petitioner comprising more than 1,400 pages, were lodged with this court. Notwithstanding this court's indication and the agreement by the parties' legal advisers at the hearing on 12 June 2024 that, in the circumstances of this case, it would be a waste of the court's time and resources to delve into the minute details of the merits of the A Petition, the Petitioner had filed extensive evidence on the merits in the 6th affidavit of Zhong Jie ("**Zhong 6**") with close to 700 pages of exhibits, in effect asking this court to conduct an examination on the merits based on affidavit evidence only. While the 1st and 2nd Respondents submit, and this court agrees, that this approach is not feasible in view of the seriousness and fact-sensitive nature of the dispute between the parties, nevertheless, they have played along and prepared their own Bundle C of over 200 pages of documents containing their responses to the Petitioner's allegations. In the end, the hearing lasted less than an hour and neither counsel seriously attempted to analyse the evidence on merits.

Background

4. In order to understand this Decision, one must start from the beginning.

5. On 20 June 2016, the Petitioner presented a Petition ("**Petition**"), on just and equitable grounds, seeking *inter alia:*

(1) The Court's directions to investigate the misfeasance and/or breach of fiduciary duties on the part of the 1st Respondent and/or the affairs and management of the 3rd Respondent ("**Company**") as it deems fit.

(2) An account of what loss and damage has been suffered by the Company as a result of the misconduct of the 1st Respondent and/or the 2nd Respondent, and/or the 1st Respondent's misconduct done with the condoning of the 2nd Respondent.

(3) The 1st Respondent and/or the 2nd Respondent do pay such damages as shall be found due in sub-paragraph (2) above with interest to the Company.

(4) An order that the 2nd Respondent do purchase the Petitioner's shares in the Company at a fair value to be determined by an independent valuer appointed by the Court with a premium to reflect the loss suffered by the Company as a result of the matters of unfair prejudice set out herein and taking into account the amount assessed in sub-paragraph (2) above with interest.

(5) Alternatively, an order that the Company be wound up.

6. At paras 98 to 104 of the Petition, the Petitioner pleaded that:

> "98. In the premises, the affairs of the Company have been and are being conducted in a manner which is unfairly prejudicial to the interests of the Petitioner as a member of the Company, and/or actual or proposed acts or omission of the Company (including one done or made purportedly on behalf of the Company) are or would be so prejudicial to the interests of the Petitioner.

99. Further or alternatively, by reason of the matters set out above, the Petitioner has simply lost faith and confidence in the 2nd Respondent and the relationship of trust and confidence between the Petitioner on the one hand and the 2nd Respondent on the other hand have irretrievably broken down.

100. The Petitioner is prepared to sell its shares in the Company, which has since mid-2014 been made under the sole control of the 1st and 2nd Respondents, at a fair value to be determined by an independent valuer appointed by the Court, pursuant to section 725 of the Companies Ordinance Cap. 622.

101. In fact, the Petitioner through ALP [1] sent letters respectively dated 8 June 2016 and 16 June 2016 to the 1st and 2nd Respondents' respective solicitors, for the purpose of:-

(1) Reiterating its demand that the 1st and 2nd Respondents do allow the Petitioner's authorized representatives Mr. Yang or Mr. Zhong, to have access to the relevant accounting, financial and transactional records by allowing an inspection of the Company's books and records; and

(2) Suggesting and/or offering to sell its shares and invited the 1st and/or 2nd Respondent to propose a fair value or reasonable price which must reflect the true financial conditions of the Company, taking into account the various misconducts committed by the 1st and 2nd Respondents.

102. The Petitioner has not received any constructive reply to-date. Rather, by three letters all dated 10 June 2016, the 2nd Respondent continued to wrongfully challenge the status of the Petitioner's representatives and the engagement of ALP.

103. The Petitioner continues to have no access to the financial, accounting, and transactional documents of the Company to ascertain the full and true state of the affairs of the Company and/or to otherwise assess the value of the shares of the Company.

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[1] Its solicitors.

> 104. In the circumstances, the Petitioner cannot resort to the *bona fide* self-help remedies. Accordingly, the Petitioner humbly invites this Honourable Court to wind up the Company on just and equitable ground pursuant to section 177(1)(f) of the Companies (Winding up and Miscellaneous Provisions) Ordinance Cap. 32 for an independent liquidator to investigate the affairs of the Company."

7. There were interlocutory applications and satellite litigation since the presentation of the Petition. In particular, on 17 October 2016, the 1st Respondent applied for an Order that the winding up relief as contained in paragraph 104 and prayer (5) of the Petition be struck out on the grounds that there was no reasonable prospect of a winding up Order being made and/or the seeking of a winding up Order constituted an abuse of process.

8. On 19 January 2017, after hearing the parties and 2 Opposing Creditors in an application by the Petitioner to reconstitute the Board of the Company and replace the existing two directors with two suitably qualified independent professionals, A Chan J made an order reconstituting the Board, removing the existing directors and replacing them with 2 professionals ("**Reconstitution Order**"). A Chan J also made an Order ("**2017 Order**") at para 6 that:

> "Unless the Petition is amended within 14 days from the date of the written decision dated 19 January 2017 to state the reason(s) why a winding up order is sought in the alternative, paragraph 104 and prayer (5) of the Petition be struck out."

9. Pursuant to the 2017 Order, the Petitioner amended the Petition and filed the A Petition on 2 February 2017.

10. At paras 102A to 105 of the A Petition, the Petitioner pleaded the following. In particular, the Petitioner pleaded in paras 104 and 105 on

why the winding up of the Company may be the only practical and/or appropriate relief.

"102A. By letter dated 10 September 2016, the 1st and 2nd Respondents purported to make an offer that the Petitioner do buy out the 2nd Respondent's shares in the Company on, *inter alia*, the basis that:-

(1) such a purported offer is in full and final settlement and satisfaction of all the rights, interests and claims which the Petitioner and the 1st and 2nd Respondents have had or may have against the other in relation to or arise out of their positions or shareholdings in the Company, whether such rights, interests and claims are present or future; and

(2) any such rights, interests or claims which the Petitioner, the Company and the 1st and 2nd Respondents may have or have had or will have against the other is waived upon completion of the purchase of the 2nd Respondent's shares in the Company.

103. The Petitioner continues to have no access to the financial, accounting, and transactional documents of the Company to ascertain the full and true state of the affairs of the Company including its genuine financial position, assets and business and/or to otherwise assess the value of the shares of the Company. In particular, the 1st and/or 2nd Respondents have not to-date complied with the inspection order made by the Honourable Mr. Justice A. Chan on 14 December 2016 in HCMP2735/2016.

103A. The Petitioner cannot accept the purported offer set out in Paragraph 102A above also in view of the continuous misappropriation and serious or fraudulent breach of fiduciary duties on the part of the 1st Respondent as set out in Paragraphs 60 to 91 above, especially when the Petitioner is not in the position to fully ascertain the Company's financial, accounting and business positions.

104. In the circumstances, the 1st and 2nd Respondents have no genuine interest to buy out the Petitioner and/or to be bought out, and the Petitioner cannot resort to the *bona fide* self-help remedies. ~~Accordingly, the Petitioner humbly invites this Honourable Court to wind up the Company on just and equitable ground pursuant to~~

~~section 177(1)(f) of the Companies (Winding up and Miscellaneous Provisions) Ordinance Cap. 32 for an independent liquidator to investigate the affairs of the Company~~.

105. The Petitioner seeks an alternative order to wind up the Company on just and equitable ground pursuant to section 177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance Cap. 32 on the ground that the winding up of the Company may be the only practical and/or appropriate relief:-

(1) By letter dated 13 August 2016, the 1st and 2nd Respondents informed the Petitioner that (a) Oriental Energy and Bohua Petrochemical respectively served and intended to serve a notice to terminate its long term contract with the Company and (b) the Company's solvency is "in serious doubt";

(2) The sudden indication of "doubtful solvency" and/or "insolvency" of the Company is extremely suspicious in view of the misappropriation and/or serious/fraudulent breach of fiduciary duties on the part of the 1st Respondent set out in Paragraphs 60 to 91 above but the Petitioner is not in the position to ascertain the same;

(3) By reason of the matters set out in Paragraphs 100 to 104 above, the buy-out negotiation between the Petitioner on one hand and the 1st and 2nd Respondents on the other have yielded no result or progress;

(4) Further or in the alternative to sub-paragraph (3) above, any buy-out order made against the 1st and/or 2nd Respondents would be difficult to enforce against the 1st and/or 2nd Respondents in that (a) it is uncertain whether they have the ability to buy-out the Company and/or (b), the 1st Respondent is a PRC based businessman and the 2nd Respondent is a BVI company with no apparent or other asset in Hong Kong apart from its shareholding in the Company.

(5) Still further, by reason of Paragraph 103 above, the Petitioner is not in possession of all the necessary information to make an informed decision to seek a buy-out order or the winding up of the Company;

(6) The persistent and serious breaches of fiduciary duties and/or fraudulent conducts on the part of the 1st Respondent including misappropriation of assets as well as their effect on the valuation of the Petitioner's shares should be an issue to be determined by the Court. As such, the winding up of the Company remains or may remain the only appropriate and/or practical relief to stop the fraudulent or improper conduct of the affairs of the Company;

(7) The Company is deadlocked and there is a complete breakdown of trust and confidence as between the Petitioner on one hand and the 1st and/or 2nd Respondents on the other hand. Paragraphs 12 to 13 and 92 to 95 above are repeated; and/or

(8) In all circumstances and in particular, Paragraphs 28 to 91 above and/or sub-paragraphs (1) to (2) above, there is a need for an independent liquidator to investigate the affairs of the Company."

11. Thereafter, the Company was wound up by a Master on 29 August 2018 in another proceedings HCCW173/2018 ("**HCCW173**") on the petition of a creditor by reason of its insolvency. HCCW173 was uncontested by anyone, whether the Petitioner or any of the Respondents[2].

12. As this court sees it, after 29 August 2018, there was little point in carrying on with the present proceedings. It is not legally feasible to wind up a company twice. Seeking a buy out Order would generally be futile given the Company was insolvent and had been wound up, since shares in an insolvent company in liquidation are clearly valueless unless a petitioner can demonstrate his shares would have had a value but for the wrongdoing of a respondent: *In re Tobian Properties Ltd* [2013] Bus LR at [11], per Arden LJ (as she then was). In view of the 1st and 2nd Respondents' strenuous denial of any wrongdoing, the Petitioner would

[2] Otherwise, the petition would have to be adjourned to a Monday morning before a Judge.

have had to go to great lengths to demonstrate that to the satisfaction of the court. This however is something which the Petitioner was not prepared to do, as evident from paras 104 and 105 of the A Petition, the history of the proceedings as depicted in its own chronology, its stance as explained in the correspondence exchanged between the parties and ultimately its decision to discontinue the proceedings.

13. As for the investigation of the alleged misconduct of the 1st and 2nd Respondents and the affairs and management of the Company generally, the most cost effective means was to leave it to the joint and several liquidators of the Company. If the Petitioner's allegations were found to be meritorious, the liquidators could seek whatever relief against the culprit(s) as they saw fit.

14. Since the A Petition has become academic, the sensible course was for the Petitioner to discontinue it. This the Petitioner eventually did. If necessary, the parties could also engage in negotiation on costs in the event of disagreement. They did so in correspondence but without success.

15. On the Petitioner's chronology, it raised this issue of discontinuance on 21 July 2020. The relevant parts of the letter dated 21 July 2020 from the Petitioner stated this:

> "The Company was wound up by its creditor Shell. The dispute between the shareholders of the Company became academic after liquidation of the Company. The Petitioner is prepared to consider to discontinue these proceedings upon reaching a satisfactory settlement with the Respondents on legal costs… The Petition was rightly commenced, as can be deduced from the Decision of the Hon. Anthony Chan J. handed down on 19th January 2017." (emphasis added)

16. Numerous correspondence ensued. The 1st and 2nd Respondents' legal advisers did not dispute the Petitioner's assessment that the proceedings had become academic. Suffice it for this court to refer to the 3 letters which followed up shortly after the Petitioner's letter of 21 July 2020 and which featured in the Petitioner's chronology.

(1) On 2 September 2020[3], the Petitioner proposed to the 1st and 2nd Respondents that the sensible way to deal with the A Petition was for the Petitioner to discontinue these proceedings with no order as to costs.

(2) On 9 September 2020, the 1st and 2nd Respondents invited the Petitioner to file a notice of discontinuance of the A Petition failing which they would take it that the Petitioner intended to continue with the proceedings.

(3) On 11 September 2020, the Petitioner stated to the 1st and 2nd Respondents that:

> "6. Regarding your proposal for the Petitioner to discontinue the action with costs to your clients, we take the view that the Petition was rightly commenced, as can be deduced from his Lordship's decision handed down on 19 January 2017. Therefore, we do not agree that costs of the Petition should be paid by the Petitioner.
>
> 7. We reiterate the Petitioner's stance: The Petition should not proceed further in view of the Company's winding up. The issues under dispute are academic. The parties should be sensible in saving further costs and the Court's precious time. The Petitioner proposes to discontinue these proceedings with no order as to costs."

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[3] There were other correspondence on the subject dated 12 August and 8 September 2020, but they do not add anything material and shall not be repeated here.

17. Further correspondence was exchanged between the parties on the subject but no agreement could be reached even up to 4 March 2024.

18. On 1 March 2024, the 1st and 2nd Respondents' solicitors wrote to the Petitioner's solicitors stating that:

> "For the avoidance of doubt, our clients' stance have always been clear that they do not object the discontinuance of this Petition but insist that the usual costs order shall apply, namely costs of this Petition shall be paid by your client to ours.
>
> Unless your client takes out any appropriate application seeking leave to discontinue within 3 business days (i.e. on or before 5 March 2024), our client will take out an appropriate application to strike out the Petition, and seek costs on indemnity basis against your client."

19. In reply, on 4 March 2024, the Petitioner's solicitors wrote back saying:

> " … the Petitioner was prepared to give consent to discontinue for the purpose of saving costs and the Court's precious time, on condition that there is no order as to costs of the Petition. Your request for discontinuance with costs to your clients is not acceptable. We reiterate our repeated requests that your clients agree to have a discontinuance with no order as to costs."

20. On 10 May 2024, the 1st and 2nd Respondents issued the Striking Out Summons for an Order that:

> "The Amended Winding Up Petition filed herein on 2 February 2017 be dismissed or struck out on the ground that it constitutes an abuse of the process of the Court and/or for want of prosecution".

21. On 6 June 2024, the Petitioner issued the Discontinuance Summons seeking at para 1 thereof "[L]eave be granted to the Petitioner to discontinue the Petition saved that the costs thereof be determined by

way of costs only proceedings". As an alternative, at para 2 thereof, the Petitioner sought leave to continue and proceed with the A Petition for the purpose of deciding on the question of costs.

22. On 12 June 2024, the two Summonses came before this court.

23. At the hearing on 12 June 2024, Mr Alex Fan, for the 1st and 2nd Respondents, very sensibly and properly conceded that a respondent could not stop a petitioner from discontinuing its own petition. Mr Fan, also very sensibly and properly, confirmed to this court after taking instructions that the 1st and 2nd Respondents were not going to proceed with their Striking out Summons.

24. On the basis of the above, this court granted the Orders mentioned in para 1 of this Decision.

Deliberation

The legal principles

25. The following legal principles are applicable to costs upon an application for leave to discontinue or withdraw.

26. First, upon an application for leave to discontinue or withdraw, the starting point is that the discontinuing or withdrawing party will be required to pay the costs of the other party. The burden of persuading the court to depart from the general rule rests on the party who seeks to discontinue or withdraw*: Hong Kong Civil Procedure 2025* Vol 1 para 21/5/12A.

27. A departure from this general rule might be proper where the matter in dispute between the parties has become academic: *Hong Kong Civil Procedure 2025* Vol 1 para 21/5/12A; *Trend Publishing (HK) Ltd v Vivien Chan & Co. (a firm)* [1996] 2 HKLR 227 at 230H-I.

28. While the court may exercise its discretion on costs to do justice, the fact that the discontinuance had been caused by the issues of the Petition becoming academic does not of itself justify departure from the said starting point. Good reason must be shown: *Re China Solar Energy Holdings Ltd* unrep, HCCW 108/2015, 1 March 2016 at [16], per DHCJ Le Pichon.

29. The approach of the court in determining costs where the issues on liability have become academic has been succinctly stated in *Glory Empire Global Ltd v Bateson Investment Limited* unrep HCA 866/2017, 17 August 2017, at [44] by A Chow J (as he then was) as follows:

> "(1) The judge has a wide discretion not only as to the manner by which the issue of costs is to be determined, but also what evidence should be received and what findings to make.
>
> (2) In a simple case where the issue of liability is clear on the face of the pleadings or existing affidavit evidence already filed, it would be open to the judge to determine the issue of costs without receiving any further evidence.
>
> (3) Where the issue of liability is not so clear, the judge may direct evidence to be filed and the witnesses to be cross examined. The judge may also confine the evidence to be filed, and cross examination of the witnesses, to a particular issue or some particular issues.
>
> (4) In determining the issue of liability for the purpose of deciding costs, the court may adopt a broad brush approach and does not necessarily have to conduct a trial to determine the substantive issues.

(5) Where it is impossible for the court, on the existing materials, to say what the likely outcome would be, the court may, in appropriate circumstances, decide to make no order as to costs.

(6) Ultimately, the objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs." (emphasis added)

30. In *Du Shui Wing & Ors v Fu Kin Fung & Ors* [2023] HKCFI 2016, Linda Chan J at [7] stated her view on costs in certain scenarios:

"(1) Where the parties reached a settlement on the underlying dispute and costs. The court would normally make the costs order as agreed between the parties.

(2) Where the parties reached a settlement on the underlying dispute but unable to agree on costs, they cannot expect the court would agree to determine the question of costs summarily. This is because far from saving time, the court would have to go through the respective cases of the parties and their evidence and come to a view on the merit, without the benefit of being able to see the witnesses and the full submissions of counsel.

(3) Where the proceedings have become academic as a result of the conduct of the parties, the court may take into account the conduct of the party responsible for bringing the proceedings to an end and decides who should be liable to pay costs.

(4) Where the reason for the proceedings coming to an end was the result of subsequent events which are not attributable to the parties, ordinarily there should be no order as to costs as it cannot be said that either party is at fault for bringing about or defending the proceedings.

(5) In the context of an "unfair prejudice" petition, if the petitioner considers the petition has become academic but contends that it should be entitled to costs, it bears the burden of satisfying the court that had the petition proceeded to trial, it would have succeeded in establishing all the complaints *and* the court would grant the reliefs sought in the petition. This is because even if the petitioner is able to establish the complaints, it would not be regarded as the successful party if the relief sought is not one which

> the court would grant under s.725 of the Companies Ordinance (Cap. 622) ("**CO**")." (emphasis added)

31. At [9], Linda Chan J made the following further observations on how to approach the merits of a petition which has been discontinued:

> "There are 2 further points relevant to the court's consideration of the merit of the complaints where the petitioner has discontinued the petition:
>
> (1) First, the court would only consider the complaints pleaded in the petition. This accords with the principle that the petitioner's complaints are defined by and limited to the matters pleaded in the petition (*In re Fildes Bros. Ltd* [1970] 1 WLR 592 at 597G-598C; *Re Tourmaline Ltd* [2000] 4 HKC 348 at 354C-D, per Chu J (as she then was)).
>
> (2) Second, the court would only consider the evidence which is not in dispute or is indisputable. It is the petitioner's own decision to discontinue the petition thereby depriving the respondent the opportunity to challenge its evidence at trial. The petitioner cannot be heard to say that the court would necessarily determine the factual dispute in its favour at trial." (emphasis added)

32. While the court should not abdicate from its function of adjudicating on costs merely because there are complicated factual disputes, if it is impossible to come to a conclusion as to the likely outcome of the petition without an investigation the costs of which would be out of all reasonable proportion, the court should accept it is truly impossible to determine the question of costs and the appropriate order is to make no order as to costs. In that scenario, no order probably best serves the justice of the situation and the interests of the parties: *In The Matter of of Fook Lam Moon Restaurant Ltd* (福臨門酒家有限公司) unrep HCMP438/2010, 8 December 2015, To J at [51].

The parties' stance – Costs of the Petition and the Discontinuance Summons

33. These can be dealt with together.

34. First, the Petitioner's primary position is to seek costs of the Petition against the 1st and 2nd Respondents. This is encapsulated in several paras of Mr Ngan's skeleton.

35. At para 17, Mr Ngan submits that since the eventual winding up of the Company in HCCW173 was caused by the 1st and 2nd Respondents in having run the Company to the ground, the Petitioner submits that it is entitled to the costs of the Petition which has become academic and unnecessary for the Petitioner to pursue: *Re Peaktop Technologies (USA) Hong Kong Ltd* [2007] 4 HKLRD 207 at [8].

36. In this court's view, the citation of *Re Peaktop Technologies* at [8] is not entirely fitting but Barma J (as he then was) at [7] did make the observation that the court had a wide discretion as to costs when giving leave to withdraw and if the circumstances were, exceptionally, such that a costs order should be made in favour of an applicant who had obtained leave to withdraw his application, there was no jurisdictional bar to the court in making a costs order in his favour.

37. The real question, in this court's view, is whether the present case is truly "exceptional" in that the A Petition is meritorious and on the available evidence the Petitioner can demonstrate that the liquidation of the Company was caused by the 1st and 2nd Respondents in having run the Company to the ground.

38. After para 17, Mr Ngan then made 3 points in support of his contention.

(1) The A Petition was well-founded especially in light of the clear exclusion of the Petitioner from the Company's affairs and denial of access to its books and records. This was endorsed by A Chan J at para 68 of his decision dated 19 January 2017 ("**2017 Decision**") that: "[o]n the above analysis of the evidence, I am satisfied that Shih-Hua[4] has made out at least a good arguable case on unfair prejudice".

(2) It became unnecessary and academic to pursue the A Petition since the Company was wound up in HCCW173 on insolvency grounds. As such, any further efforts to vindicate the Petitioner's interests as a member of the Company "fell moot".

(3) There can be no doubt that the Company's eventual winding up was caused by the 1st and 2nd Respondents. Since the Petitioner's wrongful exclusion, the Company had at all times been under their sole control. The Petitioner was totally left in the dark in respect of its management and affairs notwithstanding its efforts to try to change the situation.

39. In conclusion, at para 22, Mr Ngan submitted that "there are exceptional circumstances that justify this Court's departure from the general rule and costs of this Petition should rightfully be awarded to P."

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[4] The Petitioner.

40. On the evidence and in the circumstances of this case, this court is not at all satisfied with the Petitioner's contention that this is a truly exceptional case in that (i) the A Petition was well-founded or (ii) the Company's eventual winding up was caused by the 1st and 2nd Respondents.

41. On the question of merits, the evidence relied upon by the Petitioner, principally Zhong 6, can hardly be described as not in dispute or is indisputable – on the contrary, they are seriously disputed by the 1st and 2nd Respondents. In effect, the Petitioner is asking this court to (i) accept the A Petition and Zhong 6 *carte blanche* notwithstanding the 1st and 2nd Respondents' dispute and without giving them an opportunity to test the Petitioner's case, (ii) make findings in its favour on all allegations contained in the A Petition as well as (iii) conclude that it should grant the reliefs sought in the A Petition. It is simply impossible for this court to entertain that request from the Petitioner and reach the conclusion that had the A Petition proceeded to trial, it would have succeeded in establishing all the complaints *and* the court would grant the reliefs sought.

42. This court has not overlooked A Chan J's 2017 Decision but does not find it as supportive of the Petitioner's case as it had hoped. Putting in context, A Chan J's comment that there was a good arguable case on unfair prejudice was merely a preliminary observation in an interlocutory application by the Petitioner to re-constitute the Board of the Company by replacing the existing 2 directors with 2 independent professionals. It does not, to any significant extent, lead this court to arrive at a conclusion on the merits in favour of the Petitioner had the A Petition proceeded to trial.

43. On the cause of the Company's insolvency and liquidation, this court is also not satisfied that the Petitioner had demonstrated that the Company's eventual winding up was caused by the 1st and 2nd Respondents. Even assuming there is *prima facie* evidence of unfair prejudice, it is a quantum leap to conclude without more that this had led to the eventual insolvency of the Company.

44. The Petitioner's complaints have been summarized in Zhong 6 at para 14. They were:

(1) First, the Petitioner was gradually and, by around May 2016, totally excluded from the Company's affairs. The Petitioner was unable to ascertain the Company's affairs (since as early as January 2014) and it was unable to resort to *bona fide* self-help remedies, which necessitated the issuing of the Petition (see paragraphs 29 to 37 of the A Petition).

(2) Second, the Petitioner was wrongfully denied of access to the Company's books and records (see paragraphs 40 – 59 of the A Petition).

(3) Third, the Petitioner's company chop was forged onto the Company's purported resolutions and purported audited statements of account for the year ended 31 December 2014 (see paragraphs 61 – 64 of the A Petition).

(4) Fourth, the Company's contractual interests/profits/business opportunities were diverted away (see paragraphs 65 – 69 of the A Petition).

(5) Fifth, the Company's money was misappropriated on various occasions from its bank accounts by the Respondents (see paragraphs 70 – 88 of the A Petition).

45. It can be seen that there is no allegation in that summary at all that the 1st and 2nd Respondents' alleged misdeeds had caused the eventual liquidation of the Company.

46. Second, knowing the weakness of the Petitioner's primary case, Mr Ngan has put forward, as a fallback position, that no order as to costs would be appropriate: Mr Ngan's skeleton at para 23. Essentially, Mr Ngan relied on the principles referred to above viz *Hong Kong Civil Procedure 2025* Vol 1 para 21/5/12A; *Du Shui Wing* at [7]*; In The Matter of Fook Lam Moon Restaurant Ltd* (福臨門酒家有限公司) at [51]. In this regard, Mr Ngan submitted that:

(1) the A Petition had become academic and that was a good reason to depart from the general rule;

(2) that situation was not caused by anything the Petitioner had done; and

(3) it would be impossible for this Court to conclude as to the likely outcome of the A Petition without an unduly lengthy investigation that would involve a totally disproportionate expenditure of both parties' and this Court's time and costs. In this regard, justice and fairness and the interests of all parties would be best served with no order as to costs.

47. Eventually, this fallback position became his ultimate position.

48. At the ultimate paragraph of Mr Ngan's skeleton ie para 48, he submitted that the just and appropriate costs orders this should make were:

(1) no order as to the costs of the A Petition; and

(2) the Petitioner should be entitled to the costs of the Discontinuance Summons on an indemnity basis as "discontinuance with no order as to costs" has been repeatedly offered to the 1st and 2nd Respondents.

49. But even that ultimate position in Mr Ngan's skeleton stood to be revised.

50. Towards the end of the hearing, upon enquiry by the bench, Mr Ngan at last indicated to this court his "definitive" position[5]: there should be no order as to costs of the A Petition and the same applied to the Discontinuance Summons – the Petitioner no longer sought costs of the Discontinuance Summons against the 1st and 2nd Respondents.

51. The position of the 1st and 2nd Respondents on the other hand was that the general rule applied as no good reasons or exceptional circumstances existed to justify a departure from it. Hence, the 1st and 2nd Respondents should be entitled to all the costs of the A Petition, no doubt including costs of the Discontinuance Summons.

52. In this regard, Mr Lai made 3 main points in his skeleton at para 3.

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[5] See pp 16 and 17 of the Transcript.

(1) First, the winding up of the Company was not a good reason / exceptional circumstances which justified departing from the general rule. In particular:

(a) The mere fact that the issues in the A Petition had become academic did not justify a departure from the general rule that the discontinuing party was liable to pay costs.

(b) Further, the winding up of the Company did not render the A Petition academic because the Petitioner could still meaningfully seek its relief of buy-out from the 1st and 2nd Respondents.

(c) In any event, the winding up of the Company was fortuitous in the sense that the Petitioner's prayer for winding up as a contributory of the Company was doomed to fail in light of the Company's insolvency.

(2) Second, there was no basis to suppose that any aspect of the A Petition was bound to win. On the contrary, significant aspects of it were bound to fail. This was because:

(a) The Petitioner did not have any tangible interest to seek a winding up relief as a contributory of the Company by reason of the insolvency of the Company at the material time.

(b) The Petitioner's allegations of the 1st and 2nd Respondents' wrongdoings against the Company had

been confirmed by the liquidators of the Company to be wholly without basis.

(3) Third, there was sufficient basis for the Court to find that the Petitioner issued the present proceedings only for the collateral purpose of seizing control of the Board of the Company, and not with a view to prosecute the A Petition to its completion.

53. These points can be dealt with very briefly – in this court's view, none of them have any merits.

54. On the first point, the Petitioner did not dispute the legal proposition that the mere fact that the issues in the A Petition had become academic did not of itself justify a departure from the general rule that the discontinuing party was liable to pay costs: *China Baoli Technologies Holdings Ltd v Orient Equal International Group Ltd & Ors* [2021] HKCA 1609 at [17]. The authorities are clear that good reason or exceptional circumstances had to be shown.

55. But it is a quantum leap for Mr Lai to suggest at para 35 of his skeleton that "[a]ccordingly, P's contention that it is not liable to pay for the costs of Rs fail [sic] *in limine*" as though the fact that the A Petition had become academic through no fault of either party could never be a good reason to justify a departure from the general rule. That suggestion is clearly not the law.

56. Mr Lai contends that the liquidation did not render the A Petition academic because the Petitioner could still meaningfully seek its relief of buy-out. Proceedings were academic if there was no true dispute

and the outcome of the proceedings could not affect the parties in any way: *China Baoli Technologies* at [33]. At most, the present situation was one where the Petitioner might have considered the further prosecution of the A Petition to be undesirable for practical, pragmatic or financial reasons.

57. This contention was untenable for 2 reasons:

(1) While Barma JA did accept at [33] of *China Baoli Technologies* the proposition that proceedings were academic if there was no true dispute and the outcome of the proceedings could not affect the parties in any way, this court does not consider the learned Judge as having laid down an absolute rule that was the only circumstance in which proceedings would be regarded as academic. Every case turns on its own facts and this court has no doubt that the learned Judge realized it would be unwise to lay down any such absolute rule.

(2) As this court pointed out earlier, seeking a buy out Order would generally be futile if a company is insolvent and has been wound up, since shares in an insolvent company in liquidation are clearly valueless unless a petitioner can demonstrate his shares would have had a value but for the wrongdoing of a respondent. In the present case, the 1st and 2nd Respondents strenuously denied any wrongdoing and the Petitioner would have had to go to great length and at great expenses to demonstrate that to the satisfaction of the court, something which the Petitioner was not prepared to do. In these circumstances, even assuming the Petitioner could

theoretically continue with the A Petition to seek the relief of buy-out, it would not be a meaningful exercise. In this court's view, the A Petition has become sufficiently academic in the circumstances of this case for the purpose of costs.

58. Lastly, describing the winding up of the Company as fortuitous is little more than another way of saying its liquidation and the subsequent discontinuance of the present proceedings was brought about by events or acts of a third party which cannot realistically be attributable to the fault of either the Petitioner or the 1st and 2nd Respondents. This fact does not assist the 1st and 2nd Respondents. Rather, it lends support to the Petitioner's ultimate and definitive position that there should be no order as to costs: *Du Shui Wing* at [7(4)].

59. Second, Mr Lai contends that there was no basis to suppose that any aspect of the A Petition was bound to win. On the contrary, significant aspects of it were bound to fail. The so-called significant aspect was a reference to the claim for winding up relief in the A Petition: see section E of Mr Lai's skeleton.

60. The Petitioner does not dispute that after the liquidation of the Company in August 2018, there was no prospect of the Petitioner obtaining its winding up relief in the present proceedings. But that was through no fault of the Petitioner – but for the liquidation of the Company in HCCW173, it remained to be determined whether the allegations in the A Petition would justify the winding up of the Company in the present proceedings.

61. As for the contention that there was no basis to suppose that any aspect of the A Petition was bound to win, the short answer is that it

was not necessary for the Petitioner to demonstrate that it was bound to win in order to support its stance that there should be no order as to costs. On the authorities, as long as the A Petition had become academic and a good reason existed, the general rule could be departed from.

62. Regarding the third and last main point of the 1st and 2nd Respondents ie the Petitioner issued the present proceedings only for the collateral purpose of seizing control of the Board of the Company, Mr Lai's submission consists of 6 short paras in his skeleton. For ease of reference, this court will recite paras 49 - 54 in full below.

> "**F. P's Issuance of the Petition for a Collateral Purpose**
>
> 49. Finally, there is sufficient basis for the Court to find that P issued the proceedings only for the collateral purpose of seizing control of the board of the Company but with a view to prosecute the UP Proceedings[6] to its completion.
>
> 50. To start with, as found the Enforcement Decision and affirmed in the 2nd CA Decision, the Reconstitution Order "was not sought for the reasons advanced, but as a tactical device", and that "its application to reconstitute the Board was directed more to ousting Mr Zhang rather than putting in management that could take over the running of the Company's affairs" (§§16(1) and 17 of the Enforcement Decision) [A/26/264&266]. This finding is binding upon P.
>
> 51. Further, the fact of the matter is that P did not progress with the UP Proceedings after the Reconstitution Order was granted. From the point the Reconstitution Order was granted on 19/1/2017 until the Company was wound up on 29/8/2018, more than 20 months have passed without any steps being taken in the UP Proceedings.
>
> 52. Whilst P refer to Section B of Zhong 6th [A/23/198+] to submit that it has taken active steps to prosecute the matter, the said evidence does not address the question of why from 19/1/2017 to 29/8/2018, no active steps were taken to further prosecute the Petition. Even taking into account the

[6] Ie the present proceedings.

> fact that there was an appeal against the Reconstitution Order, such appeal was dismissed by April 2017, and therefore remains a 16-month gap between the dismissal of the appeal (in April 2017) and the winding up of the Company (in August 2018).
>
> 53. The truth of the matter is that there is no evidence from P as to why this is the case. In the absence of a proper explanation (and there is none), the compelling inference is that P has commenced the UP Proceedings solely for the collateral purpose of ousting R1 from the Board, such that once that objective was achieved P had no intention to bring the UP Proceedings to its completion.
>
> 54. For this additional reason, it is submitted P should pay for the costs of Rs."

63. The Enforcement Decision referred to in para 50 of Mr Lai's skeleton was a reference to a decision of Harris J dated 25 February 2022 in the present proceedings: [2022] 1 HKLRD 1376. It was an application by the Respondents seeking an order that the Petitioner's undertaking as to damages given to A Chan J, as contained in Schedule 1 to the 2017 Order, should be enforced. Harris J eventually ordered an inquiry.

64. Para 16(1) of the Enforcement Decision referred to above was a repetition of counsel William Wong SC's submissions which in turn repeated para 39 of an earlier decision of Harris J dated 4 June 2018, not in the present proceedings, but in a different, albeit related, common law derivative action ie HCA2682/2016 ("**HCA2682**") commenced by the Petitioner against the Respondents and others. [39] of that earlier decision of Harris J read:

> "39. It would seem to me that SH[7] has dealt with this matter in a disingenuous way. It would appear that its application to reconstitute the Board was directed more to ousting Mr Zhang rather than putting in management that could take over the

[7] Ie the Petitioner in these proceedings.

> running of the Company's affairs including the prosecution of the Action[8]…"

65. In para 17 of the Enforcement Decision, Harris J, after reciting counsel's submission, referred back to what he said in [39] of HCA2682 and apparently concluded that the Reconstitution Order made by A Chan J had been improperly obtained which eventually led to his Order for an inquiry.

66. It is absolutely deplorable that Mr Lai had failed to provide this court with the essential context in para 50 of his skeleton before asserting his concluding remark that "This finding is binding upon P."

67. The long and short of it all is that this court had not been apprised of the evidence before Harris J at the relevant hearing in HCA2682 or at the hearing which led to the Enforcement Decision in the present proceedings. This court can only act on the evidence before it and on the meagre evidence referred to by Mr Lai in those 6 short paras of his skeleton, this court is simply not satisfied that it should draw the inference that the Petitioner had commenced the present proceedings solely for the collateral purpose of ousting the 1st Respondent from the Board of the Company and had no intention to bring the proceedings to their completion.

68. That is sufficient to dispose of Mr Lai's last main point which in this court's view is pure speculation.

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[8] Ie HCA2682.

Conclusion : Costs of the Petition and the Discontinuance Summons

69. To conclude, this court rejects Mr Lai's submission and accepts Mr Ngan's submission that (i) the A Petition had become academic without any fault attributable to the parties and that was a good reason to depart from the general rule on costs and (ii) it would be impossible for this court to conclude on the likely outcome of the A Petition without an unduly lengthy investigation that would involve a totally disproportionate expenditure of both parties' and this court's time and costs.

70. In the circumstances, this court is of the view that justice and fairness and the interests of all parties would be best served by making no order as to costs of the A Petition, including the Discontinuance Summons.

Costs of the Striking Out Summons

71. The costs of the Striking Out summons can be dealt with briefly.

72. As stated earlier, the Striking Out Summons was put on the basis that the A Petition constituted an abuse of the process of the Court and/or for want of prosecution.

73. At the hearing on 12 June 2024, it was after this court had given the Petitioner leave to discontinue the A Petition that Mr Fan for the 1st and 2nd Respondents very sensibly indicated, after taking instructions, that they were not going to proceed with the Striking Out summons. Hence, leave was given by this court for them to withdraw.

74. Notwithstanding the general rule as to costs of withdrawal and what was submitted in Mr Ngan's skeleton that the general rule should be

adhered to, the "definitive" position of the Petitioner, upon enquiry from the bench at the end of the hearing, was that there should be no order as to costs.

75. On the other hand, the 1st and 2nd Respondents' position was that they should get costs because they were the "effective winner". In Mr Lai's skeleton, he submitted that:

(1) The 1st and 2nd Respondents had forewarned the Petitioner that they intended to strike out the present proceedings for want of prosecution prior to the issuance of the Striking Out Summons by a letter from Jun He Law Offices to Alvan Liu & Partners dated 1 March 2024. This court notes that the letter did not state the grounds of the proposed application at all. It certainly did not state the ground would be confined to "want of prosecution".

(2) Notwithstanding the forewarning, the Petitioner only applied to discontinue the present proceedings after the Striking Out Summons had been issued.

76. From the correspondence, it would appear that from 21 July 2020 onwards, the parties were *ad idem* on the desirability of discontinuing the A Petition but, notwithstanding protracted negotiations, could not agree on the costs thereof. This court had earlier referred to the last 2 letters exchanged between the parties' solicitors dated 1 March and 4 March 2024. What happened next was the issue of the Striking Out Summons.

77. It would appear that on the evidence, since the winding up of the Company on 29 August 2018, no serious steps had been taken by the

Petitioner to prosecute the A Petition as such, but rather, it was actively seeking to negotiate a settlement of the proceedings by way of discontinuation, at least since July 2020. That seems to this court perfectly understandable. As this court sees it, it is really the insistence of the 1st and 2nd Respondents on seeking costs which posted the biggest obstacle to an early settlement.

78. As it turns out, the 1st and 2nd Respondents do not get their costs of the A Petition.

79. If this court were to actually adjudicate on the Striking Out Summons, it would have difficulty in granting it, whether on the basis of "abuse of process" or for want of prosecution. The 1st and 2nd Respondents could not claim to be the "winner" simply because they had forewarned the Petitioner that they would issue the Striking Out Summons. They had to demonstrate that they would have succeeded if that Summons had proceeded to its completion. For these reasons, Mr Lai's submission that his clients were the "effective winner" is wholly misconceived. They had not succeeded in making good their Striking Out application. Nor have they demonstrated that they would have succeeded had the application proceeded to its completion.

80. All that happened, taking their case to the highest, is that they had succeeded in prompting the Petitioner to issue the Discontinuance Summons which in turn prompted their withdrawal of their Striking Out application. This is clearly not the same as the 1st and 2nd Respondents having succeeded in making good their Striking Out application for abuse of process or want of prosecution.

81. Given that the 1st and 2nd Respondents are the withdrawing party, costs would usually be ordered against them. However, in this court's view, this is a situation where the general rule should be departed from. This is because the Striking Out Summons had only been rendered academic by the liquidation of the Company which eventually led the Petitioner and the 1st and 2nd Respondents to agree to a discontinuance of the A Petition, subject to negotiation on costs.

82. While the 1st and 2nd Respondents blamed the Petitioner for not issuing the Discontinuance Summons much earlier, a similar argument could be made against the 1st and 2nd Respondents that they should have agreed to "no order as to costs" of the A Petition much earlier, which is the eventual result as determined in this Decision. In that event, there would have been no need for the issue of the Striking Out Summons at all.

83. To conclude, it seems to this court that justice and fairness and the interests of all parties would be best served by making no order as to costs and this court shall so order.

Disposition and costs order nisi

84. Subject to what is ordered in the next paragraph, this court makes no order for costs on the A Petition, the Discontinuance Summons and the Striking Out Summons, including all costs reserved, particularly the costs of the hearing on 12 June 2024.

85. Regarding the costs of this hearing, this court has only accepted part of the Petitioner's conclusion at para 48 of its skeleton concerning no order as to costs of the A Petition, albeit it has come to a decision in line with the ultimate definitive stance of the Petitioner, which

stance was taken rather late in the day. This court has however rejected all the submissions of the 1st and 2nd Respondents on costs. To reflect the above, on a *nisi* basis, this court is prepared to and hereby orders that 1/3 of the costs of this hearing be to the Petitioner, to be taxed if not agreed, and paid by the 1st and 2nd Respondents forthwith, certificate for counsel.

(Peter Ng)
Judge of the Court of First Instance
High Court

Mr Ronald Ngan, instructed by M/s Alvan Liu & Partners, for the Petitioner

Mr Lai Chun Ho, instructed by M/s Jun He Law Offices, for the 1st and 2nd Respondents

The Official Receiver was absent