HCMP 134/2018
[2018] HKCFI 2622

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 134 OF 2018

IN THE MATTER of Order 63, rules 4(1)(b)-(c) of the Rules of the High Court (Cap 4A); and the Court's inherent jurisdiction

and

IN THE MATTER of China Fishery Group Limited in Companies Winding-Up Proceedings No 367 of 2015 in Hong Kong

and

IN THE MATTER of China Fisheries International Limited in Companies Winding-Up Proceedings No 368 of 2015 in Hong Kong

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Before: Hon Harris J in Chambers

Date of Hearing: 11 September 2018

Date of Decision: 17 September 2018

Date of Reasons for Decision: 14 January 2019

R E A S O N S F O R D E C I S I O N

The Application

1. On 30 January 2018 William A Brandt Jr, the Chapter 11 Trustee of CFG Peru Investments Pte Limited (Singapore) ("**Trustee**"), issued an *ex parte* originating summons for leave to use the Decision of Deputy High Court Judge Kenneth Kwok, SC ("**the DHCJ**") made on 5 January 2016 in HCCW 367 and 368 of 2015 issued by The Hongkong and Shanghai Banking Corporation Limited ("**HSBC**") ("**winding-up proceedings**") discharging the joint and provisional liquidators appointed by me over China Fishery Group Limited ("**CFG**") and China Fisheries International Limited ("**CFI**") (collectively the "**Companies**") and the Reasons for Decision handed down on 17 March 2016, in Chapter 11 proceedings in the United States Bankruptcy Court of the Southern District of New York bearing the caption *In re* China Fishery Group Limited (Cayman), *et al*.[1]

2. Leave is required because, as is normal in the case of an application for the appointment of provisional liquidators, the hearing before the DHCJ was in chambers not open to the public and the Reasons for Decision are marked "*Not Open to the Public*" and "*No search, inspection or publication without leave of the court*". In addition in a similar application to that made by the Trustee in which the Companies sought leave to disclose the judgment amongst other documents generated as part of the winding-up proceedings, I ordered that the parties whether themselves or through their agents, must not without my leave provide to any persons any of the documents referred to in the Companies' summons.[2]

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1 Case No. 16-11895 (JLG) (Bankr. S.D.N.Y. Oct 28, 2016), [ECF No. 203].

2 (Unrep, HCCW 367 and 368/2015 [heard together], 23 May 2017).

3. Although the application is not framed as an application for judicial assistance by a foreign office holder charged with administering a corporate liquidation, before me Mr Dennis Kwok argued that the character of the Trustee's office justified this Court assessing the application with regard to the common law principles governing judicial assistance, which Mr Kwok argued bolstered the application, which was principally framed as one based on the open justice principle. It was not, however, necessary he argued for the court to be satisfied that the common law principles of judicial assistance are engaged in the present case in order for the Trustee to succeed.

4. HSBC opposes the application on two grounds. First, that the Trustee has failed to demonstrate sufficiently good reasons for the release of the Decision. Secondly, as the appeal against the Decision was explicitly withdrawn (as I explain in detail in [7]) because of undertakings given by the Companies to both HSBC and the court, which were then contumeliously breached by the Companies petitioning under Chapter 11 for the undisputed purpose of preventing HSBC from enforcing the undertakings, the court should not exercise its discretion to permit the application as it would allow the Companies to benefit from their egregious conduct,[3] the undertakings having been given, it is also not disputed by the Trustee, although the management of the Companies had no intention of complying with them.[4]

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[3] The finding of Garrity J at [39] of his judgment of 28 October 2016 in the Chapter 11 Proceedings.

[4] *Ibid* this is apparent from the findings at 359 to 360.

5. Before identifying the issues that in my view this application requires the court to determine, it will be helpful if I set out the relevant factual background to what is an unusual case.

Background

6. CFG is incorporated in the Cayman Islands. CFI is incorporated in Samoa. They are part of the China Fisheries Group ("**Group**"), which is engaged in the business of fisheries and fishmeal processing in Peru for wholesale distribution. The Group experienced serious financial difficulties in 2014 and 2015. Restructuring discussions took place with their various bankers. HSBC was not satisfied with the progress of the discussions, and became aware of matters which it believed demonstrated financial misconduct by the management of the Group. On 25 November 2015, HSBC issued a petition seeking the winding up of CFG on the grounds of insolvency and applied *ex parte* to me for the appointment of provisional liquidators. I granted the application. I was not available to hear the continuation summonses. It was heard by the DHCJ on 30 and 31 December 2015 and 4 January 2016. On 5 January 2016 the DHCJ set aside the appointments.

7. HSBC issued a notice of appeal on 8 January 2016. HSBC considered seeking an expedited hearing, but did not do because it anticipated that the Companies would be wound up at the hearing of the petitions on 27 January 2016. However, following discussions with the Companies' management a deed of undertaking ("**Deed**") was signed on 20 January 2016 pursuant to which HSBC agreed to withdraw all proceedings in Hong Kong and similar proceedings in the Cayman Islands against CFG in which provisional liquidators had been appointed and

remained in place. The Deed, which is governed by Hong Kong law and contains an exclusive Hong Kong jurisdiction clause, required the following the Companies to do:

> "(1) repay certain indebtedness from the proceeds of a sale of CFGL's [China Fishery Group Limited's] Peruvian subsidiaries which was to be carried out through a strict timetable of a six-month sales process ('**Sale Process**'), this being the length of time the Companies had themselves sought to implement such sale, and to provide HSBC and other creditors with updates of the Sales Process on a full and transparent basis. The date of repayment was set at 20.7.2016;
>
> (2) appoint Mr. Paul Brough ('**Mr. Brough**') as the CRO [Chief Restructuring Officer] of the CF Group [China Fisheries Group] (to which the Companies belonged) and as a director of CFGL;
>
> (3) provide Mr. Brough with full cooperation to allow him to carry out his role as CRO and to implement the Sale Process as soon as practicable;
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> (4) appoint Grant Thornton as independent reporting accountants, with full access to the affairs of the CF Group and with CFGL responsible for payment of all fess reasonably incurred by Grant Thornton; and
>
> (5) consent to any subsequent application by HSBC [The Hongkong and Shanghai Banking Corporation Limited] (or BoA [Bank of America, N.A.]) for the immediate re-appointment of provisional liquidators in the Cayman Islands if the sale of the Peruvian OpCos' operations and the repayment of the debt owed to HSBC had not occurred by 20.7.2016."

8. The petitions in Hong Kong and the Cayman Islands were also withdrawn.

9. The Deed was given additional force by orders of the courts both in Hong Kong and the Cayman Islands. The orders in Hong Kong

which are dated 1 February 2016 contain the following undertakings to the court:

> "AND UPON undertakings of [China Fishery Group Limited / China Fisheries International Limited] (the 'Company') providing to the Court as set out in Clauses 2.3 and 2.4 of the Deed of Undertaking dated 20 January 2016 entered into between the Petitioner, the Company and [China Fisheries International Limited / China Fishery Group Limited], a copy of which is appended at Schedule 1 to this Order (the 'Deed of Undertaking')"

Clauses 2.3 and 2.4 contain the provisions for the payments to HSBC summarised in [6] above. It is not disputed by the Trustee that HSBC withdrew its appeal in reliance on the Deed and the orders containing the undertakings to this Court. Neither do I understand it to be seriously disputed that it is likely the Companies would have been wound up on 27 January 2016 in Hong Kong and that it is also likely that CFG would have been wound up in the Cayman Islands.

10. Following signing of the Deed, the Companies were supposed to be engaged in the sale of assets and HSBC and others were due to be repaid by 20 July 2016. On 30 June 2016 various members of the Group including the Companies filed under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The Companies and the Group (and other companies falling within the definition of "Debtors" in the Trustee's evidence) had no operations in, or connection with, the United States. Jurisdiction was based on the payment of a retainer to the Debtors' counsel in December 2015, which I understand is a not uncommon basis for giving the Bankruptcy Court jurisdiction, and a New York governing law clause in certain notes issued by one of the Debtors. Upon making the filing, section 362 of the United States Bankruptcy Code provides for an automatic stay prohibiting

the commencement or continuation of proceedings against the Debtors worldwide. It, therefore, prevented HSBC from taking action for breach of the Order and Deed in Hong Kong.

11. On 10 November 2016, upon the hearing of the motion of Cooperative Rabobank U A, Standard Chartered Bank (Hong Kong) Limited and DBS Bank (Hong Kong) Limited for the appointment of a Chapter 11 trustee for the Debtors in the Chapter 11 Cases, Garrity J appointed the Trustee over CFG Peru Investments Pte Limited (Singapore) only. The reason for not appointing the Trustee over other Debtors was explained by Garrity J at p 50 of his decision:

> "There are sixteen Debtors in these Chapter 11 cases. As noted, most of them are dormant, non-operating companies and a few are holding companies to other operating, non-debtor affiliates and businesses. It makes little practical or economic sense to appoint a trustee for each Debtor in these cases. That is particularly so where, as here, among other things, it is uncertain what impact such an appointment would have on (i) the Debtors' other businesses and affiliates (including non-debtor operating subsidiaries) and their creditors and constituents, and (ii) the corporate governance of the affected Debtor and non-debtor entities in foreign jurisdictions (including the publicly traded companies). Moreover, it is not clear whether an appointed Chapter 11 trustee will be recognized under applicable foreign law as the authorized representative of the Debtors."

12. The Trustee has sought and obtained from Garrity J an order for discovery against HSBC that covered the Decision. HSBC attempted unsuccessfully to appeal the Garrity J's decision.

13. In his first affidavit in support of his application the Trustee summarised his reasons for wanting to leave to obtain and use the Decision (which the Trustee subsequently found amongst the Group's papers that came into his possession and as a result he is now aware its contents) to

determine whether the Debtors may have any claims against HSBC and investigate whether HSBC's conduct might give rise to defences by the Debtors' estates, for example, avoidance transfers and equitable subordination under section 510(c) of the Bankruptcy Code, or other theories of lender liability, and potentially other claims against HSBC.

14. The Trustee did not wait for determination of this application before deciding to commence proceedings against HSBC in New York. On 29 June 2018, the Trustee filed a complaint ("**Complaint**") in which in [9] it is asserted that "*HSBC's claims against the estates totalling more than $100 million should be equitably subordinated or disallowed given the extent to which HSBC exceeded the confines of permissible conduct and the damage it caused.*" As I understand it, the Trustee suggests that the impermissible conduct extends to the application for the appointment of provisional liquidators and the reasons for the Decision support the suggestion. It is for that reason that the Trustee wishes to be able to use the Decision in the Complaint.

15. There are two other factual matters that are relevant to the application. The first concerns the solvency of the Companies and the Group. It is not clear from the Trustee's evidence whether or not he believes either the Companies or the Group to be solvent. I asked Mr Kwok (the Trustee was in court during the hearing) what the Trustee believed the position to be. Although, the position does not appear to be clear, as I understand it the Trustee anticipates that the Group is solvent. The Group is owned by the Ng Family, who thus stand to benefit if the Group's debt and operations can be restructured and continue successfully under its present ownership. It is not suggested by the Trustee that the financial state of the Group and the Companies are so parlous that the

shareholders have no economic interest in the Group and the outcome of the Chapter 11 proceedings.

16. The second concerns the circumstances in which the Trustee came to be appointed. The company, CFG Peru Investments Pte Limited (Singapore), over which the Trustee came to be appointed is a wholly owned subsidiary of CFG. On the basis of the evidence before me it seems highly probable, that but for the signing of the Deed CFG would have been wound up along with CFI on 27 January 2016 or possibly provisional liquidators reappointed for a period while the creditors considered alternatives to liquidation. What seems to be clear is that the Trustee's appointment was only possible as a consequence of what Garrity J has found to be a conscious decision by the owners of the Companies and the Group, the Ng Family, to sign the Deed and, importantly, give undertakings to this Court that they had no intention of honouring. Viewed from this Court's perspective the Chapter 11 filings by the Companies and the Group were, therefore, unconscionable and an abuse and it was only as a result of this objectionable conduct that the application to appoint the Trustee became possible.

17. It is common ground that it is not for me to assess whether or not the DHCJ was wrong to set aside the order appointing provisional liquidators and that I should deal with this application on the basis that the appeal was brought in good faith and arguable. I would, however, note that the Companies did not dispute before the DHCJ that the first of the two criteria, which a petitioner has to satisfy before the Companies Court will appoint provisional liquidators, namely, that the evidence demonstrated a *prima facie* case for granting of a winding-up order had been satisfied. However, the DHCJ did find in [60]–[62] of the Decision that the Group

was balance sheet insolvent although he does not explain the relevance of this in his reasons or how, if at all, it factored into his decision. There was no suggestion before me that the Companies had any basis in December 2015 for disputing the debts owed to HSBC or the petitions, which as I have noted were to come on before me on 27 January 2016 and, therefore, applying normal principles HSBC would be entitled to winding-up orders *debito justitiae*. However, the DHCJ did in [65]–[67] of the Decision find that the Group (at least that is how I read [65]) were involved in a restructuring exercise and that it was in the interests of "stakeholders" that there was an orderly disposal of assets rather than a compulsory winding up and that this was a reason for discharging an order. The DHCJ did not explain how he reconciled this reasoning with the acceptance by the Companies that the first criteria had been satisfied and the application of the normal principles, which would suggest that the Companies would be wound up only a month after the hearing before him. It would appear from the evidence given before Garrity J and Garrity J's findings that the Companies were aware that unless they agreed some form of rescheduling of the debt owed to HSBC they were likely to be wound up on 27 January, which was why they agreed the Deed on 20 January 2016.

Open Justice Principle

18. The court has an inherent jurisdiction to control access to documents in its possession as a consequence of proceedings before it. Various authorities discuss the principle by reference to which the court determines whether access should be restricted. They establish that the judicial process should be conducted openly and that it should only be

restricted if substantial and relevant reasons are demonstrated for so doing.[5] General considerations such as privacy and confidentiality are not relevant reasons. In *TCWF v LKKS* [6] Lam JA refers with approval in [45-6] to the principles to be found in the English *Practice Guidance (Interim Non-disclosure Orders).*[7] In the context of non-disclosure orders, the principle is clear: it can only be justified when strictly necessary to secure the proper administration of justice.

19. In the Companies Court context it is generally accepted that certain restrictions are necessary in order to ensure the proper and just administration of certain types of matters that regularly come before the Companies Court. Schedule 2 of *Practice Direction 25.1* lists certain proceedings which are not usually open to the public. The justification is contained in [4(a)]:

> "The proceedings listed in Schedule 2 would usually not be open to the public. In relation to such proceedings, it is considered that having regard to their nature, one or more of the reasons for excluding the press and the public laid down in Article 10 of the Hong Kong Bill of Rights Ordinance, Cap. 383 ('Article 10') are usually satisfied. Accordingly, such proceedings would usually not be open to the public."

20. Part 3 of Schedule 2 contains a list of proceedings relating to companies winding-up and bankruptcy and the list includes applications for the appointment of provisional liquidators. The principal justification for this, as I understand it, is avoidance of the commercial damage that might result from an unjustified application becoming general knowledge. It is for this reason that the Decision is marked not open to the public and

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5 *SJ v FTCW* [2014] 1 HKLRD 849, Lam JA [28, 114]; *ATV v Communications Authority* [2013] 3 HKC 66, Cheung CJHC [19-32].

6 [2013] HKFLR 456.

7 [2012] 1 WLR 1003.

this application is necessary. If a hearing is not open to the public this would generally be a good reason for the decision also not to be available.[8]

21. What emerges in my view from the statements of general principle in the authorities and the practice of the High Court is an approach, which whilst recognising that the starting point is that the courts should conduct and decide proceedings openly, also recognises that in practice there are situations in which it is to be assumed that balancing the considerations giving rise to the general principle and those considerations commonly engaged for particular types of sensitive applications, there should be restrictions on who can attend certain hearings and have access to the decision and the court file. Applications under *section 193* of the *Companies (Winding-up and Miscellaneous Proceedings) Ordinance* is one such case. In such a case it is necessary for the applicant to justify why the normal approach is not justified. In some cases it may be straightforward and the court readily accepts that there is no justification for qualifying or restricting the general right to have proceedings conducted openly and access granted to the public. Others may not be.

22. Although this is not quite how Mr Kwok put his case, in my view the presumption that justified holding the application in private has ended. It, therefore, becomes necessary to consider the position afresh. This would normally involve focusing on the reasons why it is suggested that the restrictions should not be lifted. However, given the unusual circumstances in which this application comes to be made, in my view the appropriate starting point is to consider the status of the applicant and the reasons why he seeks to lift the restriction. I say this because the

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[8] *Huang Hsin Yang v Bank of China (Hong Kong) Ltd* (unrep, CACV 186/2007, 13 November 2007), Tang VP [8].

circumstances in which the Chapter 11 proceedings in which the Trustee came to be appointed are central to HSBC's grounds for opposing the application. I would note before considering these matters that in my view insufficient attention has been paid by the Parties to relevance of the Chapter 11 proceedings and the Trustee's status for reasons, which will become apparent in the following paragraphs.

The Trustee's Status

23. Put at its simplest, it is the Trustee's case that he has a substantial and *bona fide* reason for wanting to be able to use the Decision and this being the case the application of the open justice principle clearly entitles him to the order he seeks. As the Trustee's written submissions implicitly acknowledge, the Trustee's argument that he has a substantial reason for seeking the Decision is founded on his mandate under the US Bankruptcy Code. However, the Trustee's written submissions do not develop an argument explaining how the Trustee's position is relevant to an assessment of the application beyond making the general submission that the court has at common law a power to recognise and provide assistance to foreign insolvency proceedings and persons appointed to conduct them, which is uncontentious. The justification for this power was explained in the following way by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers*[9] at [23]:

> "… The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that

[9] [2015] AC 1675; cited by me in *Re BJB Career Education Co Ltd* [2017] 1 HKRLD 113, [12].

> companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally.… The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can."

24. However, the courts of common law jurisdictions do not recognise and assist all foreign proceedings and holders of offices associated with insolvency or some form of corporate rehabilitation and the common law on the circumstances in which foreign insolvency proceedings will be recognised and assisted varies to some degree from jurisdiction to jurisdiction. For example, courts have differed on whether or not at common law recognition should be limited to liquidators or equivalent office holders appointed by the courts of the place of incorporation. Significant differences are to be found in the decisions of Lord Hoffman (preferred in Singapore[10]) in *Re HIH Casualty and General Insurance Ltd*[11] and those of Lord Collins writing for the majority in *Rubin v Eurofinance SA*[12] on this issue, with the current position in England and Wales appearing to be that the common law should not be

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[10] *Re Opti-Medix* [2016] SGHC 108; see also the judgement of Seagal J in the Court of the Grand Cayman, *China Agrotech Holdings Ltd*, FSD 157/2017 in which he held that recognition could be extended to the Hong Kong insolvency proceedings in respect of the Cayman incorporated company. Seagal J's decision contains a useful and comprehensive consideration of the pertinent authorities in various jurisdictions. I would observe in passing that in [32-33] Seagal J found that submission to the foreign jurisdiction could be sufficient to justify recognition for certain purposes. Although, it is not necessary for me to decide this I have reservations about the proposition that submission by a company to a foreign jurisdiction resulting from the company itself commencing insolvency proceedings, for example to avail itself of the Chapter 11 process, is by itself sufficient to justify recognition. The immediate reason is that as this case demonstrates it can be open to abuse. I would also note that Seagal J's analysis [34] seems to suggest that the test for submission to the jurisdiction of the Hong Kong court for the purposes of assessing whether or not Hong Kong proceedings should be recognised are less stringent than the tests applied by the Hong Kong court in assessing whether or not it should exercise its insolvency jurisdiction over a foreign incorporated company, which is surprising. Registration by a foreign company in Hong Kong is not of itself sufficient to engage the jurisdiction.

[11] [2008] 1 WLR 852, [31].

[12] [2013] 1 AC 236.

extended beyond the established criteria that a liquidator appointed in the place of incorporation should be recognised.

25. There is one case in Hong Kong, *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)*,[13] a decision of the Court of Appeal, which touches on this issue. BCCI (Overseas) Ltd was incorporated in the Cayman Islands and had opened a branch in Macau. Officers of the Macau branch has placed monies with a bank in Hong Kong. The company was put into liquidation both in the Cayman Islands, its place of incorporation, and in Macau. The liquidators in both jurisdictions claimed the funds in Hong Kong. The court allowed the Macau liquidators to be represented and take part in an application by the Cayman liquidators seeking an order for a transfer of the funds in the Hong Kong bank account to them. The application was successful. However, it would appear from the report that very limited consideration was given to the Macau liquidators' status and none to whether the Macau insolvency process should be recognised. The position in Hong Kong, therefore, remains undecided and this is not an appropriate case to determine it or express a view on the view the Companies Court might take.

26. Similar differences exist in relation to the recognition of liquidators appointed in voluntary liquidations. In *Singularis* the majority suggest *obiter* that the common law power to recognise and assist foreign insolvency proceedings would not extend to voluntary liquidations.[14]

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13 [1997] 1 HKLRD 304.

14 *Ibid* [25].

Singularis has not been followed in Singapore.[15] I declined to follow it in *Supreme Tycoon Ltd*.[16]

27. It is not, therefore, helpful to think of the significance of the Trustee's office in the broad, unfocused way advanced by Mr Kwok. A more disciplined approach is required.

28. It is generally accepted in common law jurisdictions that determining whether or not a foreign office holder should be recognised and assisted requires a consideration of the following matters:

(1) Whether the office holder had been appointed in collective insolvency proceedings.[17]

(2) Whether the foreign jurisdiction in which the office holder has been appointed and the company have a relevant connection.[18]

(3) If the answer to these first two questions is in the affirmative one would normally expect the foreign proceedings to be recognised.

(4) If the foreign proceedings are recognised one would normally expect the office holder to be recognised unless the local court considers that there has been some irregularity in the office holder's appointment.

(5) If a foreign office holder is recognised one would normally expect assistance, which may extend to granting orders that give the foreign office holder substantially similar powers to, for example, investigate the affairs of the company as would

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15 *Gulf Pacific Shipping Ltd* [2016] SGHC 287, Abdullah J [10].

16 [2018] 2 HKC 485, [2018] HKCFI 277.

17 *Ibid* [15].

18 This follows from reasoning in cases such as *Singularis*, *Gulf Pacific* and *Supreme Tycoon* and is uncontroversial.

> be available to a local liquidator if the foreign jurisdiction has similar provisions in its insolvency regime.[19]

29. As I have already noted the issues that I have just considered were not fully canvassed before me and it is neither appropriate nor necessary for me to explore fully how the Hong Kong Companies Court would approach an application for recognition of Chapter 11 proceedings; an issue on which as I explained in [25] there is no local authority and so far as I am aware limited authority in other common law jurisdictions. The reason why I say it is unnecessary is because it seems to me clear that the Trustee could never have satisfied the relevant criteria; and perhaps this is why no such application has been made. I say this for the following reasons.

30. I accept for present purposes that the Chapter 11 proceedings are collective insolvency proceedings. However, there is no relevant connection between CFG Peru Investments Pte Limited (Singapore) and the jurisdiction of the United States Bankruptcy Court for the Southern District of New York or any other court in the United States. The company is incorporated in Singapore. Even if one takes the view that the recognition is not limited to the jurisdiction of incorporation and that some more flexible test is to be applied such as the location of the company's centre of main interest, to use the term found in the UNCITRAL Model Law and EU Insolvency Regulation ("**COMI**"), the COMI was not in the United States at the time of filing the Chapter 11 proceedings and it is not suggested that the COMI has shifted to the United States subsequently. The same is true of the other members of the China Fisheries Group. Jurisdictions in which the location of the COMI is a relevant

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[19] *Ibid* [12].

consideration differ on the time at which it is to be assessed, but as I have demonstrated it matters not for present purposes what time is considered to be relevant, the Trustee cannot satisfy it.

31. It follows that there is no basis for recognising the Trustee's office or providing assistance to him. The relevance of the applicant being a Trustee appointed in the Chapter 11 proceedings is limited to it explaining why he is interested in the Decision and has made the application. However, it does seem to me that the Chapter 11 proceedings have a further relevance. As I have explained it seems clear that they were commenced in order to prevent enforcement by HSBC of the Deed. The Deed contained undertakings to this Court. It is self-evidently objectionable and an affront to this Court for the Companies having submitted to this jurisdiction by signing the Deed which contains a Hong Kong governing law clause and given undertakings to this Court, to commence proceedings in another jurisdiction with a view to hindering enforcement of the Deed. Even if the Trustee had applied for recognition and been able to satisfy the criteria summarised in [28] I would have declined to provide assistance in the form of the order sought in this application and it is quite likely refused to recognise the Chapter 11 proceedings on the grounds that to do so would be contrary to public policy.

Public Policy Considerations

32. The relevance of public policy issues to an application for recognition is usefully illustrated by *Re Zetta Jet Pte Ltd,*[20] another decision of Aedit Abdullah J. The court was faced with an application for recognition of a Chapter 11 bankruptcy under section 354B and the

[20] [2018] 4 SLR 801.

Tenth Schedule of the Companies Act (Cap 50, 2006 Rev Ed). At the material time, by 2017 amendments to the Companies Act, the UNCITRAL Model Law on Cross-Border Insolvency applied in Singapore. The Judge proceeded on the basis that the requirements of the version of the Model Law enacted in Singapore required recognition unless he concluded that to do so would manifestly be against public policy. Shortly after the Chapter 11 proceedings had been commenced a shareholder of Zetta Jet obtained an injunction enjoining Zetta Jet and its shareholders from carrying out any further steps in the Chapter 11 proceedings until further order of the Singapore court. The Company did not comply. The Chapter 11 proceedings were subsequently converted into Chapter 7 proceedings. The application for recognition was made by the Chapter 7 trustee. In rejecting recognition on the grounds of public policy Abdullah J said this:

> "Recognising the Chapter 7 Trustee despite the breach by the pursuit of the US proceedings in the face of the Singapore injunction undermines the administration of justice in Singapore. That injunction remains in force and prohibited the pursuit of the very proceedings that were the basis of the Trustee's appointment. It is furthermore an order made by a court of coordinate jurisdiction. There is nothing before me to show any error leading to the ordering of the Singapore injunction, but even if there were, the proper course would be to apply to set it aside or appeal. I cannot ignore or overlook the Singapore injunction. But that would be the effect of granting general recognition of the Chapter 7 Trustee."

33. He did, however, grant recognition to the extent of allowing the Trustee to apply to set-aside the injunction or appeal it. Abdullah J took the view that this was consonant with the philosophy and objective of the Singapore Model Law including giving due weight to the international basis of the Model Law.

34. Although there is no recognition application before me, in my view a similar position exists in the present case. The Trustee was appointed in Chapter 11 proceedings, which were commenced to thwart HSBC taking action on the Deed in this jurisdiction. If the Companies had not done so HSBC would have taken action here which would, presumably, have prevented, or at least inhibited, the commencement of Chapter 11 proceedings in New York. It would have been the Hong Kong courts which had to determine how to deal with the Companies failure to honour the Deed and new winding-up proceedings. Although the Trustee is not appointed over the Companies, it is difficult to see how if HSBC had been free to take action for breach of the Deed and the undertakings to this Court, the Trustee would have been in a position to justify his need for the Decision on grounds relied on in the present application. This application invites me to overlook the Companies conduct and proceed on the basis that it has nothing to do with the Trustee. It seems to me that this approach ignores the fact that the Chapter 11 proceedings, and consequently the Trustee's appointment, is the consequence of what appears to be a conscious fraud on the part of the Ng family on HSBC and this Court. Public policy considerations weigh heavily in favour of declining to provide any form of assistance to a process that arises in this way. These public policy considerations in my view more than outweigh the more general public policy reasons that underpin the open justice principle and which might normally, I accept, justify making the order that is sought by the Trustee.

35. Mr Kwok has suggested that the appropriate course if HSBC is aggrieved by the impact of the Chapter 11 proceedings is for it to make an application in New York, which permits it to take action on the Deed. I disagree. There is no suggestion that the Trustee would agree to such an

application. His aggressive action against HSBC clearly suggests that he would not. Further, I see no reason why, as HSBC's complaint is that it has been hampered in enforcing its right in Hong Kong on a Deed governed by Hong Kong law and containing undertakings given to this Court, that it should have to do so.

Conclusion

36. It is for these reasons that I declined the application, which is dismissed. I make a costs order *nisi* that the Trustee pays HSBC's costs of these proceedings.

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

Mr Dennis W H Kwok and Mr Jun Lee, instructed by John C H Suen & Co, for the applicant

Mr Eugene Fung SC and Ms Elizabeth Cheung, instructed by Linklaters, for the respondent