IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 68 OF 2019 (NSJ)

IN THE MATTER OF SECTIONS 15 AND 86 OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF THE GRAND COURT RULES 1995 ORDER 102

AND IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED (IN LIQUIDATION)

JUDGMENT ON THE SUMMONS RELATING TO PERFECT GATE'S VOTE AT THE EGM

Appearances:	**Mr. Tom Lowe QC instructed by Harney Westwood & Riegels for the Company and the liquidators**
Hearing date:	**Friday 5 July, 2019**
Decisiou announced:	**Tuesday 9 July, 2019**
Draft judgment circulated:	**Friday 12 July, 2019**
Judgment:	**Tuesday 16 July, 2019**

Introduction

1. China Agrotech Holdings Limited (in liquidation) (the ***Company***) has applied, by a summons dated 12 June 2019 (the ***Summons***), for a declaration that resolutions passed at an extraordinary general meeting of the Company held on 22 May 2019 (the ***EGM***) were validly passed. The validity of the resolutions has been challenged by a shareholder, Perfect Gate Holdings Limited

(***Perfect Gate***), who voted against the resolutions.

2. The Company, which is incorporated in the Cayman Islands, is in liquidation in Hong Kong. The Company's liquidators are Stephen Liu Yiu Keung and David Yen Ching Wai (***Mr Yen***) of Ernst & Young Transactions Limited. The application is made by the Company acting by its Hong Kong liquidators. The application arises in the context of a post-liquidation restructuring of the Company. The liquidators have negotiated a series of agreements and arrangements that if implemented will result in the Company being able to continue as a going concern (and retain and realise the value of its Hong Kong listing) and the termination of the winding up proceedings. The Company and the liquidators have promoted schemes of arrangement with the Company's creditors in this Court and in Hong Kong and are seeking this Court's confirmation of the reduction of capital which is part of the post-liquidation restructuring.

3. The Summons was heard on 5 July 2019. Mr Tom Lowe QC (instructed by Harney Westwood & Riegels (***Harneys***)) appeared for the Company and the liquidators. Perfect Gate participated in the proceedings (by filing written submissions and evidence) but was not represented by Cayman Islands attorneys at the hearing. Prior to the hearing of the Summons, as I shall explain, Perfect Gate informed the Court that it had issued (on 26 June) a summons in the Hong Kong court raising the same issues as those dealt with in the Summons. Perfect Gate said that it sought a stay of the Cayman proceedings relating to the Summons pending the decision of the Hong Kong court on its summons and, if the Court refused the stay, it sought a dismissal of the Summons.

4. At the end of the hearing, I reserved judgment and indicated that I intended to hand down my judgment during the following week. However, after the hearing, on 8 July 2019, Harneys wrote (by email) to the Court to explain that they had been unaware at the hearing of certain matters that resulted in the need for an urgent decision by the Court.

5. They informed the Court that under the terms imposed by the Stock Exchange of Hong Kong and the Hong Kong Securities and Futures Commission, the Company's public offering (details of which are set out below) will lapse and subscription monies paid over will need to be refunded to subscribers in three specific circumstances: (i) if the Summons is dismissed; (ii) if the relief sought in the Summons is granted but Perfect Gate lodges an appeal, or (iii) the Company is successful on the Summons but the order is made after 9 July 2019 (Hong Kong time) unless Perfect Gate irrevocably undertook (before that time) not to lodge an appeal.

6. Harneys said that given that it was unlikely that Perfect Gate would agree not to appeal an order for declaratory relief, even if the Company was successful on the Summons it would effectively lose the case and the restructuring would fail if the order was not made on or before 9 July 2019 (Hong Kong time). There was additional time pressure for the Company because registration of the Court's order (if made) and the minute of the capital reduction must be lodged with the Registrar of Companies by 12 July 2019, in order for the capital reduction to take effect on or before Monday 15 July 2019, Hong Kong time, as required under the terms of the prospectus for the public offer.

7. In these circumstances, the Company invited me to form a view on the result of the Summons and issue an order on or before 11am, Cayman time on Tuesday 9 July 2019 with reasons to follow on 12 July.

8. Following receipt of Harneys' email, I informed Harneys and Perfect Gate on 8 July 2019 that, in these unusual circumstances (affecting not just the parties to the Summons but also the Company's other shareholders, creditors and stakeholders) I would aim to fit in with this timetable.

9. On 9 July 2019, I received an email from Mr Justice Harris in the Hong Kong court (sent with the consent of both parties) attaching a short Decision that he had just handed down following a hearing of the Company's application to the Hong Kong Court for an order sanctioning the Hong Kong scheme and staying the winding up. Mr Justice Harris adjourned both applications to 22 July 2019 to be heard by another judge (since he was required to recuse himself because his wife is a partner in Ernst & Young). In his judgment, Mr Justice Harris stated that:

> "7. *It is Perfect Gate's evidence, in the form of an affirmation filed by a director Lee On Wai ("**Mr Lee**"), that it has tried to engage the Liquidators unsuccessfully in discussions about the substance of the scheme. Mr Lee says that Perfect Gate is concerned about its dilution effect and believes that there are better alternatives. As a consequence of its concerns it gave proxy forms to Hong Kong Securities Clearing Company Limited ("**HKSCC**") to vote against the special resolution necessary to reduce the capital of the Company at an extraordinary general meeting ("**EGM**") on 22 May 2019. The capital reduction is an integral and necessary part of the implementation of the scheme. Without its approval the scheme in its present form will be abandoned.*
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> 8. *If Perfect Gate's shares had been counted the special resolution would have failed by a large margin. It would appear that a shareholder present at the meeting objected to*

Perfect Gate's shares being counted on the ground that to vote against the resolution would be irrational. The Chairman of the EGM, Mr David Yen, disallowed the votes and recorded the special resolution as passed.

> 9. *Perfect Gate found out that the resolution had been passed as a result of the public announcement published on 29 May 2019. Proceedings were subsequently issued, I understand, in the Cayman Islands by the Liquidators seeking a declaration that the special resolution was validly passed. Perfect Gate were informed of this by a letter from the Company's solicitors in the Cayman Islands dated 12 June 2019. A hearing was fixed before Segal J on 5 July 2019. Perfect Gate did not attend the hearing. Segal J has reserved judgment. When the Petition came on before Segal J on 8 July 2019 it was adjourned to Tuesday 16 July 2019.*
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> 10. *On 26 June 2019 Perfect Gate issued proceedings in Hong Kong seeking a declaration that the decision to exclude its votes was unlawful and the purported special resolution is unlawful.*
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> 11. *Unfortunately, the Company did not inform me of these developments until last Friday 5 July 2019. At that stage all that I received was a letter. It would appear that Perfect Gate did not become aware of the date of the hearing of the Petition until the end of last week. I* received its evidence on 8 July 2019.
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> 12. *Generally, shareholders can vote their shares as they wish. In Sunlink International Holdings Limited [2010] 5 HKLRD 653 I held after considering the relevant authorities, and I quote from [35], "....the authorities do demonstrate that the court will intervene to prevent a shareholder voting in a way which will result in the destruction of the economic value of other shareholders' shares for no rational reason." Perfect Gate says that its decision was rational and that as a distressed debt fund it is inherently unlikely that it would act casually to destroy the value of its investment. I do not need to consider the merits of this argument. It is sufficient to say, first, that if the law in the Cayman Islands is the same as the law in Hong Kong there is something to argue about, and, secondly, that as Perfect Gate has expressly called into question Mr Yen's bona fides in excluding its votes, it undesirable that I adjudicate the issue. Mr Ko on behalf of Perfect Gate having been alerted to the conflict issue invited me to recuse myself."*

10. Shortly after receiving Mr Justice Harris' email, I received a letter dated 9 July 2019 (the ***9 July Letter***) from Perfect Gate to inform me of what had happened at the hearing before Mr Justice Harris. Perfect Gate attached copies of certain Hong Kong court judgments to which they referred in the 9 July Letter and said that Mr Justice Harris had indicated, among other things, the following:

> "1. *The law in this area is controversial, but at least in Hong Kong, the Court will intervene to prevent a shareholder voting in [a] way which would result in destruction of economic value of other shareholders' shares for no rational reason; Sunlink International Holdings Limited v Wong Shu Wing [2010] 5 HKLRD 653 at para 33. Nonetheless, in the present case, it is arguable that Perfect Gate invests in distress assets and commonsense dictates that Perfect Gate will not vote irrationally to destroy its own investments.*
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> 2. *An allegation was made against [Mr Yen] that his decision was made in bad faith. Subject to the Honourable Justice Segal's view, a chairman's decision is subject to the review of the Court if made in bad faith: Kwok Hui Kwan v Johnny Chan & Ors [2018] HKCFI*

2112...at paragraph 53. In the present case, it is arguable that [Mr Yen's] decision was made in bad faith in light of Perfect Gate's claim that the Liquidators have never responded to the concerns of Perfect Gate prior to the EGM.

3. *In respect of the scheme of arrangement...the Court also expressed concern over the amount of costs incurred. [Mr Yen and Messrs. Ernst & Young have a direct financial interest for the Scheme to go through. the costs issue will be relevant to the issue of credibility of [Mr Yen]. In particular, [Mr Yen] had been criticised in another judgment in Hong Kong. (The said judgment referred to is Allied Ever Holdings Limited v Li Shu Chung & Ors HCCW 497/2009 (......unreported), at paragraph 102."*

11. Later in the day on 9 July 2019, I sent (via my assistant) the following email to the parties:

> *"I refer to my email of yesterday in which I raised a number of issues and set out how I intended to proceed.*
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> *I have subsequently received:*
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> *(a). a response from Harneys – received yesterday, within the timeframe I had set, confirming the Company's position and submissions on the points I had identified and confirming that the Petitioner's Note had recently been sent to Perfect Gate.*
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> *(b). a copy of the transcript of the hearing on 5 July – received late yesterday evening London time. I assume that a copy was also sent to Perfect Gate last night.*
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> *(c). a copy of a written decision of Mr Justice Harris in the Hong Kong Court, sent by Mr Justice Harris with the consent of the Company and Perfect Gate (a copy of which I attach for ease of reference). I am most grateful to Mr Justice Harris for this.*
>
> *(d). an email from Mr Lee On Wai on behalf of Perfect Gate attaching a letter to the Court together with copies of certain authorities referred to therein.*
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> *I have not received submissions from Perfect Gate in response to the Petitioner's Note (I gave Perfect Gate until 8am Cayman time today to file such further submissions if they wished to do so, and none having been received I take it that they do not wish to provide any further submissions).*
>
> *I have carefully considered the submissions and evidence that have been filed (both before, during and after the hearing last Friday) by both parties and the recent developments in the Hong Kong Court.*
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> *In relation to the Company's Summons (dated 12 June) I decide as follows:*
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> *(1). I shall dismiss Perfect Gate's application for a stay on forum non conveniens and other grounds. In view of Perfect Gate's active participation in the proceedings before me and the current circumstances where an urgent decision appears to be of considerable commercial significance for the parties and other shareholders and creditors, it is right and appropriate to rule and deliver my decision on the Summons without further delay and in particular without awaiting further developments in the Hong Kong proceedings. I am anxious to emphasise that I intend no disrespect to the Hong Kong Court and that I acknowledge the need for and importance of coordination between related proceedings in Hong Kong and Cayman wherever possible and appropriate.*

(2). I shall grant the Company's application in part – I shall make an order in the form of paragraph 1 of the Summons and reserve a decision on costs pending further submissions by the parties. I have decided that the decision of Mr Yen as chairman at the EGM is to be treated as final and conclusive (binding) and that Perfect Gate has not established adequate grounds for challenging or setting aside the chairman's decision.

I shall, as requested by the Company and as previously indicated, deliver a judgment setting out the reasons for my decision on Friday (12 July)."

12. This is my judgment setting out the reasons for orders I have made on the Summons.

The issues that arise and my decision in outline

13. The following issues arise on the Summons:

(a). the nature of the application.

(b). Perfect Gate's application for a stay.

(c). Perfect Gate's challenge to Mr Yen's decision (as chairman) at the EGM:

(i). the construction and effect of article 77 of the Company's articles of association.

(ii). the grounds on which the decision of a chairman may be challenged.

(iii). the grounds on which Mr Yen's decision is challenged in this case and the evidence filed by Perfect Gate and the Company (and its liquidators).

(iv). conclusion on Perfect Gate's challenge to and the effectiveness of Mr Yen's decision.

14. I do not consider that it is appropriate to order an adjournment or stay of the Summons pending the determination by the Hong Kong court of Perfect Gate's application on the same issue. In my view, article 77 applied and permitted Mr Yen to decide whether to permit Perfect Gate to vote (or to allow Perfect Gate's votes to be counted) and stipulated that his decision was final and conclusive. His decision must stand if he made it in good faith and properly. The evidence

supports the conclusion that he did so and Perfect Gate has failed to make out its allegation of bad faith and to establish grounds justifying the setting aside of Mr Yen's decision. His decision must stand and the EGM resolutions are to be treated as validly passed. Nor has Perfect Gate established that decisions of a chairman at a shareholders meeting to which article 77 applies can be set aside on the basis of *Wednesbury* unreasonableness. Nor has any other ground for setting aside Mr Yen's decision been made out.

15. Before discussing these issues, I need to explain the background to the application, the relief sought in the Summons and the evidence relating to what happened before, at and after the EGM and in relation to Perfect Gate's conduct.

The background

16. The liquidators were appointed by the Hong Kong court on 17 August 2015. The Company's shares were listed on the Main Board of the Hong Kong Stock Exchange (but trading in the shares has been suspended since 18 September 2014).

17. The liquidators, as I have mentioned, have put in place and negotiated a post-liquidation restructuring of the Company. The Company will acquire the shares in another company (thereby acquiring an interest in an ongoing business); will obtain an injection of new capital in return for the issue of new shares to the capital providers and will discharge the claims of all creditors by a part payment of the sums owed to them (with the payment being funded out of the subscription payments made by the capital providers). The history of the liquidators' negotiations and circumstances in which the current restructuring proposal emerged are set out by Mr Yen in his First Affidavit dated 15 April 2019.

18. This restructuring involves a number of steps and procedures. The Company must reduce the nominal value of its shares (to eliminate accumulated losses and permit the issue of new shares), which requires a special resolution and approval of this Court (this is referred to as the capital reduction); increase its authorised share capital, which requires shareholder approval by way of a special resolution; enter into subscription agreements with the new capital providers (and obtain shareholder approval); arrange for a public offer of further shares; issue new shares to the capital providers and those who participate in the public offer (the changes to the capital structure are referred to as the capital reorganisation) and promote a scheme of arrangement with its creditors

(in fact the Company needs to promote two schemes, one in Hong Kong and one in this jurisdiction, on identical terms). The schemes require the approval of this Court (as regards the Cayman scheme) and the Hong Kong court (as regards the Hong Kong scheme). It is also necessary to obtain an order from the Hong Kong court to terminate (stay) the winding up and approvals from the Hong Kong Stock Exchange and the Hong Kong Securities and Futures Commission.

19. The restructuring will have a significant impact on the Company's existing shareholders. They will retain their shares but their interest in the Company will be significantly diluted because of the injection of substantial new capital by the new capital providers. Existing shareholders are given certain additional rights under the capital reorganisation as there will be a preferential offering available to existing shareholders to enable them to participate in the public offering by subscribing for reserved shares on a preferential basis as to allocation. But even if they participate in the preferential offering they will still suffer a significant dilution. This is the background to the dispute between Perfect Gate and the liquidators. Perfect Gate says that it considers the dilution to be too high and out of line with the dilution suffered by shareholders in similar restructurings (resumption proposals). The liquidators take the view that the Company is insolvent (the restructuring involves schemes with creditors who are only receiving a part payment of their claims out of the funds raised by share subscriptions and the public offer); that the proposed capital reorganisation treats existing shareholders and all stakeholders fairly and that if the proposed restructuring is not implemented then the existing shareholders will receive nothing.

20. Furthermore, and importantly, the liquidators consider that in order to improve its position Perfect Gate improperly sought to obtain sums (ransom payments) for itself by the use of its voting rights as a shareholder. The liquidators were provided with evidence that Perfect Gate had demanded ransom payments in return for its agreement to support the capital reorganisation. When the payments were refused, Perfect Gate went ahead and voted against the resolutions (in fact, it failed to withdraw or amend a proxy previously submitted by it). Mr Yen, as chairman at the EGM, had been presented with evidence of Perfect Gate's conduct (the conduct of individuals who it is asserted were representing Perfect Gate) and concluded, based on legal advice, that he should exercise his powers as chairman to exclude and disallow Perfect Gate's votes.

Previous orders made by the Court

21. The liquidators had previously obtained this Court's authority to act for the Company to promote the Cayman scheme and the capital reduction. On 25 August 2017, I made an order authorising the liquidators to act for and on behalf of the Company for the purpose, *inter alia*, of (a) presenting a petition for a scheme of arrangement in this jurisdiction and a petition for an order confirming a resolution for reducing the Company's share capital and (b) to prosecute such petitions including the taking of all steps necessary and/or required to progress the scheme and to secure the alteration or otherwise deal with the Company's capital structure in furtherance of the scheme (see my judgment dated 19 September 2017 in which I explained the basis on which I was prepared to grant assistance to the liquidators).

22. Subsequently, the liquidators negotiated and put in place the agreements and arrangements for the capital reorganisation and restructuring to which I have referred. They have also taken steps to obtain the requisite approvals from shareholders, creditors and the courts here and in Hong Kong.

23. The liquidators obtained an order from me in this Court and from Mr Justice Harris in Hong Kong for the convening of a single meeting of creditors in Hong Kong (to vote on the schemes) and the meeting has I believe now been held. As I have explained, the application to the Hong Kong court to sanction the Hong Kong scheme is now listed to be heard on 22 July 2019. The application to sanction the Cayman scheme is currently listed to be heard on 16 July 2019. The liquidators' application to this Court for an order confirming the capital reduction is also currently listed to be heard on 16 July. However, because the issue of the validity of the resolutions voted on at the EGM must be decided before the Court can confirm the capital reduction (there needs to be a valid resolution passed by the shareholders in order for the Court to have jurisdiction to confirm the capital reduction), the liquidators issued the Summons and the Summons has been heard before the other applications.

The Summons

24. On 16 April 2019, the Company issued a petition in this Court seeking an order sanctioning the Cayman scheme and an order confirming the proposed capital reduction. On the same day, the Company issued a summons for directions in relation to the petition seeking various orders in relation to the Cayman scheme (including an order directing that a meeting of the Company's

creditors be convened to vote on the scheme) and the capital reduction.

25. The summons was heard on 30 April 2019. I gave various directions in relation to the scheme but adjourned the applications for directions with respect to the capital reduction until after the EGM. Subsequently, the Company restored the application for directions in relation to the capital reduction, which application was heard on 4 June 2019. At that hearing, the Company was represented by Harneys (who had only recently been appointed as the Company's and liquidators' new Cayman attorneys) and I was informed of the outcome of the EGM, the decision of the chairman of the EGM to reject and disallow Perfect Gate's votes and correspondence from Perfect Gate in which they objected to and challenged the chairman's decision. I indicated that the Company and the liquidators would need to decide whether a further application or proceedings were needed in this Court in order to allow the issue concerning the validity of the vote at the EGM to be properly decided and if so how to deal with the required witness evidence. I also said that Perfect Gate must be given notice of any such application or proceedings and a proper period in which to file evidence and participate if they wished to do so.

26. Following the hearing, the Company issued the Summons and a hearing of the Summons was listed on 5 July.

27. In the Summons, the Company sought the following declarations:

    (a). that the resolutions proposed at [the EGM] were validly passed as declared by [Mr Yen] in his capacity as Chairman of the EGM; and/or in the alternative

    (b). that the votes of [Perfect Gate] cast at the EGM in respect of the proposed capital reduction of the Company be set aside and disregarded in determining whether the resolutions considered at the EGM were passed.

28. Directions were given for service on Perfect Gate of the Summons, the Company's evidence in support and a note summarising the reasons why the Company considered that the resolution voted on at the EGM was to be treated as valid and Perfect Gate was given fourteen days after receipt of these documents in which to give notice of its intention to appear at the hearing (if it wished to do so) and to file its evidence.

29. The Company's evidence in support of the Summons was the Fourth Affidavit of Mr Yen dated 3 June 2019, and the Affidavit of Lee Wa Lun Warren (***Mr Warren Lee***) dated 24 May 2019. Mr Warren Lee is an important participant in the proposed restructuring. He is a director of the company whose shares are to be acquired by, and will subscribe for new shares in, the Company. His evidence is that he had meetings with individuals who he believed were (and were held out by Perfect Gate's solicitors as being) representatives of Perfect Gate and that these individuals demanded that improper and unlawful payments be made to Perfect Gate in return for Perfect Gate agreeing to vote in favour of the resolutions.

30. On 2 July, the Court received an undated letter (the ***2 July Letter***) sent by email. The 2 July Letter was signed by Lee On Wai (***Mr Lee On Wai***) as the sole director and sent on behalf of Perfect Gate. Perfect Gate stated that it would oppose the Summons and set out its grounds of opposition. I deal with and explain these below. Perfect Gate also informed the Court, as I have already mentioned, that it had issued a summons in the Hong Kong court seeking a declaration that the decision of the chairman at the EGM was unlawful, void and of no effect and that Perfect Gate's votes should be counted so that the resolutions proposed at the EGM be treated as having been rejected. Perfect Gate submitted that Hong Kong was the proper forum for deciding the dispute concerning the validity of the resolutions proposed and the decision of the chairman at the EGM and requested an adjournment of the hearing of the Summons.

31. Subsequently, on 4 July Perfect Gate wrote again to the Court and filed an affirmation (the ***Affirmation***) of Mr Lee On Wai, and said that the 2 July Letter was to be treated as its submissions in opposition to the Summons.

32. On 4 July the Court sent an email to Perfect Gate informing it of the need to consider whether to instruct Cayman counsel to represent it at the hearing and to liaise with Harneys (regarding the 5 July hearing and the need for and benefits of coordination of the proceedings in this Court and Hong Kong). Perfect Gate again wrote to the Court, on 5 July 2019, the morning of the hearing (the ***5 July Letter***). Perfect Gate confirmed that it opposed the Summons, that it would not be represented at the hearing, that it relied on the reasons set out in the Affirmation, that it wished to rely on an additional ground for challenging the decision of the chairman at the EGM and that it supported the use of court to court communications to coordinate the Hong Kong and Cayman proceedings.

The capital reorganisation

33. The main steps required to give effect to the reorganisation are as follows:

(a). the Company has agreed to acquire (the ***Acquisition***) for a cash consideration all the shares in Yu Ming Investment Management Limited (***Yu Ming***);

(b). there will be a reduction of the Company's share capital (involving the reduction of the nominal value of each share in the Company from HK$0.10 to HK$0.01 by cancelling HK$0.09 from the paid up capital of each share) and the resulting credit will be transferred to the Company's contributed surplus account to be applied to eliminate an equivalent amount of accumulated losses;

(c). the capital reduction will be followed by a share consolidation (so that every ten reorganised shares of HK$0.1 each will be consolidated into one new share of HK$0.10 each);

(d). the Company's authorised share capital will be increased;

(e). there will be a subscription by Ms Chong Sok Un (***Ms Chong***) for new shares (or in the event of the lapse of Ms Chong's subscription agreement, a placing to independent placees of new shares) which will generate funds to be used to pay part of the cash consideration payable on the Acquisition and to part pay the amounts payable to creditors under the scheme;

(f). there will be a further subscription for new shares by Mr Warren Lee who was a founding director of Yu Ming and also by employees of Yu Ming, which will also generate funds to be used to pay part of the cash consideration payable on the Acquisition and to pay the amounts payable to creditors under the scheme;

(g). there will be a public offer of further shares to raise funds to be used to pay part of the cash consideration payable on the Acquisition, to repay loans made to the Company by the seller of the shares in Yu Ming, to pay professional fees incurred by the Company, to provide the Company with working capital and to pay the amounts payable to creditors

under the schemes; and

(h). there will be a preferential offering available to existing shareholders of the Company to enable them to participate in the public offering by subscribing for reserved shares on a preferential basis as to allocation.

34. Each of these steps is inter-conditional. If each step obtains the requisite approvals (including approvals from the Company's shareholders, the Hong Kong Stock Exchange, this Court and the Hong Kong Court) the various components of the reorganisation become effective (so that, for example, the capital reduction will take place subject to the Company being restored to solvency via the creditor schemes and therefore at a time when the Company is solvent).

The effect of the capital reorganisation on existing shareholders

35. On 28 December 2018, the Company published an announcement (under Rule 3.5 of the Hong Kong Stock Exchange Listing Rules) which disclosed the dilution effect of the existing shareholders' shares resulting from the proposed capital reorganisation. The analysis of the dilution effect considered the impact of the capital reduction and reorganisation, the impact of the subscriptions for new shares and the public offer (taking into account the position where none of the existing shareholders entitled to participate in the preferential offering take up their entitlement - scenario I – and the position where all of them did so – scenario II).

36. The Company stated that upon completion of the proposed restructuring it was anticipated that Ms Chong would hold 45% of the issued share capital of the Company; Mr Warren Lee and others associated with Yu Ming would hold approximately 25% of the issued share capital and more than 25% of the issued share capital would be held by public shareholders.

37. The announcement referred to the position of Perfect Gate. Perfect Gate holds 23% of the Company's share capital and acquired the shares after the commencement of the Company's liquidation, with the sanction of the Hong Kong court. The announcement noted that after the completion of the capital reorganisation Perfect Gate would retain its 23% shareholding; immediately after completion of the capital reorganisation and the subscriptions Perfect Gate's shareholding would be reduced to 2.6%; that in scenario I (if it and the other existing shareholders failed to subscribe for and take up their entitlement in the preferred offering) its

shareholding would be reduced to 2% (which will be worth approximately HK$10 million) but in scenario II its holding would be reduced only to 5%.

38. As regards the Company's existing shareholders, the announcement noted that:

> *"...immediately after completion of the [capital reorganisation, the new subscriptions and the public offer] the shareholding interest of the existing Public Shareholders will be diluted from approximately 77% as at the date of this announcement to (approximately 6.6% under Scenario I; and (ii) approximately 17% under Scenario II. The possible maximum dilution to the shareholdings of existing [shareholders entitled to participate in the preferential offering] if they elect not to subscribe for [reserved shares] under the Preferential Offering will be approximately 91.2%. Nonetheless, in considering (i) the Company is placed into the third delisting stage and Resumption will only happen if the Proposed Restructuring is implemented; (ii) the [subscriptions and the public offer] form part of the Proposed Restructuring ..the implementation of which are necessary for the Resumption; and (iii) the Preferential Offering allows the [shareholders entitled to participate in the preferential offering]to continue to participate in the future development of the [Company] upon completion of all the transactions contemplated under the Proposed Restructuring at their own wish, the Liquidators consider the possible dilution impact to the Shareholders as a result of the [various subscriptions] and the public offer to be acceptable."*

Notice of the EGM

39. To be effective, the capital reduction must (pursuant to sections 14 and 15 of the Companies Law (2018 Revision) (the ***Companies Law***) be approved by the Company's shareholders by special resolution and an order of this Court confirming the reduction.

40. On 27 April 2019, the Company issued a circular to shareholders in connection with the capital reorganisation, which included a notice convening the EGM on 22 May 2019 and details of the special and ordinary resolutions to be proposed at the EGM. The special resolutions were (a) to approve the capital reduction and the increase in the Company's authorised share capital; (b) to approve an amended and restated memorandum and articles of association and (c) to change the Company's name. The ordinary resolutions were to approve the schemes, the agreement relating to the Acquisition, the agreements relating to the share subscriptions, the public offer of shares and the appointment of new directors (including Mr Lee).

Perfect Gate's objections prior to the EGM

41. On 16 May 2019, Perfect Gate's former solicitors (WT Law Offices – ***WTL***) wrote to the Hong Kong solicitors for the Company and the liquidators (Michael Li & Co – ***Michael Li***). They referred to the circular and details of the proposed dilution of existing shareholders. WTL stated that Perfect Gate found the dilution of its equity interest too severe and unacceptable and therefore urged the liquidators to revise the terms of the proposed restructuring to minimise the dilution to existing shareholders. WTL said that unless the proposed restructuring was revised so as to make it acceptable to Perfect Gate, Perfect Gate would have no alternative but to vote against the proposed restructuring at the EGM.

Alleged meeting between Mr Warren Lee and representatives of Perfect Gate

42. Mr Warren Lee says that following receipt by Michael Li of WTL's letter of 16 May he considered it necessary to meet with representatives of Perfect Gate to explain the benefits of the proposed capital reorganisation. He noted that the proposed restructuring had been recommended by the liquidators and the Company's independent financial adviser (Pelican Financial Limited) as being fair and reasonable to shareholders and that he understood that in the past the Court's view had been that the return to shareholders in a restructuring should be token compared to the return to creditors. He therefore viewed the request from Perfect Gate as irrational and unreasonable.

43. Mr Warren Lee referred to a meeting he had on 17 May with Mr Yen and Mr Wong of Michael Li during which Mr Yen received a call from WTL in which they indicated that the dilution of Perfect Gate's holding to a single digit (2%) percentage was unacceptable. He understood that to mean that Perfect Gate required a minimum of a double digit shareholding after dilution, and this would mean at least a 5 times improvement on the dilution effect under the proposed restructuring.

44. Mr Warren Lee says that following that call pursuant to an arrangement made between Mr Wong and WTL he met two representatives of Perfect Gate at 9:00 pm on 20 May at the coffee shop of the Empire Hotel at 62 Kimberley Road, Tsim Sha Tsui, Hong Kong (the ***20 May Meeting***). The two representatives were Mr. Ben Lau (***Mr Lau***) and Mr. Ricky Kwan ***(Mr Kwan)***.

45. Mr Warren Lee says that the following occurred during the 20 May Meeting:

"(a). I explained to them that the EGM and the Proposed Restructuring represented a binary outcome for shareholders: either the shareholders voted for it, and they would receive approximately HK$50 million worth of shares; or the shareholders voted against it, and they would receive nothing;

(b). Mr . Lau of Perfect Gate asked for irregular benefits in return Perfect Gate's vote at the EGM in favour of the Proposed Restructuring. Mr. Lau appeared to be asking for a payment that would be made in secret to Perfect Gate and/or himself personally without making the same payment to the other shareholders;

(c). I said that I noted that Perfect Gate had already voted all its 230,000,000 shares against the resolutions, the voting deadline had already closed, and that the outcome of the EGM could not be reversed. Mr. Lau's response was that I should know a way to deal with this (I understood this to mean that I should cause the EGM to be adjourned so that the votes of Perfect Gate could be cast again to a new deadline);

(d). I said that the regulators keep a close eye on misconduct and that no one can obtain any irregular benefit via the Proposed Restructuring. In response, Mr. Lau said it would be possible to orchestrate several legitimate ways to receive such a benefit: he said that they have a corporate finance team(s) and an investor relation team(s), and that they could structure the benefits in many ways, such as charging hefty corporate finance and investor relation fees; or that they could run the placement of Company shares, corner the stock, and make money in this manner. Mr. Lau also stressed that it was important to have an upfront payment as well, and not only a future promise of benefit;

(e). no conclusion was reached, they said that they would make some suggestions to MLI, and asked me to check with [Michael Li's] team the next day; and

(f). at about 9:30pm, Mr.Lau and Mr. Kwan left the coffeeshop."

46. Mr Warren Lee arranged a meeting for the following day with Mr Wong and others from Michael Li. He told Michael Li that he had decided not to do anything about Perfect Gate's demands and would let the resolutions at the EGM be voted down. He says that during the meeting Mr Wong

"..received a call from a representative of Perfect Gate and left the conference room to take the call...Mr Henry Wong came back to the conference room and informed us that a representative of Perfect Gate (I did not ask their identity) had made a ridiculous demand of HK$140 million. The inference being that this HK$140 million would be paid in return for Perfect Gate voting their shares in favour of the Proposed Restructuring..."

47. After leaving that meeting, Mr Warren Lee received a call from Mr Wong. Mr Wong told him that the representatives of Perfect Gate (presumably Mr Lau and Mr Kwan) wanted to meet again and so he arranged a meeting with them at 7:00pm at Isola Restaurant & Bar at the International

Finance Centre in Central, Hong Kong. Mr Warren Lee's evidence regarding what happened at the meeting is as follows:

> *"I arrived at Isola Restaurant & Bar at 7:00pm, only Mr.Kwan, representing Perfect Gate, was present. He said that the HK$140 million demand was "stupid" (by which I understood he meant it was too high a figure to have been requested), and he asked me whether I was sincere in striking a deal of some kind. I said that I would rather let the Proposed Restructuring lapse than commit to anything improper. I left Isola Restaurant & Bar at 7:30pm..."*

The EGM

48. On 17 May 2019 at 8:35pm, Mr Yen received the proxy form (submitted by HKSCC Nominees Limited) listing the proxies received in connection with the EGM. The proxy form showed that 230,000,000 votes were cast against all the resolutions at the EGM and 13,776,800, were cast in favour of all the proposed resolutions.

49. The EGM was held on 22 May 2019. The chairman was Mr Yen. Mr Yen has confirmed that in respect of the special resolution relating to the approval of the capital reduction, of the shareholders present and voting in person or by proxy 14,621,440 votes (representing approximately 1.46% of the Company's total issued shares) were cast for the special resolution and 230,000,000 votes (representing approximately 23% of the Company's total issued shares) against.

50. Mr Yen, in his evidence, has given the following account of what happened immediately prior to and during the EGM:

> *"16. .....*
>
> *(iv). At around 8am on 22 May 2019, the day of the EGM, I received a call from Mr. Warren Lee, the managing director of [Yu Ming]. Yu Ming is the target company for acquisition under the Resumption Proposal. [Mr. Warren Lee] informed me that he had met with representatives from Perfect Gate who had told him that Perfect Gate would vote against the Proposed Restructuring unless the [proposed dilution of existing shareholders] was revised. <u>He also told me that Perfect Gate had made a request for payment of a substantial ransom in order to vote in favour of the proposed resolutions.</u>*
>
> *(v). During the EGM, after the votes were cast, I notified all shareholders present that 230,000,000 shares had purportedly voted against all the resolutions. A shareholder who was present at the meeting then stated that it was irrational for a shareholder to vote against the Proposed Restructuring and to prevent all other shareholders from making a recovery under the Proposed Restructuring.*

(vi). *After hearing the shareholder' comments on the irrationality of the votes against the resolutions, [Mr. Warren Lee], who was present at the EGM, asked me to allow him to report to the EGM on the requests for payment of a substantial ransom that he received from Perfect Gate including its requests that the [proposed dilution] be revised. Mr. Warren Lee proceeded to give an account of serious irregularities as to when and how he recently communicated and met with a representative of Perfect Gate and was asked by Perfect Gate to pay a substantial amount of ransom to them for the purpose of supporting the Proposed Restructuring.*

(vii). *Consequently, having heard Mr. Lee's account of events, the shareholder I have referred to at paragraph (v) above, objected to the votes that were being cast on behalf of Perfect Gate on the grounds that they were improper.*

17. *After giving due consideration to the representations that were made at the EGM by Mr. Lee and the shareholder, I rejected the votes of the 230,000,000 shares pursuant to article 77 of the Company's Articles of Association which provides that:*

> *"77 If:*
>
> *(a). Any objection shall be raised to the qualification of any vote; or*
> *(b). Any votes have been counted which ought not to have been counted or which might have been rejected; or*
> *(c). Any votes are not counted which ought to have been counted;*
>
> *the objection or error shall not vitiate the decision of the meeting or adjourned meeting on any resolution unless the same is raised or pointed out at the meeting or, as the case may be, the adjourned meeting at which the vote objected to is given or tendered or at which the error occurs. Any objectionor error shall be referred tothe chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the chairman decided that the same may have affected the decision of the meeting. The decision of the chairman on such matters shall be final and conclusive.*

18. *In particular, I considered that:*

(a). *the Company has disclosed the [proposed dilution] as early as December 2018. The [dilution]was further disclosed in the RTO Circular which....was dispatched on 27 April 2019 to all registered shareholders. However, no objections were raised to the [dilution] until [WTL's] letter was received on 16 May 2019.*

(b). *The Company was placed into the third delisting stage and the HKSE only allows the Company to submit new listing applications in relation to the submitted proposals (i.e. the proposal relating to the Proposed Restructuring) but not any other proposals and if the proposal fails to proceed, the HKSE will cancel the Company's listing to the detriment of its shareholders and creditors.*

(c). *I took into account that the only votes that were being cast against the resolutions were those of Perfect Gate.*

(d). *I also believed that Perfect Gate's votes against the Proposed Restructuring could have damaged the Company's economic position and the economic value of its shares to the detriment of the shareholders and creditors in the Company. The Proposed Restructuring on the other hand, will return value for the Company's shareholders and creditors.*

> (e). *Given that the Company is seriously insolvent, the creditors' interests should be protected.*
>
> (f). *The ransom asked for by Perfect Gate is considered unethical and illegal.*
>
> 19. *I note that the required number of votes (being a majority of not less than three-fourths of the votes cast by the Shareholders present and voting in person or by proxy at the EGM) had been cast in favour of the Special Resolutions. I therefore declared that the Special Resolutions has been passed in accordance with article 6 of the Articles of Association and section 14 of the [Companies Law]"*

[underlining added]

51. Mr Yen exhibited to his Fourth Affidavit a copy of the minutes of the EGM which recorded, after referring to Article 77 that:

> *"It was noted that at the EGM an objection (the Objection) was raised by a Shareholder regarding some impropriety of the votes which were identified as having cast votes against all resolutions to be proposed and resolved in the EGM.*
>
> *It was noted that following due consideration to the Objection, the Chairman declared that the votes of the 230,000,000 Shares should not be counted towards all resolutions in the EGM (the Chairman's Decision).*
>
> *It was further noted that the Shareholder(s) whose votes were rejected may challenge the decision of the Chairman.*
>
> *It was further noted that after the Chairman exercised his rights at the EGM under Article 77 and based on the Chairman's Decision, the results of [voting on] the resolutions [was that the resolutions were carried]."*
> [underlining added]

52. On 29 May, the Company announced (in a circular issued via the Hong Kong Stock Exchange) the results of the EGM. The announcement recorded that:

> *"At the EGM, an objection was raised by a Shareholder regarding the impropriety of 230,000,000 Shares which were identified as having casted [sic] votes against all the resolutions to be proposed and resolved at the EGM. Following due consideration and pursuant to Article 77 of the Articles of Association, any objection or error shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the chairman decides that the same may have affected the decision of the meeting, the chairman of the EGM declared that the vote of 230,000,000 Shares should not be counted. The [Executive of the Hong Kong Stock Exchange] has requested the financial adviser to the Company to make submissions to the Executive in this connection and will consider whether there would be any effect to the consents [given by the Executive] and any other implications under the Takeover Code."*

[underlining added]

Perfect Gate's objections after the EGM

53. On 23 May WTL wrote to Michael Li to inquire about the outcome of the EGM. On the same day Michael Li responded to say that Perfect Gate must await the public announcement of the result. On the same day that the announcement was made (29 May) WTL wrote again to Michael Li noting what that the announcement had stated that Perfect Gate's votes had not been counted and challenging the decision of the chairman to that effect. WTL said that if the situation was not remedied within seven days Perfect Gate would take action. On 30 May WTL also wrote to the Hong Kong Securities and Exchange Commission complaining about the chairman's decision and asking for details of the reasons for that decision insofar as the Commission was aware of them. On 3 June, WTL wrote to Hong Kong Registrars and HKSCC Nominees Limited making the same points.

54. On 4 June 2019, Michael Li responded to WTL's letter dated 29 May. They explained that the EGM was properly conducted and that the chairman had sought legal advice during the EGM and acted impartially. They referred to the objection raised at the EGM and said that the chairman had noted that Perfect Gate had been the only shareholder to vote against the resolutions and that Perfect Gate's votes would destroy the economic value of the Company since the proposed restructuring would return value to shareholders and creditors while the alternative would result in shareholders receiving nothing. They went on as follows:

> *"At the EGM Mr Warren Lee...reported that he had met twice with Perfect Gate's representatives prior to the... EGM and Perfect Gate's representatives had asked for huge benefits that were only to be received by Perfect Gate, and not all shareholders of the Company as a whole in return for Perfect Gate to vote at the EGM in favour of the Proposed Restructuring. Mr Warren Lee also reported that he declined the proposal made by Perfect Gate's representatives, as Perfect Gate's demand would constitute improper commitment.*
>
> *Having received the Objection and considered the irrationality of Perfect Gate's votes and the representation made by Mr Warren Lee <u>and after seeking legal advice as to his power and authority in dealing with objection of votes from shareholder as well as previous decisions of the Hong Kong Court</u> the Chairman duly exercised his right pursuant to the power contained in Article 77....and declared in the EGM that the votes of Perfect Gate were not to be counted."*
>
> [underlining added]

55. Michael Li wrote to WTL on 1 June to notify Perfect Gate that a hearing of the Company's application for directions in relation to its petition for an order confirming the capital reduction was listed in this Court on 4 June. WTL apparently wrote to Michael Li on 3 June. A letter of that

date from WTL is referred to in a second letter to WTL from Michael Li dated 4 June 2019. WTL appear to have complained that the notice they had been given of the hearing was too short. Michael Li denied that the notice had been too short and disclosed that Mr Yen had been the chairman at the EGM.

56. It appears that WTL did not respond to Michael Li's first letter of 4 June and the allegations regarding the conduct of Perfect Gate's representatives made therein. Mr Lee On Wai, in his Affirmation, does not refer to or exhibit any such response.

Perfect Gate's position and evidence as to the alleged meeting between Mr Warren Lee and its representatives

57. As I have already noted, on 2 July, the Court received by email the 2 July Letter sent by Mr Lee On Wai on behalf of Perfect Gate. He referred to the Summons and then set out Perfect Gate's position:

(a). he referred to the dilution effect of the proposed restructuring on Perfect Gate's shareholding and stated that if the restructuring was implemented the damage caused to Perfect Gate would be irreparable.

(b). he explained that Perfect Gate considered the dilution of its equity to be too drastic and unacceptable. He referred to WTL's letter of 16 May, which set out Perfect Gate's position.

(c). he noted that prior to the EGM Perfect Gate had not received any positive response from Michael Li or the liquidators, which is why it delivered its proxy form to HKSCC Nominees in which Perfect Gate voted against all resolutions at the EGM.

(d). he also notes that Perfect Gate only became aware after reading the Company's 29 May announcement that Mr Yen had purportedly exercised his powers under Article 77 to disallow and not count Perfect Gate's votes. Had Perfect Gate's votes been counted, all resolutions would have been rejected.

(e). he referred to Mr Yen's Fourth Affidavit and Mr Yen's account of what happened at the EGM including what Mr Warren Lee's account of his meeting with representatives of Perfect Gate. He says that Perfect Gate does not agree with the liquidators' claims and the account of events given at the EGM.

(f). as regards the alleged meeting referred to by Mr Warren Lee, he says (in paragraph (7)) the following:

> *"Perfect Gate strenuously deny that prior to the EGM Perfect Gate had authorised any person to meet with Mr Warren Lee and to make any monetary demands as alleged. Subsequent to [WTL's] letter dated 16 May 2019, there was a short without prejudice conversation between [WTL] and the liquidators. Apart from [that] conversation there was not any other contact between [WTL]/Perfect Gate on the one part and the Company/the Company's creditors/other parties to the restructuring proposal on the other part (in particular Mr Warren Lee) prior to the EGM. For the avoidance of doubt, Perfect Gate has not had and has not been informed of any contact with the Company/the Company's creditors/any party to the restructuring proposal (in particular Mr Warren Lee) prior to the EGM.*
>
> *Rather the truth is that subsequent to [WTL's] letter dated 16 May 2019, [WTL] or Perfect Gate did not receive any reply from [WTL] or the liquidators at all. Hence, Perfect Gate had no choice but to vote against the restructuring proposal at the EGM.*
>
> *In fact, quite to our surprise, despite the very serious allegations of Mr Warren Lee against Perfect Gate, Mr Yen did not enquire with Perfect Gate about what happened or gave [sic] Perfect Gate any opportunity to make representation [sic] to answer Mr Lee's allegations."*

(g). he said that Perfect Gate believed that Mr Yen had a duty to allow different opinions to be fully and fairly presented and debated at the EGM. Mr Yen had failed to discharge that duty by accepting Mr Warren Lee's bare allegations as true.

(h). Perfect Gate considered that Mr Yen's decision at the EGM was unlawful, void and of no effect and was made in bad faith or "*was unreasonable in the Wednesbury sense or something similar.*"

(i). he then referred to the summons issued by Perfect Gate in Hong Kong and submitted that Hong Kong was the proper forum for dealing with the dispute since the Company's shares were listed on the Hong Kong Stock Exchange; the

Company had its principal place of business in Hong Kong; all notices circulars and announcements were issued in Hong Kong; the alleged meetings which form the subject matter of the dispute took place in Hong Kong and the EGM also took place in Hong Kong.

(j). he requested that this Court should adjourn the 5 July hearing of the Summons pending the outcome of the Hong Kong proceedings.

58. In the Affirmation, filed on 4 July, Mr Lee On Wai largely repeated the points made in the 2 July Letter. He expanded on Perfect Gate's reasons for voting against the resolutions at the EGM, and explained why he considered that Perfect Gate's position was rational and reasonable in the circumstances. He said that:

> "24. *Since Perfect Gate became a shareholder of the Company, I on behalf of Perfect Gate, had made several attempts to contact the Liquidators by phone. At the time, I had several rescue plans in hand (which included (i) raising sufficient amount of capital from shareholders/banks/other financial institutions to repay the Company's creditors and (ii) referring food & beverage business and carpet wall paper and furniture business with substantial revenue and profit in the Mainland China so as to meet the requirement of HKEx in order to maintain the listing status) and wanted to discuss with the Liquidators about them. However, the Liquidators were not available to answer my calls. I left my phone number with them but they never returned my calls. They just ignored me, and were not interested in listening to the view and proposals of Perfect Gate at all.*
>
> 25. *Perfect Gate decided to vote against all the resolutions proposed at the EGM because if the proposed restructuring were implemented Perfect Gate's equity interest in the Company would be substantially reduced from 23.0% to 2% in Scenario I (i.e. more than 90% reduction) and to 5% in Scenario II (i.e. more than 78% reduction). Prior to the EGM Perfect Gate had conducted some researches of similar restructuring schemes in the market and found that the degree of dilution of the existing shareholders' equity interest were [sic] much less drastic in those similar schemes. It was Perfect Gate's genuine belief that a better restructuring scheme could be reached with less drastic degree of dilution, and as a result Perfect Gate and other existing shareholders' economic interest can be improved and advanced.*
>
> 26. *Further, while it is true that the Company is in debt, it does not mean that the Company is of no value to investors and its shareholders should accept whatever restructuring proposal [is] put forth by the Liquidators. The Company is listed on the Main Board of the HKEx. It is a well-known fact that investors interest in listed companies that fail, where investors can take advantage of the listing status of listed companies to facilitate a listing of the investors. In fact the restructuring proposal of the Company is such a scheme involving a reverse takeover of the Company by investors. The Liquidators structured the current restructuring proposal for this exact reason. In fact, the current restructuring proposal is not the only viable resumption plan available. Apart from what I stated hereinabove, as can be seen from [the first affidavit of Mr Yen dated 15 April 2019 filed in this Court] there were other available resumption plans and the Liquidators only considered "on balance" that the current restructuring proposal was*

> *the best. Nonetheless, from the standpoint of Perfect Gate, the dilution effect in the current restructuring proposal was far from reasonable. As admitted by the Liquidators that "any value enhancement of the New Shares as a result of the Acquisition may not necessarily offset the dilution effect to the Existing Shareholders."*
>
> 27. *It is against this backgrounds [sic] that Perfect Gate decided to vote against the current restructuring proposal. I strenuously deny that Perfect Gate was irrational in voting at the EGM at all. In fact, Perfect Gate acquired the Company's shares as part of its investment in distress assets, and it would be egregious to suggest that Perfect Gate had acted irrationally in destroying the value of its own investment. The truth is that the Liquidators had consistently ignored Perfect Gate's views and pressed ahead with the proposal they preferred for whatever reason. This has left Perfect Gate with no choice but to reject the restructuring."*

The nature of the application

59. In the Petitioner's Skeleton Argument, Mr Lowe pointed out that the validity of the chairman's decision at the EGM was a central issue on the Company's application for confirmation of the capital reduction. The Court could decide the issue in the proceedings commenced by and at the hearing of the Company's petition seeking a confirmation order (in the course of determining whether the conditions for approval had been met). Alternatively, the Court can decide this issue in advance of hearing the petition and, to allow this, the Company had issued the Summons. Mr Lowe explained that in the current circumstances the Company and the liquidators considered it important to deal with the challenge to the EGM resolutions immediately and before the hearing of the confirmation petition.

60. He submitted that since the Chairman had disallowed the vote of Perfect Gate it was only necessary for the Court to determine whether his decision was valid. If the decision was upheld by the Court, it would not be necessary for the Company to seek the further relief sought in the second paragraph of the Summons, for an order setting aside Perfect Gate's vote. Mr Lowe pointed out that the decision of Levers J in *Re Seapower Resources International Limited (in provisional liquidation)* [2004-05 CILR Note 2] suggested that the Court would be prepared to make an order on the hearing of the confirmation petition setting aside votes cast by shareholders at the relevant meeting without the need for a separate application, although the fact that the decision was only reported in the form of a short note meant that little weight could be placed on it.

61. In any event, Mr Lowe submitted that insofar as the Petitioner sought declaratory relief, this

would be final and not interlocutory relief granted pro tem (as to which see *International General Electric Company of New York v Customs & Excise* [1962] Ch. 784 at p789). There could not be any doubt that the Court had jurisdiction to grant a declaration without having a full trial.

62. I have had some concerns as to the manner in which the dispute concerning the voting at the EGM has been brought before the Court. The case has had to be dealt with urgently, without the benefit of counsel for Perfect Gate (its choice) and with limited submissions on certain points. Furthermore, the case involves conflicting factual evidence and allegations of dishonesty, which in the ordinary course need to be tested by cross-examination. However, I am satisfied that I can properly deal with the Company's application for a declaration regarding the chairman's decision at the EGM in the current circumstances. The issue arises in connection, and is closely connected, with the confirmation petition and it must be right that the Court can deal with it within in the proceedings on or by way of an application arising out of the petition. Detailed witness evidence has been filed by both parties and is sufficient for the disposal of the application. Neither party has asked the Court to order a full trial or cross-examination of the witnesses and it seems to me that this is not essential in this case.

63. I do remind myself, of course, of the normal rule that where a conflict of evidence on affidavit arises the Court is not in a position to choose between the completing versions of the facts unless cross-examination on the affidavits takes place or there is sufficient uncontradicted credible evidence upon which the Court can reach a decision. In circumstances where cross-examination does not take place, a court is not obliged to accept evidence given on affidavit if there is conflicting evidence given on affidavit (or orally) that the court accepts.

Perfect Gate's application for a stay

64. Perfect Gate argued that Hong Kong was the proper forum for the resolution of the dispute concerning the chairman's decision at the EGM.

65. In the 2 July Letter Perfect Gate submitted that Hong Kong was the proper forum because (i) the Company's shares were listed on the Hong Kong Stock Exchange; (ii) the Company's principal place of business is in Hong Kong; (iii) all notices, circulars and announcements were issued in Hong Kong; (iv) the alleged meetings which form the subject matter of the dispute took place in Hong Kong and (v) the EGM took place in Hong Kong. Perfect Gate asked the Court to adjourn

the 5 July hearing pending the outcome of the proceedings on the Hong Kong summons.

66. In the Affirmation (paragraph 29) Mr Lee On Wai stated that he did not think that Cayman would be a proper forum because:

(a). the only connection between the Company and Cayman is the fact that the Company was incorporated here. On the other hand, the Company has a close connection with Hong Kong for the reasons he set out in the 2 July Letter. He also mentioned that all the witnesses and relevant parties were located in Hong Kong.

(b). the 5 July hearing in this Court would be conducted without calling any witnesses to testify.

(c). if the declaration sought by the Company in this Court were granted and the restructuring were implemented Perfect Gate would suffer irreparable damage if the Hong Kong court subsequently reached a different view (I take this to be a reference to the risk of and need to avoid inconsistent judgments).

67. Mr Lowe opposed any adjournment or stay. He submitted that the most important factor to take into account was that the Company (and liquidators) had presented the confirmation petition, which was properly before this Court. The approval of the capital reduction was a matter for this Court and was not before and did not arise in the Hong Kong proceedings. The question of the validity of the decision of the chairman, and resolutions voted on, at the EGM had to be decided before the Court could confirm the capital reduction and was therefore a part of or very closely connected with the proceedings in this jurisdiction relating to the capital reduction. It would therefore be most convenient and appropriate for the issue to be decided in this Court. Furthermore, this issue needed to be decided urgently and it was not clear how long the proceedings in Hong Kong would take. As regards the risk of inconsistent judgments, he submitted that there was no serious risk because the judgment of this Court on the Summons would be binding on Perfect Gate, by reason of its active participation in these proceedings, and give rise to an issue estoppel.

68. I carefully considered these submissions and the connections with Hong Kong to which Mr Lee On Wai referred but concluded that an adjournment or stay pending the determination by the Hong Kong court was not appropriate or justified for the following reasons:

(a). particular weight is to be given to the fact that the dispute relates to the conduct of a meeting of shareholders of a Cayman company. The rights and responsibilities of shareholders and the chairman of the EGM are subject to and governed by the Company's constitution and are governed by Cayman law. This Court is usually the most appropriate forum for dealing with such disputes (see, for example, Order 11, rule 1(1)(ff) of the Grand Court Rules which permits service out of the jurisdiction of claims brought against members of a Cayman company where the subject matter of the claim relates in any way to the company). I appreciate that the Hong Kong court is able to deal with disputes relating to such issues (see a number of the decisions of Mr Justice Harris to which reference is made below) but where a forum dispute arises I consider that this Court is entitled to pay particular regard to this point.

(b). also of particular weight is the connection between the dispute and the confirmation petition which is pending in this Court. I accept Mr Lowe's submissions on this point. As I explained above, the Summons should be viewed as part or arising out of the confirmation petition.

(c). I also give weight to the fact that the purpose of the proceedings in this jurisdiction is to provide assistance to the Hong Kong liquidators and it is they who have presented the confirmation petition, issued the Summons and sought to have the dispute determined in this Court.

(d). it also seems to me to be right, for the reasons given by Mr Lowe, that there are strong grounds for believing that the risk of inconsistent judgments is low. I am anxious, however, to avoid any discourtesy to or conflict with the Hong Kong Court and would, had the Hong Kong court expressed the wish to do so, been prepared to defer giving judgment pending further discussions between the parties and the courts regarding the need for steps to be taken to coordinate the Cayman and Hong Kong proceedings (I have for some time suggested to the liquidators that consideration be given to court to court communications for this purpose if the need arose). However, no such request has been made and I note that Mr Justice Harris was made aware at the hearing before him on 9 July that the Summons had been heard and that I had reserved judgment.

(e). I note Mr Lee On Wai's reference to the absence of witness testimony at the 5 July

hearing. I accept that this could be a serious issue, for the reasons explained above. However, it was open to Perfect Gate to apply for the cross-examination of witnesses in the proceedings on the Summons but it did not do so. Furthermore, Mr Lee On Wai has not explained the circumstances in which witness testimony and cross-examination would be given in the proceedings in Hong Kong. In any event, for the reasons I explain in this judgment, I am satisfied that the Summons can properly be disposed of without the need for cross-examination.

The Petitioner's submissions on the challenge to the chairman's decision

69. Prior to the hearing of the Summons, the Company filed a skeleton argument. During oral argument at the hearing, Mr Lowe developed and amended his submissions and at my request filed further written submissions (the ***Petitioner's Note***) following the hearing to set out and clarify the Company's position. The Company's position was also confirmed in email correspondence between Harneys and the Court following receipt of the Petitioner's Note. Perfect Gate were copied in on the email correspondence and were sent a copy of the Petitioner's Note (together with a transcript of the hearing) and invited to file further submissions in response but chose not to do so.

70. The Company:

(a). asks the Court to make certain findings of fact.

(b). submits, based on those findings of fact, that Mr Yen as chairman of the EGM was entitled (by reason of article 77 of the Company's articles of association) to rule on the question of whether it would be wrong to count and admit Perfect Gate's votes and to decide whether to disallow the votes; that Mr Yen did make a ruling disallowing and rejecting Perfect Gate's votes and that his ruling was made properly and in good faith and was final and binding and could not in the present circumstances be challenged and set aside (the ***Article 77 Point***).

(c). submits, based on those findings of fact, that Perfect Gate's conduct was dishonest and its votes were tainted by illegality and void or capable of being ignored. In the Petitioner's Note the Company submitted as follows:

(i). the attempt to seek an improper financial benefit in return for a vote on a company that is otherwise liable to face liquidation was a dishonest use of a threat ("menaces") to get money which Perfect Gate had no right to receive in return for voting for the resolution (colloquially extortion).

(ii). dishonesty is an objective question and is the same in civil and criminal law (see *Ivey v Genting Casinos UK Ltd* [2018] AC 391). Most reasonable right-thinking businessmen would regard Perfect Gate's behaviour as unacceptable.

(iii). since this took place in Hong Kong statutory illegality would be a matter of Hong Kong law. It is sufficient that the conduct is dishonest. Dishonesty even without statutory criminality is sufficient "illegality" (see *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 at p446 at [25] per Lord Sumption).

(iv). in *Clarke v Chadburn* [1985] 1 WLR 78 at 80 Megarry VC held that resolutions which were in contempt of court were void for illegality.

(vi). a resolution carried by such a vote would be tainted by illegality and could properly be disallowed consistently with *Clarke v Chadburn* and, pursuant to article 77, the chairman could decide that the decision was vitiated by that vote and disregard it.

71. The Company invites the Court to make the following findings based on the evidence contained in the affidavit of Mr Warren Lee and the Fourth Affidavit of Mr Yen:

(a). WTL contacted the Company by letter on 16 May 2019 on behalf of Perfect Gate.

(b). on the same day a telephone call took place between WTL and Mr Yen when WTL repeated that the proposed dilution was unacceptable to Perfect Gate.

(c). as a result of the WTL letter Mr Warren Lee contacted Mr Wong of Michael Li and Mr Yen on 17 May 2019. On 20 May 2019, by arrangement between WTL and Michael Li, Mr Warren Lee met Ben Lau and Ricky Kwan at the Empire Hotel.

(d). since WTL had clearly been acting for Perfect Gate in the matter and had arranged the meeting Ben Lau and Ricky Kwan, it is to be inferred that they had authority to act for Perfect Gate.

(e). Perfect Gate disputes any meeting or any discussion took place. This is inherently improbable, as Mr Warren Lee would have wanted any opportunity to dissuade Perfect Gate from voting against the resolutions. Perfect Gate has not produced evidence from Ben Lau or Ricky Kwan or WTL and has chosen not to deal with the evidence of Mr Warren Lee.

(f). the Court is invited to accept as truthful Mr Warren Lee's account of the conversations with Perfect Gate's representatives set out in paragraphs 21, 24(c) and 26 of Mr Warren Lee's affidavit.

(g). the vote that had been given to HKSCC by Perfect Gate on 16 May 2019 was part of an attempt by Perfect Gate to seek secret, improper financial benefits for itself as a price for supporting the restructuring (i.e. from Mr. Warren Lee, Yu Ming Investment Management Ltd and/or the Company).

The Article 77 Point

72. Mr Lowe identified two issues that needed to be considered. First, whether, as a matter of the proper construction of article 77, it gave the chairman the power to decide whether votes should be allowed or rejected or merely permitted him to ignore challenges where he concluded that the votes in question did not affect the outcome of the meeting (the ***first issue***). Secondly, if the chairman has the power to decide to admit or reject votes, whether his decision could be reviewed and set aside by the court and if so in what circumstances (the ***second issue***).

73. The Company submits that, pursuant to article 77, Mr Yen as chairman was entitled to decide whether the votes of a shareholder at the EGM should be admitted or excluded for the purpose of determining whether a resolution had been passed; that he properly exercised that power; that his decision is final and conclusive and can only be reviewed for bad faith and that since Mr Yen's decision was made properly in good faith it must be treated as binding.

74. Article 77 is quoted in the extract above from Mr Yen's Fourth Affidavit but it is convenient to set it out again here (with some reformatting by me for ease of understanding):

> *"If:*
>
> *(a). Any objection shall be raised to the qualification of any vote; or*
>
> *(b). Any votes have been counted which ought not to have been counted or which might have been rejected; or*
>
> *(c). Any votes are not counted which ought to have been counted;*
>
> *the objection or error shall not vitiate the decision of the meeting or adjourned meeting on any resolution unless the same is raised or pointed out at the meeting or, as the case may be, the adjourned meeting at which the vote objected to is given or tendered or at which the error occurs.*
>
> *Any objection or error shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if the chairman decides that the same may have affected the decision of the meeting.*
>
> *The decision of the chairman on such matters shall be final and conclusive."*

75. In relation to the first issue, Mr Lowe relied on the decision of Mr Justice Harris in Hong Kong in *Kwok Hiu Kwan v Johnny Chen & Others* [2018] HKFCI 2112 (***Convoy Global***):

(a). in this case, Harris J considered an article in the articles of a Cayman company that was in the same terms as article 77 (in *Convoy Global* the relevant provision was article 74).

(b). at an EGM an objection was raised as to whether a shareholder at the meeting was qualified and entitled to vote. It was said that they did not own the voting rights. The chairman at the EGM after receiving legal advice informed the meeting that based on article 74 it was his responsibility to decide on any objections raised and that "*If any of the shares are deemed questionable I have to void these shares for allowing to vote for the rest of the resolutions. And with this decision I deem that to be final and conclusive.*"

(c). Harris J considered (after having heard expert evidence on Cayman law from both Mr Lowe QC and the eminent retired justice of this Court, Mr Justice Henderson!) that the correct approach to the construction of a provision in the articles (being a term in the statutory contact between members and the company, which was a commercial contract) was to ask what the language used, viewed objectively, would mean to a reasonable

member of the company, applying the standard of the reasonable commercial person (who was to be treated as hostile to technical interpretations and undue emphasis on niceties of language).

(d). the shareholder whose vote had been challenged argued that article 74 should be construed narrowly. He argued that the article only authorised the chairman to determine whether if an objection was upheld it would alter the result of a vote on a resolution. It was accepted by this shareholder that at common law the chairman has the authority to determine the substantive issue of whether or not an objection justifies excluding a shareholder's votes but that such a decision is reviewable by the court.

(d). Harris J held (see paragraph [21]) that properly interpreted article 74 authorised "*the chairman to decide the objection not just the possible impact the objection might have on the numbers cast in respect of a resolution*". He said as follows:

> "*The penultimate sentence [of article 74] reads: "Any objection...shall be referred to the chairman of the meeting and shall only vitiate the decision of the meeting on any resolution if <u>the chairman decides that the same may have affected the decision</u> of the meeting." Any objection will only vitiate a resolution if (1) it is upheld and (2) having been upheld results in a resolution that would otherwise have been passed being rejected or vice versa. Consequently, article 74 is to read as authorising the chairman to decide the objection not just the possible impact the objection might have on the numbers cast in respect of a resolution. It seems to me that this is clear and that it is the interpretation the hypothetical reasonable business person would be likely to put on article 74.*"

(e). in response to the argument that article 74 should be construed narrowly Harris J said:

> "*In my view the [narrow] construction of article 74 advanced on behalf of Mr Kwok would deprive article 74 of utility. I find it difficult to see how it can sensibly be suggested that that the hypothetical commercial person would think the construction advanced on behalf of Mr Kwok is a credible reading of the article. On the contrary it invites the question: why if the drafter thought it necessary to include an article dealing with the narrow and straightforward question of numbers would he not have dealt with the more substantial question of the determination of the objection itself? Self-evidently in my view one would expect the articles to contain a mechanism that allowed the chairman to decide at a meeting the substantive objection and introduce certainty into the status of a resolution, which Mr Sussex accepted in argument was an important consideration. It seems to me that the natural reading of article 74, mindful of this consideration and the fact that all parties agree that the drafter provided a provision to address the impact of objections on the numbers of votes cast, is that the chairman can decide both the substantive objection and its possible impact on the voting in respect of a resolution. In practice, one would expect the chairman to consider whether the numbers involved are sufficient to make any difference to the result of a vote. If they do not he might decide not to spend time and invite controversy by deciding the substantive issue; but if it does make a difference article 74 empowers him to do so.*"

76. In relation to the second issue:

(a). Mr Lowe referred to the discussion of the second issue by Harris J in *Convoy Global*. It was common ground before Mr Justice Harris that if the chairman's decision was reached in bad faith the court could intervene and set the decision aside. After a careful review of the English and Australian authorities, he concluded that:

> *"50. It is common ground that the Chairman's decision can be challenged on the grounds of bad faith. What I have not been asked to decide and I invited Mr Sussex to consider arguing at the next hearing, is whether the finality of the decision prevents a challenge on the grounds that is unreasonable in the Wednesbury sense or something similar. It seems to me that a qualification to finality on the grounds that it cannot have been intended to extend to serious error is a more principled and coherent explanation for restricting finality..."*
>
> ....
>
> *53. [The chairman's]...decision... was final and conclusive unless [it could be shown] either that it was reached in bad faith or it is demonstrated that the court should intervene for the reasons referred to in [50]"*

[underlining added by me]

(b). but Mr Lowe was unable to say what had been decided in the subsequent hearing to which Mr Justice Harris referred.

(c). Mr Lowe relied on the English authorities that he submitted established that once the decision was made by the chairman, it was unchallengeable except on the grounds of mala fides: it was irrelevant that the decision may be erroneous or irrational. In particular, *Wall v London and Northern Assets Corp* [1898] 1 Ch. 550 and *Wall v Exchange Investment Corp* [1926] 1 Ch. 143. Mr Lowe submitted that the English approach to the finality of a chairman's decision made in good faith appeared to have been followed in this jurisdiction by Henderson J in *Tempo Group Ltd and Others v Fortuna Development Corporation* (Unreported, 31 March 2015) at paragraphs 200-205.

(d). in the first English case, North J had considered a differently worded article that stated that "*No objection shall be made to the validity of any vote except at the meeting at which such vote shall be tendered....and every vote...not disallowed at [the meeting]shall be deemed valid for all purposes whatsoever.*" North J concluded:

"In my opinion the meaning of the article is that all objections to votes at a meeting must actually be taken and dealt with at the meeting and the decision as to their validity by the person who presides is to be final on that point. The only difficulty I felt was as to whether the article could not be construed to mean merely that all proceedings founded on the chairman's ruling as to votes are to be deemed valid when they are not challenged by legal proceedings. But I do not think I can come to the conclusion on the actual words of the article that the meaning be so limited."

(e). in the second English case, the Court of Appeal considered the same article. Pollock MR, after quoting the first sentence of the judgment of North J, which I have set out above, said:

"I agree with North J. I do not see the purpose of [the article] unless the effect which he has summarised [in that sentence] is to be given to it. The chairman is to exercise his power and come to a decision whether votes which are in question shall be disallowed or not. If he comes to that decision regularly and...fraud is not suggested – it appears that the action of the chairman cannot after be questioned. he acts in effect as if he were an arbitrator chosen by the parties concerned and whose decision is to bind the parties on the question whether these votes are to be treated as valid votes or not. No suggestion is made here against [the chairman] that he was guilty of any misconduct and certainly no suggestion that he was guilty of such conduct as would as in the case of an arbitrator would invalidate his award.....in the absence of any charge of fraud or misconduct which would be sufficient to invalidate the award of an arbitrator, [the chairman] was entrusted with the power under [the article], and for the purpose of getting through the business of the meeting was entrusted with powers which required him to decide whether or not the votes should be disallowed."

(f). Warrington LJ said that he agreed with Pollock MR (and North J). Sargant LJ also agreed with Pollock MR and North J. He concluded that:

"It is obviously desirable that questions of this sort should be determined in a summary way and without the necessity of coming to the courts. [It was argued that on a proper construction of the article] if the chairman disallowed a vote, his decision was not conclusive. It may well be that in the case where a vote has been disallowed, the shareholder whose right has been impeached to that extent should have a right to apply to the Court. Here, all that is done is to take away from a shareholder a right of appeal against a decision disallowing an objection by him against the votes of some other shareholder, and it seems to me quite reasonable that such a question should be allowed to be decided summarily and finally by the chairman, although there should not be the same summary and final effect given to a decision against the right of a shareholder to vote."

(g). Mr Lowe noted that Harris J in *Convoy Global* had considered the suggestion in the second underlined sentence above that there might be a distinction between (i) a shareholder's right to challenge in court the decision of the chairman to reject that shareholder's objection to the votes of another shareholder and (ii) a shareholder's right

to challenge in court the decision of the chairman to reject that shareholder's votes. Harris J had concluded that such a distinction was "*erroneous*."

(h). Mr Lowe also drew to my attention and relied on the analysis in Kosmin and Roberts, *Company Meetings and Resolutions* (2nd ed., 2013) at paragraph [9.81] which states as follows:

> *"The authorities...from Australian and New Zealand do appear to provide a sensible and reasoned approach to the problem, justifying the intervention of the court when a strict and literal application of the articles would lead to the chairman's erroneous decision being upheld, perhaps to the acute disadvantage of the shareholders and the denial of their legal and statutory rights. However, in view of the current trend in English law favouring methods of alternative dispute resolution which restrict access to the courts, it may be doubtful that these authorities although persuasive on their reasoning, would be followed by an English court. It is suggested that the court in England following the precedent set by the Wall cases is likely to rule that a chairman's decision on the validity of votes when taken in good faith and at the correct time is final and binding. Accordingly, it remains the position that an English court will require cogent evidence of fraud or bad faith before it will be prepared to set aside the chairman's ruling."*

[underlining added by me]

(i). Mr Lowe had in the Petitioner's Skeleton Argument drawn to my attention certain Australian and New Zealand authorities which appeared to take a different view, as explained in Kosmin and Roberts. He referred to *Cordiant Communications (Australia) Pty Ltd v. The Communication Group Holdings Pty Ltd* (2005) 55 ACSR 185 at paragraph 200-20545 but noted that Mr Justice Harris had said (in *Convoy Global* at [51]) that a different approach from that taken in the Australian authorities was justifiable because of the weight to be given to the principle of party autonomy. Harris J quoted the passage from Kosmin and Roberts relied on by Mr Lowe and set out above. He then said (at [52]):

> *"I have no evidence of the weight given by the courts of the Cayman Islands to party autonomy. It seems to me, unsurprisingly perhaps given Hong Kong law, that this is a material consideration and one to which no consideration seems to have been given in the Australian authorities. In my view it weighs in favour of upholding the finality of a Chairman's decision."*

(j). Mr Lowe also referred to the following passage in *Shackleton on the Law and Practice of Meetings (14th ed., 2017)* at [15-10]:

> *"At any meeting at which a special resolution is submitted to be passed on a show of hands, a declaration of the chairman that the resolution is, or is not, carried is,*

> *unless a poll is demanded, conclusive evidence of the fact without proof of the number or proportion of the votes recorded. <u>Once the declaration has been made by the chairman that a special resolution has been passed or not, the court will not interfere unless there is evidence of fraud or manifest error...The court will however intervene if it can be proved that the chairman has acted on a mistaken principle...</u>"*

[underlining added]

The statement in the first sentence reflects the language of section 320 of the UK Companies Act 2006. The proposition in the second sentence is based on *Re Graham's Morocco Co Ltd* 1932 S.C. 269. The proposition in the third sentence appears to be based on *Re Capital (New) Mines Ltd* [1902] 2 Ch. 498 in which Buckley J said:

> *"I am asked to affirm a proposition that if a chairman makes a declaration and in it actually gives the numbers of votes for an against the resolution, which he is bound to recognise, and adds that there are proxies (which in law he cannot regard) and then declares that the result is that the statutory majority has been obtained although the numbers stated by him show that it has not been obtained, the declaration is conclusive. In my judgment that proposition cannot be supported."*

(k). Mr Lowe therefore submitted that in order for Perfect Gate to succeed it must (and the burden of proof was on it to) establish that Mr Yen made his decision in bad faith. It had failed to do so. Based on the findings of fact which the Company invited the Court to make (as set out above), the Court could and should conclude that the objection to Perfect Gate's votes had been properly raised at the EGM and was properly dealt with by Mr Yen. He had obtained legal advice on the legal effect of Perfect Gate's ransom demands and acted on that advice. There could be no suggestion that he had acted mala fides. His evidence on the reasons for and basis of his decision demonstrated that he genuinely believed that he was entitled to exercise his powers under article 77 to disallow Perfect Gate's vote and Perfect Gate's evidence did not deny or challenge that conclusion.

(l). furthermore, Mr Lowe submitted that Mr Yen had been right as a matter of law to disallow Perfect Gate's vote. In the Petitioner's Skeleton Argument the Company argued that Perfect Gate's vote was to be disallowed because it was not made bona fide. The bona fides of the vote was in issue for two reasons:

(i). first, because majority shareholders were not acting bona fides if they voted and *acted not for the benefit of the company at large but entirely for their own benefit and in their own interests* (in reliance on Sidebottom v Kershaw [19020] 1 Ch. 154 at 167, per Lord

Sterndale). In the present case, a vote which was cast with a view to extorting funds from the Company and which had no other discernable basis was not bona fide. Perfect Gate was acting with a view to extorting funds for their own benefit and to promote their own interests.

(ii). secondly, a vote was not bona fide in the relevant sense if no reasonable person would consider the vote to the advantage of the company. In particular, the Company relied on the judgment of Mr Justice Harris in *Re Sunlink International Holdings v Wong Shu Wing* [2010] 5 HKLRD 653 (***Sunlink***). This was a case relating to a shareholder's vote on resolutions for a restructuring of a Cayman company. The learned judge had observed:

> *"...the authorities do demonstrate that the court will intervene to prevent a shareholder voting in a way which will result in the destruction of the economic value of other shareholders' shares for no rational reason."*

The Company submitted that this approach was supported by authority in this Court. In *Re Seapower Resources International Limited (in provisional liquidation)* Lever J (see the citation above) dealt with a case in which the petitioner had sought an order confirming a capital reduction where the resolution to approve the capital reduction had failed due to the vote of one dissenting shareholder. The petitioner's case was that without the proposed restructuring, the petitioner would be insolvent and that, in casting its votes as it did, the dissenting shareholder must have acted in bad faith. This assertion appears to have been accepted by the Court and the resolution treated as if passed.

The Company concluded that:

> *"In the present case, Perfect Gate's vote was irrational. No rational shareholder could consider that it was in anyone's interest (let alone those of shareholders) for the Company to go into insolvent liquidation. Absent a restructuring, there will be no returns to shareholders or creditors. The capital reduction itself causes no diminution in the shareholders' equity. If there is a restructuring, the position of shareholders and creditors will only be improved."*

(m). however, during his oral submissions at the hearing Mr Lowe said that he was no longer relying on the irrationality ground. He said that the chairman was right to disallow Perfect Gate's vote on the basis that Perfect Gate had acted with a view to extorting funds and

therefore illegally. The ransom demands (and impropriety) to which the chairman had referred in his evidence and to which the Company had referred in its announcements was a sufficient justification and ground in law. In the Petitioner's Note filed after the hearing the Company's position was set out as follows:

> "(a). *the attempt to seek an improper financial benefit in return for a vote on a company that is otherwise liable to face liquidation was a dishonest use of a threat ("menaces") to get money which Perfect Gate had no right to receive in return for voting for the resolution (colloquially extortion).*
>
> (b). *dishonesty is an objective question and is the same in civil and criminal law (see Ivey v Genting Casinos UK Ltd [2018] AC 391). Most reasonable right-thinking businessmen would regard Perfect Gate's behaviour as unacceptable.*
>
> (c). *since this took place in Hong Kong statutory illegality would be a matter of Hong Kong law. It is sufficient that the conduct is dishonest. Dishonesty even without statutory criminality is sufficient "illegality" (see Les Laboratoires Servier v Apotex Inc [2015] AC 430 at p446 at [25] per Lord Sumption).*
>
> (d). *in Clarke v Chadburn [1985] 1 WLR 78 at 80 Megarry VC held that resolutions which were in contempt of court were void for illegality. In the time available it has not been possible to identify any authority precisely in point in which the vote of one member of a class was disallowed.*
>
> (e). *however, it is submitted that (i) a resolution carried by such a vote would be tainted by illegality and could properly be disallowed consistently with Clarke v Chadburn (ii) as per Regulation 77 of the Articles the Chairman could decide that the decision was vitiated by that vote and disregard it.*

(n). following the hearing, in order to ensure that the Company's position was clear, I sent an email to Harneys (copied to Perfect Gate) to confirm this point. I said as follows:

> *"The Petitioner's Skeleton Argument set out and relied on two grounds in support of its position that the Chairman at the EGM was entitled to reject and disallow Perfect Gate's vote and/or that the Petitioner is entitled to an order setting aside Perfect Gate's vote. First, that "in the present case a vote which is cast with a view to extorting funds from the Company and which has no other discernible basis is not bona fide" (the* ***First Ground****): see paragraphs 34-36 of the Petitioner's Skeleton Argument. Secondly, that "a vote is not bona fide in the relevant sense if no reasonable person would consider the vote to advantage the Company....Perfect Gate's vote was irrational." (the* ***Second Ground****): see paragraphs 37-40 of the Petitioner's Skeleton Argument.*
>
> *As I understood Mr Lowe's oral submissions, and the Petitioner's Note, the Petitioner (i) is now not relying on the Second Ground; (ii) still relies on the First Ground (on the basis set out in paragraph 34 of the Petitioner's Skeleton Argument) by reason of the factual findings which it invites the Court to make in the Petitioner's Note and on the basis that dishonesty constitutes bad faith for this purpose and (iii) now also submits that Perfect Gate's vote was properly disallowed by reason of, and can as a matter of Cayman law (without expert evidence as to Hong Kong law), be treated as void for illegality (on the principle for which Clarke v Chadburn stands as authority).*

(o). Harneys confirmed that my statement of the Company's position was correct.

77. Perfect Gate has not challenged Mr Yen's power to decide on the validity of, and to reject, votes cast at the EGM under article 77. It has made no submissions on the first point. It does, however, submit that the chairman's decision can be challenged not only on the basis of bad faith but also on the basis that it was Wednesbury unreasonable.

(a). in the 2 July Letter (paragraph (10)) Perfect Gate state that:

> *"We verily believe that [Mr Yen's] decision at the EGM that the votes in respect of Perfect Gate's Shares not be counted was unlawful, void and of no effect. We also believe that [Mr Yen's] decision was made in bad faith or was unreasonable in the Wednesdbury sense or something similar."*

(b). in the Affirmation, Mr Lee On Wai repeated the statement made in the 2 July Letter and added:

> *"Further, I wish to stress that none of the reasons relied on by Mr Yen to discount Perfect Gate's votes was raised by Mr Yen before the EGM. This was so despite the fact that prior to the EGM, Mr Yen was allegedly aware that Perfect Gate would vote against all resolutions and was allegedly aware of the alleged meetings between Mr Warren Lee and Perfect Gate's representatives [referring to the evidence given by Mr Yen in his Fourth Affidavit]. As such, it is doubtful whether Mr Yen had duly taken into account all relevant matters before making the decision to discount Perfect Gate's votes."*

(c). in the 5 July Letter, Perfect Gate expanded on its submission that Mr Yen's decision was Wednesbury unreasonable (and therefore ineffective) as follows:

> *"(i). Perfect Gate is a bona fide investor who invested and acquired the shares in the Company after it had been wound up as its' [sic] investment in distress assets, and Perfect Gate would not vote irrationally to destroy its own investment.*
>
> *(ii). Despite having prior knowledge of Perfect Gate's stance on 16 May 2019, the Chairman had made no allegation of irrationality so that Perfect Gate did not have an opportunity to explain its decision before the Chairman's decision, and the Chairman had thus failed to take into account Perfect Gate's explanation, no doubt a relevant consideration.*
>
> *(iii.). in similar vein, no opportunity was allowed for Perfect Gate to answer the allegation made by Mr Warren Lee. The Chairman had thus failed to take into account Perfect Gate's explanation and denial, no doubt a relevant consideration.*

> *(iv). Perfect Gate had tried to contact the Liquidators and offer alternative proposals of restructuring, but was ignored. The Chairman had failed to take those alternatives into account.*

(d). the reference to "*unreasonable in the Wednesdbury sense or something similar*" is a quotation from paragraph 50 of the judgment of Harris J in *Convoy Global* (set out above). Mr Justice Harris had said that he had not been asked to decide whether a challenge could properly be made on grounds other than good faith but he did invite counsel to consider arguing at the subsequent hearing whether "*the finality of the decision prevents a challenge on the grounds that is unreasonable in the Wednesbury sense or something similar.*" So he did not consider this point and, as I have explained, no details of whether he made a decision on the point on the subsequent hearing have been provided on this application (Mr Lowe says he has no information and Perfect Gate have not referred to any decision of Mr Justice Harris). However, Harris J did go on to indicate that he was not immediately persuaded that a challenge on the basis of Wednesbury unreasonableness would be permitted. He said "*It seems to me that a qualification to finality on the grounds that it cannot have been intended to extend to serious error is a more principled and coherent explanation for restricting finality...*"

(e). Mr Lee On Wai does not explain what precisely he means by "*Wednesbury unreasonableness*." However, the term is well known and I take Mr Lee On Wai to be referring to the grounds of review by the courts of administrative decisions and certain contractual discretions, which were summarised by Lady Hale in *Braganza v BP Shipping Limited* [2015] 1 WLR 1661, 1670-1671:

> *"23. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410 as follows:*
>
> > *"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*
>
> *24. The problem with this formulation, which is highlighted in this case, is that it is not a precise rendition of the test of the reasonableness of an administrative decision which was adopted by Lord Greene MR in Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 233-234. His test has two limbs:*
>
> > *"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought*

not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

<u>The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former.</u>"

[underlining added]

(f). not only does Mr Lee On Wai not explain the meaning of Wednesbury unreasonableness but he also fails to cite any authority, or principle, supporting its application to decision making by a chairman at a shareholders' meeting. I have sought to assist Mr Lee On Wai and Perfect Gate by finding and citing authority which seems to me to explain the meaning of the legal principle on which it relies (because the term is in truth a term of art) but I do not consider that I can or should seek to fill the gaps in its case by speculating on the submissions that it might have made had it addressed the issue fully and properly. Mr Lee On Wai does, as I have explained, use without acknowledgement, a phrase lifted from a passage in Mr Justice Harris' judgment in *Convoy Global* in which he invited further argument on whether a chairman's decision could be challenged on the basis of Wednesbury unreasonableness but he did not discuss further or decide the point and in fact went on to indicate that he did not as then advised think that such a ground of challenge was available.

(g). I note that in the 9 July Letter Perfect Gate refer to the challenge to Mr Yen's decision in Hong Kong being based on an allegation of bad faith based on Perfect Gate's claim that the liquidators failed to respond to the concerns of Perfect Gate prior to the EGM and that certain issues were raised as to Mr Yen's credibility because of his firm's alleged financial interest in the post liquidation restructuring being successfully completed and criticisms of him in a previous Hong Kong court case. However, I must decide this application based on the evidence filed and submissions made by Perfect Gate in this Court and not on evidence or matters raised by it in the Hong Kong court.

8. Having reviewed the evidence and submissions as summarised above, my conclusion on

the first issue is as follows. It seems to me that the construction of article 77 adopted by Mr Justice Harris in *Convoy Global* is right and I agree with his analysis and approach. Article 77 applies in three situations. Where there has been an objection to a shareholders' qualification to vote; where an error has been (or would be) made by counting votes which ought not to be counted (or which could have been rejected) and where an error has been (or would be) made by rejecting votes that ought to have been counted. The operation of the article is also subject to a procedural condition, namely that the objection or error must be brought to the attention of the meeting and the chairman at the meeting. The article envisages that the objection can vitiate and invalidate the result of the meeting. This only occurs if the votes that have been or would be wrongly admitted or rejected would change the outcome of the meeting. But for vitiation to occur and be possible, there must be a decision on whether there has been (or would be) an error or proper objection. It is only if there has been (or would be) such an error or proper objection that the outcome of the meeting could be affected at all. Therefore, it is implicit that the chairman must decide whether there has been (or would be) an error or proper objection. I say has been or would be, because the article is addressing the position of the chairman after the casting of the votes and before the chairman has taken his decision. The chairman has to consider whether there would be an error or proper objection if the votes cast were admitted.

79. As regards the second issue:

(a). it seems to me that, as a matter of principle, Cayman law follows English law, and Hong Kong law, to the extent consistent with the English authorities. Henderson J applied the English authorities in *Tempo Group* and assumed that decisions taken by the chairman of an EGM in bad faith were invalid (although he was considering a case in which the EGM itself was a nullity because of the dishonesty and fraud of those who convened and conducted the meeting).

(b). it is clear that the chairman's decision can be set aside on the basis of bad faith. The burden of proof is on the person asserting bad faith (Perfect Gate) and as Kosmin and Roberts point out the "*court will require cogent evidence of fraud or bad faith before it will be prepared to set aside the chairman's ruling.*"

(c). I do not consider that Perfect Gate has established on the evidence bad faith on the part of Mr Yen.

(i). Perfect Gate appears to make two main points based in both cases on the liquidators' and Mr Yen's failure to contact it to establish its position. First, it is said that Mr Yen was wrong to conclude that Perfect Gate was behaving irrationally and had decided to vote against the resolutions without a proper justification. Had he approached and asked Perfect Gate he would have found out that Perfect Gate had understandable and commercially rational reasons for deciding to vote against the recapitalisation proposals. Secondly, Mr Yen was wrong to conclude that Perfect Gate was behaving improperly and to believe Mr Warren Lee's assertions and evidence as to Perfect Gate's conduct. Had Mr Yen approached and asked Perfect Gate he would have found out that Perfect Gate had not (or at least that it claimed not to have) authorised any person to make ransom demands or attend meetings with Mr Warren Lee.

(ii). Perfect Gate asserts that Mr Yen's decision was made in bad faith but does not explain how. Perfect Gate does not show how Mr Yen's alleged failures go to his bona fides – show that he knew or must be taken to have known that he had no (proper) grounds for disallowing Perfect Gate's votes or how they undermine his evidence of an honest belief based on legal advice that he was entitled to do so.

(iii). Mr Yen's alleged omissions seem more relevant to Perfect Gate's argument that his failure to approach it before taking his decision at the EGM resulted in him being unaware of certain relevant matters so that his decision was flawed on *Wednesbury* grounds. Perfect Gate says that Mr Yen failed, when deciding to exclude its votes, to take into account relevant matters, namely the answers it would have given had it been approached to explain why it was voting against the restructuring or Mr Lee Warren's allegations and evidence. I will consider shortly whether that is a proper ground for challenging the chairman's decision.

(iv). I have considered whether it could be said that Mr Yen's failure to ask Perfect Gate for a response to his concerns and to set out its position on Mr Warren Lee's evidence (or the liquidators' failure to respond to Mr Lee On Wai's calls) before the EGM could constitute evidence of bad faith on the basis that this conduct can be treated as evidence that Mr Yen did not have an honest belief that the events to which Mr Lee Warren referred had happened or that Mr Warren Lee's evidence could not be relied on (or that Mr Yen intended to disallow Perfect Gate's votes irrespective of Perfect Gate's real position and whatever the true position was).

(v). but I do not think that such an argument is available on the evidence. Perfect Gate has provided no evidence to support such a conclusion. Mr Yen has sworn an affidavit to confirm that he acted properly based on credible evidence of impropriety and wrongdoing by Perfect Gate (he referred to Perfect Gate's demands for ransom payments which was considered to be unethical and illegal). There is no evidence that challenges Mr Yen's evidence as to why he took the decision to exclude Perfect Gate's vote (that he made his decision taking into account and relying on the matters set out in his Fourth Affidavit including the alleged illegality and dishonest conduct of Perfect Gate) or to show that he did not believe (or could not have believed) Mr Warren Lee's statements and evidence.

(vi). the evidence shows that Mr Yen took legal advice before reaching his decision. This supports the conclusion that he adopted a proper process before deciding on how to deal with the objection raised. In their letter to WTL dated 4 June 2019, Michael Li confirmed that Mr Yen took legal advice before reaching his decision (I note that they refer to him having taken advice on Hong Kong and not Cayman law but since Cayman law on this issue is not materially different from the law of Hong Kong this is not in my view a serious or vitiating failure).

(vii). as regards the liquidators' failure to approach Perfect Gate, it is certainly surprising that such a large shareholder was not approached and its support sought at an early stage in the restructuring process. One would have

expected the liquidators to take a proactive approach. However, even if Mr Lee On Wai did make a number of calls to the liquidators which were not answered, Perfect Gate failed to set out its position in writing until 16 May (having been aware since 28 December 2018 of the proposed dilution to its position by reason of the announcement of that date which dealt specifically with Perfect Gate's position). As soon as Perfect Gate had put its position in writing, Mr Warren Lee approached it to discuss its position. The evidence does not indicate or permit the inference that the failure to engage or the delay in engaging with Perfect Gate was done in bad faith.

(viii). Perfect Gate also say that Mr Yen was wrong to conclude that it was behaving irrationally. Mr Lee On Wai submits that his evidence demonstrates that Perfect Gate behaved rationally and came to a view as to how to vote based on a reasonable assessment of the impact on Perfect Gate and the fairness of the recapitalisation proposal (in view of other similar resumption proposals that had been previously concluded). But irrationality was not one of the reasons relied on by Mr Yen according to his evidence nor was this a reason given in the EGM minutes or the 29 May Hong Kong Stock Exchange announcement (although I do note that Michael Li do mention irrationality as one of the grounds of Mr Yen's decision in their 4 June letter, with Mr Lee Warren's allegations). But even if Mr Yen was mistaken in his view as to Perfect Gate's apparent irrationality this would not be evidence of or demonstrate bad faith. The fact that Perfect Gate had a commercially rational basis for its refusal to vote in favour of the recapitalisation proposal would not prevent Mr Yen honestly (and reasonably) believing that he was entitled to and should exclude its vote on the basis of conduct which appeared to him to have been taken by representatives of Perfect Gate and demonstrated illegality and impropriety.

(ix). it is true that Mr Yen's evidence is that this conduct was only one of a number of the matters on which he relied. However, it was clearly one of the important factors. The significance of the allegations of unlawfulness and improper conduct are supported by the content of the EGM minutes and the 29 May Hong Kong Stock Exchange announcement (contemporaneous

documents) both of which refer to "impropriety" as being the basis for the challenge and objection to Perfect Gate's votes.

(x). I do not consider that I need to or should make all the findings of fact which the Company invites me to make (see paragraph 71 above). As I explain below, it seems to me that Mr Lee On Wai's evidence constitutes a denial that Mr Lau and Mr Kwan were properly authorised to represent Perfect Gate and of dishonesty on the part of anyone so authorised. Resolution of these conflicts in the affidavit evidence requires cross-examination. But these issues do not need to be resolved. The key issue is whether there is any or sufficient evidence to support a finding of bad faith on the part of Mr Yen and whether Perfect Gate has made good its assertion of bad faith (Perfect Gate bears the burden of proof on this issue).. I am satisfied that it has not.

(d). I have also considered whether Mr Yen's decision could be set aside if the legal advice he had received was wrong so that it could be said that he had made, or his decision was based on, an error of law. This was not a point that Perfect Gate relied on although I did raise the issue with Mr Lowe:

(i). no authorities have been cited to show that error of law is sufficient and proper citation of authority is needed to deal with the point properly.

(ii). I note that in the passage from Shackleton set out above it is said that in addition to bad faith the chairman's decision may be set aside if there is evidence of manifest error or that the chairman has acted on a mistaken principle. Manifest error requires the error to be clear and obvious. Mistaken principle appears to require a fundamental error affecting the counting or analysis of the votes (see the *Re Capital* decision cited by Shackleton).

(iii). I also note Mr Justice Harris's preliminary dictum in *Convoy Global* that a serious error was likely to be sufficient. I also note that Pollock MR in *Wall v Exchange Investment Corp* refers to "*misconduct*" in addition to fraud (he also sets out the principle that a challenge to a chairman's decision can be made on the same grounds as a challenge to a party appointed arbitrator -

and perhaps expert - but I have received no submissions or authorities on the law governing or permissible scope of such a challenge).

(iv). for the purpose of the present application, since the error of law issue has not been raised by Perfect Gate it cannot be relied on to support its opposition to the Summons. In any event, it has not been established either that error of law is sufficient or that there has been an error of law in the present case.

(v) I would say that, as presently advised and based on Mr Lowe's submissions in the Petitioner's Note, it seems to me that the dishonest and illegal conduct of the kind alleged against Perfect Gate is capable of justifying the exclusion its shareholders' vote (although I do not accept that dishonesty is solely an objective standard – it is necessary to consider the subjective state of mind of the defendant as well):

(A). the judgment in *Clarke v Chadburn* establishes that resolutions tainted by illegality (and which are passed to carry into effect an illegal purpose) may be treated as void.

(B). the *ex turpi causa* principle is capable of extending to dishonesty. As Lord Sumption said in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 at p446 at [25]:

> "25 *The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts, which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by FlauxJ in Safeway Stores*

Ltd v Twigger [2010]Bus LR 974."

(C). a demand for a secret ransom payment for an improper financial benefit (and an offer to conceal the manner in which the payment or benefit was provided) in order to prevent the shareholder from voting against a resolution is capable of constituting dishonesty and deception (I note that contracts whose object is the perpetration of a fraud on shareholders is treated as illegal – see *Begbie v Phosphate Sewage* (1875) L.R. 10 QB 689).

(D). the fact that the ransom payment was eventually not paid is not of itself a sufficient defence. The voting on the resolution can be seen as a step taken to put into effect the dishonest scheme and the shareholder would need to provide clear evidence of repentance and disengagement from the dishonest scheme.

(vi). however, I do not consider that is permissible for me to make a finding of dishonesty against Perfect Gate without there being cross-examination of the witnesses. Mr Lee On Wai has made a blanket denial that any authorised representatives attended meetings with Mr Warren Lee or that anyone was authorised by Perfect Gate to make improper (ransom) demands and that seems to me to constitute a denial of dishonesty by Perfect Gate.

(vii) but I would add that I do not regard Mr Lee On Wai or Perfect Gate as having given a comprehensive or satisfactory response to the allegations (which Perfect Gate has known about at least since Michael Li's letter to WTL of 4 June). Mr Lee On Wai does not deal in his evidence specifically with Mr Warren Lee's allegations and does not mention Mr Lau or Mr Kwan nor does he deny that they had a connection with Perfect Gate. Nor has Perfect Gate ever provided an explanation as to who these individuals are and why they held themselves out as authorised to act for Perfect Gate or why Perfect Gate's solicitors put them forward and nominated them as representatives of Perfect Gate (I accept that Mr Warren Lee does not explain how Mr Lau or Mr Kwan were or said they were connected with

Perfect Gate although his evidence is that they were put forward as representatives of Perfect Gate by Perfect Gate's Hong Kong solicitors and that seems a credible basis for believing that they were authorised to act for Perfect Gate).

(e). Perfect Gate relies on *Wednesbury* unreasonableness as a basis for setting aside Mr Yen's decision. However, Perfect Gate has not established that this is sufficient in law. There is no authority cited which supports this proposition and I am not able to accept that it is good law on this application (this is a point which requires full argument and citation of authority). Nor do I consider that *Wednesbury* unreasonableness can be treated as establishing bad faith or misconduct, which seems to me to connote deliberate wrongdoing.

(f). I would finally add that since the Company and the liquidators have not relied on the irrationality ground for disallowing Perfect Gate's votes it has not been necessary for me to consider Mr Justice Harris's judgment in *Sunlink* and the question of whether it would be followed in this jurisdiction (although I did refer Mr Lowe to the article by Mr William Wong in the Law Quarterly Review arguing that irrationality was not the correct test – see (2011) 127 LQR 522). It seems to me that the principle justifying the rejection of a vote on the basis of irrationality (particularly a negative vote) by a shareholder (particularly a shareholder who has neither the votes to pass or veto the relevant resolution) requires further elucidation and analysis. I accept that the authorities indicate that bad faith may in some cases be inferred where a shareholder reaches a decision which no reasonable shareholder could properly reach but it is far from clear that a bad faith vote can be disallowed unless the shareholder is otherwise subject to a restriction which requires him to have regard to others' interests. It might be argued that the exercise by shareholders with a de facto blocking power of a statutory power to approve a capital reduction are subject to the same requirements that apply to majority shareholders exercising the statutory power to amend the articles (namely that they exercise the power bona fide and in the interests of the company - or all shareholders – as a whole) – even though court approval is required – or that this requirement applies whenever the issue being voted on centrally involves the interests of the company, as in the case of the restructuring of an insolvent

company, but the analysis is far from straightforward and the justification for overriding the shareholder's freedom to decide far from clear.

Mr Justice Segal
Justice of the Grand Court, Cayman Islands

16 July 2019