In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2020 No: 118

IN THE MATTER OF FDG ELECTRIC VEHICLES LIMITED (PROVISIONAL LIQUIDATORS APPOINTED) (FOR RESTRUCTURING PURPOSES ONLY)

IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Dates of Hearing:	13 May 2020
Additional Evidence Filed	18 May 2020
Date of Decision:	20 July 2020
Sino Power Resources Inc: (Petitioning Creditor)	Mr. Keith Robinson and Mr. Kyle Masters (Carey Olsen Bermuda Limited)
Joint Provisional Liquidators:	Mr. Kevin Taylor and Mr. Benjamin McCosker (Walkers (Bermuda) Limited)
FDG Electric Vehicles Limited:	Mr. Christian Luthi and Mr. Jonathan O'Mahony (Conyers Dill & Pearman Limited)

Whether to appoint Joint Provisional Liquidators under s.170(2) of the Companies Act 1981) – Whether to Remove previously appointed 'light-touch' / 'soft-touch' Joint Provisional Liquidators- Legal Principles on the Appointment and Removal of Provisional Liquidators - Letter of Request for Recognition by Hong Kong High Court

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Introduction

1. The present case holds a mirror to a maze of conflict between a petitioning creditor; an insolvent parent company; a frangible board of directors; drifting subsidiaries; indignant shareholders and impugned joint provisional liquidators. The applications before this Court were pressing by nature but the factual evidence is multiplex and has commanded a careful and steady analysis. It has not been lost on this Court that the present applications not only deal with exorbitant sums of money owed to the creditors but also impacts the widespread reputation of a public conglomerate and shakes the sense of security of an employment populace.

2. This Court is concerned with various summons applications, one of which was filed[1] by the Petitioner, Sino Power Resources Inc. ("the Petitioner") on an *ex parte* summons dated 30 March 2020 for an order fully extending the current powers of the joint provisional liquidators' (" the JPLs"). Prior thereto, on 12 March 2020 this Court granted the Petitioner's *ex parte* application (made on short notice) for the appointment of JPLs with a 'light touch' or 'soft touch' powers. (Subsequent controversy arose on the form of the 12 March 2020 Order which sought to empower the JPLs under paragraph 14(b) with the ability to suspend or remove the Board of Directors without further reference to the Court.)

3. At the direction of this Court, the Petitioner's 12 March and 30 March summons applications were heard on an *inter partes* basis. The hearing of these summonses precedes the first hearing of the Petition to wind up FDG Electric Vehicles Limited ("the Company") which was filed on 5 March 2020 under section 161(e) of the Companies Act 1981. (This came subsequent to another petition which has been separately filed against the Company by one of its shareholders known as "Jingang".)

4. On the 30 March summons, the Petitioner prays for a full-power conferment on the JPLs on the basis that such an order would safeguard the interests of the creditors as a whole, the Company itself and third parties. A further summons application was filed by the Petitioner in April 2020 seeking the immediate replacement of the current JPLs for the appointment of Ms. Wing Sze Tiffany, WONG and Ms. YEUNG Mei Lee of Alvarez & Marsal Asia Limited in Hong Kong and Mr. Mathew Clingerman of KRyS & Associates (Bermuda) Ltd.

5. The Petitioner's applications are supported by the written evidence of (i) Mr. Jun Zhou of China Orient International Asset Management, Hong Kong ("China Orient International") and Vice President of China Orient International Asset Management (International) Holding

[1] The ex parte summons and all other Court documents subsequently filed in these proceedings were received by the Supreme Court Registry by email due to the current formal closure of the Supreme Court on account of the COVID-19 Pandemic.

Limited ("China Orient Holding"), a representative of the sole shareholder of the Petitioner (First Affirmation); (ii) Ms. Jin Zhai, the head of the legal department of China Orient International (First-Fifth Affirmations); (iii) Mr. Yang Yang, a senior associate of Carey Olsen Hong Kong LLP (First Affirmation) and (iv) Mr. Henry Tucker, Counsel of Carey Olsen Bermuda Limited (First Affidavit).

6. The Company, who has opposed the Petitioner's application for extended powers to be conferred on any JPLs, but who also seeks for the current JPLs to be replaced by nominees of its own choosing, has filed evidence from (i) Mr. Che, the Director and Chief Executive Officer ("CEO") of the Company (Four Affirmations).

7. The JPLs have also filed an *ex parte* summons for a Letter of Request to be directed to the High Court of the Hong Kong Special Administrative Region ("the Hong Kong High Court") for recognition of my 12 March Order and any further Order of this Court in respect of the powers conferred on the JPLs. The JPLs filed affidavit evidence sworn by Mr. Yen Ching Wai David (First and Second Affidavit) in support of its own 12 May summons application for a Letter of Request and in response to the evidence filed by the Petitioner and the Company. Mr. David Yen is one of the three JPLs appointed by this Court on 12 March 2020, the other two JPLs being Ms. SO Kit Yee Anita and Ms. Eleanor Fisher. Additionally, the JPLs filed two reports in these proceedings, dated 6 April 2020 and 11 May 2020.

8. The hearing of these applications was conducted remotely by an audio-recorded teleconference chambers hearing during the closure of the Supreme Court due to the effects of the worldwide COVID-19 Pandemic. Notwithstanding, this matter proceeded on the basis of the Court's determination that these applications raise issues of urgency in a commercial context.

9. Having heard the most able of submissions from Counsel for the Petitioner, the Company and the JPLs, for which I am most grateful, I now give my decision and underlying reasons.

Factual Background

The Debt owed to the Petitioner

10. The Company is a Bermuda exempt company which operates from Hong Kong as an investment holding company. Its shares are publicly traded on the Hong Kong Stock Exchange. The Company, together with its multiple direct and indirect subsidiaries ("the Company Group" / "the Group"), carries on a business which principally involves the manufacturing and sale of pure electric vehicles and lithium-ion battery and related cathode products.

11. The Company's authorized share capital is HK$1,000,000,000 divided into 5,000,000,000 shares valued at HK$0.20 per share. (On the Petition, it is stated that as of 3 March 2020 1,949,469,872 shares were issued.)

12. The Petitioner is a creditor of the Company in respect of a debt which exceeds the sum of HK$1,000,000,000.00 (US$128,649,300 at relevant time of conversion rate). The debt is said to partly arise in default of the terms of a loan facility agreement for HK$600,000,000.00 (US$76,923,076.92) made on 28 November 2017 ("the Facility Agreement"). Interest payable under clause 9.1 of the Facility Agreement was fixed at the rate of 12% per annum for payment on the final day of each six month interest period. Under clause 9.3, interest at an additional 5% per annum would accrue in default of any loan obligation amount payable under the Facility Agreement as particularized in a Finance Document. Further, an event of default would contractually entitle the Petitioner to serve a notice on the Company demanding immediate payment of all interest and principal.

13. The debt owed by the Company is also said to arise out of its default under a subscription agreement entered into on 28 November 2017 with the Petitioner for secured convertible bonds to the aggregate value of HK$400,000,000.00 (US$51,282,051.28) ("the Subscription Agreement"). The principal sum of the convertible bonds was issued under a bond instrument which was executed on the same day ("the Bond Instrument"). Interest at the rate of 8% per annum was payable under Condition 9. The Bond Instrument also contains provisions entitling the Petitioner to give a notice of redemption for immediate payment of the principal sum of the bonds and interest together with additional interest at the rate of 24% in the event of default repayment as due. I shall collectively refer to the Subscription Agreement and the Bond Instrument as "the CB Agreement".

14. The evidence before the Court suggests that the debt owed to the Petitioner accounts for at least 50% of the Company's indebtedness to its unsecured creditors. The Facility Agreement and the CB Agreement are secured for the Petitioner's benefit by share charges over three of the Company's subsidiaries: (i) Preferred Market Limited ("Preferred Market"); (ii) Union Grace Holdings Limited ("Union Grace") and (iii) Sinopoly Strategic Investment Limited ("Sinopoly"). I shall collectively refer to these three companies as "the Share Charge Subsidiaries". Consequently, various terms of the Facility Agreement and the CB Agreement, were amended by a Deed of Amendment dated 30 June 2019 ("the Deed of Amendment").

15. Under the Deed of Amendment, the Company and the Petitioner agreed to convert the total outstanding amount of interest due to the Petitioner under Facility Agreement and the CB Agreement (for the period of 5 December 2018 to 30 June 2019: HK$110,330,739.73 (US$14,144,966.63)) into 4,086,323,694 newly issued shares at the subscription price of HK$0.027 (US$0.003) per subscribed share ("the Subscription Shares"). The Petitioner is thus

a minor shareholder of the Company whose holdings (at the initial stage of these proceedings and up until a subsequent share rights issuance) came to approximately 10% of the outstanding issued share capital of the Company. The Petitioner also has share charges over some of the subsidiaries in the Group. (However, the Petition and summons applications have been brought by the Petitioner in its primary capacity as a creditor.)

The Court's 12 March Order Appointing JPLs with 'Light Touch' Powers

16. On 12 March 2020 I appointed Mr. YEN Ching Wai David and Ms. SO Kit Yee Anita of Ernst & Young Transactions Limited in Hong Kong and Ms. Eleanor Fisher of Ernst & Young Cayman Ltd c/o EY Bermuda Limited as JPLs of the Company with immediate effect. I limited those powers for their joint and several exercise under section 170(3) of the Companies Act 1981, in an attempt to preserve the current constitution of the Board of Directors ("the Board"). However, the powers conferred on the JPLs under my 12 March Order were nevertheless drafted to be broad enough to enable the JPLs to remove or suspend the Board under paragraph 14(b). (I will in due course address the legal controversy which arose on this part of the Order).

17. The 12 March Order was made on the strength of the First Affirmation of Mr. Jun Zhou. The thrust of Mr. Zhou's evidence was that the Board's continuing control of the Company endangered the interests of all stakeholders. Mr. Zhou alleged incidences of the Company's breach of the Deed of Amendment which entitled the Petitioner to participate in the management of the Company via a Credit Committee. Mr. Zhou deposed that no such Credit Committee was ever established.

18. Mr. Zhou also detailed the Petitioner's rights to a deciding vote of approval before any of the Company's bonds could be issued and before any share sales or asset transfers could be carried out. He forewarned pending breaches and stated that the Company was contemplating engaging in several such transactions which would dispose of various Company assets without the pre-approval of the Petitioner's representative to a Credit Committee.

19. Another provided example of the Company's contractual breach of the Petitioner's rights was in its refusal or failure to disclose copies of its financial statements pursuant to Clause 18 of the Deed of Amendment. Notwithstanding, Mr. Zhou relied on the Company's Interim Report as at 30 September 2019 in validation of his concerns that the Company is rapidly deteriorating in its financial condition. I do not propose to elaborate in any great detail on this portion of his evidence. Suffice to say, Mr. Zhou spoke about the Company's liabilities in respect of leaseholds, banks and other borrowings in addition to other Court proceedings, one of which is seized by an intermediate court in the People's Republic of China in respect of a Mareva injunction over the assets of subsidiaries of the Company.

20. The Court was made to understand on Mr. Zhou's evidence that a 10 February 2020 Share Prospectus announcement by the Company revealed that as of 31 December 2019, the Company was unable to make certain principal and/or interest repayments on its immediate financial obligations (to the approximate tune of HK$1,661,000,000 (US$212,948,717.95) of which HK$1,359,000,000 (US$174,230,769.23) is the subject of litigation) rendering necessary an issuance of shares in the Company.

21. The Court was further informed, on Mr. Zhou's evidence, of a 16 January 2020 shareholder requisition for a special general meeting to pass a resolution deciding whether the Board should be replaced. However, only a few days thereafter, the Company announced its intention to raise approximately HK$203,000,000.00 by way of a rights issuance offered to the existing shareholders ("the Rights Issue"), 50% of which would be applied against the Company Group's debts. The Court was invited to find that this was all evidence supporting the Petitioner's allegations that the Company was engaged in a wrongful scheme to dissipate its own assets and to place them out of the reach of its creditors.

22. It was on the strength of this evidence that the 12 March Order was made on an urgent basis. Having expressed some trepidation for making an *ex parte* Order, I directed the listing of an *inter partes* hearing for the following week. However, this was overtaken by the onset of the COVID-19 breakout.

Allegations that the Petitioner was not full and frank in its disclosure to the Court

23. The opposing evidence later came from the Company's CEO, Mr. Jamie Che who is also the CEO of the Company's subsidiary, FDG Kinetic Limited ("FDG Kinetic") and a director of various other subsidiaries of the Company. Mr. Che's First Affirmation is a direct response to the evidence underlying my 12 March Order, namely the First Affirmation of Mr. Zhou and the First Affirmation of Mr. Tucker.

24. In Mr. Che's evidence, he accuses the Petitioner of having abused this Court's process in deliberately failing to discharge its duty to give full and frank disclosure in its *ex parte* application before me. Mr. Che said that the wrongful appointment of provisional liquidators, which was 'procured by misleading evidence', has resulted in loss for which the damages to the Company Group are irretrievable.

25. The Court was informed by Mr. Che that the Board was of the belief that it was having constructive discussions with the Petitioner in negotiation of the repayment of the debt owed. (Mr. Che later explained in his Second Affirmation that a "Special Committee" was established on the Board's resolution to allow the convening of directors without the presence of those who are subject to a conflict of interest. The Special Committee consists of all members of the

Board save Mr. Huang Tan (the Chief Executive Director of China Orient Holding where Mr. Zhou is Vice President)) and the Company's former CEO Mr. Cao Zhong, who is suspected by the Company to be in wrongful collusion with the Petitioner. So, where Mr. Che's evidence refers to the Board's views and conclusions, he is for the most part referring to the Special Committee of the Board).

26. Mr. Che contended that the share subscription agreement signed by the Petitioner on 30 June 2019 and completed on 13 September 2019 (to offset the interest payments due under the Facility Agreement) was entered on the strength of the Company's financial position as reported in the 30 September Interim Report. Mr. Che's underlying point is that it is hardly open to the Petitioner to now point to the same Interim Report as a means of demonstrating otherwise. More so, he says, the Company's financial position has since which seen continuous and drastic improvement.

27. Mr. Che deposed that Mr. Huang Tan has been a representative of the Petitioner as a non-executive Director of the Company since 23 December 2019. He produced a letter, dated 16 December 2019, wherein the Petitioner confirmed Mr. Huang to be their representative. Here, I would observe that this was done pursuant to a request by the Petitioner, as a shareholder (as opposed to a creditor), for the Board to exercise its powers under Bye-law 86(2). The opening paragraphs of the 16 December letter states:

"*Pursuant to provision 86(2) of the Company's bye-laws ("the Bye-laws"), the Directors shall have the power from time to time and at any time to appoint any person as a Director either to fill a casual vacancy on the Board or as an addition to the existing Board. Any Director so appointed by the Board shall hold office only until the next following general meeting of the Company (in the case of filling a casual vacancy) or until the next following annual general meeting of the Company (in the case of an addition to the Board) and shall then be eligible for re-election at that meeting.*

We, Sino Power Resources Inc., a shareholder of the Company, hereby request the Board to exercise power under Bye-laws (86(2) and nominate Huang Tan ("Mr. Huang") to act as a non-executive Director of the Company and to hold office until the next following annual general meeting of the Company."

28. Mr. Che added that Mr. Huang has had an invitation to observe the Board meetings since 3 September 2019, pursuant to the terms of the Deed of Amendment. He further claimed that Mr. Huang partook in discussions on the Company's financial position and that he has had active involvement in the Company's ongoing dialogue on restructuring. By way of example, Mr. Che made specific references in his evidence to meetings that Mr. Huang attended in China and the United States. The Company's case is that Mr. Zhou misled the Court in presenting a

case that the Petitioner, as both a creditor and shareholder, was being 'kept in the dark'. At paragraph 14 of Mr. Che's First Affirmation he states:

Sino Power, through Mr. Huang, has at all times received all the latest financial information available to a director, including the board papers approving the Interim Report and the latest management financial statements as at 31 December 2019. The preparation of the management financial statements as at 31 January 2020 has been delayed due to the outbreak of the Novel Coronavirus (COVID-19). Sino Power's request for information on 26 February 2020 (referred to in paragraph 32 of Zhou#1) was therefore delayed. Mr. Huang is fully aware of the difficulty. He receives the same amount of information as any other director."

29. Additionally, in answer to the allegation that a Credit Committee was never convened, Mr. Che retorted in his First Affirmation [paras 18-19]:

"*18. The allegation that the Company has failed to set up a Credit Committee is false. The Credit Committee was set up on 31 July 2019 comprising of myself, Mr. Tse Kam Fow (an independent non-executive director of the Company) and Mr. Huang. Although the Credit Committee has not convened a formal committee meeting, the Company has sought consent from Sino Power on potential transactions and refinancing, for instance: (a) disposal of the right to inject the capital of 25% shareholding of …(Guizhou Changjiang Vehicle Limited) in October 2019 and (b) pledge of shares of…(FDG Kinetic (Chongqing) Lithium Ion Battery Materials Co., Ltd), a wholly owned subsidiary of FDG Kinetic Limited for the renewal of the existing borrowings of… (FDG Kinetice (Chongqing) Lithium Ion Battery Materials Co., Ltd) with amount of around RMD32.7million from Industrial Commercial Bank of China in January 2020.*

19. Further, as Mr. Huang is Sino Power's representative in the Board, the Company has treated Mr. Huang's support of potential transactions and fund raising deals as consent from Sino Power. Mr. Huang has remained generally supportive until around 20 January 2020 when the Board declined Jingang's proposal to act as the underwriter in the contemplated rights issue."

30. A copy of the 31 July 2019 Resolution was produced by Mr. Che under his Fourth Affirmation to this Court. At paragraph 3 of the Resolution it provides:

"3. ESTABLISHMENT OF CREDIT COMMITTEE

"*IT IS NOTED THAT the credit committee shall comprise of three committee members, among which one committee member shall be appointed by the Subscriber and the other two committee members will be Mr. Jamie Che and Mr. Tse Kam Fow*."

31. However, in her Fifth Affirmation in support of the Petitioner, Ms. Zhai invited this Court to disregard the 31 July Resolution since it was belatedly produced for the first time on the day of the 13 May 2020 hearing. She added that Petitioner "*did not at any time appoint a third member of the Credit Committee as contemplated in the concluding paragraph of the Purported Written Resolution*."

32. Ms. Zhai distinguished Mr. Huang's role and identity from the Petitioner in her Third Affirmation [para 23 a.-b.]:

"*23. …the Company seeks to impugn the involvement of Mr. Huang…which I address in the following sub-paragraphs of this Affirmation.*

a. Mr. Huang is an employee of the sole shareholder of the Petitioner. Mr. Huang is not a director of the Petitioner, nor a director of the shareholder of the Petitioner.

b. *In Che 1, it is admitted by Mr. Che that "I consider it is crucial to keep Sino Power well informed of the Company's position as it is the single largest creditor and a substantial shareholder of the Company". Che 1 sought to…suggest that the Petitioner is informed of the financial information of the Company through Mr. Huang's appointment to the Board of Directors of the Company. However, it is the position of the Petitioner that the Company is under an obligation to provide full financial information to the Petitioner under the Deed of Amendment between the Company and the Petitioner (referred to in the First Affirmation of Zhou Jun). The Petitioner makes its independent decisions, including the decision to file the petition, in light of the evidence available that the Board of Directors has not been acting in the best interest of the Company and its creditors, including hiding from or providing misleading information to the Petitioner and other creditors*."

33. On the controversial subject of the Rights Issue, Mr. Che keenly pointed out that this was initially supported and approved by the Petitioner through Mr. Huang. At the 13 May hearing Mr. Luthi directed my attention to Board minutes of a meeting held prior to 10 March 2020 by means of contrasting Mr. Huang's subsequent and sudden change of heart. Mr. Che further explained that the equity funding via the Rights Issue, as opposed to debt financing, was generally more beneficial for the Company's creditors.

34. Mr. Che scathingly accused the Petitioner of having misled the Court on the financial prospects of the Company and its future ability to repay its debts. He referred to the Letter of Intent offer ("LOI") from J. Streicher Holdings LLC in respect of the proposed sale of Chanje Energy Inc ("Chanje") a valuable subsidiary of the Group. [paras 33-34]:

"*33. …When the LOI was discussed in the Board meeting last week on 10 March 2020, Mr. Huang was not supportive of this apparently attractive deal with no particular reason. With hindsight, I can now see that the existence of LOI would prejudice Sino Power's then pending application for appointment of provisional liquidators to be heard on an ex parte basis two days later. This was probably why Mr. Huang was not supportive of the LOI during the Board meeting on 10 March 2020. This further explains why Sino Power omitted to mention the role of Mr. Huang in the supporting evidence.*

34. Sino Power relied heavily on paragraphs 39 to 47 of Zhou#1 (under the sub heading "Rapidly Deteriorating Financial Condition of the Company") in justifying the need for appointment of provisional liquidators. The analysis was largely based on the Interim Report. And then in paragraph 45, Mr. Zhou claimed "The financial difficulties in connection with this matter <u>appear</u> to have persisted" (emphasis added). In light of the matters deposed above, and given Mr. Huang's personal knowledge of the Company's affairs, this section of Zhou#1 is highly inaccurate and misleading. There is no reasonable basis for Sino Power to assert that the Company's financial position is "rapidly deteriorating".

THE APPLICATIONS FOR NEW JOINT PROVISIONAL LIQUIDATORS WITH UNLIMITED POWERS

<u>Complaints about the Board's Conduct</u>

<u>Commercial transactions made by the Board</u>

35. After the 12 March Order, the Petitioner filed evidence from Ms. Zhai in further complaint of the Board's comportment. In particular, she characterized the Board's recent commercial transactions as a clandestine attempt to siphon off company assets from creditor claims. In her First Affirmation [para 5] she stated:

"*The Board has continued to conduct the affairs of the Company without regard for the interests of the Petitioner or the class of creditors of which the Petitioner forms part. In particular, the Board of Directors have* (sic) *taken several corporate actions for which there can be no good commercial purpose, save to put the assets of the Company beyond the reach of the Petitioner and other creditors unrelated to the Board of Directors*."

36. Mr. Yang of Carey Olsen Hong Kong LLP produced a bundle of documents containing copies of loan agreements to which the Company was party. He explained that he received these documents from the Board's former chairman, Mr. Cao. The particulars of some of the loan agreements complained of are as follows:

(i) A 22 August 2018 loan agreement guaranteed by the Company where FDG Kinetic Limited ("FDG Kinetic") is the borrower of HK$100,000,000 and Join View Development Limited ("Join View") is the lender. (By supplemental agreements, the repayment date of the outstanding principal was extended from 22 February 2019 to 22 May 2019 and thereafter to 30 September 2019.);

(ii) A 10 September 2018 loan agreement under which the Company borrowed from Fortune Team Investment Limited ("Fortune Team") the amount of HK$175,000,000;

(iii) A 24 June 2019 Deed of Assignment assigning all the Company's rights in a shareholder loan provided by the Company to FDG Kinetic, as security for the 10 September 2018 Fortune Team loan;

(iv) A 5 September 2019 loan agreement guaranteed by the Company where FDG Kinetic borrowed up to HK$60,000,000.00 from SHK Finance Limited ("SHK Finance") and

(v) A 26 September 2019 Deed of Assignment assigned all the Company's rights in a shareholder loan provided by the Company to FDG Strategic Investment Limited ("FDG Strategic"), as security for the 10 September 2018 Fortune Team loan.

37. The JPLs also confirmed that on 6 and 10 March 2020 the Company made payments to FDG Kinetic by means of funding matters related to its day to day operations. Of no less than equal controversy to the loan transactions evidenced by Mr. Yang, the Company also advanced a HK$30,000,000.00 interest free loan to FDG Kinetic on 12 March 2020.

38. In respect of the 22 August 2018 loan agreement wherein FDG Kinetic borrowed the Company-guaranteed sum of HK$100,000,000 from Join View, Mr Che highlighted that the transaction was unanimously approved by the Executive Committee of the Board when Mr. Cao was the Chairman and CEO of the Company. He explained that the loan proceeds were used to fully repay convertible bonds in the principal sum of HK$100,000,000.00 issued by FDG Kinetic to a third party. Notably, the convertible bonds matured on 4 August 2018 which onset a post-maturity interest rate of 47.93% from the interest rate of 23.53% throughout the loan period. Having considered the Group's 74.56% shareholding in FDG Kinetic, the Board satisfied itself that it was fair and reasonable for the Company to offer up the guarantee.

39. A strong innuendo on the Petitioner's case in respect of the Fortune Team loan is that the Company sought to underhandedly siphon away Company assets into the clutches of Mr. Che's mother ("Mrs. Chong"). Relying principally on the evidence of Ms. Zhai, the Petitioner alleges that Mrs. Chong acquired an interest in various entities, including Fortune Team, which

received security interests by the Company after the execution of the Deed of Amendment on 30 June 2019.

40. However, Mr. Che stated in his Second Affirmation [para 102] that his mother's connection with him was duly disclosed to the Board pursuant to the Hong Kong Stock Exchange listing requirements. He further emphasized that it is a matter of public knowledge that his mother holds a minority share interest in the listed companies and that she is not a holder of any directorship appointments in any loan counter-party company other than China Medical and Healthcare Group Limited ("China Medical").

41. Yet, on the evidence of Mr. Yang, the Court's attention was drawn to a 24 February 2019 annual return for Fortune Team on the Hong Kong Companies Registry website suggesting that Mrs. Chong is in fact a director of Fortune Team and Besford International Limited. Further, in response to Mr. Che's denial of his mother's directorship status over any counter-party entity other than China Medical, Ms. Zhai in her Third Affirmation deposed that Mrs. Chong, in addition to being the Deputy Chairman and executive director of China Medical, is a director of Fortune Team and was the sole director when the loan was made in September 2018.

42. Mr. Che's evidence addressed the commercial motivation behind the Fortune Team loan and restated that China Medical's ownership of Fortune Team was transparent to the Board when the loan was approved. In his Second Affirmation he also specified his mother's corporate role and interests [paras 104-106]:

"*104. The HK$175 million loan from Fortune Team... dated 10 September 2018 was duly approved by the Board unanimously on (sic) when Mr. Cao was still the Chairman and the CEO of the Company. At the time of approving this loan, the Board was aware that: (i) the ultimate beneficial owners of Fortune Team are China Medical (ii) Ms. Chong was beneficially interested in approximately 17.9% of China Medical and was disclosed to be the Deputy Chairman and an executive director of China Medical. Ms. Chong's interest in China Medical has been duly disclosed to the Board before the loan arrangement in question was entered into.*

105. The purpose of the Fortune Team Loan was to repay a loan advanced by Sun Hung Kai Structured Finance Limited to the Company which matured on 7 September 2018 (the "Original Loan"). At that time, the Company had cash and bank balance of approximately HK$3 million which was insufficient to repay the Original Loan, and the financial institutional lender of the Original Loan has no intention to extend the loan. As such, the Company approached Fortune Team to repay the Original Loan.

106. The terms (including interest rate and security) of the Fortune Team Loan are similar to those of the Original Loan except that certain intercompany receivables from FDG Kinetic and FDG Strategic Investment Limited to the Company and 24% of additional interest in the total issued share of FDG Strategic Investment Limited were provided as additional security for the Fortune Team Loan, which are consistent with commercial norm in loan refinancing. The Board considered that the terms of the Fortune Team Loan were fair and reasonable and in the interests of the shareholders as a whole."

43. However, in Mr. Che's Third Affirmation [para 13], he appears to be stating for the first time that his mother is and was in 2018 one of the directors of Fortune Team, his emphasis being placed on the fact that all of the other ten directors, like his mother, are also the directors of China Medical, contrary to Ms. Zhai's earlier description of Ms. Chong as a sole director of Fortune Team.

44. Dissatisfied with Mr. Che's claim to transparency before the Board, Ms. Zhai underlined Mr. Che's silence as to whether or not he seized the first opportunity to disclose his mother's interests in the transactions in accordance with section 97(4)(b) of the Companies Act 1981. She also chimed in on the Board's failure to disclose Ms. Chong's interests in China Medical and Fortune Team to the Company's public shareholders and creditors.

45. Fortune Team now has a fixed and floating charge over 75% of the issued share capital and assets of FDG Strategic in addition to loan receivables due by the Company to the tune of HK$305,200,000.00. The JPLs reported that on 17 April 2020 the Company bid Fortune Team to accept various concessions in respect of the loan repayment; however, this was met with rejection on 28 April 2020 together with a notice that receivers had been appointed. This is particularly significant to the Chanje transaction as FDG Strategic holds 82.2% of Chanje's share capital. Of further concern, the JPLs reported that the loan from Fortune Team was not approved by the Company's shareholders, leading to the Writ and injunction proceedings commenced by the Share Requisitionist, Jingang.

46. Ms. Zhai in her Third Affirmation accused the Company of making preferential payments on the Fortune Team loan in the amount of HK$80,000,000.00 in addition to interest in the approximate sum of HK$40,000,000. She further referred to the enforcement action taken by Fortune Team against FDG Strategic and the consequential receivership over 75% of its share capital and assets. At paragraph 16 she complained that neither the Board nor the JPLs initiated any legal proceedings to prevent the enforcement action.

47. Ms. Zhai further took issue with the Company's advancement of a HK$30,000,000.00 interest free loan to FDG Kinetic. Mr. Che described this as an internal management decision for the benefit of a subsidiary which is 75% owned by the Company and in the wider interests of a

pending restructuring. Further, explained Mr. Che, the loan was advanced prior to the appointment of the JPLs and before the Company had any knowledge of the filing of a winding up petition against the Company.

48. The JPLs agreed that the Company's guarantee of the HK$60,000,000.00 loan from SHK Finance to FDG Kinetic was not previously approved by the Company's Credit Committee and that this constituted a breach of the Deed of Amendment. They further reported that on 2 April 2020 the Company unsuccessfully sought a loan forbearance from SHK Finance in aid of a restructuring plan.

49. Mr. Che deposed that over 98% of the proceeds of the HK$60,000,000.00 loan to FDG Kinetic were used for repayment on FDG's loan responsibilities. Specifically, HK$51,000,000.00 of the HK$60,000,000.00 borrowed from SHK Finance (as guaranteed by the Company itself) was used to partially repay the Company for a past due promissory note and the smaller sum of HK$8,000,000.00 was applied against the outstanding loan sum borrowed from Join View. Mr. Che described the loan interest rates to be within market norm for the relevant period and outlined the necessity for the seeking funding through local financial institutions as follows [Second Affirmation para 114]:

"*14. At that time, the Company and FDG Kinetic did not hold any property in Hong Kong and it is therefore not easy for the Company and FDG Kinetic to obtain loan facilities from local banks. The Company and FDG Kinetic could only choose to obtain loan financing through local financial institutions by pledging the Company's or/and FDG Kinetic's assets, which may have higher interest rate than local banks. As comparison, the aggregate net assets value of security for (sic) provided to Sino Power Resources Inc. for the HK$1 billion facility (bearing interest at 12% per annum) was approximately HK$5.1 billion at the time of entering into the facility agreement and bond subscription agreement, representing approximately 5.1 times the value of the aggregate principal. On the other hand, the net asset value of security provided to SHK Finance was approximately HK$333 million at the time of entering into the facility agreement (bearing annual percentage rate at 15.15% per annum), representing approximately 5.6 times to the principal amount of HK$60 million*."

50. Ms. Zhai pointed out that the Company also made a further preferential payment on the Join View loan in the sum of HK$35,000,000 (See Third Affirmation para 24f.) She sought to impugn these loan transactions as [para 24g.]: "*circular loans among Related Parties with extortionate interest rate(s)…designed to create additional securities in favour of the Related Parties*… [para 24 h.] …*the Company has been secretly making payments to the Related Parties*."

51. In addition to the above loan transactions, the Petitioner's stated concerns that the Company is engaged in efforts to dispose of its substantial assets is exacerbated by the 16 April 2020 Company announcement of a purchase offer for the sale of FDG Kinetic. (FDG Kinetic is 51.04% owned by Sinopoly Strategic and 23.52% by Union Grace, both of which are subject to full share charge control by the Petitioner.)

Shareholder Support of the Board

52. Relying on the voting results of an SGM held on 15 March 2020, Mr. Che claims that the Company's shareholders are supportive of the continued operation of the Board. He stated that all requisitioned resolutions for the removal of the existing Board were voted down. (See his First Affirmation [para 15]). However, the Petitioner invited this Court not to over-rely on these resolutions by drawing the Court's attention to the fact that approximately 63% of the voted shares in the Company had been issued to Universal Way Limited, which is part of the web of "Related Parties" as termed in Ms. Zhai's evidence.

53. A significant example of Board misconduct, according to the Petitioner, is their refusal to count the Petitioner's votes and those of certain shareholdings from the Rights Issue at the 15 March 2020 meeting. Ms. Zhai deposed that the Board, however, selectively and conveniently counted the votes of Rights Issue shares beneficially owned by Mr. Che's mother.

54. Mr. Che fired the below response to these complaints in his Second Affirmation [paras 76-82]:

"*76. Pursuant to the records of the Company, Ms. Zhai did not attend the SGM. However, Mr. Huang was present as a director.*

77. Sino Power sent a representative named Yu Feng to attend the SGM bringing with him a corporate representative letter which purportedly appointed that representative to vote on behalf of Sino Power. However, Union Registrar Limited (the "Share Registrar", share registrar of the Company and the scrutineer of the SGM) was unable to verify the authority and signature of the sole director of Sino Power appended on the corporate representative letter. In an attempt to assist Sino Power on the spot, I suggested, and the Chairman of the meeting agreed, that the corporate representative to (sic) vote on behalf of Sino Power subject to vetting of their specimen signature after the SGM. Sino Power's representative and legal representative present agreed to the arrangement. However, it was subsequently found out that Sino Power had not provided any specimen signature to the Share Registrar on or before 14 March 2020 despite the request of the Share Registrar to provide the documents in order to facilitate the verification of their authorized signatories by a letter dated 13 September 2019. This is why their votes were not counted. Exhibited as pages 35 to 36 is a copy of an email by the Share Registrar dated 15 March 2020.

78. Notwithstanding to the above, the Company still tried to accommodate Sino Power's situation by delaying the result announcement into the evening (the meeting was concluded in early afternoon) and allowing them time to provide the documentation requested by the Share Registrar. Mr. Huang, representing Sino Power, refused the courtesy in the end as he claimed their corporate representative has gone home and will not come out again as it was a Sunday. Exhibited at pages 37 to 45 is a copy of the relevant WeChat exchanges amongst the Board members and between me and Mr. Huang on 15 March 2020 together with English translations.

79. Without knowing the identity of the "certain shareholders" referred to in paragraph 23(b), I am unable to comment on the allegation. That said, to the best of my knowledge, no share issued under the Right Issue was rejected to vote.

80. The votes of the Rights Issue shares allotted to Universal Way Limited and Allied Group were duly counted because they were at that time registered shareholders of the Company.

81. As Zhai First was made in support of the 2nd Ex Parte Application, Sino Power owes a duty of full and frank disclosure to the Court in outlining the relevant events in the SGM to the best of their knowledge. The reason why their votes were not counted is well within their personal knowledge, yet they did not disclose the reason.

82. In any event, as the resolutions requisitioned by Jingang seeking to remove the current Board were declined by a vast majority of voted shares (approximately 90%), allowing the votes which were excluded would not impact on the outcome of the SGM. It should be noted that Mr. David Yen was present at the SGM. The JPLs did not take issue with the conduct of the SGM in the JPL Report. In his affirmation filed in support of the JPLs' application for a letter of request dated 21 April 2020, Mr. David Yen only notes that the SGM was contentious and the Chairman of the SGM directed the proposed resolutions be put to vote notwithstanding Jingang's request that the SGM be adjourned."

55. Ms. Zhai challenged the accuracy of this account and pointed out that Carey Olsen for the Petitioner was in attendance at the SGM together with Mr. Yu Feng with an executed resolution of the sole director of the Petitioner in hand, authorizing him to vote on behalf of the Petitioner. She added that Carey Olsen also produced an internal document evidencing that authority.

The Application of the Proceeds of the Rights Issue

56. On 21 January 2020 the Company announced the Rights Issue as a means of raising capital for general operations and for settlement of the Group's debts. The Rights Issue raised approximately HK$101,000,000.00. (Prior to the Rights Issue, the Petitioner held 10.481% of the shares in the Company. Since which, its shareholding has been calculated at 8.157%.)

57. Mr. Che defended the propriety of the Rights Issue in his First Affirmation [para 16]:

"*Exhibited …is the Circular published by the Company in respect of the Rights Issue…dated 10 February 2020…Pursuant to the listing requirements, this Circular was duly vetted by HKSE before it was published. The Circular outlined the particulars of the Rights Issue. Notably, the "Letter from the Board" addressed the commercial rationale, desirability, and the impact of the Rights Issue on the Company's financial status and its shareholding structure. The Circular highlighted the urgency of this fund raising exercise. The Rights Issue has been carried out in a transparent manner in strict compliance with the listing requirements of the HKSE*…"

58. Beyond the occurrence and announcement of the Rights Issue, the Petitioner's focal point of complaint in is in relation to the disposition of the proceeds. It is complained on the evidence of Ms. Zhai that HK$52,800,000.00 of the proceeds of the Rights Issue were disposed of subsequent to the filing of the Petition on 5 March 2020. These dispositions included payment of Board fees, payments to entities over which the Petitioner does not have a security interest and payments to entities connected to those which Mr. Che's mother acquired an interest.

59. The Petitioner invited this Court to observe significant contradictions between the Company's 10 February 2020 announcement on the intended application of the Rights Issue proceeds and that which was made on 4 March 2020 announcement of the results. (See Ms. Zhai's Third Affirmation [paras 40-41]). Further, as underscored on the Petitioner's case, a payment in the sum of HK$4,700,000.00 was paid to Chanje, a subsidiary of the Group where the Petitioner has no security interest. The Petitioner complains that the Chanje payment in addition to the other disposals amount not only to a breach of the Deed of Amendment but also an unlawful post-Petition disposition. More so, the Petitioner lands on the primary complaint that no portion of the proceeds were paid on the outstanding debt owed to the Petitioner.

60. Mr. Che in his Second Affirmation summarized the payments made out of the Rights Issue [paras 70-71 and 74]:

"70 …*As of now, a total of HK$24 million out of the total proceeds from Rights Issue of HK$107 million has been applied to pay (i) outstanding directors' fees since April 2029 of HK$11 million; (ii) legal and professional fees of HK$5 million' and (iii) general operating expenses of HK$8 million up to 31 March 2020. The figure of HK$52.8 million was wrongly stated in the JPL Report.*

71. The Company had in its Circular dated 10 February 2020 (exhibited in Che First) indicated its intention to apply around 50% of the Rights Issue proceeds for general working capital of the Group including but not limited to the overhead of the Group (34%), professional fees (5%)

and other operational expenses (11%). The payments are consistent with the Company's publicly stated intentions as to the application of the proceeds of the rights issue.

74. …the payments in question are for proper purposes and are necessary in maintaining the operation of the Group as a going concern: (i) the sum of approximately HK$11 million in total represents outstanding remuneration of the directors since April 2019 (ii) the sum of approximately HK$4.7 million to Chanje represents the outstanding salaries to employees and taxes since December 2019; (iii) Yu Ming Investment has been engaged by the Company as its financial adviser in respect of Jingang's requisition for the SGM and the Rights Issue and played a critical part in it. The Company was obligated to pay their fees as previously agreed. "

61. Mr. David Yen weighed in on the Rights Issue at paragraph 17 of his Second Affirmation to report that the Company's announcements to the Hong Kong Stock Exchange were lawful.

62. Turning to the post-Petition aspect of the Petitioner's complaints about these transactions, it is an agreed fact that the 5 March Petition was not served on the Company until 9 March 2020 when it made the public announcement. This is also the Company's defence to the Petitioner's case that the Board sought to offload its assets in response to the Petition. The JPLs reported that on 10 March 2020 the Company filed an application in this jurisdiction for a Validation Order which has not yet been determined. This is the basis upon which the JPLs reserved their view as to whether the Board's disposition of the Rights Issue proceeds is void.

63. In answer to the Petitioner's complaint that the Company failed or refused to apply any of the Rights Issue proceeds on the debt owed to the Petitioner, the Company professed to have been temporarily averted from paying on the outstanding interest due to the filing of the Jingang Petition which it now seeks to strike out on a summons filed with the Court.

Complaints about the JPLs

64. The only real common ground between the Petitioner and the Company is that the current JPLs should be removed from their appointments. Both parties have levied severe incursions into the conduct of the JPLs, many of which are contradictory, particularly where allegations of bias are made. Notwithstanding any conflicting evidential details before me, the Petitioner and the Company agree that the JPLs have relinquished all credence and caused the parties to lose confidence in them. On the JPL's narrative of the case, they warrant a commendation for having resisted the pressures of both parties while focusing their efforts on ameliorating the Company's refinancing prospects.

65. Mr. David Yen deposed in his affidavit evidence that the JPLs regularly attended meetings with the Company's management team in search of the assets of the Company. He said that the JPLs have competently overseen the Board's operations and the general business of the Company. In their assessment of the potential for a restructuring, as may be gleaned from their First and Second Reports, the JPLs have focused on the Company's cash flow position and its asset sale offers, including Chanje.

66. Mr. David Yen stated in his First Affidavit that the JPLs had been working with the management of the Company to determine the appropriate response to the threat of enforcement action against the Company. He explained that it was not until 29 April 2020 that the JPLs first became aware of SHK Finance's exercise of its enforcement rights to appoint SHINEWING Specialist Advisory Services Limited ("SHINEWING") as receivers of the FDG Kinetic's assets. He also said that on 14 and 21 April 2020 the JPLs called for the Board to seek the return of the HK$30,000,000.00 interest free loan and that the JPLs went so far as to have their legal adviser issue a 5 May 2020 demand letter to SHINEWING for the said loan sum to be held on trust for the benefit of the Company.

67. On the Petitioner's 23 April 2020 summons for the replacement of the JPLs ("the Petitioner's Replacement Summons" / "the Replacement Summons") an Order is sought for the immediate full-power appointment of Ms. Wing Sze Tiffany, WONG and Ms. YEUNG Mei Lee of Alvarez & Marsal Asia Limited and Mr. Mathew Clingerman of KRyS & Associates (Bermuda) Ltd.

68. The Petitioner's principal complaint is that the JPLs were delinquent in their exercise of duty by failing to have either removed or suspended the Board. This, according to the Petitioner, was a most egregious error in the face of the Board's unilateral efforts to progress the sale of FDG Kinetic and Chanje. However, Mr. David Yen refuted the Petitioner's suggestions that the Company was continually engaged in efforts to unlawfully dispose of key assets or create security interests over its assets since their 12 March 2020 appointment, adding that all interest payments on Company loans were aborted upon the JPLs' appointment. He further pointed out that the JPLs' powers to manage the Company do not by extension empower them to exercise control over the management of the subsidiaries.

69. In expressing commentary on the JPLs refusal to suspend the Board, Mr. David Yen's clear position was that the Board is not operating against the best interests of the Company and that the Board does not pose any real risk to the restructuring of the Company. In his Second Affidavit [paras 14-15]:

"*14. At paragraph 26, Mr Zhai states that there can be no restructuring if the powers of the current board are not removed. As the JPLs have stated before, many times, both to the*

Petitioner and in their reports to this Honourable Court, the JPLs do not believe that the current board is acting adverse to the best interests of the Company or is otherwise jeopardizing the Company's restructuring. The JPLs have scrutinized the conduct of the board carefully, and are not aware of any misconduct which would justify their removal or the suspension of their powers. The Petitioner plainly disagrees, and it is entitled to that view, but it simply does not correspond with the JPLs' actual knowledge of the board's conduct.

15. At paragraph 34, Mr. Zhai alleges that the JPLs have "turned a blind eye" to the industrial disputes and workforce difficulties currently being experienced by certain of the Company's factories in the PRC. This is untrue. The JPLs have expended appropriate time and energy into the oversight of the Company's PRC operating subsidiaries through discussions with the management of the Company and attending certain board meetings, as without these operations the prospects of a restructuring are bleak. There have been concerns as to the provenance of certain complaint letters which have purportedly been issued by certain of these factories, and that is a matter under active investigation by the JPLs."

70. Mr. David Yen further stated in his evidence that the JPLs have acted and would continue to act in accordance with the Orders of this Court and have always acted in furtherance of the best interests of the Company's creditors. He also explained the priority attention given by the JPLs to the creditors who have threatened to enforce their claims to the detriment of the Company.
71. Acknowledging that the continuance of their appointment is unsupported by the Petitioner and the Company, the JPLs purported to adopt a neutral stance [paras 8-9]:

"8. *The JPLs are caught in the middle of these two factions, which both appear to be seeking to advance their own interests rather than the interests of the general body of creditors as a whole. It is unsurprising given the financial position of the Company that these parties would act in a self-interested manner.*

9. The JPLs are officers of the Court and owe their duties to the general body of creditors. The purpose of this affidavit is not to advocate for their continuing appointment over competing practitioners- the JPLs take an entirely neutral view and, if ordered by the Court, will continue their role with or without expanded powers, or will step aside in favour of whichever alternative office holders are appointed by the Court…"

72. The Replacement Summons is mostly supported by the Second Affirmation of Ms. Zhai. In a succinct statement of the Petitioner's position, Ms. Zhai deposed [para 13]:

"*The overriding priority of the Petitioner, who is also the largest creditor of the Company, is to lead a successful restructuring. A successful restructuring of the Company will require JPLs*

that have the trust and confidence of the unsecured creditors, secured creditors and new investors. In its discussions with all parties, the Petitioner has determined for the reasons set out below, that no such restructuring is possible with the Existing JPLs in office and therefore makes the present application."

73. In Ms. Zhai's Second Affirmation she pointed to the agreement of 33% of the shareholders and the support of three major creditors (out of a known total of six creditors, excluding the Petitioner), namely VMS Investment Group Ltd ("VMS"), China Innovation Foundation Ltd ("CIF") and Mr. Jin Zheng Yuen for the removal of the JPLs [para 16]:

"*The Petitioner was informed by VMS, CIF, and (Mr. Jin Zheng Yuen) that they:*

a. were concerned based on the prior conduct of one of the JPLs in the Hong Kong Case that the Existing JPLs may favour the Petitioner in any restructuring or otherwise fail to act impartially;

b. were concerned that the Existing JPLs failed to contact VMS, CIF, and (Mr. Jin Zheng Yuen) after their appointment until they independently learned of the Existing JPLs appointment and sought and obtained the contact details of the Existing JPLs from the Petitioner;

c. were not prepared to participate in a restructuring led by the Existing JPLs;

d. *in light of the foregoing and for the reasons later expressed at the Creditors Committee at paragraphs 25-26, support the Full Powers Application, and would supports (sic) the Removal Application and Replacement Applications*."

74. Ms. Zhai subsequently produced further evidence of an informal meeting of the creditors convened by the JPLs on 17 April 2020 and a subsequent meeting at the behest of VMS two days later on 19 April. At the second meeting, by a 4/5 majority vote, the creditors resolved to advise, *inter alia*, the JPLs to exercise their powers to remove or suspend the Board and take all measures to preserve Company assets. This preceded the meeting of 23 April 2020 when the same group of creditors (the Petitioner; VMS; CIF; and Mr. Jin Zheng Yuen (Advanced Lithium Elecrochemistry Co Ltd having abstained)) agreed that the current JPLs ought to be discharged from their appointments.

75. On Ms. Zhai's initial evidence 45.1% of the total pool of creditors, support the removal of the current JPLs. However, in her Fourth Affirmation, she produced further letters of support from contingent creditors of the Company augmenting the support for the Petitioner's applications to come from the collective position of the *ad hoc* Creditors Committee and 65% in value of

the total body of creditors (representing HK$2,121,378,835.00 of debt owed to creditors supporting the Petitioners out of an overall total of HK$3,285,535,835.00).

76. It should be noted that some controversy on the evidence arose between the JPLs and the Petitioner as to whether Ms. Zhai was correct in stating that Advanced Lithium Electrochemistry (Cayman) Co. Limited ("ALEES") had expressed support for the Petitioner's applications before this Court. Under the Fourth Affirmation from Mr. Che, a 13 May 2020 email from a Mr. Brandon Chang of ALEES was produced. In that correspondence, Mr. Change unreservedly denied the truthfulness of Ms. Zhai's claim to have been provided express support for the Petitioner. He said that an ALEES representative attended the 29 April 2029 *ad hoc* meeting of the Creditors but abstained from the vote taken. Ms. Zhai, responding to this in her Fifth Affirmation, accepted that she had previously and incorrectly stated that the vote was unanimous and she accepted that ALEES in fact abstained. In her defence, she proffered a transcript note as evidence of Mr. Chang's informal agreement for the sole shareholder of the Petitioner to "*take charge to replace the JPLs*".) Ms. Zhai also added that ALEES is closely connected to the Company through ownership interests and common management [para 12].

77. In the JPLs' First Report, they state that the largest contingent creditor is the Bank of China. Ms. Zhai invites this Court to attach significance to the fact that the Bank of China assigned their debt to a third party, China Cinda Asset Management Co Ltd ("Cinda"). She states that Cinda is closely related to the sole shareholder of China Orient Asset Management Co Ltd ("China Orient") who is the same sole controlling shareholder of China Orient International and China Orient Holding and a fourth related asset management company. This is also the sole shareholder of the Petitioner. This, according to Ms. Zhai, would point to the likelihood that Cinda would support the Petitioner's Replacement Summons. Looking more narrowly to the class of the non-contingent creditors, it is suggested on Ms. Zhai's evidence (Fourth Affirmation [para 20]) that 94% of creditors in value expressly support the sought-after removal of the current JPLs.

78. By letter to the sole shareholder of the Petitioner, dated 21 April 2020, China CITIC Bank Corporation Limited, Hangzhou Branch ("CITIC Bank") held itself out to be a creditor of the PRC subsidiary Hangzhou Changjiang in the amount of RMB100,000,000, such sum being guaranteed by the Company. In that same letter, CITIC Bank confirmed its support of the Petitioner in any action led in Hong Kong and in Bermuda, including the applications for the appointment of new JPLs with expanded powers. (See Ms. Zhai's Fourth Affirmation [para 21]).

79. Also by letter dated 21 April 2020, the Zhejiang Branch of China Orient Asset Management Co., Ltd. ("China Orient Zhejiang"), wrote to the sole shareholder of the Petitioner to advise

that Hangzhou Changjiang are now indebted to them for RMB27,700,000.00, which is another loan sum guaranteed by the Company. (China Orient Zhejiang's status as a creditor arose from it having acquired the rights of the lender from China Minsheng Bank.) Like CITIC Bank, China Orient Zhejiang supports the Petitioner in its applications before this Court.

80. Ms. Zhai also produced under her Fourth Affirmation a 29 April 2020 letter from China ZheShang Bank Hangzhou Branch ("CZ Bank") asserting itself to be a creditor of the Company's subsidiary, Hangzhou Changjiang Automobile Co., Ltd., holding HK$0.499 billion in debt capital guaranteed by the Company. CZ Bank also supports the Court action taken by the Petitioner in defence of the Company's creditors.

81. The Petitioner, not wanting to omit mention of any supporting opinions, further pointed to the management sector of the Company's subsidiaries and those of potential investors in promoting its application to appoint full powers to Ms. Wing Sze Tiffany, WONG and Mr. YEUNG Mei Lee and Mr. Mathew Clingerman. A summary statement of their eligibility and qualifications appears in Ms. Zhai's Second Affirmation [para 39].

82. However, the Petitioner's count of its support in favour Replacement Summons is overstated according to Mr. David Yen in his Second Affidavit. He pointed out the non-binding status of the *ad hoc* Creditors Committee and explained that although the committee was formed by the JPLs for consultative purposes only, the JPLs were not notified of the second meeting and were therefore not in attendance. Mr. David Yen reported that the JPLs also query the level of weight to be attached to the Petitioner's claim to support from various stakeholders [para 12]:

"*12. At paragraph 6, Mr Zhai recites the list of stakeholders who purportedly support the Petitioner's application for the removal of the JPLs in favour of the Petitioner's favoured appointees. Mr Zhai mischaracterizes how the purported support of these stakeholders came about. For example, Mr Zhai suggests that the management and directors of the Company were consulted, when in reality the Company has on foot its own application in which it seeks the appointment of different provisional liquidators on a light-touch basis (subject to the outcome of the inter partes hearing) to those sought by the Petitioner. Mr Zhai also alludes to the views of "potential investors in the Company". Whichever investors Mr Zhai is referring to have not made themselves known to the Company (at least as far as the JPLs are aware) or to the JPLs. As they have not been identified, the JPLs do not know if they are aligned with the Petitioner and are seeking to advance its interests over the interests of the general body of creditors or if they even exist*."

83. The Company, on the other hand, contends that it is more in the interests of the Company's creditors and shareholders that the Court replace the current JPLs with Mr. Cosimo Borrelli, Mr. Michael Chan and Mr. John McKenna, each of whom have filed a Consent to Act. It is

explained in the Second Affirmation of Mr. Che that Mr. Borrelli and Mr. Chan have assisted the Board in developing a 'Restructuring Strategy and Analysis'.

84. The Company's primary objection to the continued appointments of the JPLs arises out of its sentiment that the JPL's have paid insufficient attention to the Chanje transaction. The Company condemned the JPLs for having barely considered the Chanje transaction in their first report to the Court of 6 April 2020 ("the First JPL Report"). Worse, as the Company would argue, the JPLs' First Report on their analysis of the Company's financial position is poorly and unfairly pitched as desolate in addition to containing significant factual errors on the Company's financial position. Mr. Che in his Second Affirmation [paras 39-40] addresses these points in some detail. The Board's general view is that the JPLs lack an overall interest in the Chanje transaction and have wasted time focusing their attention on the prospect of issuing new shares at the current stock price which fall below par value. This has resulted in the Board's loss of confidence in the JPLs.

85. The JPLs in their Second Report to the Court were expressly clear that the best prospects of the Company's return to solvency would be the successful sale of Chanje. Mr. David Yen defended all criticism from the Company that the JPLs had ignored the Chanje transaction. He highlighted the JPLs' duty to consider alternative restructuring options as a plan for a worst case scenario in the event that the Chanje transaction fails to come to fruition. In his Second Affirmation [paras 23-24] Mr. David Yen said:

"23. *At paragraph 37, Mr Che alleges that the JPLs have failed to give proper attention to the details of the proposed transaction involving the sale of Chanje to J Streicher…This is untrue. The sale of Chanje is, in the JPLs' view, the most prospective means of effecting the financial restructuring of the Company and will allow the Company to pay down certain of the debt owed to the Petitioner and other creditors. This has been made abundantly clear to all stakeholders in the provisional liquidation.*

24. At paragraph 39, Mr Che alleges that not enough was said about the Chanje Transaction in the JPLs' First Report. This is because the terms of the Chanje Transaction are uncontentious and were essentially settled prior to our appointment. There is not much to be said. Either the Chanje Transaction completes or it does not. In the even that it does not complete, alternative restructuring options will need to be explored. The JPLs are acting conservatively, on the assumption that there may be difficulties or delays with the Chanje Transaction."

86. The Special Committee of the Board is eager to remove Mr. Cao Zhong and his brother in law, Mr. Zhenguo Miao, from the Board due to concerns by the Special Committee of questionable transactions involving its subsidiary in Hangzhou Changjiang (referred to as the Company's

"PRC subsidiary" in Mr. Che's evidence). In order to retain control over its PRC subsidiaries, the Special Committee has commissioned the JPLs' consent for the removal of Mr. Cao and Mr. Zhenguo. Following an initial appearance of willingness, Mr. Che says that the JPLs changed their stance and decided against the refusal on grounds stated in email correspondence sent to the Board on 22 April 2020 by JPL, Ms. Anita So:

"*Although changing directors of the PRC subsidiaries is in the ordinary course of business, the JPLs are still concerned that the proposed change of board composition of the PRC subsidiaries may cause significant uncertainties which might result in disruption to operations, industrial action in the PRC, and even enforcement actions by creditors.*

…

In light of the above considerations, the JPLs recommend the Board not to proceed with the proposed change of management of the PRC subsidiaries at this time or, to wait until a board restructuring plan can cover all required changes with the consent of all stakeholders."

87. Mr. Che blames the JPLs for the untenable continuance of Mr. Cao's and Mr. Zhenguo's influence over the PRC subsidiaries. This, says Mr. Che, is obstructive to the viability of the business no matter what restructuring steps are ultimately taken. [See Mr. Che's Second Affirmation paras 57-60].

88. Mr. David Yen stated in his evidence that the JPLs recommended against any change of board composition for the PRC subsidiaries while restructuring options were being explored. In his Second Affirmation [para 35] he said this:

"*…To be clear, the JPLs' view is that the removal of Mr. Cao could jeopardise the Company's PRC operations and would not be in the best interests of the creditors of the Company. I understand the allegations that have been levelled against Mr. Cao and I have taken these into account. However in the present circumstances, and considering the questions that have been raised as to the provenance of communication purportedly received from the PRC factories in relation to industrial action, the JPLs have determined that the removal or suspension of Mr. Cao would not be appropriate at this time. I consider that the change of composition of the board of the Company (and/or the boards of the Company's subsidiaries) is not preferable during the course of the provisional liquidation, unless necessary. As for Hangzhou Changjiang in particular, in light of the potential industrial action and the threat of appointment of receivers, and having considered the information provided by the board of directors of the Company, the JPLs recommended that the board not proceed and highlighted the risks in doing so. The board should, after considering the JPLs' comments, make its own decision as to whether they should proceed with the change of the board of Jangzhou Chingjiang, based on their views as to whether such change is necessary and in the best*

interest of the Company, in the ordinary course of business. The JPLs will not suspend the powers of any director of the Company unless actual harm occurs, or will occur imminently."

89. On the subject of costs, the Board accuses the JPLs of general inefficiency citing as an example their engagement of financial advisors, Somerley Capital Limited ("Somerley Capital") and their pressure on the Board to approve a substantial and excessive retainer sum for the JPLs' legal representation. Additionally, the Board has further denounced the JPLs' meetings with major stakeholders of the Company and Somerley Capital about a restructuring without consultation from the Board. The Company also bitterly complained that the JPLs' disallowed the Company from making any loan interest payments to some of its other creditors in prevention of substantial loan defaults. Another complaint made was in respect of the JPLs' delay in payments to the Company's legal advisors in their assistance in the Bermuda proceedings and regulatory matters in Hong Kong.

90. Mr. David Yen, however, denied the allegations of improper delay in payment to the Company's legal team and underscored the JPLs' duty to review the underlying invoices and related documents to ensure that the propriety of the payments. He further stated the JPLs have since which established a more streamline process for approval of such payments.

91. The Company also advanced a conflict of interest objection grounded on the financial advice provided by Ernst & Young's Hong Kong office ("E&Y (HK)") to Volvo Truck ("Volvo") in its potential acquisition of Chanje. Mr. Che deposed that he was assured by a partner of E&Y (HK), Mr. Andrew Koo, that this Court's appointment of Mr. David Yen Ching Wai and Ms. Anita So as JPLs would not give rise to a conflict as their office had a "Chinese wall" system in place. Notwithstanding, the Company asserts that E&Y (HK) cannot properly act both as financial advisor to a potential buyer in the Chanje transaction and at the same time as JPLs in the handling of any Chanje transaction.

92. Advancing another ground of the Board's objection to the continued appointment of the current JPLs, Mr. Che sought to impugn the professional reputation of Mr. David Yen. In his First Affirmation [paras 35-37] he deposed:

"*35. The appointed provisional liquidator David Yen Ching Wai has a reputation of taking an aggressive/destructive approach. In fact, he was heavily criticized for his approach by the Hong Kong Court in Re Luen Tat Watch (copy of which is exhibited at pages 182-249), particularly his bias towards the petitioner who nominated him. This case is well known by Hong Kong legal practitioners and would naturally lead to concerns by the market. Notwithstanding it is on the face a soft touch provisional liquidation, the PL Order contains very extensive powers. If the Court is minded to put the Company into provisional liquidation*

to monitor/facilitate the Company's restructuring, I respectfully ask that this Court allows the Company to make its own nomination of insolvency practitioners to work with them.

36. Pending final determination of the PL Application, in light of the on-going, fast developing restructuring steps, I respectfully ask that the scope of the powers of JPLs be narrowed down to serve a limited monitoring function. Counsel appearing on behalf of the Company will submit a revised scope of powers.

37. In any event, under paragraph 3(i) of the PL Order, the JPLs shall have the power to approve any transaction HK$2 million for any subsidiary of the Company. This does not work in my view at a practical level because the Company has listed subsidiaries and other joint venture subsidiaries. The Company only has full autonomy over wholly owned subsidiaries."

93. In the Hong Kong High Court decision of <u>*Allied Ever Holdings Limited v Li Shu Chung et al*</u> HCCW 497/2009 (27 November 2017) (cited by Mr. Che above) the point of scrutiny against the JPLs attached to their handling of a proof of debt submitted by one Li Shu Chung ("Ken"). Ken's entitlement to company shares and profits which applied to the sums claimed under his proof of debt had been previously resolved against him in the Court of First Instance ("CFI") whose decision was affirmed by the Hong Kong Court of Appeal. Accordingly, Mr. Justice Anthony To found that the doctrine of *res judicata* applied in respect of any question as to whether the debt was owed to Ken.

94. Mr. Che correctly pointed out that one of the Court-appointed liquidators in that matter was Mr. David Yen. At paragraphs 49-50 of To J's ruling he found evidence of bias on the part of the liquidators stating:

"*49. Any reasonable liquidator would have respected the CFI Judgment and rejected Ken's claims as bogus. But, instead of paying heed to the CFI Judgment, the Liquidators kept this, what I call an "empty" proof alive for nine months. David Yen said in his affidavit that Ken was appealing and it was not a forgone conclusion that the appeal would be dismissed. He was optimistic that the appeal would be allowed. This might arguably be an error of judgment, though I would not find it was. Then, he went all out of his way to even provide arguments for Ken that he could be entitled to claim as a former employee and/or agent, when such arguments were not even pursued by Ken himself… The Liquidators' argument in overt assistance for Ken is clearly unsustainable in view of how Ken ran his case in the Main Action and in view of the court's unequivocal reasoning in dismissing his counter claim. This shows the length to which the Liquidators were prepared to go in siding with Ken. This is positive assistance which could not have been the result of an error of judgment. It is clear evidence of bias*.

50. In January 2017, the Court of Appeal dismissed Ken's appeal and upheld all the findings of the Court of First Instance. By this time, any liquidator, however obstinate, should have respected the Court of Appeal Judgment and both courts' criticism of Ken's credibility. Again, the Liquidators ignored the finding of both courts as being observations which have no bearing on the proof of debt. Also, very remarkably, just two months before this hearing, they wrote to Ken asking for documentary proof in support. Now, they argued that they had to investigate into this outstanding proof as a ground for resisting the application to stay. Clearly that was a tactical move to keep Ken's proof alive and to justify their continuation in office. Such argument is disingenuous.

51. The above facts show that even after Ken's appeal was dismissed, the Liquidators did not resile from their position. In the light of the Court of Appeal Judgment, they have no further reasons or excuse to keep Ken's proof alive… … Obviously, their intention was to fortify Ken's case and to create a reason for their continuation in office. As officers of the court, the Liquidators' duty was to give effect to the order of the court. Their repeatedly ignoring the findings of both the Court of First Instance and the Court of Appeal, their advancing a new argument to justify Ken's claim, which argument was not even raised by Ken himself, and their attempt to fortify Ken's claim tantamount to annulling the findings of the court. On any view, such conduct demonstrated that they were determinedly biased in favour of Ken against the Father and his camp. They have forgotten that they are officers of the court and are now pursuing their own agenda and the interest of their new master. Their conduct certainly gives rise to a real and reasonable loss of confidence in them by the contributories."

95. In the concluding paragraphs of To J's decision, without mincing his words, he stated that the Court had lost confidence in the liquidators. To J held that bias on the liquidators had been proven and that they had acted in bad faith with '*an intention to benefit themselves to the prejudice of the persons who are interested in the assets of the Company*' [para 102]. Even worse, To J found [para 127] that the liquidators actively attempted to mislead the Hong Kong Court.

96. Mr. Che accused the Petitioner of being motivated to remove the JPLs in this case on account of their failure to unfairly secure the JPLs' bias in their favour. At paragraph 4 of Mr. Che's Second Affirmation he said:

"*I note that the Petitioner has now applied for the removal of Ernst & Young as JPLs. It is my belief that they have done so because they are dissatisfied that they have not been pursuing their objectives. They have not put forward alternative provisional liquidators, no doubt in the belief that the new proposed appointees will pursue their agenda*."

97. Mr. David Yen provided a one paragraph reply to the Company's reference to To J's decision. In his Second Affirmation [para 38]:

"*At paragraph 84 of the Company's skeleton argument, reference is made to a decision of the Hong Kong Court…in which myself and the other liquidators of the subject company were removed. I wish to clarify for the Court's benefit that this decision is under appeal, and that such appeal was lodged well in advance of my appointment as one of the JPLs of the Company. I believe that this decision, and its appeal, has no bearing upon my ability to independently continue in my role as one of the JPLs. I confirm that I will be attending the electronic hearing on 13 May 2020 in order that I may answer any questions the presiding judge may wish to ask in relation to this matter*."

98. In Ms. Zhai's Fourth Affidavit, she deposed that the Petitioner was not previously aware of To J's decision of the Hong Kong Court. She stated [para 14]:

"*In light of this decision which was not known to the Petitioner prior to Mr. Yen's appointment, the Petitioner is concerned that one explanation for this inaccurate statement regarding the motives of the Petitioner and other inconsistent statements in Yen 2, may be that Mr. Yen may be similarly prepared in these proceedings to ignore the virtually unanimous views of the creditors of the Company to whom he ought to be answerable and/or evidence of the Board of Directors failing to act in the best interests of creditors, so long as it justifies his own continuation in office. The approach taken in Yen 2, when taken with the foregoing statement of the Hong Kong Court, gives the Petitioner concern that Mr. Yen may have put his own interest and the interests of the Board of Directors before the interests of those interested in the assets of the Company, namely the general body of creditors*."

99. In addition to the Petitioner's application for the replacement of the current JPLs, the Petitioner says that any JPLs appointed should be given full powers while the Company contends that the scope of JPLs' powers should be further limited. While the outer packaging of their response to these requests for their removal may appear neutral and even-handed, the JPLs nevertheless expressed some commentary favouring expanded powers. Mr. David Yen stated in his First Affidavit [para 21]:

"*The JPLs have not taken a view as to the appropriateness of the Full Powers Application. Independently, however, the JPLs do believe that the granting of expanded powers to permit them to run the day-to-day operations of the Company would be in the best interests of the Company and its creditors and would facilitate the expeditious development and implementation of a restructuring proposal*."

Prospects of a Restructuring

100. The Company has criticized the Petitioner for pursuing these proceedings with the knowledge of the ongoing negotiations in furtherance of the Chanje transaction, the proceeds of which would be more than sufficient to fully satisfy the debt owed. However, Ms. Zhai, in support of the Petitioner, states in her the First Affirmation [para 7] that *"... the Petitioner has come to the Court on an emergency basis as a last resort in order to save any prospect of a restructuring that will produce a distribution to the class of creditors of which the Petitioner forms part*."

101. There is no dispute that the Company is insolvent on a balance sheet basis and wholly reliant on a successful restructuring in order to meet its obligations to its creditors.

102. The proposed sale of the Chanje, an indirect subsidiary of the Company, is held out by the Board to be the central and most significant aspect of its restructuring plan as outlined by the Special Committee's "Restructuring Strategy and Analysis". It is proposed by J. Streicher Holdings LLC ("Streicher") that a special purpose vehicle ("SPV") will be established by 30 June 2020 to purchase 94.74% of the Company's shareholding in Chanje.

103. At paragraph 33 of Mr. Che's First Affirmation he stated:

"*More significantly, on 26 February 2020, the Company received a Letter of Intent offer (the "LOI") from J. Streicher Holdings LLC in respect of a restructuring proposal involving a potential disposal of the Company's equity interests in Chanje at a consideration of US$260 million to US$360 million, plus a long term electric vehicle manufacturing order to utilize the Group's production bases in Hangzhou. The proposed restructuring proposal would realize the Company's market capitalization significantly and would turnaround the Group's financial position including ability to pay its debts. Exhibited at pages 173-181 is a copy of the LOI updated on 18 March 2020. The offeror provides an immediate, one year interest free deposit of US$12 million in return for an exclusivity period up to 30 June 2020 for the purposes of negotiating and finalizing definite sales and purchase agreement*…"

104. The Chanje transaction entails more than the mere sale of the entity. In his Second Affirmation, Mr. Che outlined the progressive stages of the transaction as follows [para 27 (b)-(i)]:

"(b) The Company will receive additional consideration of a 10% equity stake in the SPV in the form of common equity securities of SPV, which will not be capable of dilution and will remain at 10% prior to any qualified public offering of SPV or Chanje.

(c) The Company will support the negotiation of the acquisition of the remaining 5.26% shareholding of Chanje which is under an employee benefit trust program of the Company.

(d) The Company will receive an additional payment upon completion of a successful initial public offering of Chanje or SPV with a market capitalization of no less than US$500,000,000. The payment to the Company would be 1/20 of the market capitalization of the initial public offering, capped at US$100,000,000.

(e) The Company will retain its ownership of the OEM Commercial Electric Vehicle Deisgn Package, namely the intellectual property licence needed for its manufacturing of its EVs in Asia. A new licence agreement is to be negotiated between the Company and Chanje.

(f) Chanje (as purchaser) and the Company (together with its other subsidiaries, as supplier) will enter into a three-year supply agreement for vehicles, parts, semi-knockdown kits and complete knockdown kits. The Company's PRC production subsidiary Changjiang in Hanzhou shall reserve the production capacity of 10,000 units of vehicles per year for SPV/Chanje for the three year period.

(g) SPV shall have an option to lease the Changjiang factory (real estate and tooling) on material terms to be set out in the supply agreement exercisable in an event of default of the supply agreement.

(h) The establishment of an incentive equity compensation structure for key employees of Chanje.

(i) SPV shall have the right to appoint me as a director of the SPV upon closing."

105. Chanje was set up in 2015 as a North American company engaging in the sale of the Group-manufactured electronic vehicles, which is said to be very competitive. It falls outside of the Mainland Chinese Corporate Structure where the Petitioner has its share security and it has no involvement in the manufacturing services offered by the Group. Mr. Che reported in his evidence that Chanje has been largely successful in securing substantial sales orders from Ryder System Inc. (a S&P 400 company listed on the New York Stock Exchange) ("Ryder") and Federal Express Corporation ("FedEx"). He also referred to the Chanje V8100 model ("the V8100 model") and specified in his Second Affirmation that the V8100 model "*has been admitted by the government of California in the government grant list and it is also recognized by FedEx as the only approved EV model enlisted on its vendor list.*" Having founded Chanje, Mr. Che emphasized his in-depth knowledge of its operation and his strong relationship with the management of Chanje is demonstrative of the value of his and the Board's participation in a restructuring dependent on the Chanje transaction.

106. However, Ms. Zhai stated in her Third Affirmation [para 27] that the FedEx and Ryder Orders are not an indication that the Company is capable of returning to solvency under the Board and that a substantial part of the deliveries were not completed in any event. She flagged that those orders were placed through Chanje and reminded this Court that Chanje's assets are under the control of Fortune Team through the receivers appointed over FDG Strategic, since FDG Strategic holds all of the Company's interest in Chanje.

107. Ms. Zhai's analysis on the prospects of the Chanje transaction was irreconcilable with that of Mr. Che. Illustrating the proximity of the expected financial relief, Mr. Che detailed the payments which would be forthcoming before, at the time of and 6 months after the transaction. The Special Committee of the Board unanimously support the proposed Chanje transaction contending that this will relieve the Company of its capital pressure and financial difficulties including bringing the Group long term benefits in its plan to expand the market.

108. The Petitioner, notwithstanding, mounted a case full of doubt on the promises of the Chanje transaction on the evidence of Ms. Zhai (Third Affirmation):

[para 24 d.] "…*that the Company has failed to arrange to obtain any meaningful financing for Chanje in the past year*….

[para 24 h.] *The Petitioner believes that the Company has been using Chanje business to mislead the other creditors and to delay their demand for interest payments from the Company*…

[para 24 i.] *In light of the announcements made in relation to the appointment of receivers to FDG Strategic and FDG Kinetic, the Petitioner believes that the LOI is another attempt by the Board of Directors to delay any action by other creditors so that the Related Parties may ring-fence and grab the valuable assets of the Company*.

[para 24 j.] "*Even if the LOI is a bona fide attempt by the Board or restructuring the Company (which the Petitioner does not accept), the Petitioner and other legitimate creditors have no confidence that the current Board of Directors of the Company will be able to complete the transaction and receive payment "up to" US$360,000,000 for the repayment of the debts of the Company. The LOI clearly has strings attached- one example is that a significant amount of payment is contingent upon the completion of a successful initial public offering of Chanje, which involves significant uncertainties and no control of the Company.*

[para 24 k.] *Further, on 19 March 2020, the Company made an announcement that the Intended Purchaser of Chanje is required to pay the Deposit in the aggregate sum of US$12 million in three instalments. … On 28 April 2020, 39 days after the initial announcement in*

relation to the LOI, the Company admitted in its announcement (and in Che 2) that only US$200,000 has been received from the Intended Purchaser, representing only 5% of the first instalment of the deposit of US$4 million, or 1.6% of US $12 million. Che 2 failed to mention the fact that the Intended Purchaser had already failed to pay all of the three installments of the Deposit pursuant to the terms of the LOI.

[para 24 l.] *The failure of Intended Buyer to pay the Deposit pursuant to the terms of the LOI suggests a strong execution risk to the transaction, including the funding risk of the Intended Purchaser and/or lack of the intention to proceed with the transaction. This, couple(d) with the Petitioner's experience of the failed transactions involving Chanje in the past, leads the Petitioner to believe that there is a significant risk of the Chanje Transaction not being able to continue, let alone completion…*"

Extent to which the Petitioner's Consent may be required

109. In any event, says the Petitioner, no restructuring of the Group can take place without its cooperation and agreement. Paragraph 8 of Ms. Zhai's First Affirmation:
"*The debt due to the Petitioner in the amount of in excess of HK$1.1 billion represents approximately 50% of the total outstanding indebtedness of the Company. Accordingly, it is not possible for there to be any scheme of arrangement or other restructuring without the approval of the Petitioner*."

110. Mr. Che took issue with Ms. Zhai's description of the percentage value held by the Petitioner of the Company's overall debt. In his Second Affirmation he stated [para 83]:

"*The underlying theme of Zhai First is that, in light of their "overwhelming interest" in the liquidation or restructuring of the Company, any restructuring must be carried out according to their wishes. In paragraphs 8 to 10, Mr. Zhai refers to the size of Sino Power's debt, its contractual entitlements and its security at the PRC subsidiaries level in suggesting any restructuring plan would not be possible unless it is with Sino Power's consent. It is noteworthy that, taking into account the liabilities of the subsidiaries in the Group guaranteed by the Company, Sino Power holds approximately 33% of the total indebtedness of the Company. Further, it is not accurate for Ms. Zhai to say in paragraph 9 that Sino Power has a security interest over "virtually all of the assets of the Company, save for [Chanje]". For instance, Sino Power does not have any security interest over account receivable of the Company of over HK$ 1.6 billion (primarily consist of shareholder loans extended to various subsidiaries of the Company) and the Group's global IP rights in respect of technology and design of our EVs*."

111. Also, Mr. Luthi pointed out that the extent to which the Petitioner is an unsecured creditor remains uncertain since much of its debt is secured by the share charges.

112. Beyond its claim to the controlling vote for a scheme of arrangement, Ms. Zhai flagged that the Petitioner's approval of the sale would be required in accordance with the terms of the Facility Agreement and the CB Agreement. Ms. Zhai further pointed out in her evidence that Chanje's value is contingent on the Share Charge Subsidiaries. So, the Petitioner argues that while Chanje may be free from any share charges owned by the Petitioner, the Petitioner's cooperation in a restructuring is needed as that would necessarily require the agreement of the Share Charge Subsidiaries.

113. In her Fourth Affirmation, Ms. Zhai recounted that representatives of the sole shareholder of the Petitioner attended an 8 May 2020 telephone meeting with J. Streicher, the prospective buyer of Chanje, to discuss the LOI. She deposed that a mutual desire was confirmed between the two parties to work with one another "*in the manner sought by J. Streicher and is currently in discussions with J. Streicher to conclude a non-disclosure agreement to all those discussions to proceed*." She further referred to an 11 May 2020 letter containing what she described to be "*the first and only current global recovery plan from a party with sufficient capital and influence to support a full restructuring of the Company*" [paras 24-25].

114. The Petitioner also pointed to a pool of employee complaints emanating from a branch of subsidiaries in the Company Group sometimes referred to as the "Mainland Chinese Corporate Structure" where the Share Charge Subsidiaries are located. Mr. Jin deposed in his First Affirmation that the employee representatives of the Mainland Chinese Corporate Structure have stated in writing that they have no confidence in the Board and are not prepared work with the Board in a restructuring (to the point of even striking) "*but are prepared to work with the Petitioner on the basis that the Petitioner is a wholly-owned subsidiary of China Orient Asset Management, a Chinese state owned entity*" [para 11]. Mr. Che responded to this evidence in his Second Affirmation [para 88] stating that certain employees indicated to him by telephone "*that they were forced or misled to threaten the Board but they do not wish their identities disclosed as they fear retaliation and that their employment with the PRC subsidiaries is on the line*."

115. Mr. Taylor, on behalf of the JPLs, queried how the Petitioner could reasonably resist the Chanje transaction if its effect would indeed result in the satisfaction of the entirety of the debt owed to the Petition. To this end, suggested Mr. Taylor, the real focus and true objective of the Petitioner is doubtful. Is the Petitioner more concerned with a takeover of the Company or a repayment of the debt it is owed? Notwithstanding, the JPLs state their recognition that the disposal of Chanje will require the approval of a number of stakeholders. Further, the JPLs accept that there is reason for concern as to whether a successful restructuring proposal can be

advanced while there continues to be a breakdown in relationship between (i) the Board and the Company's creditors and (ii) the Company and those managing its subsidiaries.

116. Referring to one of the resolutions of the informal meeting of the creditors held on 23 April 2020, Ms. Zhai in her Second Affirmation stated that the creditors agreed [para 26d]:

"…*immediately after the removal of the Board and replacement of the JPLs taking place, members of the Creditors Committee will work together and explore all options available to implement a successful restructuring plan, including investing by the creditors or procuring investment from potential investors to inject fresh capital into the Company and/or debt to equity swap and/or extension of existing debt, among other viable options, in light of the imminent risks faced by the Company*."

117. However, Mr. Che turned to the ongoing civil proceedings in Hong Kong (HCA 275/2020) which were commenced on 10 March 2020 against, *inter alia*, Mr. Cao, Mr. Zhao and Mr. Jingang for allegations of false representation to the Board as a means of enabling Mr. Zhao to obtain the largest shareholding of the Company. The Writ of Summons in this action was exhibited to Mr. Che's Second Affirmation. (This was the basis for the Board's exclusion of Mr. Cao from the Special Committee.)

118. More directly, Mr. Che stated in his Second Affirmation [paras 118-119] the Board's belief that:

"118. …*Sino Power has no interest in obtaining the best recovery for creditors within a reasonable time. Their actions leading to the Petition and the PL Application are believed to be driven by their ulterior objective of seizing management control of the Company in pursuit of their own interests without regard to the interests of other stakeholders of the Company, particularly its public shareholders. Their strategy has been apparently supported by the actions of Jingang and Cao. This appears to be a clear blatant attempt to abuse the liquidation regime in Bermuda*.

119. On 17 April 2020, the Company wrote to Sino Power offering to make an immediate repayment of HK$50 million (cf. the original outstanding interest of HK $34 million to be top up to HK$100 million (subject to the potential sales of FDG Kinetic) in exchange of their agreement to withdraw the winding up petition and the PL Application, together with an agreement for a 12 months standstill. Up to date, Sino Power has not responded to this proposal…"

THE JPLS' APPLICATION FOR A LETTER OF REQUEST

119. The current JPLs seek a letter of request from this Court to the High Court of the Hong Kong Special Administrative Region for recognition of their appointment. The application is supported by the First Affidavit of Mr. David Yen [paras 24-35] and is uncontroversial, without prejudice to the Petitioner's and the Company's respective requests for the appointment of its nominees for JPL appointment.

RELEVANT STATUTORY FRAMEWORK AND LEGAL PRINCIPLES

The General Legal Position on the Appointment of Provisional Liquidators

120. Section 161(e) of the Companies Act 1981 provides the statutory basis for a petition being presented on the grounds that a company is unable to pay its debts. The Petitioner's application is grounded on section 170(2) which grants the Court wide and unfettered discretionary powers to appoint a provisional liquidator at or after the presentation of a petition but before the first appointment of a liquidator. Section 170(2) provides:

"*The Court may on presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.*"

121. The appointment made by the Court on 12 March 2020 was ordered pursuant to subsection (3) which empowers the Court to limit the powers of a joint provisional liquidator in the form of what is now commonly referred to as a 'soft touch' or 'light touch' basis. Subsection (3) states:

"*When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him.*"

122. In *Re North Mining Shares Company Limited* [2020] SC (Bda) 7 Com (27 January 2020) I made the following general remarks about the purpose behind appointing a provisional liquidator [para 24]:

"*24. The appointment of a provisional liquidator can sometimes be described as a draconian measure employed by the Court to paralyze the directors of a company from their ability to deal with and dispose of the company's assets. In such cases, the appointment of a provisional liquidator is ordinarily ordered on an urgent ex parte basis to enable swift and unforeseeable seizure of the control of the company's assets by the provisional liquidators. The underlying*

purpose here is to protect the interest of the company's creditors who are at risk of not being repaid their debts due to the likely dissipation of the company's assets."

123. In *Re Up Energy Development Group Ltd* [2016] Bda LR 94 [paras 20-21], the learned Hon. Chief Justice, Mr. Ian Kawaley (as he then was), reiterated that the appointment can only be made where there is a *prima facie* case for a winding up order:

"The main basic criterion for the appointment is that a prima facie case be made out for a winding-up. As Ground J observed in Re CTRAK Ltd et al [1994] Bda LR 37:

'…I am most acutely aware that I am only considering whether or not there is at least a 'good prima facie case' for the winding up of the respective companies, and not deciding whether or not they should be wound up…'

This demonstrates that in the restructuring context, the JPL applicant need only show that a good prima facie case for potentially winding-up the company exists, a burden which the Petitioner in the present case has clearly discharged…"

124. 'Light touch' appointments will usually be the preferred route in cases where the ultimate aim is to rescue a company by restructuring its affairs rather than winding up the company altogether. Under Bermuda common law, it is recognized that by this jurisdiction that the Court has discretionary powers to appoint a provisional liquidator without displacing the directors of the company. This can be traced back to the *ratio decidendi* of LA Ward CJ in the landmark judgment from *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69:

"I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the Company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court."

Where a Majority of Unsecured Creditors are seeking the Appointment of Provisional Liquidators and a Change of Previous Court-Appointed Provisional Liquidators

125. The Court is always primarily considered with the best interests of unsecured creditors as a priority in any liquidation. Where there is a conflict between a company subject to a winding-up petition and a majority of unsecured creditors, the Court is duty-bound to give rank in consideration to the true stakeholders which are indeed the unsecured creditors since it is they who are ultimately entitled to the first serving of the Company's assets. Such precedence is

applicable not only to the question of provisional liquidator appointments but also to other applications which include whether or not to make a winding-up order or to adjourn a petition.

126. In Re Up Energy, the then Hon. Chief Justice, Mr. Ian Kawaley held at paragraph 10 in his ruling of 20 September 2016:

"*10. …It was well settled that the views of the majority of unsecured creditors would ordinarily be given considerable weight, if not hold sway, when deciding whether or not to adjourn for restructuring purposes rather than immediately winding-up…*"

127. In the English Court of Appeal case *In re P. & J. Macrae Ltd [1961] 1 WLR 229 at 235* Wilmer L.J. held:

"*Where the majority of creditors do for good reason oppose a petition… then prima facie they are reasonably entitled to expect that their wishes will prevail, in the absence of proof by the petitioning creditor of special circumstances rendering a winding-up order desirable in spite of their opposition*."

128. In *In re J D Swain Ltd [1965] 1 WLR 909 CA* Lord Diplock held:

"*…for the wishes of the petitioner to overrule those of the majority of the creditors there must be some special reason why the wishes of the majority should be overridden*."

129. In *Re Up Energy Development Group Ltd* [2018] Bda LR 100 I adopted a practical approach to assessing the likelihood of securing a three-fourths creditor majority under section 99(2) of the Companies Act 1981:

"*47. However, in assessing and ascertaining the majority position, the Court will have regard to the nature and value of each creditor's debt. So, the meaning of a majority position, in the context of whether the Court will adjourn a winding up order in exercise of its unfettered discretion, will not necessarily find parity with the meaning of 'majority' as defined by s.99 of the Companies Act when having regard to the rules for sanctioning a scheme of arrangements.*

48. In my judgment, the Court need not at this stage satisfy itself on the certainty of success of a scheme of arrangement in order to adjourn the petition. A reasonable prospect of success will do. It is sufficient to establish, in deciding whether to adjourn the petition, that a majority (even if not yet up to 75%) of unsecured creditors are desirous of adjourning in order to support the JPLs further attempts for a restructuring. If the current majority (51% plus) of unsecured creditors are reasonably optimistic that a scheme of arrangement at 75% majority of voting creditors' claims is attainable, the Court will usually decide in favour of the wishes of the unsecured creditors who are the real stakeholders."

130. However, the Court must balance the wishes of a petitioning unsecured creditor against the prospects of a timely full repayment of a petitioner's debt. In Maud v Aabar Block Sarl *[2016] EWHC 2175 (Ch) at p. 99 [AB/7/68]* it was held that the test is *"whether there is a "reasonable prospect of the petition debt being paid in full within a reasonable time"*.

131. The learned Hon. Chief Justice, Mr. Narinder Hargun, most recently in *Argenco Ltd v Credit Suisse Brazil (Bahamas) Ltd* [2020] SC (Bda) 28 Com (17 June 2020) spoke about the need for the Court to keep the general commercial consequences of an appointment under its consideration [paras 12-13]:

"*12. The Court is bound to take into account all relevant considerations in making the decision whether or not to appoint provisional liquidators. In particular, the court is bound to consider the commercial consequences of the decision whether to make the appointment. The Court will also consider the views expressed by creditors and the shareholders. In the ordinary case, where the company is clearly insolvent, the clearly expressed views of the majority of the creditors in value are likely to be persuasive unless there are good reasons why those views should not be accepted and followed.*

13. The Court has a similar discretion in relation to the issue of whether provisional liquidators should be appointed with full powers or whether they should be appointed with limited "soft touch" powers. Again, the Court is bound to take into account the commercial consequences of the exercise of the discretion in relation to this issue. In the ordinary case, where the company is insolvent, the Court would be heavily influenced by the views of the majority of the creditors unless there are good reasons why in a particular case those views should not be accepted."

Legal Principles Applicable to the Removal of Provisional Liquidators

132. Liquidators of a company are officers of the Court and the Court has an inherent jurisdiction to control the conduct of its own officers. (See *Deloitte & Touche AG v Christopher D. Johnson et al* [1999] UKPC JO610-1[p.24])

133. Section 173(1) of the Companies Act 1981 empowers the Court to remove a liquidator for cause. It provides:

"*173 (1) A liquidator appointed by the Court may resign or, on cause shown, be removed by the Court."*

134. There is no express restriction under section 173 on who may apply for the removal of a liquidator, clearly because any number of unique and unforeseeable circumstances might give

rise to a justified removal of a liquidator. (See *Deloitte & Touche AG v Christopher D. Johnson et al*. Also in *A M P Music Box Enterprises Ltd v Hoffman* [2002] EWHC 1899 (Ch), Neuberger J (as he then was) observed that it was impossible to identify every circumstance that might lead to a removal.)

135. Generally, the Court will prolong its gaze on the majority wishes of the unsecured creditors in an application for removal. In Adam Eyton Ltd, Re (1887) 36 Ch. D. 299, Cotton L.J. stated:

"*If the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean that all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the Court has the power to remove the present liquidator, and then of course to appoint some other person in his place*."

136. So, it follows that where the majority of unsecured creditors seek the removal of any liquidator on proven grounds of unfair bias or any other form impropriety, the most exceptional of circumstances would be required for the Court to refuse any such application. In this case, bias is one of the grounds relied on by both the Petitioner and the Company.

137. In cases, such as the present case, where an application for removal is also grounded on a reasonable loss of confidence in the liquidator, the Court will be careful not to remove a liquidator simply because it disagrees with a decision taken (See McPherson's Law of Company Liquidation (Second Edition) ("McPherson's") [para 8.046] citing *Shruth Ltd, Re* [2005] EWHC 1293 (Ch)).

138. The judgment of Malins V.C. in *Marseilles Extension Railyway and Land Co, Re* (1857) L.R. 4 Eq. 692 is cited in McPherson's for the principle that it is not necessary to prove misconduct or personal unfitness on the part of the liquidator since it is open to the Court, taking all circumstances into account, to find that on the whole it is undesirable for the liquidator to continue.

139. Of course, where the Court independently finds that a liquidator has fallen short or forfeited its entitlement to the Court's confidence, he or she will in all likelihood be removed.

140. Where a company under the threat of a petition makes a cross-application for the removal of liquidators, but seeking replacements by professional persons other than those put forth by the support of the majority of creditors, the Court must again have a very strong basis for preferring the wishes of the insolvent company over that of its creditors. After all, an insolvent company's interests are adverse to those of its creditors.

ANALYSIS AND DECISIONS

141. Before I examine the disputed issues, I will dispose of the uncontested application for a Letter of Request by this Court for recognition by the Hong Kong High Court. The legal principles are uncontroversial and have been recited most recently in my previous judgment in *Kelley (Trustee of the PCI Liquidating Trust) v Stevanovich and Ors* [2018] Bda LR 89. I am untroubled in deliberating this application as both the principle of comity and cross-border cooperation favour the granting of this application, which is common in cross-border insolvency cases.

142. In preamble to the remaining hard-fought applications, I note the absence of any real contention about the balance sheet insolvency status of the Company itself and the Company Group. Equally, there is no doubt raised on the evidence that the debt asserted in the Petition for HK$1,000,000,000.00 is in fact owed to the Petitioner. More so, no serious challenge has been mounted against the need for the Petitioner's cooperation in order to achieve the desired restructuring of the Group.

143. The disputed issues for my determination are as follows:

- Should the powers appointed to the JPLs be upgraded to full powers, thereby displacing the Board?

- Should the current JPLs be removed from their appointment by this Court of 12 March 2020? If so, should the Court replace them with the JPL-nominees proposed by the Creditors or those proposed by the Company?

- If this Court determines that the JPLs shall be removed, should they be remunerated for their fees and expenses prior to any discharge of duty?

Decision as to the Appointment of Joint Provisional Liquidators (s. 170(2))

144. I now turn to the disputed issue as to whether the Board should be displaced by full-powered provisional liquidators. The Petitioner's case on this application is anchored to the alleged misconduct of the Board.

145. Amongst the first complaints made by the Petitioner was the Company's failure or refusal to establish a Credit Committee. The Company's best-effort response was that one had in fact been established on 31 July 2019, albeit that no meetings were ever convened. The competing case put forth by the Company was that it nevertheless sought the Petitioner's consent in respect of certain transactions and refinancing measures and that Mr. Huang's seat on the

Board afforded the Petitioner the same level of access and input into the Company's operations as it would have had through its participation at Credit Committee meetings.

146. The immediate observation to be made is that Mr. Huang's representative capacity of the Petitioner on the Board was invoked by the Petitioner in exercise of its shareholder rights under the Company's bye-laws. The Petitioner's contractual rights as a creditor are embedded in the Facility Agreement and the CB Agreement as amended by the Deed of Amendment. Part of the rights assigned to the Petitioner as creditor, was to have a non-voting observer attend all directors' meetings with the same level of access to company documents as any other voting director. More crucially, the amended terms also inserted into the Facility and CB Agreements the requirement for a Credit Committee to be formed and operated in accordance with specified terms. The Credit Committee would have consisted of only 3 committee members, one of whom would have been appointed by the Petitioner.

147. Had the Credit Committee been properly active, the Petitioner's appointee would have attended bi-weekly and *ad hoc* meetings with Mr. Jamie Che and Mr. Tse Kam Fow *(an independent non-executive director of the Company)* to monitor the operation and financial status of the "the Material Companies" (as defined in the Facility Agreement, which I have in this Ruling referred to as "the Company" and "the Share Charge Subsidiaries"). More pertinently, the Petitioner's appointee was entitled to a veto right on the Credit Committee in respect of any decision for the Material Companies to engage in:

(a) *winding-up, liquidation, division, merger or consolidation of the Material Companies with any other person;*

(b) *any issuance of bonds of the Borrower exceeding HK$20,000,000, save for issuance of bonds which are subordinated to the Loan and Bonds;*

(c) *any purchase, sale, transfer or disposal of any Shares or assets of the Material Companies exceeding HK$20,000,000, save for those conducted under the Ordinary Course Of Business;*

(d) *any capital expenditure or capital commitment individually or in the aggregate in excess of HK$20,000,000 per financial year in any transaction (including but not limited to the acquisition, merger or disposal of Securities, assets or businesses, the establishment of joint venture enterprises and partnership enterprises);*

(e) *any change of financial accounts, accounting policy, and/or auditors of the Material Companies;*

(f) *save for extension and renewal of existing borrowings of the Group and any borrowings which are subordinated to the Loan and Bonds, any borrowing from banks and individuals (or incurring of indebtedness, including but not limited to bank loan, short term financing and supply chain financing) by the Material Companies exceeding HK$20,000,000;*

(g) *save for provision of Security, guarantee or indemnity in any form, creation of financial commitment, incurrence of actual or contingent liabilities, and the creation of Encumbrance over any asset in relation to any extension and renewal of existing borrowings of the Group, any provision of Security, guarantee or indemnity in any form, creation of financial commitment, incurrence of actual or contingent liabilities, and the creation of Encumbrance over any asset of the Material Companies exceeding HK$20,000,000;*

(h) *save for provision of any loan, guarantees or any form of financial assistance in relation to any extension and renewal of existing borrowings of the Group, providing any loan, guarantees or any form of financial assistance to any person exceeding HK$20,000,000;*

(i) *any future buyback of bonds, shares, rights, convertible bonds, convertible securities or equity linked securities by the Material Companies exceeding HK$20,000,000; and*

(j) *entering into any agreement to do any of the foregoing.*

148. Clearly, the 30 June 2019 Deed of Amendment provided that the Company was prohibited from approving or authorizing any of the above type transactions without the agreement of the Petitioner's appointee on the Credit Committee. Mr. Luthi, on behalf of Company, most skillfully sought to persuade this Court that Mr. Huang's role and access to information as a director of the Company was akin to the entitlements which would have been afforded to the Petitioner through an active Credit Committee. However, Mr. Robinson for the Petitioner quite rightly distinguished Mr. Huang's role as a director with a duty owed to the Company from the role of a creditor appointee on a Committee established to protect that creditor's rights.

149. Mr. Huang, who of note is neither a director nor a shareholder of the Petitioner, had no power as a director of the Company to exercise any veto rights (in addition to other unspecified rights under the provisions establishing a Credit Committee e.g. the financial approval procedure of the Share Charge Subsidiaries) which were only exercisable by the Petitioner's appointee on the Credit Committee as a matter of contractual right. After all, Mr. Huang was not placed on the Board to protect the Petitioner's creditor rights and any seeking of the Petitioner's consent for a select few transactions could not erase the Company's failure to engage in an active Credit Committee.

150. When the Company announced the Rights Issue the Petitioner was wrongly left powerless to exercise its veto rights in the absence of an active Credit Committee. This was worsened by the fact that not even part of the proceeds of the Rights Issue were applied to the debt owed to the Petitioner. This was in direct contravention of the terms of the Deed of Amendment. Any show by the Petitioner of incandescence against the Company, which certainly resonated through Mr. Robinson's relentless pursuit of the Petitioner's applications, was indeed to be expected.

151. Clearly the Company had a duty to obtain the approval of the Petitioner, via the Credit Committee route, before guaranteeing the HK$60,000,000.00 borrowed by FDG Kinetic on 5 September 2019 and thereafter advancing the HK$30,000,000.00 interest free loan 12 March 2020 (having been served with the Petitioner's statutory demand for repayment only 3 months prior on 9 December 2019 and the Petition having been filed with the Court days prior to the loan on 5 March 2020). This breach of the Petitioner's rights might have been mitigated had any portion of the HK$51,000,000.00 proceeds paid to Company (for an overdue promissory note) been used to make repayments on the debt owed to the Petitioner. Of course, matters descended from bad to worse when the Petitioner was made to swallow the Company's announcement of a purchase offer for the sale of FDG Kinetic notwithstanding that 74.56% of FDG Kinetic is owned by the Petitioner's Share Charge Subsidiaries, Sinopoly Strategic and Union Grace.

152. While I have given considerable attention to the competing arguments on the commercial sensibility of these transactions, I accept that the overriding point is that the transactions were made without the Petitioner's approval in breach of the Petitioner's Credit Committee contractual rights, commercially sensible or not, and that the HK$30,000,000.00 interest free loan was a post-Petition transaction.

153. The 26 September 2019 Deed of Assignment under which the Company assigned the entire of its shareholder rights in FDG Strategic as security for the loan advanced by Fortune Team is another breach of the Petitioner's creditor rights under the Deed of Amendment. Against this background, it is difficult to wholly disregard the evidence that Fortune Team is partly owned and operated by Mr. Che's mother- a fact which was far less than apparent in Mr. Che's Second Affirmation [para 102] where he stated that his mother was not a holder of any directorship appointments in any loan counter-party company other than China Medical. I am reminded that it was not until Mr. Che's Third Affirmation [para 13], that he was clear in stating for the first time that his mother is and was in 2018 one of the directors of Fortune Team. So, it was reasonable and unsurprising that the Petitioner came to label the Company's payments on the Fortune Team loan (HK$80,000,000 in principal and an additional sum of HK$40,000,000 representing interest) as preferential. These loan transactions have led to the receivership of FDG Kinetic and FDG Strategic which has 82.2% ownership over Chanje, where all of the

high hopes for restructuring are pinned. Effectively, FDG Strategic and Chanje are at the mercy of Fortune Team.

154. Presuming for a moment that the Chanje Transaction is indeed infused with the scent of prosperity, I must still determine whether there is any reasonable prospect of a scheme of arrangement under the direction and control of the Board. Clearly, not. It is accepted by all parties that the Petitioner has, at the very least, the contractual power under the Deed of Amendment to occlude a restructuring. This is plainly so on the evidence. Further, the Petitioner holds itself out to have over 50% of the voting power amongst the unsecured creditors and a stronghold in respect of any scheme of arrangement which needs to be sanctioned by the Court for a restructuring. I find that the Company's evidence that the debt owed to the Petitioner accounts for only 33% of the total indebtedness of the Group is unhelpful as the only creditors who would be entitled to vote in a scheme of arrangement in these Court proceedings, as they currently stand, would be the creditors of the Company and not its subsidiaries.

155. Mr. Luthi queried the extent to which the Petitioner could be classified as an unsecured creditor. In reality, however, the Petitioner's share charge security is limited to the questionable value of the Share Charge Subsidiaries. Stated more grimly, the Petitioner's security is not so secure as it is contingent on the uncertain viability of those insolvent manufacturing entities. For these reasons, I find it right to apply the *Re Up Energy* reasonable prospects approach to assessing the likelihood of securing a section 99(2) unsecured creditors majority of 75%. In my judgment, this weighs in favour of the Petitioner's case.

156. Yet, my assessment ought not to end here as I should also consider the likely commercial consequences which would burden the Company if this Court appoints provisional liquidators under section 170(2). It seems to me, however, that the inevitable position is that the Company would not thrive without the agreement and cooperation of the Petitioner in a restructuring. And the accepted reality is that it is a near certainty that the Company will remain insolvent without a successful restructuring. Therefore, my finding in favour of the Petitioner's case for the appointment of provisional liquidators is inescapable as this is clearly in the best interests of the entire class of the Company's unsecured creditors, who by majority support the Petitioner's application.

Decision as to the Replacement of the Current JPLs

157. This brings me to the Petitioner's Replacement Summons which is also supported by a majority of the creditors. Additionally, the Company seeks for the JPLs to be removed and replaced with its own nominees rather than those preferred by the Petitioner.

158. Where a removal application is being made by an insolvent company, the Court's approach should be most cautious, to the point of trepidation. As officers of the Court, provisional liquidators are expected to consistently be guided by and act in accordance with the golden rule that the collective body of the unsecured creditors shall always be given priority and the greatest advantage. This will likely be far removed from the focus of an insolvent company who has been dodging its outstanding debts for as long as possible before being thrown into the fire of compulsory liquidation proceedings. For this reason, only the most extreme and exceptional circumstances would draw me to ignore a strong collective view of a creditor majority in favour of the wishes of a Board of Directors on the brink of displacement.

159. With that said, a closer look into the conduct of the JPLs and the likely commercial impact of removing the current JPLs is warranted. The Court's powers to remove a liquidator under section 173(1) of the Companies Act 1981 are broad and limited only to the extent that cause must be shown. Cause does not necessarily signify misconduct, incompetence or any other form of fault since the Court is required to look at all circumstances in identifying the decision which best protects the interests of the stakeholders. Of course, it is also important for the Court to avoid the removal of its well-performing officers merely because any one party seeks to demand it.

160. A belated replacement of the JPLs would usually give rise to real costs concerns and its impact on an already insolvent company. However, no real dollar sign objections in this case have been raised; not by the Company (who also seek a replacement) and not even by the JPLs themselves. In this case four out of five known unsecured creditors are prepared for the Company to expend that which is necessary for the appointment of new provisional liquidators. (Notably, the fifth creditor has not objected to the application but appears to have taken a neutral stance by abstaining from voting at the *ad hoc* Credit Committee meeting.) Given the level of expressed creditor support, I have no reason to refuse a replacement of the JPLs for any commercial purpose.

161. I now turn to the grounds of 'reasonable loss of confidence' and 'bias' which are argued by both the Petitioner and the Company. I have already rehearsed the examples of complaint in great detail in providing a summary on the complaints against the JPLs.

162. There is no room for debate that the professional integrity of Mr. David Yen was brought into serious disrepute by the scathing results of the Hong Kong Court's near six-month deliberation and 66-page decision in the *Allied Ever Holdings Limited* 2017 case. Of particular concern to me is that this this Court was not previously made aware of Mr. Yen's judicial lashing. I accept Ms. Zhai's evidence that she had no prior knowledge of the decision and I am grateful to the Company for having brought the decision of To J to my attention. In my strong view, the findings of the Hong Kong Court were so incredibly disturbing and impactful on the

integrity of Mr. Yen's role as a liquidator, that the decision should be part of the full and frank disclosure required to be made to any Court before a decision is made on his appointment as a liquidator in new proceedings. The only caveat I foresee arises on a complete reversal of To J's findings on further appeal from the Hong Kong Court of Appeal. However, if and until such a reversal occurs, To J's Decision ought to be disclosed to any Court contemplating Mr. Yen's appointment as a provisional liquidator.

163. Mr. Taylor on behalf of the JPLs sensibly argued that the discontent and accusations of bias from both the Petitioner and the Company is proof in and of itself that the JPLs were indeed acting neutrally without fear or favour to either side. However, moving beyond the complaints of bias, I understand the frustration most ardently conveyed through Mr. Robinson's submissions that the JPLs had a duty to take steps to address (i) the Company's numerous and blatant breaches of the Petitioner's contractual rights under the Deed of Amendment; (ii) the belatedly disclosed familial link between Mr. Che's mother and Fortune Team especially and (iii) the post-Petition transactions.

164. On 9 March 2020 the Company was served with the Petition. On 10 March 2020 the Company filed an application for a Validation Order in respect of prior dispositions from the Rights Issue. On 12 March 2020 I appointed the JPLs with the controversially drafted 'light touch' powers under s. 170(3). It was on this very same day that the Company made another disposal and transferred the HK$30,000,000.00 interest free loan to FDG Kinetic. There was obvious cause for alarm here.

165. In assessing whether there is cause to remove the JPLs, I should first consider the fairness of the Petitioner's complaint that the JPLs did not exercise their powers to suspend or remove the Board under paragraph 14(b) of my 12 March 2020 Order. At the 13 May hearing before me, Mr. Taylor expressed doubt as to whether it was within the Court's jurisdiction to confer on provisional liquidators the power to remove a board of directors without further reference to the Court. In support of this concern, Mr. Taylor subsequently referred this Court to the *obiter* remarks of Hargun CJ in ***Re Agritrade Resources Limited*** [2020] SC (Bda) 28 Com (17 June 2020) at [29] where the learned Chief Justice agreed, subject to further argument, that the Scheme of Part XIII of the Companies Act 1981 did not appear to contemplate such an enlargement of the powers of provisional liquidators.

166. I have refused Mr. Taylor's request for the filing of supplemental submissions on this particular proposition because the question is not dispositive of the issues for resolve in this case. However, I do accept that it is difficult to envisage how a provisional liquidator's power to remove a board of directors, without the specific direction of the Court to do so, might be described as 'limited' in any way at all. It seems to me, only with the benefit of hindsight of Mr. Taylor's submission, that paragraph 14(b) is arguably a disguised *ultra vires* conferment

of suspended full-powers. Given the circumstances, I accept Mr. Taylor's urging for this Court not to assess the application for the removal of the JPLs on any notion that the JPLs had a lawful power to suspend or remove the Board of their own motion under paragraph 14(b).

167. Notwithstanding, I have found that the Company was blatant in its *ask-not-for-permission-but-forgiveness* expense strategy. The fact of the HK$30,000,000.00 transfer is merely observed by the JPLs in their First Report of 6 April 2020 without any expression of concern or the expression of any intent to seek the voidance of the post-Petition transfer. It was not until after a month from having been appointed that the JPLs called for the Board to take steps seeking the return of the HK$30,000,000.00 sum. Having written to the Board on 14 and 21 April 2020 without achieving the desired result, the JPLs had to take it upon themselves to issue a demand letter to SHINEWING on 5 May 2020 for the said loan sum to be held on trust for the benefit of the Company. However, to date, the HK$30,000,000.00 sum appears to be entirely out of the Company's reach.

168. One could, therefore, grasp how there came to be a relationship breakdown between the general body of unsecured creditors and the JPLs when the JPLs seemed not to accept or suspect that the Board was engaged in efforts to dissipate Company assets through these related loan transactions. Unquestionably, the JPLs were aware that there were serious allegations made under the Jingang Derivative Action that Mr. Che's mother was associated with and/or controlled Join View, SHK Finance and Fortune Team. This coupled with the fact that substantial repayments had been made on the Fortune Team Loan (in addition to the transfer of sums to Chanje) while the Company professed to be unable to repay any part of the debt owed to the Petitioner provided a sufficient basis for real concern that the Board was operating in conflict of the collective interests of the Company's unsecured creditors, bearing in mind that by this point; the Company had made post-Petition disposals of approximately HK$52,800,000.00 from the HK$101,000,000.00 total in Rights Issue proceeds.

169. Under these circumstances, it was reasonable for the Petitioner and the other unsecured creditors to expect visible steps from the JPLs in furtherance of their call for the voidance of at least some of the post-Petition disposals. The same point applies to the Petitioner's grievances arising out of the contractual breaches to the Deed of Amendment, notwithstanding any holding application from the Company for a Validation Order. After all, the Petitioner would likely have at least 50% of the voting stronghold amongst the unsecured creditors given the balance sheet insolvency of the subsidiaries over which it has share charges.

170. Much ado was given to the *ad hoc* status of the Credit Committee. However, the undeniable value in its formation by the JPLs was the insight it offered into the majority views of the unsecured creditors. This is no less true on account of the Credit Committee being *ad hoc* and it is no less true on account of the Petitioner fighting this litigation with the loudest voice in

protection of its own interests. The *ad hoc* Credit Committee was formed at the critical point when the Board was visibly on the brink of displacement and the hearing of the Petition pending. Irrespective of whether the JPLs were inappropriately absent from the 19 and 23 April 2020 meetings, it would have been reasonable for the creditors to expect for the JPLs to respond to their plea for the JPLs to take every step towards a remedy against the Company's unlawful disposal of key assets. This is likely why the JPLs' expressed endorsement of the Board's conduct led to the creditors' loss of confidence in the JPLs.

171. The *ad hoc* Creditors Committee voted in favour of the JPLs' exercise of paragraph 14(b) of the 12 March 2020 Order. While I have accepted that there is cause for reticence as to whether the Court had jurisdiction to make such an order and that this was likely in the minds of the JPLs; the unsecured creditors could have reasonably expected for the JPLs to either exercise their powers under paragraph 14(b) or to seek clarity from the Court on the lawfulness of paragraph 14(b).

172. From the creditors' perspective, the JPLs played a waiting game during a critical period in which Company assets were being unlawfully squandered leading to the regrettable receivership of FDG Strategic. Fortune Team now has the benefit of a fixed and floating charge over 75% of the issued share capital and assets of FDG Strategic. Fortune Team's security charges ensue from the 26 September 2019 Deed of Assignment under which the Company assigned all of its shareholder rights in FDG Strategic as security for the Fortune Team loan. Consequently, Chanje which is 82.2% owned by FDG Strategic, is now subject to the external control of Fortune Team. The 26 September 2019 Deed of Assignment is a clear breach of the Deed of Amendment. This particular breach gravely impacted the prospects of the Chanje transaction. For these reasons, I am unable to agree with Mr. Taylor's submission that it would have been unreasonable for the JPLs to look into the rear view mirror at the Board's previous conduct as part of the course ahead towards a restructuring.

173. I also find that the JPLs were inconsistent in their reported conclusions and recommendations as to the need to displace the Board. In one breath, Mr. Yen, speaking for the JPLs, recognized that the disposal of Chanje will require the approval of the unsecured creditors and he questioned whether a successful restructuring proposal could be achieved with the Board's breakdown in relationship with the creditors. He even went so far as to state that it was the JPLs' belief that the granting of expanded powers to permit them to run the day-to-day operations of the Company would be in the best interests of the Company and its creditors. He said this would facilitate the expeditious development and implementation of a restructuring proposal: "*The JPLs have not taken a view as to the appropriateness of the Full Powers Application. Independently, however, the JPLs do believe that the granting of expanded powers to permit them to run the day-to-day operations of the Company would be in*

the best interests of the Company and its creditors and would facilitate the expeditious development and implementation of a restructuring proposal."

174. Remarkably, however, the JPLs also reported that the Board is not operating against the best interests of the Company and that the Board does not pose any real risk or jeopardy to the restructuring of the Company. Mr. Yen deposed; *"... The JPLs have scrutinized the conduct of the board carefully, and are not aware of any misconduct which would justify their removal or the suspension of their powers. The Petitioner plainly disagrees, and it is entitled to that view, but it simply does not correspond with the JPLs' actual knowledge of the board's conduct."*

175. It is incomprehensible how these contradictory views were expressed without so much as an explanation by the JPLS to the Court on how these opposing conclusions might be reconciled.

176. These are the reasons which underlie my decision that there is cause for the Petitioner's reasonable loss of confidence in the JPLs and that they shall be removed. With that said, I am unreserved in my findings that all of the costs reasonably incurred by the JPLs shall be paid without undue delay. The current JPLs were appointed as officers of the Court to assist the Court. Haven fallen short of a finding of misconduct (notwithstanding the inappropriate lack of disclosure in making this Court aware of the *Allied Ever Holdings* decision in respect of Mr. Yen) I see no reason why they ought not to be promptly paid for their services and reasonable expenses.

CONCLUSION

177. While I accept that the Court's jurisdiction to make an order in the terms of paragraph 14(b) of the 12 March 2020 Order is questionable; I have found in favour of the Petitioner's application for the appointment of provisional liquidators pursuant to section 170(2) of the Companies Act 1982. Accordingly, the Board of Directors of the Company shall be displaced for the appointment of full-powered Joint Provisional Liquidators.

178. I also grant the Petitioner's application for the immediate appointment of Ms. Wing Sze Tiffany, WONG and Ms. YEUNG Mei Lee of Alvarez & Marsal Asia Limited and Mr. Mathew Clingerman of KRyS & Associates (Bermuda) Ltd.

179. The outgoing JPLs shall be remunerated for all of their reasonably incurred costs and expenses no later than within 30 days of receipt of any invoice. Any dispute as to whether such costs or expenses were reasonably incurred shall be resolved by this Court on a summons application to be filed within 30 days of receipt of any invoice for payment.

180. A Letter of Request shall be issued by this Court for recognition by the Hong Kong High Court.

181. Any Order shall be drawn by the Petitioner containing the terms decided under this Ruling.

182. Any party wishing to be heard on costs may file a Form 31P in the next 21 days for the application to be determined on the papers.

Dated this 20th day of July 2020

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THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT