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HCCW 880/2001

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO. 880 OF 2001**

IN THE MATTER of MONEY
FACTS LIMITED

and

IN THE MATTER of the Companies
Ordinance (Cap. 32)

AND

HCCW 246/2002

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO. 246 OF 2002**

IN THE MATTER of FONFAIR
COMPANY LIMITED

and

IN THE MATTER of the Companies
Ordinance (Cap. 32)

(Heard Together)

Before: Hon Kwan J in Court

Dates of Hearing: 19-21, 24-27 November and 1 December 2003

Date of Handing Down of Judgment: 2 February 2004

J U D G M E N T

Introduction

1. This is the hearing of two winding-up petitions on the just and equitable ground. They were ordered to be heard together as there are common issues of fact and law in these petitions. They are another episode in the long-running disputes between Mr Leung Yat Tung (“YT Leung”) and his elder brother Mr Leung Yuet Keung (“YK Leung”).

2. Both petitions are presented by Harbour Front Limited (“Harbour Front”). The first petition, being HCCW No. 880 of 2001, was presented on 16 August 2001. This is in respect of Money Facts Limited (“Money Facts”). The only respondent named in the petition is YK Leung. The subsequent petition, being HCCW No. 246 of 2002, was presented on 5 March 2002. It is in respect of Fonfair Company Limited (“Fonfair”). The 1st respondent is Money Facts and the administrators of the estate of Mr Leung Man Kwong, deceased are named as the 2nd respondent. The late Leung Man Kwong, who had passed away in 1966, was the father of the brothers and the founder of Universal Dockyard Limited (“Universal Dockyard”).

3. Mr Kenneth Chan and Mr David Chum appeared for Harbour Front in both proceedings. Mr Anthony Ismail appeared for YK Leung in

HCCW No. 880 of 2001 and for Money Facts in HCCW No. 246 of 2002. The 2nd respondent in HCCW No. 246 of 2002 did not take part in the proceedings.

The companies

4. It would be convenient to start with the corporate facts of the companies concerned.

5. Harbour Front was incorporated in the British Virgin Islands. Prior to the bankruptcy order made against YT Leung on 1 March 2001, he was the sole shareholder, sole director and the company secretary of Harbour Front. After YT Leung was adjudged bankrupt, his wife Mrs Irene Leung Yu Oi Ling (“Irene Leung”) became a director of Harbour Front. YT Leung claims he has ceased to be the sole shareholder.

6. Money Facts was incorporated in Hong Kong on 21 May 1991 and was acquired by YK Leung and YT Leung in September 1991. A total of 7,900 shares have been allotted, of which 3,950 shares have been allotted to YK Leung. The remaining 3,950 shares were allotted to YT Leung until he transferred them to Harbour Front in February 1998 with the consent of YK Leung in circumstances that I will go into. The only asset of Money Facts is a majority shareholding of 65.79% in Fonfair. Money Facts has not carried on any other business. Until the events complained of after YT Leung was adjudged bankrupt, YK Leung and YT Leung were the only directors.

7. Fonfair was incorporated in Hong Kong on 3 July 1980. The only material asset of Fonfair is Yau Tong Marine Lot Nos. 2, 3 and 4

(“the Yau Tong Property”), which has been held by Fonfair as the registered owner since October 1980 when it was acquired from the administrators of the father’s estate. Fonfair used to be a wholly owned subsidiary of Universal Dockyard until the flotation of UDL Holdings Limited (“UDL”) on the Stock Exchange of Hong Kong in September 1991. Fonfair was then spun off from Universal Dockyard to keep the Yau Tong Property in the hands of the Leung family. Since September 1991, Fonfair had leased the Yau Tong Property to Universal Dockyard and it was occupied by the companies in the UDL group until vacant possession was recovered by Fonfair in the latter part of 2002. Other than letting out the Yau Tong Property, Fonfair did not appear to have carried on any business activity.

8. According to the latest annual return of Fonfair dated 3 July 2003, the authorised share capital is HK\$10,000.00 divided into 1 million shares of HK\$0.01 each, and the issued share capital is made up of 12,008 ordinary shares and 987,992 non-voting deferred shares. The ordinary shares are held as follows according to the latest annual return: 7,900 shares by Money Facts (65.79%), 3,958 shares by Harbour Front (32.96%; there is an issue whether Harbour Front was registered in the register of shareholders), and 150 shares by Mr Leung Yuet Wah (“YW Leung”) for the estate of Leung Man Kwong (1.25%). All the non-voting deferred shares are held by Universal Dockyard. Before YT Leung was adjudicated bankrupt, there were four directors in Fonfair. They were YK Leung, YT Leung, Fire Full Investment Limited (“Fire Full”) and Marcon Investment Limited (“Marcon”). Fire Full was a company controlled by YT Leung and Marcon was and is controlled by YK Leung.

The issues and the witnesses

9. The principal relevant issues in dispute in these proceedings may be grouped as follows:

- (1) whether Money Facts and Fonfair were formed to operate as quasi-partnerships between YT Leung and YK Leung;
- (2) if so, whether there is quasi-partnership between Harbour Front and YK Leung after YT Leung's shares in Money Facts and Fonfair were transferred to Harbour Front;
- (3) whether Harbour Front has locus standi to present the petition in HCCW No. 246 of 2002 in establishing to the satisfaction of the court that it was registered in Fonfair's register of members for at least six months during the 18 months before the commencement of the winding up;
- (4) whether Harbour Front was wrongfully excluded by YK Leung from the control and management of Money Facts and Fonfair or whether YK Leung was justified in refusing to appoint Harbour Front or its nominee as a director of Money Facts and Fonfair in view of section 156 of the Companies Ordinance, Cap. 32 and/or section 49 of the Bankruptcy Ordinance, Cap. 6 and/or for some other good reason;
- (5) whether Harbour Front could rely on other grounds to wind up Money Facts and Fonfair not raised in the petitions, namely, that there was frustration of the three purposes for which Money Facts was set up and that there was loss of mutual confidence based on lack of probity in the conduct of the affairs of Money Facts and Fonfair by YK Leung, and, if so, whether these grounds are established;

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(6) if the reliefs to wind up Money Facts and Fonfair on the just and equitable ground should be refused because Harbour Front has not come to court with clean hands; and

(7) if the relief to wind up Money Facts should be refused because there is an alternative remedy available.

10. Four witnesses gave evidence for Harbour Front. They were YT Leung, Irene Leung, Mr Chan Kim Leung Bobby (“Bobby Chan”) and Ms Foo Wing Yan Polly (“Polly Foo”). Bobby Chan was a director of UDL and is a shareholder and director of Fire Full. Polly Foo was a former employee of Firm Winner Trading Limited until May 2001 and was entrusted by YT Leung with the responsibility of looking after the accounts of Fonfair.

11. On the opposite side, YK Leung gave evidence. He also called Mr Wong Sum Yuen (“SY Wong”), who was a director of UDL until he resigned in March 2000 and was appointed by YK Leung as a director of Money Facts on 9 March 2001.

12. All these witnesses have filed affirmations in these proceedings, which have been ordered to stand as their evidence in chief. I should mention that much of the evidence in the affirmations of YT Leung, Irene Leung and YK Leung is repetitive, discursive, argumentative, and may be categorised as legal submissions. In the affirmations of YT Leung, Irene Leung, Bobby Chan and Polly Foo, they even sought to re-open matters that were determined against YT Leung and Universal Dockyard in previous legal proceedings, a position which Mr Kenneth Chan has not sought to maintain before me.

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13. In the course of cross-examination, YT Leung was confronted with a number of untrue or misleading statements he had made in his affirmations in other proceedings and in other documents. It would appear from his replies, when confronted with such statements, that he has a cavalier attitude towards truthfulness. He is hardly an impressive witness. Irene Leung has tried to paint a picture that she has an independent mind and was not under the influence of YT Leung when she carried out her duties as a director of various companies after YT Leung was made bankrupt. I do not think she has conveyed that impression successfully. Bobby Chan and Polly Foo merely have subsidiary roles to play in these proceedings, in view of the concession at the trial that Harbour Front would not seek to re-open certain findings made against YT Leung, Universal Dockyard and associated entities in other proceedings.

14. YK Leung strikes me as a meticulous and scrupulous person and has not embellished his evidence or over-stated his case when his explanation was sought on various matters. Similarly, SY Wong has given his evidence in a straightforward manner. I accept that, by and large, YK Leung and SY Wong are truthful witnesses of fact.

The genesis of Money Facts

15. Harbour Front’s case for winding up the companies on the just and equitable ground is founded on the assertion that there was an initial understanding between YT Leung and YK Leung that Money Facts would be operated as a quasi-partnership and this is how the assertion was put in the petitions:

“(1) [Money Facts] would operate as a quasi partnership vehicle by means of and through which [YK Leung] and [YT

- Leung] would have *joint control* of the majority holding of the issued share capital of [Fonfair] vested in [Money Facts]
- (2) neither would become entitled to exercise sole control of [Money Facts] at board level or to exercise board control of [Money Facts] (with or without the participation of others) to the exclusion of the other
- (3) each of them would be entitled to exercise an *equality of management control* over the majority holding in [Fonfair] vested in [Money Facts]”. (emphasis supplied)

16. It is therefore of crucial importance to ascertain the circumstances in which Money Facts was acquired and what agreement or understanding was reached between YK Leung and YT Leung at the time. This was connected with the acquisition by YT Leung of the shares of Universal Dockyard, which was then the holding company of Fonfair, from YK Leung and their four siblings, YW Leung, Mr Leung Yuet Hoi, Ms Leung Yuet Han and Ms Leung Yuet Chuen.

17. The six children of Leung Man Kwong had all received shares in Universal Dockyard as part of their inheritance. Prior to September 1990, their shareholdings were as follows: YT Leung held 2,117 shares, YK Leung held 1,975 shares, YW Leung held 1,975 shares, Leung Yuet Hoi held 1,049 shares, Leung Yuet Han held 2,371 shares and Leung Yuet Chuen held 2,371 shares. The remaining 150 issued shares in Universal Dockyard were not distributed and were held by the estate of the father. The authorised share capital of Universal Dockyard at the time was HK\$12,500,000.00 divided into 12,500 shares of HK\$1,000.00 each, of which 12,008 shares were issued and paid up.

18. On 5 June 1990, an agreement (“the Share Sale Agreement”) was entered into between YT Leung and YK Leung for the sale of YK

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Leung's shares in Universal Dockyard to YT Leung for the price of HK\$11,257,500.00. It was provided in clause 2.02 that YT Leung should not be obliged to complete the purchase unless his aggregate shareholding in Universal Dockyard should exceed 50% of all issued shares on completion. By clause 4.04, YT Leung undertook to cause Universal Dockyard to distribute share holding in Fonfair to all existing shareholders in Universal Dockyard proportional to their respective shareholdings in Universal Dockyard within two years, subject to the grant of a lease of the Yau Tong Property by Fonfair to Universal Dockyard. Upon this event happening, YT Leung was to afford YK Leung the opportunity to acquire 3,950/12,008 of the total issued shares in Fonfair at a price of HK\$8,295,000.00, which could be set off against outstanding payments for the purchase price of YK Leung's shares in Universal Dockyard.

19. Completion under the Share Sale Agreement duly took place within three months, as YT Leung was able to acquire the shares of YW Leung, bringing his aggregate shareholding in Universal Dockyard to just over 50% (thereby meeting the requirement in clause 2.02 of the Share Sale Agreement), on completion of the purchase of shares from YK Leung and YW Leung. On 13 September 1990, YK Leung's shares in Universal Dockyard were transferred to YT Leung. On the same day, YW Leung's shares in Universal Dockyard were also transferred to YT Leung.

20. On the same day of the Share Sale Agreement, another agreement ("the Shareholders Agreement") was made between YT Leung and YK Leung for the establishment of a new company (referred to as "newco" in the Shareholders Agreement; Money Facts became newco when it was acquired in September 1991) in the event that they should become shareholders in Fonfair pursuant to the Share Sale Agreement, to

hold the 3,950 shares owned by YK Leung in Fonfair and the 2,117 shares owned by YT Leung in Fonfair, with the proviso that YT Leung should have the option to inject a further 1,833 shares in Fonfair into newco (to match the amount of shares in Fonfair injected into newco by YK Leung) to bring the total holding of newco in Fonfair to 7,900 shares.

21. Other material terms of the Shareholders Agreement were as follows:

- (1) newco was to buy the 3,950 shares in Fonfair from YK Leung and the 2,117 shares from YT Leung at HK\$2,100.00 per share, such price to be raised by newco by external borrowing or shareholders' loans or by both methods;
- (2) newco was to issue initially a total of 6,067 shares of HK\$1.00 each, to be offered at par to YK Leung as to 3,950 shares and to YT Leung as to 2,117 shares. In the event that 1,833 shares in Fonfair were injected into newco by YT Leung, a further 1,833 shares were to be issued and offered at par to him;
- (3) YK Leung and YT Leung agreed not to cause newco to issue further shares without their mutual consent;
- (4) newco was to be "operated as a company to:
 1. ensure as the majority shareholder in [Fonfair], that the rental and other incomes received by Fonfair are properly administered and that after reasonable provisions for expenses such incomes are distributed to the shareholders of Fonfair;
 2. ensure as the majority shareholder in [Fonfair], that Fonfair shall pursue and negotiate any future

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development plan and other business to safeguard and maximize the interest of Fonfair shareholders;

- 3. safeguard and maximize the interest of [YK Leung] and [YT Leung] in [Fonfair]”;

(I shall refer to the above objects as “the three purposes”.)

- (5) YK Leung and YT Leung as sole shareholders in newco should cause themselves to be elected as “the only two directors in newco” and both directors should not be subject to rotation;

- (6) no shares in newco should be transferable to any other person without the consent of the other shareholder;

- (7) in the event that one of the shareholders in newco should decide to sell his shares, he should be allowed to do so only after two years had lapsed from the day of the Shareholders Agreement and the following procedure should be followed:

the intention of the shareholder who wished to sell should be notified to the other shareholder with the price and terms of the sale and within three months of receiving such notice, the other shareholder might elect to:

- 1. agree to the price and terms offered by the selling shareholder and buy in his own name or through a nominee, the shares from the selling shareholder;

or

- 2. offer his shares to the selling shareholder at the same price and terms, in which event the selling shareholder should be obliged to buy those shares at that price and terms; or

3. give his consent for the selling shareholder to sell his shares to a third party;

(8) YK Leung and YT Leung agreed to negotiate and execute such further and other documents and instruments and to do such and further things as might be necessary to implement and carry out the intent of the Shareholders Agreement; and

(9) the Shareholders Agreement was expressed to inure to the benefit of and be binding upon the parties thereto and their respective heirs, administrators, executors and permitted assigns.

22. On 7 May 1991, the shares of Leung Yuet Hoi, Leung Yuet Han and Leung Yuet Chuen in Universal Dockyard were all transferred to YT Leung. Thus, by that date, YT Leung had acquired all the shares of his siblings in Universal Dockyard, and was holding a total of 11,858 shares, with the remaining 150 shares held by the estate of the father.

23. On 3 September 1991, a deed of agreement and release (“the Deed of Agreement and Release”) was entered into by YK Leung and YT Leung whereby it was provided inter alia that YK Leung and YT Leung should jointly acquire a shelf company in the name of Money Facts Limited and each was to take up 3,950 shares in Money Facts, that they should be the first directors of Money Facts and should cause the articles of association of Money Facts to be amended in the manner pursuant to the provisions of the Shareholders Agreement. It was further provided that YT Leung should cause and procure at his own costs and expenses that 7,900 shares in Fonfair be transferred to Money Facts to the intent that Money Facts would be holding 7,900/12,008 of the issued share capital of Fonfair.

In consideration of the above, YK Leung was to pay YT Leung HK\$3,689,736.00, which was to be set off against part of the outstanding balance of the purchase price that YT Leung should pay for the shares of YK Leung in Universal Dockyard.

24. Money Facts was duly acquired by YK Leung and YT Leung and shares were allotted to them in accordance with the above agreements. Pursuant to the Deed of Agreement and Release, a special resolution was passed on 5 September 1991 to amend the articles of association of Money Facts as follows:

- (1) by the new article 24, no shares of Money Facts shall be transferred to any other person without the unanimous consent of YK Leung and YT Leung and not until a period of two years commencing from 5 June 1990 shall have lapsed;
- (2) by the new article 25, any member may transfer all or any of his shares subject to the restrictions prescribed thereunder, which is in the manner as provided in the Shareholders Agreement set out above;
- (3) the existing articles 79, 81 and 83 to 85 were deleted; the old article 81 had provided that the shareholding qualification for directors may be fixed by the company in general meeting, and unless and until so fixed no qualification shall be required; the old article 83 had provided that the directors shall have power at any time, and from time to time, to appoint any person to be a director, either to fill a casual vacancy or as an additional director; the old article 84 had provided that the company may by special resolution remove any director before the expiration of his period of office; and the old article

85 had provided that the company may by ordinary resolution appoint another person in place of a director removed from office under the old article 84 and may appoint any person to be a director either to fill a casual vacancy or as an additional director;

- (4) by the new article 81, unless and until otherwise determined by the company the number of directors shall be two;
- (5) by the new article 82, the first directors shall be YK Leung and YT Leung;
- (6) by the new article 83, the first directors shall not be subject to retirement by rotation; and
- (7) the existing article 96 was deleted and replaced by a new article 96; the old article 96 had provided inter alia that the office of director shall be vacated if the director becomes bankrupt or resigns his office by notice in writing; by the new article 96, the office of director shall be vacated if the director ceases to be a shareholder of the company.

25. On 6 September 1991, the articles of association of Fonfair were amended to provide for the respective rights of the holders of ordinary shares and of non-voting deferred shares. Suffice it to say that I do not need to be concerned with the latter category of shareholders in Fonfair in the present proceedings. As mentioned earlier, all the non-voting deferred shares in Fonfair are held by Universal Dockyard. Universal Dockyard was ordered to be wound up by the court on 9 June 2003 in HCCW No. 663 of 2002 upon a creditor's petition presented by Fonfair based on a judgment debt for arrears of rent and mesne profits in HCA No. 1886 of 2001 obtained in circumstances that I will deal with.

26. On or about 4 October 1991, YT Leung procured 7,900 shares in Fonfair to be transferred to Money Facts. As to the remaining issued shares in Fonfair, 3,958 shares were held by YT Leung and 150 shares were held by the estate of the father.

The transfer of shares to Harbour Front

27. On 13 February 1998, YT Leung sought YK Leung's consent to transfer his 3,950 shares in Money Facts to Harbour Front. This was done by an urgent fax of that date from a staff of UDL to YK Leung enclosing the minutes of a directors' meeting of Money Facts approving the transfer of YT Leung's shares in Money Facts to Harbour Front, the minutes of a directors' meeting of Fonfair approving the transfer of 3,958 shares in Fonfair from YT Leung to Harbour Front (the transfer of shares in Fonfair is not subject to similar restrictions as prescribed in Money Facts), and a letter of consent of YK Leung to the transfer of the shares in Money Facts to Harbour Front pursuant to article 25(b) of the articles of association. YK Leung was requested to sign and return the consent letter before lunch that day so that the staff could arrange for the documents to be stamped.

28. YK Leung responded by a fax of the same day to YT Leung stating that on the basis that his consent was required urgently, he had signed the consent letter and faxed it to the staff. He went on to state that for the avoidance of doubt and as a condition for his consent, he would ask YT Leung and Harbour Front to confirm Harbour Front's agreement to be bound, as a shareholder of Money Facts, by the provisions in the Shareholders Agreement. YT Leung and a duly authorised representative of Harbour Front were asked to countersign the fax of YK Leung to signify

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their acceptance of that condition. YT Leung subsequently countersigned the fax on his own behalf and on behalf of Harbour Front to signify the acceptance of both to the condition imposed by YK Leung. In the notice of sale which was served by YT Leung on YK Leung pursuant to article 25(a), it was stated that YT Leung had offered to sell all his shares in Money Facts at a price of HK\$1.00 per share and that YK Leung was at liberty to adopt one of the three alternatives under article 25(b). It is not in dispute that the notice of sale was not a genuine offer, as the letter of consent was prepared on the basis that YK Leung was to give his consent for YT Leung to transfer his shares to a third party, namely, Harbour Front.

29. YT Leung executed bought and sold notes and instruments of transfer in favour of Harbour Front in respect of his shares in Money Facts and Fonfair dated 13 February 1998. These documents were stamped in February 1998. Harbour Front was registered as a shareholder of Money Facts. YK Leung takes issue in these proceedings if Harbour Front was registered as a shareholder of Fonfair for the reason that I shall come to. It is not in dispute that not long after the transfer of shares to Harbour Front was effected, and from March 1998 onwards, the financial difficulties of the UDL group had worsened, as petitions for winding up were presented against UDL and several of the main operating subsidiaries.

30. On 20 April 1998, article 5 of the articles of association of Fonfair was amended to provide that a quorum for directors' meeting is to be three directors instead of two directors.

31. I should also mention that notwithstanding article 96 in the articles of association of Money Facts which provides that the office of a director shall be vacated if the director ceases to be a shareholder of the

company, YT Leung remained as a director of Money Facts after the transfer of his shares to Harbour Front without any objection from YK Leung.

Was there a quasi-partnership

32. I begin with the seminal speech of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* [1973] AC 360 at 379B to G on the words of “just and equitable” in the statutory provision equivalent to our section 177(1)(f):

“The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be ‘sleeping’

members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.”

33. The circumstances in which the equitable considerations would arise would vary from case to case. The fact that the three typical elements mentioned above are found to exist does not necessarily mean that the court would draw the inference that there are superimposed equitable obligations on the company law rights and duties, what Lord Wilberforce had said is that their existence *may* bring into play the equitable considerations (*Morgan v. 45 Flers Avenue Pty. Ltd.* (1986) 10 ACLR 692 at 707; *Ng Yat Chi v. Max Share Ltd.* [2001] 1 HKLRD 561 at 569J to 570A). Conversely, the fact that not all three elements are found to exist is not necessarily fatal to the existence of a quasi-partnership (*Re Taipao Resins Chemical Co. Ltd.*, HCCW No. 590 of 1998, Le Pichon J, 13 March 2000). Further, it is not necessary that there should be an express assurance or understanding between the parties concerned of the rights or obligations that are not contained in the articles of association, as in an appropriate case, such rights or obligations could be implied or inferred from the conduct of the parties (*Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] BCLC 472 at 475f to h; *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 19g to h). What I need to decide is whether, on the facts viewed objectively as a whole, the basis of association was adequately and exhaustively laid down in the articles of association.

34. It may be convenient to consider first if any of the three typical elements existed when YT Leung and YK Leung first became the shareholders of Money Facts and when Money Facts and YT Leung first became shareholders of Fonfair.

35. Was the association formed or continued on the basis of a personal relationship involving mutual confidence? Mr Ismail submitted on behalf of YK Leung that Money Facts was not formed out of trust but to prevent an abuse of power, as YT Leung would otherwise have control over Fonfair as the majority shareholder. He referred to the fax exchanges between YT Leung and YK Leung in May 1991, in which YT Leung sought the agreement of YK Leung to do away with the formation of a new company to hold their respective shares in Fonfair, and proposed instead that YK Leung should hold his 3,950 shares in Fonfair with UDL as the other substantial shareholder in Fonfair, so as to give UDL a better asset portfolio in the impending flotation. In rejecting the proposed change in his fax dated 16 May 1991, YK Leung stated the intention behind pooling their shares in a new company to be as follows and YT Leung did not dissent from this in his fax in reply:

“providing a means to bind [YT Leung and YK Leung] (the shares) into Newco to make it the majority shareholder in Fonfair and by providing a clear set of company objectives for the incorporation, Newco provides some protection for the otherwise minorities in Fonfair.”

36. Further, in re-examination, YT Leung said that Money Facts was a commercial arrangement and had nothing to do with trust or mistrust. Mr Ismail submitted that this is also a factor pointing against a quasi-partnership.

37. I am quite unable to see the matter in that light. It does not seem to me that the rationale for the formation of Money Facts, in that the shares held by Money Facts in Fonfair should form the majority shareholding, must be inconsistent with there being a relationship of mutual confidence. I also do not attach much weight to the statement of

YT Leung that the association was purely commercial. As mentioned previously, the relevant facts should be viewed on an objective basis.

38. According to the Shareholders Agreement, the business of Money Facts was to be operated with three specific objectives, one of which was to safeguard and maximise the interests of YK Leung and YT Leung in Fonfair. At the time of the agreement, it could not have been envisaged by the parties that this objective could be achieved without mutual trust and confidence. It was further provided in the Shareholders Agreement that YK Leung and YT Leung should cause themselves to be elected as “the only two directors in newco” and they should not be subject to rotation. That, in my view, also points to a personal relationship involving mutual confidence, for otherwise the management of Money Facts could not have functioned.

39. It is also pertinent to note that when YT Leung purported to serve a notice of sale on YK Leung in February 1998 pursuant to article 25 offering to sell all his shares in Money Facts at par value, it was taken for granted that YK Leung was not to exercise his right to elect to purchase these shares, notwithstanding that it was an extremely good offer on any view. Instead, YK Leung gave his consent to the sale of these shares to a third party, Harbour Front, after imposing a condition that Harbour Front should agree to be bound by the provisions of the Shareholders Agreement. This, again, was indicative of the special relationship that had existed between the parties all along until they fell out in 2000 and that the association was not a purely commercial arrangement.

40. I find that Money Facts was formed on the basis of a personal relationship between YK Leung and YT Leung involving mutual

confidence. I also find that Fonfair was continued or operated on a similar basis to Money Facts, as the shareholding in Fonfair held by the estate of the father is so small as to be almost insignificant.

41. Was there any agreement or understanding that both parties should participate in the conduct of the business of Money Facts and Fonfair? There was no express agreement or assurance to that effect but this may be implied or inferred from the conduct of the parties in an appropriate case. Mr Ismail submitted that both companies were run in accordance with the articles of association, the provisions of some of which were derived from the Shareholders Agreement as a result of the amendments. He prayed in aid the following dicta of Lord Templeman in *Tay Bok Choon, supra.* at 475b to c to show that equal shareholdings, representation on the board of directors and restriction on the transfer of shares are not sufficient, without more, to create rights and obligations beyond the articles:

“In this company there were only four shareholders, they held an equal number of shares, they were all directors and no one shareholder could transfer his shares without the consent of at least two of the others. These facts may go some way to establish that the relationship between the shareholders shared some of the attributes of a partnership. But in the absence of any further indications or oral assurances the petitioner would not discharge the burden of proving that the other shareholders were not entitled to use their voting powers in the company to oust the petitioner without due cause and in the interests of the company and were under an obligation to continue to appoint the petitioner as a director of the company.”

42. I consider that there are further indications here for the right of equal participation in the business of Money Facts and Fonfair to be implied or inferred, although the further indications here are somewhat different from those considered in *Tay Bok Choon*. For one thing, the

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rights and obligations in this instance were not exhaustively laid down in the articles of association of Money Facts. These important provisions in the Shareholders Agreement had not been incorporated into the articles: that YK Leung and YT Leung had agreed not to cause Money Facts to issue further shares without their mutual consent, and that they should cause themselves to be elected as the only two directors in Money Facts. These provisions must have been designed to ensure that there was to be equality of control in Money Facts of the two shareholders.

43. Further, as mentioned earlier, it was apparent from the fax of YK Leung to YT Leung dated 16 May 1991 that the purpose of forming a new company to hold an equal amount of their shareholdings in Fonfair was to form a majority block of shares. Implicit in this arrangement was that Money Facts should exercise control over the affairs of Fonfair as the majority shareholder. The Shareholders Agreement set out the three objectives of Money Facts in its role as the majority shareholder of Fonfair, including the important objective of pursuing and negotiating any future development plan of the Yau Tong Property. In view of these objectives, it must have been intended that YK Leung and YT Leung should have a right to participate equally in the business of Money Facts and through Money Facts in the business of Fonfair.

44. I hold that there was an implicit agreement or understanding that both shareholders of Money Facts should participate in the conduct of its business and that through Money Facts, both should participate in the business of Fonfair, and that neither was to be excluded from management and control unless for good reason such change should become necessary.

45. The third typical element being a restriction on the transfer of shares is present in the case of Money Facts. It was provided in the Shareholders Agreement that no shares in Money Facts should be transferable to any other person without the consent of the other shareholder.

46. Thus, all three typical elements are found to exist in the case of Money Facts when YK Leung and YT Leung first became shareholders and two of these elements are found to exist in the case of Fonfair when Money Facts and YT Leung first became shareholders. I am unable to discern any significant countervailing factor that may point against a quasi-partnership. Was there any change to this special relationship when the shares of YT Leung in Money Facts and Fonfair were transferred to Harbour Front?

47. YK Leung gave his consent for the transfer of shares in Money Facts to Harbour Front on the basis that Harbour Front had agreed to be bound by the provisions in the Shareholders Agreement in the place of YT Leung. There was also provision in the Shareholders Agreement that the provisions therein were to inure to the benefit of and be binding upon the permitted assigns of the parties. Mr Ismail submitted that the relationship of a quasi-partnership could only have existed as between individuals, quoting the dictum of Lord Wilberforce in *Re Westbourne Galleries, supra.* at 379D that the equitable considerations are “of a personal character arising between one individual and another”. I do not think the speech of Lord Wilberforce should be read in such a restrictive light. There is no reason why a permanent relationship involving mutual confidence could not have been formed between individuals acting through the agency of entities, at least where the entity is not an impersonal state-

owned company as in the case of *Ng Yat Chi v. Max Share Ltd., supra*. I also reject the submission of Mr Ismail that any quasi-partnership between YK Leung and Harbour Front had ended when YT Leung was made bankrupt on 1 March 2001 by virtue of section 35(1) of the Partnership Ordinance, Cap. 38. I am not persuaded that YT Leung and Harbour Front should be treated as the same entity for the purpose of this section. In any event, I do not think this provision could have any application here.

48. As for the fact that YT Leung had remained a director of Money Facts after the transfer of his shares to Harbour Front, notwithstanding article 96 which provides that the office of a director shall be vacated if he ceases to be a shareholder, it seems to me implicit from the conduct and acquiescence of the parties that they must have accepted the directorship of YT Leung in his capacity as a representative or nominee of Harbour Front.

49. In conclusion, I hold that there is a quasi-partnership between YK Leung and Harbour Front in respect of their association in Money Facts and Fonfair giving rise to equitable considerations.

Locus of Harbour Front to present petition to wind up Fonfair

50. The locus standi of Harbour Front to present the petition in HCCW No. 246 of 2002 is the subject of challenge on the ground that Harbour Front has failed to prove the allegation in its petition that it was registered in Fonfair's register of members on 13 February 1998 as the holder of the 3,958 shares previously held by YT Leung, and in particular, that these shares were registered in the name of Harbour Front for at least

six months during the 18 months before the commencement of the winding up, as required by section 179(1)(a)(ii) of Cap. 32.

51. The challenge was first raised in a letter dated 2 May 2003 from the solicitors of YK Leung to the solicitors of Harbour Front, in which the former referred to an order made on 30 January 2002 in HCA No. 2002 of 2001 (an action brought by Fonfair against UDL Management Limited (“UDL Management”, a subsidiary of UDL, of which Irene Leung and Bobby Chan are directors) for the recovery of Fonfair’s accounting and other company records), requiring UDL Management to deliver up to the solicitors of Fonfair inter alia the share register of Fonfair by 6 February 2002. As that order had not been and is still not complied with, YK Leung’s solicitors stated that in the said letter it had not been possible for Fonfair to verify if any of the shares in Fonfair had indeed been registered in the name of Harbour Front for the requisite period under section 179(1)(a)(ii). Harbour Front was requested to cause UDL Management to deliver up the share register of Fonfair within seven days thereof, failing which issue would be taken on its entitlement to present the petition.

52. There was no response to the above letter. It is not in dispute that at some stage UDL Management was in possession of the documents and accounting records of Fonfair, as there was a letter dated 24 March 2001 addressed to UDL Management from Irene Leung on behalf of Fire Full, as a director of Fonfair, and copied to the other directors, in which she requested UDL Management to refrain from making “unauthorised disclosures” of documentation relating to Fonfair and parting with possession of such documents and accounting records until the dispute of excluding Harbour Front from participation on the board of directors had

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been resolved. In cross examination, Irene Leung stated that subsequently she has not been able to locate the documents of Fonfair including the share register and asserted that those who knew where such documents were kept had left their employment.

53. Has Harbour Front adduced sufficient evidence in these proceedings to discharge the burden of proof that it was registered as a shareholder of Fonfair for the requisite period?

54. Mr Chan submitted on behalf of Harbour Front that there is sufficient evidence to establish the fact of registration notwithstanding the inability to produce the share register of Fonfair. Reliance was placed on the following matters:

- (1) Copies of the annual returns of Fonfair from 1998 to 2003 were produced. All these returns showed that 3,958 shares are held by Harbour Front, as a result of the transfer made by YT Leung on 13 February 1998. There is no dispute that the documents of transfer were executed by YT Leung in favour of Harbour Front.
- (2) The 1998, 1999 and 2000 returns were signed by YT Leung and the company secretary, Asec Secretarial Limited (“Asec”). Asec would appear to have no connection with YT Leung or Irene Leung, being a secretarial company controlled by Lau & Au Yeung CPA Limited (“Lau & Au Yeung”), an independent accountant firm that had been appointed as the auditors of Money Facts and Fonfair for some time. The returns for 1999 and 2000 gave the reference for Harbour Front’s shareholding as “Folio: Mem 005”, whereas the other shareholders were

given the following references: YW Leung (Folio: Mem 002), Money Facts (Folio: Mem 003) and Universal Dockyard (Folio: Mem 004). These references must be the relevant entries in the register of members and it can be deduced that “Folio: Mem 001” must have been YT Leung’s registration, before he transferred his shares to Harbour Front.

55. I accept Mr Chan’s submissions. I find that Harbour Front has established satisfactorily that it was registered as a shareholder of Fonfair since 1998 and that it has locus to petition to wind up the company.

Exclusion of Harbour Front from management

56. I will first give an account of the undisputed facts relating to Harbour Front’s exclusion from the management of Money Facts and Fonfair before I deal with the question if such exclusion was wrongful.

57. On 1 March 2001, YT Leung was adjudged bankrupt on the petition of a judgment creditor, Healthy Wharf Limited (“Healthy Wharf”), which is controlled by YK Leung and SY Wong. It is stated in the petitions herein that “thereupon” YT Leung “resigned” as a director of Harbour Front, Money Facts and Fonfair. As this is not a matter in dispute, I find that he had resigned on that date notwithstanding that no documentary evidence of resignation was produced.

58. On 9 March 2001, YK Leung signed a resolution as the continuing director of Money Facts, purportedly under the authority in section 153(4) of Cap. 32. It was noted in the resolution that YT Leung’s office as director should be vacated upon his being made bankrupt

according to article 96(b) of the articles of association (the reference to article 96(b) is wrong as this article has been amended in the manner set out earlier) and it was resolved that SY Wong should be appointed a director to fill the vacancy. I should digress here to say that I do not think it necessary to make a finding if the appointment of SY Wong as director of Money Facts was permitted under the articles of association in that he is not a shareholder. The issue I am concerned with is whether Harbour Front was wrongfully excluded from management, not the validity or otherwise of the appointment of SY Wong.

59. On 14 March 2001, board resolutions of Fonfair were signed by YK Leung and Marcon, to the exclusion of Fire Full, to authorise the company secretary to record and give notice of YT Leung vacating his office as director and to authorise YK Leung to bring proceedings against Universal Dockyard for breaches of the tenancy agreement of the Yau Tong Property.

60. On 16 March 2001, the solicitors for Harbour Front wrote to YK Leung asserting that Harbour Front must be appointed as the other director of Money Facts by virtue of the Shareholders Agreement and alleging that the appointment of SY Wong as a director of Money Facts was void. They enclosed a written resolution of shareholders to appoint Harbour Front as the other director for YK Leung's execution.

61. On 28 March 2001, Fire Full wrote to the board of directors of Fonfair giving notice to hold a board meeting on 29 March 2001 to consider the proposed appointment of Harbour Front as a director. The proposed board meeting was aborted as it was inquorate. In YK Leung's response on behalf of Fonfair on 30 March 2001, he stated that it would be

inappropriate for any director to participate in the proposed board meeting as by attempting to procure the appointment of Harbour Front as a director it would be a contravention of section 156 of Cap. 32.

62. On 4 April 2001, Harbour Front served a requisition on the board of directors of Fonfair for an extraordinary general meeting to be held to consider the proposed appointment of Harbour Front as a director. This was rejected by YK Leung on behalf of Fonfair by a letter dated 25 April 2001, which was copied to the Official Receiver, in which he made the following points:

- (1) It had been the understanding of the board that notwithstanding YT Leung's transfer of his shares to Harbour Front, he was to remain the ultimate beneficial owner. That being the case, once YT Leung was declared bankrupt, the shares in question would form part of the estate to be administered by the Official Receiver as the trustee in bankruptcy. If there were rights attached to those shares, they should be exercised by the Official Receiver and not by Harbour Front.
- (2) It was alleged that Harbour Front was a company wholly owned and controlled by YT Leung, so its appointment as a director would constitute a violation of section 156 of Cap. 32.
- (3) Unless Harbour Front could obtain confirmation from the Official Receiver that he did not consider the shares in question to be part of the bankrupt's estate or that he would agree to Harbour Front exercising the rights attached to those shares, the board would not accept the requisition of Harbour Front as valid.

63. Harbour Front went ahead to convene the extraordinary general meeting of Fonfair on 28 May 2001, but YK Leung caused Money Facts to withdraw from the meeting thereby rendering it inquorate. No director has ever been appointed to fill the vacancy of YT Leung. The board of Fonfair has since come under the control of YK Leung, as Fire Full is the only nominee of Harbour Front on the board of Fonfair. Fire Full was out voted in several board meetings.

64. The petition to wind up Money Facts was presented on 16 August 2001.

65. On 22 February 2002, an annual general meeting of Money Facts was held. Harbour Front renewed its attempt to appoint its nominee as the other director and gave notice to YK Leung by a letter dated 19 February 2002 of its proposal to appoint Irene Leung as director to fill the vacancy of YT Leung in the event that the resolution proposed by YK Leung to ratify the appointment of SY Wong as director was not carried. At the meeting, YK Leung exercised his casting vote as chairman of the meeting to ratify the appointment of SY Wong as the other director of Money Facts. The proposed resolution of Harbour Front was not dealt with.

66. The petition to wind up Fonfair was presented by Harbour Front on 5 March 2002.

67. At the annual general meeting of Money Facts on 18 June 2003, Harbour Front again proposed to appoint Irene Leung as a director. This was rejected by YK Leung and with his casting vote as chairman of the meeting, SY Wong was re-elected as the other director.

68. I have held earlier that the association between YK Leung and Harbour Front ought to give rise to equitable considerations with an equal right of participation in the business of Money Facts and through Money Facts in the business of Fonfair, and that such equality of participation in business should not be altered without good reason. In the second affirmation of YK Leung filed in HCCW No. 880 of 2001, he acknowledged that the shifting of the management control in his favour was a “windfall” brought about by the bankruptcy of YT Leung and considered it his “duty” to take advantage of this windfall to address the wrongs done to Fonfair, particularly as regards the proper enforcement of the tenancy agreement between Fonfair and Universal Dockyard, which was one of the three purposes for which Money Facts was set up. This is another way of approaching the issue if Harbour Front has come to court with clean hands. In other words, if the breakdown of the relationship of mutual trust and confidence was attributable to the misconduct of Harbour Front, it cannot rely on the principles of justice and equity to assert its right of equal participation in the management and control of the two companies.

69. I turn to consider whether there was good reason for not appointing a nominee of Harbour Front to fill the vacancy of YT Leung on the boards of Money Facts and Fonfair. It can be seen from the above that three broad grounds have been relied on by YK Leung to justify the exclusion of Harbour Front:

- (1) section 156 of Cap. 32;
- (2) section 49 of Cap. 6; and
- (3) misconduct of YT Leung and/or Harbour Front.

70. I will consider these matters in the order set out above.

Section 156 of Cap. 32

71. The relevant part of section 156(1) reads as follows:

“If any person being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the court by which he was adjudged bankrupt, he shall be guilty of an offence and liable to imprisonment and a fine ...”

72. YT Leung is an undischarged bankrupt. YK Leung contended that Harbour Front and YT Leung are one and the same entity and reliance was placed on these matters:

- (1) Prior to the bankruptcy order, YT Leung was the sole director of Harbour Front, the company secretary and the sole signatory of its bank accounts. He was also the sole shareholder.
- (2) Until YT Leung was made bankrupt, he had remained as a director of Money Facts and of Fonfair, notwithstanding the transfer of his shares in these companies to Harbour Front in February 1998. No other representative of Harbour Front had served as a director of these companies apart from Fire Full, which was controlled by YT Leung.
- (3) Harbour Front is the trustee of the Harbour Front Unit Trust. In the judgment of Cheung J (as he then was) in HCBI No. 1 of 2001 and HCB No. 2019 of 2000 on 1 March 2001 (being the bankruptcy petition of Healthy Wharf against YT Leung and his application for an interim order under sections 20 and 20A of Cap. 6), Cheung J noted that the initial number of units in this trust was 101, with YT Leung holding 100 units. The trust deed of another trust, called the 747 Trust, was also

produced in those proceedings. The settlor of this trust is YT Leung, and he is excluded from the corpus and income of the trust; the beneficiaries are, among others, his spouse and issue. Harbour Front Unit Trust and the 747 Trust were referred to as the “Family Trust” in those proceedings. There was a complete absence of evidence how the two trusts relate to each other (page 19 of the judgment). Cheung J came to the view, on the evidence before him, that the assertion that YT Leung was hiding behind the Family Trust and that he has unfettered control of it and its assets is “not a fanciful one” (pages 16 and 17 of the judgment). According to the affirmation of Irene Leung filed in those proceedings, YT Leung was the one who executed the decisions relating to the administration of the Family Trust (page 20 of the judgment). Whether YT Leung owns beneficial interest in the Family Trust is “clearly one of the matters that need to be investigated in bankruptcy so that any hidden asset should be made available for distribution” (page 20 of the judgment).

- (4) In upholding Cheung J’s judgment, the Court of Appeal stated in CACV No. 408 of 2001, 19 April 2001 that “on the face of the documentation which was eventually revealed”, it would appear that YT Leung “has both control over [Harbour Front] and almost the entire beneficial interest in the Harbour Front Unit Trust” (page 17 of the judgment). It was noted that from the deed setting up the Harbour Front Unit Trust, YT Leung was the sole beneficiary and that there was no explanation as to how he managed to divest himself of his beneficial interest under this trust (page 28 of the judgment).

- (5) Harbour Front was one of five companies with which YT Leung had signed an employment contract to render “exclusive service” to each of these companies and for which he received a total annual remuneration of HK\$6.2 million (page 15 of the judgment of the Court of Appeal).

73. It was submitted on behalf of YK Leung that it would be naïve to think that YT Leung would not indirectly take part in the management of Money Facts or Fonfair, if a nominee of Harbour Front were to be appointed to the board of directors of these companies to fill YT Leung’s vacancy. Further, YK Leung would not have been able to monitor the situation effectively to ensure that YT Leung would not indirectly participate or concern himself in the management, in contravention of section 156(1). It was submitted that it was reasonable and prudent in the circumstances to refuse to accede to the request of Harbour Front to appoint its nominee to the board of directors of the two companies.

74. For present purpose, I do not think it is necessary to make a definite finding that YT Leung and Harbour Front must have been one and the same entity as contended by YK Leung. In my judgment, there would be ample justification for refusing to appoint a nominee of Harbour Front as director if there is sufficient reason to think that YT Leung would indirectly take part in or be concerned in the management. In view of the matters mentioned earlier, I think it justified to regard it as likely that YT Leung would continue to be involved in the management and control of the companies if given the opportunity. I do not regard it as relevant that Fire Full was allowed to remain as a director of Fonfair notwithstanding that it was a company controlled by YT Leung.

Section 49 of Cap. 6

75. The relevance of section 49 and other provisions of Cap. 6 to the issue of exclusion from management may be summarized as follows. Under section 49, where a debtor is adjudged bankrupt and he has at a relevant time (as defined in section 51) entered into a transaction with any person at an undervalue, the trustee in bankruptcy may apply to court for an order to set aside the transaction. For present purpose, the relevant time under section 51(1) is five years ending with the day of the presentation of the bankruptcy petition by Healthy Wharf, which was 14 June 2000. This means that the transfer of the shares of YT Leung in Money Facts and Fonfair in February 1998 would prima facie fall within the relevant time, if YT Leung had a beneficial interest in these shares at the time the transfer was made (see the judgment of Cheung J at page 21 and the judgment of the Court of Appeal at pages 9, 10 and 24). As the transfer was more than two years from the presentation of the bankruptcy petition, and as provided in section 51(2), the time mentioned in section 51(1) is not a relevant time unless the debtor is insolvent at that time or becomes insolvent as a result of the transaction. However, if Harbour Front was at the time of the transfer an associate of YT Leung within the meaning of sections 51B(6) and (8), then by virtue of section 51(2), there would be a presumption in favour of the Official Receiver that YT Leung was insolvent at the relevant time.

76. Both Cheung J and the Court of Appeal, on the evidence then before the court, were of the view that the matter called for an investigation whether the transfer of YT Leung's shares in Money Facts and Harbour Front would fall within section 49 and whether YT Leung enjoys a beneficial interest in at least the Harbour Front Unit Trust. The judgment of the Court of Appeal was given on 19 April 2001. Subsequent

thereto, and on 10 August 2001, the solicitors for Harbour Front provided to the Official Receiver an opinion obtained from a Queen's counsel who was asked to advise on whether the transfers of shares are liable to be set aside under section 49, on the assumption that YT Leung had been the beneficial owner at the time of the transfers. Harbour Front did not produce the letters in response of the Official Receiver in August and September 2001, upon receipt of this opinion. On 14 and 28 September 2001, the solicitors for Harbour Front provided further documents to the Official Receiver relating to the transfers of shares in 1998, the Harbour Front Unit Trust and the 747 Trust. To date, Harbour Front has not received from the Official Receiver any confirmation that he does not consider the shares to be part of the assets of YT Leung or that he is agreeable to Harbour Front exercising the rights attached to these shares.

77. The legal opinion and the documents provided by Harbour Front's solicitors in September 2001 to the Official Receiver are produced in these proceedings. YT Leung claims that these documents were not placed before the court in his bankruptcy proceedings and his application for an interim order because he had misunderstood his responsibility and that of the nominees to make disclosure for the purpose of an individual voluntary arrangement. I am very sceptical about this. Be that as it may, I do not think it necessary to make a definite finding in these proceedings whether YT Leung had the beneficial interest of the shares when he executed the transfers in 1998 and whether the transfers in 1998 are liable to be set aside on account of his insolvency at that time. Nor is it appropriate to make any such findings here, as the evidence is far from complete. The court is not informed of the progress and outcome of the enquiries by the Official Receiver, who has extensive powers under Cap. 6 to conduct examinations of the bankrupt, his spouse and of any other

person whom the court may deem capable of giving information respecting the bankrupt, his dealings or property.

78. As for the legal opinion obtained by Harbour Front, I would regard it of limited assistance to the court, as the opinion was given on the basis of limited instructions. As pointed out by Mr Ismail, counsel was not given a full picture of YT Leung's assets and liabilities at the time of the transfers; he was not told of a loan of HK\$4 million made to YT Leung by Ming Hing Waterworks Engineering Company Limited on 9 February 1998, less than a week before the transfers, or of the share mortgage dated 22 November 1996 executed by YT Leung and Money Facts in favour of the Standard Chartered Bank to secure inter alia a fixed loan facility amounting to HK\$20 million extended to Y. T. Leung Trading Company Limited ("YT Leung Trading", a company wholly owned by YT Leung), or of the deed of indemnity dated 22 November 1996 given by YT Leung and YK Leung to Fonfair to indemnify Fonfair for creating a first legal charge over the Yau Tong Property and executing various security documents as security for inter alia the fixed loan facility to YT Leung Trading; he was not instructed to consider if Harbour Front was an associate of YT Leung for the purpose of section 51B. The advice of counsel was sought in respect of what account should be taken of two specific guarantees in determining if YT Leung was insolvent on a balance sheet test at the time of the transfers, his instructions were that at the relevant time YT Leung was subject to guarantee liabilities under only two guarantees. He did not come to a concluded view on the question of what impact the liability under these two guarantees had on YT Leung's balance sheet solvency for the purpose of section 51(3)(b).

79. For present purpose, what matters is that in the light of the judgments of Cheung J and of the Court of Appeal calling for a full investigation, whether there was reason to think that the transfers of shares would not be liable to be set aside under section 49 of Cap. 49. If no conclusion could reasonably be reached on this, then that would be a sufficient justification for refusing to appoint a nominee of Harbour Front to the board of directors.

80. I should also mention that in providing the legal opinion and further documents to the Official Receiver in September 2001, the solicitors of Harbour Front had imposed a condition of confidentiality and these documents have not been disclosed by the Official Receiver to YK Leung or his solicitors until they were exhibited to the affirmations filed on behalf of Harbour Front in these proceedings.

81. In respect of the documentary evidence not adduced before Cheung J and the Court of Appeal, YK Leung has pointed to a number of features which tend to cast doubt on the credence of the new evidence:

- (1) The declarations of trust in respect of the Money Facts shares (both dated 5 September 1991, by which YT Leung declared that his 3,950 shares are held on trust for Harbour Front and Harbour Front in turn declared that such shares are held on trust for the Harbour Front Unit Trust) and the Fonfair shares (both dated 12 September 1991, by which YT Leung declared that his 3,958 shares are held on trust for Harbour Front and Harbour Front in turn declared that such shares are held on trust for the Harbour Front Unit Trust) were not attested, notwithstanding that there was an attestation provision in each of these documents. In contrast, the declaration of trust dated

9 September 1991 made by YT Leung in respect of his shares in UDL in favour of Harbour Front as the trustee of the Harbour Front Unit Trust was attested.

- (2) The four declarations of trust in respect of the Money Facts shares and the Fonfair shares were not stamped, unlike 22 declarations of trust dated from September 1991 to July 2000 filed by YT Leung with the Official Receiver as part of his statement of affairs. The date of execution of the trust for the Fonfair shares pre-dated the date of registration of YT Leung as a shareholder, which was 4 October 1991.
- (3) The originals of the four declarations of trust are missing, and it was only revealed in documents produced at the hearing and confirmed by the evidence of Polly Foo that the originals were never sent to the solicitors for Standard Chartered Bank, contrary to the assertion made by the solicitors for Harbour Front to the Official Receiver in their letter dated 14 September 2001.
- (4) The four declarations of trust are inconsistent with the statements made in the annual reports of UDL of 1996 and 1997 (that YT Leung has direct or indirect beneficial interests in Fonfair), the prospectus for UDL dated 10 September 1991 (that YT Leung is the beneficial owner of his shares in Money Facts and Fonfair), and the share mortgage dated 22 November 1996 in favour of the Standard Chartered Bank mentioned earlier (that YT Leung is the beneficial owner of his shares in Fonfair). YT Leung's explanation is that this was due to the "failure to properly distinguish legal

ownership ... from beneficial ownership". YT Leung has obtained a law degree in England.

(5) The signatures of YT Leung on these four declarations of trust do not resemble many of his signatures on other documents that he had executed in 1991 and 1992 and adduced in evidence but resemble his signatures on the documents he had executed in 1998, such as the instruments of transfer, the bought and sold notes and two assignments all executed in February 1998. YT Leung's explanation is that he is an "erratic" signer of documents.

(6) Notwithstanding the declarations of trust in September 1991 that the shares in Money Facts and Fonfair were held on trust, YT Leung had continued to deal with these shares as if they were his own. His shares in Fonfair were mortgaged to the Standard Chartered Bank in November 1996 to secure a fixed loan facility granted to YT Leung Trading. On 19 November 1999, he wrote to YK Leung stating that further to their discussion on the subject of obtaining finance on the security of the Yau Tong Property and "the critical need of cash for the UDL restructuring", he intended to sell out all or part of his interest in the Yau Tong Property and made an offer to YK Leung before he was to approach outside parties.

(7) YT Leung executed two assignments dated 16 February 1998 in respect of the Money Facts shares and the Fonfair shares, purportedly for the purpose of perfecting his intention in his two declarations of trust in September 1991. The assignments provided that YT Leung as the assignor and Harbour Front as the assignee should within 14 days thereof execute

instruments of transfer and such other documents as might be necessary for effecting the transfers of shares. The assignments were executed by YT Leung alone, and were not attested, despite the presence of attestation clauses. It is not entirely clear why these assignments were executed as YT Leung had already signed bought and sold notes and instruments of transfer for these shares dated 13 February 1998.

(8) Contrary to the submission made to Cheung J on behalf of YT Leung that the bought and sold notes in February 1998 were stamped at nominal value and not ad valorem (page 21 of the judgment), the stamp duty for the bought and sold notes of the Fonfair shares was assessed not on the basis of the stated consideration being HK\$25,919.30 but on the market value of the shares based on the valuation of the Yau Tong Property held by Fonfair. YT Leung did not make representation to the Inland Revenue Department that the Fonfair shares had been held by him on trust since September 1991 and that the transaction was merely for the purpose of transferring the legal title to the beneficial owner. YT Leung's explanation here is that the stamp duty paid in the sum of HK\$43,920.00 was just a small amount.

(9) In respect of 348 million shares in UDL purchased from YT Leung by Harbour Front in its capacity as trustee of the Harbour Front Unit Trust at a total consideration of HK\$31,125,000.00 (being the equivalent of US\$4 million) pursuant to a purchase and sale agreement dated 9 September 1991, the acquisition of such trust property by the Harbour

Front Unit Trust was accompanied by the creation and subscription of new trust units of 4 million. The proceeds received from the issuance of the new trust units in the amount of US\$4 million would appear to have been used to pay for the purchase of the UDL shares from YT Leung. Notwithstanding the acquisition of the Money Facts and Fonfair shares by Harbour Front as additional trust properties for the Harbour Front Unit Trust, the issued trust units at 4,000,101 units have remained unchanged since September 1991.

82. As stated earlier, Harbour Front did not disclose the further documents to YK Leung before bringing these proceedings, notwithstanding it was clearly stated in the letter of YK Leung dated 25 April 2001 that the issue of whether the shares in question would form part of YK Leung's estate in bankruptcy would need to be addressed. In any event, I do not think the above matters casting doubt on the additional documents supplied could simply be brushed aside. There remains, in my view, a case for investigation by the Official Receiver. I do not think Harbour Front can justifiably complain in these circumstances that its requests for appointing its nominee to the board of directors of the two companies were not complied with.

Misconduct of Harbour Front

83. The misconduct complained of by YK Leung may be grouped under two broad categories:

- (1) the misappropriation of the funds of Fonfair; and

- (2) the persistent failure to enforce the tenancy agreement made by Fonfair with Universal Dockyard.

84. Many of the relevant matters cannot be disputed as they formed the subject of findings in earlier proceedings involving YT Leung and Universal Dockyard. I do not propose to go into allegations of misconduct of YT Leung before Harbour Front became a shareholder of Money Facts and Fonfair in February 1998.

85. For the period from September 1998 to December 1999, almost all the rental income received by Fonfair from Universal Dockyard was misappropriated by YT Leung into the account of YT Leung Trading (see paragraph 13 of the judgment of Deputy Judge To in HCA No. 1886 of 2001, 25 January 2002). As mentioned earlier, YT Leung Trading is wholly owned by YT Leung.

86. Subsequent to December 1999, Universal Dockyard was allowed to remain in possession of the Yau Tong Property without payment of rent, contrary to the first of the three purposes in the Shareholders Agreement. In respect of this, the misconduct of Harbour Front was as follows:

- (1) At a meeting between YT Leung and YK Leung on 7 January 2000, YK Leung raised his concern of the apparent abuse of authority that YT Leung had been entrusted with by Fonfair and Money Facts as regards the enforcement of the tenancy agreement and the misappropriation of rental income and failed to get a satisfactory answer from YT Leung. YK Leung wrote to YT Leung on 14 January 2001 giving notice that unless funds taken from Fonfair were fully reimbursed within

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seven days thereof, legal proceedings would be commenced without further notice.

(2) On 12 February 2000, YK Leung's solicitors gave notice on his behalf to convene a board meeting of Fonfair on 17 February 2000 to consider, inter alia, commencing legal proceedings against YT Leung Trading and the directors who had made unauthorised advances to the aforesaid and legal proceedings against Universal Dockyard for enforcement of the tenancy agreement. Harbour Front's representatives on the board, YT Leung and Fire Full, refused to attend, rendering the board meeting abortive.

(3) A board meeting was also convened by YK Leung for Money Facts on 17 February 2000. YT Leung, as the representative of Harbour Front, refused to attend and the meeting could not proceed for lack of quorum.

(4) On 18 February 2000, YK Leung's solicitors issued two letters, one to YT Leung as a director of Fonfair and Money Facts and the other to Harbour Front as a shareholder of Money Facts. Harbour Front was requested to sign the enclosed resolution in accordance with article 64 of the articles of association to appoint a representative of Money Facts to convene an extraordinary general meeting of Fonfair to carry out the purposes of the Shareholders Agreement. Harbour Front refused to sign the resolution.

(5) On 9 April 2001, Irene Leung in her capacity as a director of Fire Full, wrote to Universal Dockyard (of which she is also a director) to put on notice that Universal Dockyard had "no right" and was under "no obligation to comply with the

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demands made to pay rent and other amounts for [the Yau Tong Property] to Messrs Lau & Au Yeung” (paragraph 23 of the judgment of Deputy Judge To).

(6) It had only become possible for Fonfair to bring proceedings against Universal Dockyard to enforce the tenancy agreement in HCA No. 1886 of 2001 on 26 April 2001, after YK Leung had secured control of the board upon the bankruptcy of YT Leung. In resisting the proceedings, YT Leung caused to be produced documents purportedly made by Fonfair which Deputy Judge To held to be lacking in credence (paragraph 32 of the judgment). Such action was clearly against the interest of Fonfair and Money Facts. These documents were:

- (a) a statement of account as at 29 August 2000 acknowledging the indebtedness of HK\$6,350,695.14 from Fonfair to YT Leung Trading, signed by YT Leung on behalf of Fonfair and Irene Leung on behalf of YT Leung Trading (paragraph 26(1) of the judgment);
- (b) a notice of assignment dated 30 August 2000 signed by Irene Leung on behalf of YT Leung Trading as the assignor and by YT Leung on behalf of Fonfair, by which the assignor gave notice to Fonfair of the assignment of the debt in (a) in favour of Universal Dockyard (paragraph 26(3) of the judgment);
- (c) an unstamped tenancy agreement dated 30 August 2000 purportedly entered into between YT Leung on behalf of Fonfair and Li Kam Wa on behalf of Universal Dockyard for a term of two years commencing on 1 September 2000 to 31 August 2002 at a reduced monthly rental of

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HK\$150,000.00 (paragraphs 10, 16 to 21 of the judgment, in which it was held that the defence founded on the alleged agreement is “blatantly incredible”);

- (d) a letter dated 31 August 2000 signed by YT Leung on behalf of Fonfair acknowledging the set off of HK\$1,863,250.00 from the debt in (a) allegedly assigned to Universal Dockyard in (b) against the outstanding rental of Universal Dockyard (paragraph 26(5) of the judgment); and
- (e) a letter dated 1 September 2000 offering to set off the rate payable by Universal Dockyard and two years of “pre-paid” rental from September 2000 to August 2002 in the sum of HK\$3.6 million and acknowledged by YT Leung on behalf of Fonfair.

- (7) Universal Dockyard failed to pay the judgment debt obtained by Fonfair for arrears of rent in HCA No. 1886 of 2001 or to deliver up vacant possession of the Yau Tong Property, notwithstanding the judgment entered against it on 11 December 2001. On 18 June 2002, Irene Leung, in her capacity as a director of Universal Dockyard, filed an affirmation in support of its application for a stay of execution for six months of Fonfair’s writ of possession issued on 23 April 2002. On 21 June 2002, Fonfair presented a petition to wind up Universal Dockyard in HCCW No. 663 of 2002. At a board meeting of Fonfair on 29 June 2002, Harbour Front’s representative, Fire Full, voted against a resolution to endorse the action taken by YK Leung on behalf of Fonfair and to re-affirm the authority of YK Leung to take such further action

as needed against Universal Dockyard to enforce Fonfair's rights under the tenancy agreement and against UDL Management for recovery of Fonfair's documents.

(8) At another board meeting of Fonfair on 21 August 2002, Fire Full, which was then represented by Li Kam Wa, again objected to bringing winding up proceedings against Universal Dockyard, on the basis that it might not be in Fonfair's interest as the costs incurred might not be "justified by the recovery".

(9) On 17 October 2002, Irene Leung on behalf of Harbour Front wrote to the board of directors of Fonfair expressing deep concern about the "futile venture" of petitioning to wind up Universal Dockyard, as the latter is "a company of no material substance after the implementation of its Scheme of Arrangement". Harbour Front requested the board of directors to withdraw the proceedings against Universal Dockyard within seven days thereof. Fire Full supported the stance of Harbour Front in a letter by Bobby Chan to Fonfair dated 21 October 2002. In a further letter to Fonfair dated 6 November 2002, Bobby Chan on behalf of Fire Full made the point that it was not right to pursue legal proceedings against Universal Dockyard and Fonfair should agree to dispose of its interest in the Yau Tong Property as soon as possible.

(10) At a board meeting of Fonfair on 27 November 2002, Fire Full, which was then represented by Bobby Chan, again raised the issue if Fonfair should commit any further resources to pursue the recovery of the debt owed by Universal Dockyard, as there

was “prima facie” evidence that nothing could be recovered from Universal Dockyard.

(11) On 4 February 2003, the solicitors for Harbour Front wrote to the Official Receiver in respect of the winding up proceedings against Universal Dockyard as the “de facto” majority shareholder in Fonfair and stated that “all along” Harbour Front had objected to the decision of Fonfair to wind up Universal Dockyard. Contrary to the earlier assertions that nothing could be recovered from Universal Dockyard, the solicitors for Harbour Front stated that they were “given to understand” that Universal Dockyard “is of positive net worth”. Harbour Front’s solicitors made an offer to the Official Receiver to inject cash into Universal Dockyard in return for new equity issues on condition that there be a stay of the winding up petition.

(12) On 6 February 2003, Li Kam Wa filed an affirmation in his capacity as director of Universal Dockyard to oppose the winding up petition in which he exhibited the aforesaid letter of Harbour Front’s solicitors to the Official Receiver proposing to invest in Universal Dockyard. He made the assertion that Universal Dockyard has a “positive asset value” and is not insolvent and produced the unaudited balance sheet as at 31 December 2002 purporting to show net assets of HK\$765,595.29. He deposed that Harbour Front “is aware of the present financial status” of Universal Dockyard and “in particular its positive asset value as shown in balance sheet”.

(13) Up to the hearing of the petition against Universal Dockyard on 4 March 2003, Universal Dockyard had sought a stay or

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B adjournment until after the determination of Harbour Front's
C petitions to wind up Money Facts and Fonfair as these
D petitions, if successful, would have the effect of "changing the
E management of [Fonfair] and thereby its stance" to the
F petition against Universal Dockyard. It was only in the course
G of the hearing that Universal Dockyard abandoned the above
H ground and its reliance on Harbour Front's proposal to invest
I in Universal Dockyard.

H 87. It could be seen from the above that Harbour Front had not
I only objected to Fonfair's petition to wind up Universal Dockyard but had
J actively assisted the latter to resist the petition and to thwart Fonfair's
K attempts to recover the judgment debt for arrears of rent, which had grown
L to HK\$8.5 million with interest at the time of the hearing in March 2003.
M In doing so, Harbour Front had changed its stance from asserting that there
N was no prospect of recovery against Universal Dockyard to justify
O incurring legal expenses to the opposite position that Universal Dockyard
P had a positive asset value to justify its investment in that company. In so
Q siding with Universal Dockyard, Harbour Front had acted against the
R interest of Fonfair and had defeated the first of the three purposes for
S setting up Money Facts, which was to ensure that as the majority
T shareholder in Fonfair, "the rental and other incomes received by Fonfair
U are properly administered and that after reasonable provisions for expenses
V such incomes are distributed to the shareholders of Fonfair". I reject the
submission made on behalf of Harbour Front that its opposition to wind up
Universal Dockyard was justified for "sentimental" or commercial reasons.
I also reject the submission that the misconduct of YT Leung should have
nothing to do with Harbour Front for present purpose. As I have stated at
the outset, I have not considered the allegations of misconduct of YT

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Leung before Harbour Front became a shareholder in the two companies in February 1998. Thereafter, YT Leung's position in the two companies was by virtue of his being a representative of Harbour Front.

88. I find that it was due to the misconduct of Harbour Front that there was a breakdown in the relationship of mutual trust and confidence. In the circumstances, Harbour Front cannot assert its right of equal participation in the management of Money Facts and Fonfair. So for this reason as well, whether singly or cumulatively with one or both of the other grounds that I have considered earlier, Harbour Front has failed to make out a case of wrongful exclusion from management.

Reliance on other grounds not raised in the petitions

89. This is a very unsatisfactory aspect of the conduct of these proceedings.

90. It is alleged by Harbour Front that apart from its wrongful exclusion from management, the two companies should be wound up because there was frustration of the purposes for which Money Facts was set up and there was lack of confidence due to the grave misconduct of YK Leung and others acting in concert with him. The difficulty about these allegations is that they do not form part of Harbour Front's case in the petitions. They are raised only in the affirmations filed on behalf of Harbour Front, and answered in the affirmations filed by YK Leung. Mr Ismail belatedly took the point that these allegations are outside the ambit of the petitions in his closing submissions, citing among other authorities *In re Fildes Bros. Ltd.* [1970] 1 WLR 592 at 597G to 598D. Mr Chan did not apply to amend the petitions at any time. Perhaps in recognition of the

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fact that so much evidence of these allegations had already been adduced and the lateness of his objection to such evidence, Mr Ismail asked the court to consider these allegations on their merits, notwithstanding that strictly speaking the court should not travel outside the petitions.

91. I see no reason why Harbour Front should not be confined to the complaint raised in the petitions. It is wholly undesirable that a petitioner should be allowed to rely on allegations raised only in the affidavits, without first amending the petition. Quite apart from the element of surprise, allegations raised in affidavits often do not define the scope of the issue in dispute with sufficient clarity, as I find in these proceedings. Mr Chan has even sought to rely on matters which had only emerged in cross-examination. In case these proceedings should go further, and if I should be wrong in holding that Harbour Front is not allowed on rely on allegations not covered in the petitions, it is desirable that I should make findings on these allegations, having heard the evidence. I wish to emphasise that such findings are obiter, and do not form part of my judgment.

Frustration of the three purposes

92. It is difficult to understand what Harbour Front's case is regarding the allegation of frustration of the three purposes for which Money Facts was set up, not least because there is no allegation of this in the petitions. In the opening submissions of Mr Chan, it would appear to be the case of Harbour Front that there was frustration of all three purposes. In respect of the first purpose (the proper administration of rental and other incomes received by Fonfair), reference was made to the evidence filed on behalf of Harbour Front denying that there was misappropriation of rental

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into the account of YT Leung Trading and seeking to justify the delay and failure of Universal Dockyard to pay rent, which was contrary to the findings in HCA No. 1886 of 2001. In Mr Chan's closing submissions, no mention was made of the frustration of the first purpose. If this is not abandoned by Harbour Front, in view of my earlier finding that it was due to the misconduct of Harbour Front that the first purpose was defeated, I cannot see how it can rely on the frustration of the first purpose as a ground to wind up Money Facts and Fonfair.

93. The second purpose related to the pursuit and negotiation of future development plan for the Yau Tong Property. It is alleged by Harbour Front that there was frustration of this purpose because YT Leung was unable to act as the managing director to carry out the proposed development plan after his bankruptcy and because of the breakdown of trust and confidence between YT Leung and YK Leung. Again, I cannot see how Harbour Front can legitimately rely on these matters. YT Leung's bankruptcy was brought about by his own doing, for failing to pay a judgment debt to Healthy Wharf of HK\$3,566,479.37. I have already found that the breakdown of mutual trust and confidence, which led to the exclusion of Harbour Front from the management, was attributable to the misconduct of Harbour Front.

94. The third purpose was a general one and that was to safeguard and maximize the interest of YK Leung and YT Leung in Fonfair. It is alleged by Harbour Front that YK Leung had only protected his own interest in Fonfair, without any regard to the interest of Harbour Front, when YK Leung outvoted Harbour Front on various matters in the board meetings after he assumed control. This allegation can be considered

conveniently with the next allegation that there was misconduct on the part of YK Leung which led to the loss of confidence of Harbour Front.

Misconduct of YK Leung

95. I have already dealt with the allegations of misconduct of YK Leung in blocking the attempts of Harbour Front to appoint its nominee to the board of directors of the two companies. Other allegations of misconduct relate to the following matters:

- (1) the development of the Yau Tong Property;
- (2) the leasing of the Yau Tong Property;
- (3) the loan made to Fonfair to finance litigation against Universal Dockyard; and
- (4) the renting of premises in Star House as office for Fonfair.

96. I will consider these allegations in the order set out above.

97. Regarding the development of the Yau Tong Property, the complaint seems to be that YK Leung had tried to develop the property without Harbour Front's consent and that he had conducted negotiations for development without informing Harbour Front or Fire Full. Reliance was placed on a letter dated 27 May 2002 from David C. Lee Surveyors Limited ("the Surveyors") written on behalf of a consortium to Fonfair stating that the consortium had recently obtained agreement from the Town Planning Board on the redevelopment of the Yau Tong Bay area and requesting Fonfair to a meeting to discuss some form of co-operation with the consortium.

98. It does not appear to me there is any substance in the complaint. It is clear from the evidence that no joint venture was formed by Fonfair with any party, no agent was appointed by Fonfair and Harbour Front was kept informed of any important step proposed to be taken. The relevant evidence may be summarised as follows:

- (1) On 7 August 2002, Fonfair gave notice of a directors' meeting to be held on 14 August 2002 to consider and resolve, inter alia, appointing the Surveyor or other suitable party as its agent to procure a suitable partner in joint venture for redevelopment of the Yau Tong Property. On the same day, YK Leung faxed to Fire Full the sole agency appointment proposal of the Surveyor dated 6 August 2002 with the Surveyor's marketing proposal for Fire Full's consideration.
- (2) On 12 August 2002, Harbour Front wrote to Fonfair objecting to the board meeting and complaining that it did not have enough time to "digest and give a critical review of the terms of the proposal" by the Surveyor. Accordingly, on 13 August 2002, Fonfair wrote to Harbour Front agreeing to postpone the board meeting to 21 August 2002.
- (3) At the board meeting on 21 August 2002, in which Fire Full took part, Li Kam Wa on behalf of Fire Full tabled a letter dated 20 August 2002 from another property agent, Flourish Property Agency (HK) Limited ("Flourish Property") for YK Leung to follow up. YK Leung agreed to hold off voting on the matter of procuring a joint venture partner until relevant facts could be ascertained from Flourish Property. The proposed resolution of appointing the Surveyor as Fonfair's agent was not voted on, pending the follow up with Flourish

Property. Fire Full voted in favour of a resolution to hold an annual general meeting for the shareholders to express their views on the redevelopment and “other options that may be open”.

(4) In response to Harbour Front’s letter dated 13 September 2002, Fonfair replied on the same day stating that at the annual general meeting on 19 September 2002, it was proposed to receive and consider views that members might wish to express on the redevelopment and other options rather than to seek a “specific mandate” from the shareholders at that stage.

(5) The annual general meeting on 19 September 2002 was attended by the representatives of Fire Full and Harbour Front. After YK Leung had given an account covering the past invitation to participate in a joint venture which had been rejected by YT Leung, the prospect of a sale, and the option of redevelopment with a suitable joint venture partner, members were invited to put forward any views or questions. No views or questions were put forward by Fire Full or Harbour Front.

99. I turn to the leasing of the Yau Tong Property. The allegations here, raised in the evidence filed by Harbour Front, would appear to be that YK Leung had acted against Fonfair’s interest in turning down Harbour Front’s proposal to lease the Yau Tong Property by imposing “excessively onerous terms” on Harbour Front. I decline to consider two further allegations (that YK Leung had acted irresponsibly in allowing a licensee to occupy the property for a use which was in breach of the government lease, and that income received from the licensee had not

yet been distributed to the shareholders), which were not even raised in any of the affirmations filed by Harbour Front.

100. I will first set out the relevant evidence:

- (1) On 22 June 2002, Harbour Front made an offer to Fonfair to lease the Yau Tong Property at a monthly rental of HK\$150,000.00. On 26 June 2002, Fonfair engaged FPD Savills (“Savills”) as its exclusive agent to procure a tenant for the Yau Tong Property at an asking rent of HK\$260,000.00 per month, subject to negotiation. The appointment of Savills was reported to the board at a directors’ meeting held on 29 June 2002 attended by Fire Full.
- (2) On 28 June 2002, Savills wrote to Harbour Front with a counter-offer to lease the Yau Tong Property, subject to contract, at HK\$260,000.00 per month, inclusive of management fee, government rent and rates, for a period of 12 months, and on terms that the first six months’ rent should be paid upon signing of a binding contract or possession of the premises, whichever was earlier. The offer was also subject to the provision of a corporate guarantee by UDL, a listed company.
- (3) On 29 June 2002, Harbour Front’s solicitors wrote to Fonfair stating that in view of the winding up petition against Fonfair, they sought confirmation from Fonfair that it would not let the Yau Tong Property without a validation order. An undertaking was given by YK Leung to the court on 16 August 2002 to apply for a validation order prior to all

transactions relating to the Yau Tong Property including leasing and disposals.

(4) Harbour Front declined to negotiate with Savills on the counter-offer. On 2 July 2002, Irene Leung on behalf of Harbour Front wrote to Savills accusing them of conspiring with Fonfair to “fabricate unsupported prices” of the Yau Tong Property “with intent to deny fair access for Harbour Front Limited to rent and mitigate its exposure to potential claims from former tenants/occupiers”. Irene Leung admitted in cross-examination that the letter was meant to “intimidate” Savills and she refused to answer questions about the potential claims from former tenants or occupiers referred to in her letter. Savills replied by letter dated 12 July 2002 denying any conspiracy.

(5) On 31 October 2002, Fonfair obtained a validation order in respect of, inter alia, the appointment of an estate agent to procure a new tenant or licensee for the Yau Tong Property, and the disposition of the Yau Tong Property by way of a licence determinable by giving not more than three months’ notice at a monthly licence fee of not less than HK\$100,000.00 inclusive of rates. In Fonfair’s summons, it had sought a validation order for the leasing of the premises for a term of not more than two years at a monthly rental of not less than HK\$150,000.00, but due to Harbour Front’s opposition, Fonfair was only allowed to grant a licence of the premises on the terms as mentioned.

(6) At a board meeting of Fonfair on 27 November 2002, which was attended by Bobby Chan as a representative of Fire Full,

YK Leung reported that a licensing agreement for the use of the Yau Tong Property was negotiated with an interested party at a monthly licence fee of HK\$105,000.00. By a majority of votes, YK Leung was authorised to proceed with the negotiation and execution of the licensing agreement subject to the bounds set by the validation order.

(7) On 28 April 2003, Fonfair's solicitors wrote to Harbour Front's solicitors that the licensee of the Yau Tong Property had offered to enter into a two-year tenancy at the monthly rental of HK\$150,000.00 and sought Harbour Front's consent to a validation order to enable Fonfair to enter into such a transaction. Harbour Front declined to give consent on 2 May 2003.

101. I do not think YK Leung had departed from the standards of fair play in making a counter-offer to lease the property to Harbour Front at HK\$260,000.00. It is pertinent to note that only on 18 June 2002, Irene Leung had made an affirmation on behalf of Universal Dockyard offering to pay mesne profits at the rate of HK\$226,000.00 as ordered by the court in HCA No. 1886 of 2001 in seeking a stay of execution of the writ of possession for six months. Further, in view of the persistent failure of Universal Dockyard to pay rent, it could not be regarded as unreasonable to seek additional protection by the advance payment term with a corporate guarantee from UDL, as Harbour Front and Universal Dockyard have a common management. There is no substance in the allegations concerning the leasing of the Yau Tong Property.

102. The next allegation relates to the loan made by YK Leung to finance Fonfair's litigation against Universal Dockyard and related

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companies. The complaint is that YK Leung had advanced money to Fonfair for this purpose at an interest rate of 12% per annum and that he had caused a resolution to be passed on 21 August 2002 to increase the limit of the loan from HK\$600,400.00 to HK\$900,000.00. I cannot see how this could be the subject of any legitimate complaint, taking into account the following matters:

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- (1) As in December 2001, Fonfair had a credit balance of only HK\$153.83 in its bank account. It had no income from the Yau Tong Property due to the persistent failure of Universal Dockyard to pay rent. The licensing agreement for the Yau Tong Property was only made in December 2002.
 - (2) At a board meeting of Fonfair on 6 May 2002, Fire Full had voted against the resolution that an interest-free loan be requested from shareholders on a pro rata basis to fund litigation costs and another resolution to authorise YK Leung to raise money on whatever terms he considered necessary if Fonfair should fail to raise money from the shareholders' loan. Both resolutions were carried by a majority.
 - (3) On 7 May 2002, YK Leung sought contribution from all shareholders of Fonfair to an interest-free loan pursuant to the first resolution. Harbour Front did not respond.
 - (4) On 21 May 2002, YK Leung wrote to Fire Full stating that in view of the failure to raise money by the shareholders' loan, he saw no alternative but to continue with making advances to Fonfair out of his own funds and that he would do so on condition that all moneys advanced by him would carry interest at 12% per annum retroactive from the date of the advance until repayment and that the loans would be

repayable on demand. He further stated that unless he was advised of any viable alternative by 25 May 2002, he would proceed to accept the arrangement on behalf of Fonfair acting on the authority of the second board resolution on 6 May 2002. Neither Harbour Front nor Fire Full had responded by the deadline.

103. The last allegation, concerning the leasing of premises at Star House as an office for Fonfair in November 2002, may be dealt with shortly. The complaint is that it was unnecessary for such premises to be rented as Fonfair's only business is to hold the Yau Tong Property. Further, the property in Star House is owned by Excelwise Enterprise Limited ("Excelwise"), which in turn is jointly owned by YK Leung and SY Wong beneficially.

104. The renting of the premises in Star House was discussed in the board meeting of Fonfair held 27 November 2002 and notice of the agenda was given to Fire Full on 19 November 2002. Fire Full through Bobby Chan wrote to Fonfair on 27 November 2002 objecting to renting office premises for Fonfair on the ground there was no apparent need, as Fonfair had been using the office of Lau & Au Yeung as its registered office and that should serve the basic function. YK Leung explained the reasons for renting the premises in Star House at the board meeting. The existing office at the Yau Tong Property would be unavailable to Fonfair as it was close to concluding the licensing agreement with an outsider. The premises proposed to be rented were small in area and Fonfair would have the use of the common area and office facilities, the entire expenses would only come up to HK\$1,500.00 per month. YK Leung also disclosed and confirmed that he and SY Wong had beneficial interest in Excelwise, and

invited Bobby Chan to make alternative proposals for office space if he should find the arrangement not acceptable. The resolution to rent the premises was carried by a majority. The complaint has no merit.

105. In summary, I find that none of the other allegations not raised in the petitions would have constituted any valid basis to wind up the companies.

If Harbour Front has come to court with clean hands

106. It follows from the findings I have made above that I am against Harbour Front on this issue. The breakdown of mutual trust and confidence was attributable to the misconduct of Harbour Front. By its misconduct, Harbour Front had acted in breach of the Shareholders Agreement, which was the original agreement of mutual trust and confidence, and had thwarted at least one of the three purposes for which Money Facts was set up.

107. As stated by Rogers VP in *Ng Yat Chi v. Max Share Ltd.*, *supra.* at 573D, “it cannot be right that a person can rely on principles of justice and equity when he founds his claim on an agreement which not only has he not honoured but has deliberately abused”. Similar statements were made by Ribeiro PJ in *Ng Yat Chi v. Max Share Ltd.* (2001) 4 HKCFAR 299 at 302I in refusing leave to appeal:

“We also agree with the Court of Appeal that it lies ill in the mouth of a petitioner who has defrauded the company and his fellow investors to complain that he has not been accorded equitable treatment by those other investors, characterised as members of an alleged quasi-partnership. It is a well-known principle that he who seeks equity must do equity.”

If there is an alternative remedy available

108. It is not necessary to consider if the relief to wind up Money Facts should be refused because there is an alternative remedy available by invoking article 25 to sell the shares of Harbour Front, in view of the findings I have reached that Harbour Front has failed to establish its case it was wrongfully excluded from management and that it has not come to court with clean hands.

Conclusion

109. For the above reasons, I dismiss the petitions of Harbour Front to wind up Money Facts and Fonfair. I make an order *nisi* that Harbour Front is to pay the costs of the respondents in each petition, to be taxed if not agreed, and that the costs of the Official Receiver are to be deducted from the deposit of the petitioner.

(S Kwan)
Judge of the Court of First Instance
High Court

Mr Kenneth Chan and Mr David Chum, instructed by Messrs Tsang & Lee, for the Petitioner in HCCW No. 880 of 2001 and the Petitioner in HCCW No. 246 of 2002

Mr Anthony Ismail, instructed by Messrs Ho & Ip, for the Respondent in HCCW No. 880 of 2001 and the 1st Respondent in HCCW No. 246 of 2002

The 2nd Respondent in HCCW No. 246 of 2002, absent

The Official Receiver, attendance excused