

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
MISCELLANEOUS PROCEEDINGS NO 1987 OF 2018

IN THE MATTER of FONFAIR
COMPANY LIMITED

and

IN THE MATTER of sections 724
and 725 of the Companies Ordinance
(Cap 622)

BETWEEN

estate administrator → **HARBOUR FRONT LIMITED** Petitioner
and
MONEY FACTS LIMITED 1st Respondent
LEUNG YUET WAH, LEUNG YUET KEUNG and LEUNG YUET HOI 2nd Respondent
LEUNG YUET KEUNG 3rd Respondent
MARCON INVESTMENT LIMITED 4th Respondent
FONFAIR COMPANY LIMITED 5th Respondent

Before: Deputy High Court Judge Kenneth Wong in Chambers

Date of Hearing: 23 November 2018

Date of Decision: 26 November 2018

Date of Reasons for Decision: 26 November 2018

REASONS FOR DECISION

Introduction

court order to prevent action

1. The petitioner (Harbour Front Limited, “**Harbour Front**”) applies for interlocutory injunction and disclosure of information by summons dated 12 November 2018. The 3rd respondent (Mr Leung Yuet Keung, “**Y K Leung**”) opposes the application.

2. The first hearing took place before this Court on 16 November 2018. After this Court informed the parties of its decision that the *status quo* should be preserved, the summons was adjourned to 23 November 2018 for full arguments, with the 3rd respondent’s undertaking that he will not, whether by himself or through his agents or through the 1st and 4th respondents or otherwise howsoever procure the 5th respondent (Fonfair Company Limited, “**Fonfair**”) to enter into any contract to privately sell a piece of land known as Yau Tong Marine Lot Nos 2, 3 and 4 (the “**Yau Tong Property**”) until the conclusion of the hearing on 23 November 2018.

3. The matter is of some urgency because Fonfair has been conducting a sale by public tender of the Yau Tong Property and the closing date for return of the tender (the “**Public Tender**”) is 30 November 2018. Further, it was stated in the Public Tender that the Yau Tong Property may be sold by private sale prior to the closing date.

4. Having heard the parties on 23 November 2018, given the urgency of the matter, this Court delivered its decision at 9:30 am on 26 November 2018.

5. The decision is to continue to preserve the *status quo*, for the reasons below.

The Petition

6. The Petition was filed on 12 November 2018, the same date as the summons for interlocutory injunction. It seeks various reliefs in relation to the management and operation of Fonfair. The reliefs sought in the Petition include those now sought in the summons on interlocutory basis. They are grounded on unfair prejudice, under sections 724 and 725 of the Companies Ordinance, Cap 622.

The parties

7. Harbour Front is a company of the family trust of Mr Leung Yat Tung (“**Y T Leung**”). Y T Leung and Y K Leung are brothers. Harbour Front was, and still is, the majority shareholder of Fonfair. It holds, directly or through the 1st respondent (Money Facts Limited, “**Money Facts**”), 65.86% shares in Fonfair.

8. Money Facts holds 65.79% shares in Fonfair. It was, and still is, owned 50% by Y K Leung and 50% by Y T Leung (subsequently transferred to Harbour Front with Y K Leung’s consent).

9. The 2nd respondent are the administrators of the estate of the late Mr Leung Man Kwong, the founder of Universal Dockyard and the father of Y T Leung and Y K Leung. It holds 0.63% of the shares in Fonfair.

10. Marcon Investment Limited, the 4th respondent (“**Marcon**”) is owned and controlled by Y K Leung. It holds 0.42% of shares in Fonfair.

11. Through himself, Marcon and Money Facts, Y K Leung holds 33.53% of the shares in Fonfair. Since March 2001, he and Marcon have been the only two directors of Money Facts and Fonfair. In effect, he is in sole control and management of both companies.

12. Y T Leung was used to be a director of both Money Facts and Fonfair. After he was adjudged bankrupt in March 2001, he resigned as director of both companies.

13. Y T Leung and Y K Leung have engaged each other in litigation for many years. The disputes revolve around the control and management of Money Facts and Fonfair and also the Yau Tong Property.

Fonfair's business and the Yau Tong Property

14. The business of Fonfair and the Yau Tong Property was fully described in the Judgment of Kwan J (as Her Ladyship then was) in HCCW 880/2001 and HCCW 246/2002 dated 2 February 2004 (“**Kwan J’s 2004 Judgment**”), paragraph 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.”

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15. The position remains the same today: the Yau Tong Property is the only material asset of Fonfair, and other than letting out the Yau Tong Property, Fonfair carries on no other business.

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16. According to the 2nd Affirmation of Ms Leung Chi Yin Gillian, Y T Leung’s daughter, based on articles and advertisements in various Hong Kong newspapers, in early November 2018, it was estimated that the value of the Yau Tong Property was around HK\$1.2 billion to HK\$1.5 billion.

Quasi-partnership between Y K Leung and Harbour Front

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17. In paragraph 49 of Kwan J’s 2004 Judgment, it was held in conclusion that there is a quasi-partnership between Y K Leung and Harbour Front in respect of their association in Money Facts and Fonfair which gives rise to equitable considerations.

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18. Money Facts was set up by Y K Leung and Y T Leung. Their shareholders’ agreement dated 5 June 1990 states that there are three specific objectives of this company, which are to:

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- “ 1. ensure as the majority shareholder in Fonfair Ltd., 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 Ltd., that Fonfair shall pursue and negotiate any future development plan and other business to safeguard and maximise the interest of Fonfair shareholder;
 3. safeguard and maximize the interest of YK and YT in Fonfair Ltd.”

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19. The shareholders' agreement then stipulates that "YK and YT as sole shareholders in Newco [ie Money Facts] shall cause the election of YK and YT as the only two directors in Newco. Both directors shall not be subject to rotation."

20. Therefore to me it is very plain that Money Facts and Fonfair were intended to be a quasi-partnership between the two brothers, such that each has the equal right of participation in the two companies. Hence in clear terms were the findings in paragraph 40 of Kwan J's 2004 Judgment:

" 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."

21. The equal right of participation of Y T Leung and Y K Leung in the management of Fonfair's business is further explained in paragraphs 43 and 44 of Kwan J's 2004 Judgment:

" 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."

22. Y K Leung consented to Y T Leung's transfer of his 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 Y T Leung: see paragraph 47 of Kwan J's 2004 Judgment.

Exclusion of Y T Leung / Harbour Front from control and management of Money Facts and Fonfair

23. Y T Leung and Harbour Front were excluded from control and management of Money Facts and Fonfair, for good reasons. In the summary at paragraph 10.4 of Harris J's Reasons for Judgment dated 15 February 2018 in HCCW 111/2015 and HCCW 116/2015, [2018] HKCFI 358 ("**Harris J's 2018 Judgment**"):

" 10.4 There was good reason for YK to exclude Harbour Front from management and it was thus not unfair:

(a) Section 156 of the then *Companies Ordinance*, Cap 32, prohibits bankrupt from acting as a director. Without finding that YT and Harbour Front should be treated as one entity, Kwan J held in [74]:

'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.'

(b) There was a case for investigation by the Official Receiver as to whether the transfer of YT's shares to Harbour Front was at an undervalue and liable to be set aside pursuant to section 49 of the *Bankruptcy Ordinance*, Cap 6:

'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': [75]–[82].

(c) There has been misconduct by YT, namely, misappropriating funds of Fonfair in the form of rent received by Fonfair for the occupation of the land by Universal, a company controlled by YT, and subsequently YT's persistent failure to enforce the tenancy agreement made by Fonfair and Universal. As Kwan J notes in [84]–[88]:

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....

87. It could be seen from the above that Harbour Front had not only objected to Fonfair's petition to wind up Universal Dockyard but had actively assisted the latter to resist the petition and to thwart Fonfair's attempts to recover the judgment debt for arrears of rent, which had grown to HK\$8.5 million with interest at the time of the hearing in March 2003. In doing so, Harbour Front had changed its stance from asserting that there was no prospect of recovery against Universal Dockyard to justify incurring legal expenses to the opposite position that Universal Dockyard had a positive asset value to justify its investment in that company. In so siding with Universal Dockyard, Harbour Front had acted against the interest of Fonfair and had defeated the first of the three purposes for setting up Money Facts, which was to ensure that as the majority shareholder in Fonfair, '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'. 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 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.' ”

24. Therefore, Harbour Front was then not entitled to complain that it had been unfairly excluded from the control and management of Money Facts and Fonfair, because its hands were unclean. As summarised in paragraph 10.5 of Harris J's 2018 Judgment:

“ 10.5 Harbour Front has not come to court with clean hands. In [106] and [107] Kwan J held:

‘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.* [[2001] 1 HKLRD 561] 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.’ ”

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25. It follows that unless Harbour Front “cleaned” its hands by remedying its misconduct, it will not be ever entitled to complain of unfair prejudice. Any complaints before remedying can only amount to abuse of process. This has been confirmed by the Court of Appeal and various courts at the Court of First Instance. As summarised in paragraphs 20 – 23 and 41 – 42 of Harris J’s 2018 Judgment:

“ 20. Both Recorder Kwok and Kwan J refused to grant injunctions because Harbour Front remained in breach of the Shareholders Agreement. Kwan J says this in [10] of her judgment:

‘I cannot agree with this. On the evidence adduced in this application, Harbour Front remains in breach of the Shareholders Agreement, and has thwarted the first of the 3 purposes for which Money Facts was set up. It has made no reparation of the losses suffered by Fonfair as a result of its misconduct in the misappropriation of rental income and the thwarting of Fonfair’s attempts to recover the judgment debt of \$8.5 million for arrears of rent owed by Universal Dockyard Limited, which has been wound up in 2003. Harbour Front is seeking equitable relief by invoking its rights under the Shareholders Agreement notwithstanding it has been and still is in breach of the agreement. I am unable to see how its misconduct is irrelevant to the equitable relief sought or that its breach of the agreement is spent.’

21. The Court of Appeal dismissed Harbour Front’s appeal. Rogers VP was similarly clear about the reasons in his judgment:

‘In my view the commencement of this action was, as Mr Recorder Kwok said, an abuse of the process and appears to have been an attempt to re-litigate the matters which were raised in HCA 1937 of 2007 and in the winding up proceedings to which I have referred. Furthermore and most importantly, Harbour Front has done nothing to repair the losses suffered by Fonfair as a result of its misconduct by misappropriating the rental income and, indeed, thwarting Fonfair’s attempts to recover its judgment debt from Universal Dockyard Ltd. In those circumstances, quite apart from there being no serious question to be tried, Harbour Front is in no position to seek the court’s assistance by the grant of interlocutory injunctions in this case.’

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22. It should by September 2008 have been quite clear to Harbour Front and YT that if Harbour Front was to have any prospect of returning to a role in the management of Fonfair it would have to make good the losses it had caused to Fonfair and that if Harbour Front continued with its belligerent refusal to respect the decisions of the courts it was likely to find itself permanently excluded from a role in Fonfair's affairs. Certainly one would have expected Harbour Front's legal advisers, and it has had the same solicitor since the presentation of the Petitions in 2001, to have made the position clear to Harbour Front and YT.

23. Despite this at no time has YT or Harbour Front made an approach in writing to Fonfair or YK with a view to remedying the misconduct found by Kwan J. The closest on its own case that Harbour Front has come to offering to remedy its wrongful acts is exchanges between Harbour Front's solicitor, Tsang Wai Kwan and YK at the AGM held on 23 November 2009. Unfortunately, although Harbour Front had the tape made by YK at the AGM since May 2015, when it was exhibited to YK's 1st affirmation in the Fonfair Petition, Harbour Front did not produce a transcript of it or refer to it in evidence until Mr Fung SC put selective parts of it to YK in cross-examination. Ms Lok produced a longer transcript and translation, which provides greater context. The exchange between Mr Tsang and YK concerns a reconciliation process, which I shall explain later. It seems to me that what little Mr Tsang says falls far short of constituting a sensible proposal to make good the loss Harbour Front was liable for. I will return to this subject in more detail later, but it seems to me that Harbour Front has very obviously failed to take appropriate action to cure the matters, which Kwan J found justified it from being excluded from management of the Companies and led the Judge to conclude that Harbour Front had not come to court with clean hands.

...

41. As, in my view, is clear from the history of the disputes between YK and Harbour Front, which I do not think it can sensibly be suggested in practice is anything other than YT's corporate alter ego, YT has made no sensible effort to try and establish what needs to be done to remedy the breaches of the Shareholders Agreement. The opposite is the position. YT and Harbour Front have made no effort to engage meaningfully to agree what is owed despite being given the interim reports. Instead Harbour Front tried to intimidate Lau & Au Yeung in to stopping compiling them. Harbour Front has made no effort to propose an alternative method for agreeing what is owed and moving on. The guiding mind behind Harbour Front, who as I have said I think it is reasonable to assume is YT, is motivated by an animosity towards YK and a lack of objectivity, which seems to render any prospect of Harbour Front doing what is required to remedy its breaches illusory.

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42. I find that Harbour Front has fairly been excluded from
management. In my view this will remain the case until such
time as Harbour front takes genuine and substantial steps to
remedy its misconduct. Mr Fung has cited no authority for
the proposition that a finding that a shareholder has been fairly
excluded from management becomes spent simply by effluxion
of time even if the shareholder has made no substantive effort to
remedy his wrong as I have found to be the position in the present
case. This is entirely unsurprising as the proposition seems to
me to be as meritless as it is unattractive. If a shareholder acts
in such a way as to destroy the mutual trust which was central to
any agreement that he could take part in management, it seems
to me clear that until such time as he remedies the misconduct, if
it is possible to do so and it might not, he loses the right to argue
that his exclusion alone justifies the court making a winding-up
order on the just and equitable ground or granting relief for
unfair prejudice. The reason is simple: it would not be just and
equitable to wind up in these circumstances and the exclusion
from management is not unfair.”

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26. In more concrete term on how Harbour Front had failed to
remedy its misconduct, Harris J was critical of Harbour Front’s complaint in
relation to the way in which Y K Leung addressed Harbour Front’s failure
to make good the loss caused by Y T Leung’s breaches (see paragraph 57
of Harris J’s 2018 Judgment). His Lordship commented that in response
to the interim reports produced by Y K Leung’s accountants (the latest of
which was in 2016 (“**2016 Interim Report**”) recording the losses that Y K
Leung treated as attributable to Harbour Front and the amounts that he had
drawn down from Fonfair, Harbour Front had failed to propose any
sensible way of assessing the loss that had been suffered by Fonfair or to
engage with Y K Leung constructively over the agreement of figures once
Y K Leung started to provide the interim reports. This demonstrated, in
His Lordship’s view, that Harbour Front had no interest in having a
constructive dialogue with Y K Leung over compensating Fonfair.

A *Has Harbour Front now taken genuine and substantial steps to remedy its*
B *misconduct?*

C 27. In these proceedings, Harbour Front now contends that ever
D since the hearing before Harris J in HCCW 111/2015 and HCCW 116/2015
E in June 2017, Harbour Front has continuously taken active, serious and
F diligent steps to remedy its breach of the shareholders' agreement identified
G in Kwan J's 2004 Judgment, and that it has paid particular heed to Harris J's
H said remark by maintaining a constructive dialogue with Y K Leung over
I compensating Fonfair.

J 28. As such, in its submissions, Harbour Front should be allowed
K to reassert its rights under the shareholders' agreement. But instead, Y K
L Leung pushes ahead the Public Tender without Harbour Front's knowledge,
M participation, approval or consent.

N 29. Briefly, the steps which Harbour Front contends that it has
O taken to remedy its past breaches include:

- P (a) On 7 June 2017, a written offer to pay was made by Harbour
Q Front's then solicitors to Y K Leung's solicitors.
- R (b) On 5 July 2017, another written offer was made by Harbour
S Front to Fonfair. The offer was attached with a cheque for
T HK\$3.022 million payable to Fonfair.
- U (c) On 10 August 2017, Harbour Front wrote to Fonfair
V demanding for "quantification of any alleged claims for which
Harbour Front is liable to Fonfair together with details of such
quantification".
- (d) On 24 July 2018, Harbour Front by letter offered two
alternatives to Fonfair: to fully and finally settled the matter by

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paying Fonfair the sum of HK\$12,762,695.14, or alternatively to pay the same amount to Fonfair as interim payment pending formal adjudication of the question of quantum.

(e) On 9 August 2018, Harbour Front by letter offered to pay to Fonfair the sum of HK\$15,616,705.23 which is the total amount asserted to be due by Harbour Front to Fonfair in Appendices I to IV of the 2016 Interim Report as security pending adjudication of the figures claimed by Fonfair. Harbour Front also offers to pay HK\$1,000,000 as security for any future legal costs award against Harbour Front should the process of adjudication or determination of Fonfair's claims be not in Harbour Front's favour.

(f) On 29 September 2018, Harbour Front's solicitors wrote to Fonfair and tendered a cheque in the sum of HK\$11,467,293.47, being the total amount asserted to be due by Harbour Front to Fonfair in Appendices I to III of the 2016 Interim Report, as payment "to settle any liabilities owed by Harbour Front to Fonfair given rise by the breach of the Shareholders Agreement".

(g) On 13 October 2018, Harbour Front's solicitors wrote to Fonfair accepting Fonfair's proposal of "execution of the one-off 'reconciliation exercise' based on the figures stated in the Interim Report." The letter asked Y K Leung to regard Harbour Front as having fully purged its breach of the shareholders' agreement, not to object or obstruct Harbour Front's exercise of rights and entitlements under the shareholders' agreement, including equal participation in management of both Fonfair and Money Facts, and to procure the appointment of Harbour Front's representatives to the boards of Fonfair and Money Facts.

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- (h) On 22 October 2018, Harbour Front’s solicitors wrote to Y K Leung and Fonfair reconfirming Harbour Front’s “acceptance of the execution of the one-off ‘reconciliation exercise’ based on the figures contained in the 2016 Interim Reports (‘Settlement by Reconciliation Exercise’), which is Fonfair’s/YKL’s own proposed and insisted form of settlement to fully and finally settle and to purge Harbour Front’s past breaches including those of the Shareholders Agreement”.
- (i) On 9 November 2018, Harbour Front’s solicitors wrote to Y K Leung’s solicitors confirmed again its client’s acceptance of the Settlement by Reconciliation Exercise, and stated that its client’s acceptance is “not subject to any precondition”.
- (j) In the Petition, Harbour Front undertakes to pay into court HK\$4,149,411.76 being legal costs asserted to be due by Harbour Front to Fonfair in Appendix IV of the 2016 Interim Report pending final determination of the figure.

30. Ms Frances Lok (with Mr Vincent Chiu), Counsel for Y K Leung, submit that the offers by Harbour Front were not genuine attempts to make amends for its misconduct, that they were a series of hostile, verbose and argumentative letters by which Harbour Fronts demanded its nominees to be appointed to the boards of Fonfair and Money Facts, and that Harbour Front’s disputes of the extent of its liability and requests for adjudication amount to total denial of liability in substance. Further, as Ms Lok submits, the cash offers made since late 2017 were made years too late, and they were meaningless when made, and Harbour Front’s acceptance of the 2016 Interim Report in October 2018 was stated to be purely “for settlement” and was not reparation in good faith.

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31. Bearing in mind whether the breach has been fully remedied is a matter for trial, on the evidence put before me, for the purpose of this application, I am satisfied Harbour Front has shown it has made real effort in “purging” its past wrongs. Having read the correspondence, while some of the offers made by Harbour Front were really framed in no unequivocal manner, the rest of them, particularly those letters sent in September and October 2018, have shown at least some seriousness on the part of Harbour Front to remedy the breach as soon as possible. While I can see such payment or confirmation might well be driven by Harbour Front’s strong desire to restore its right to participate in the management of the company, I cannot, for the purpose of this application, accept the argument that the tendering of the cheque for payment of HK\$11,467,293.47 drawn in Fonfair’s favour as well as the written confirmation of unconditional acceptance of the reconciliation exercise based on figures stated in the 2016 Interim Report were not reparation in good faith. Objectively these steps may well be considered by the trial judge hearing the Petition as effective remedies of the past breach. I also do not accept that these steps must be regarded as taken too late, and that as a result of such delay Harbour Front has been permanently barred from participating in the management of the companies, notwithstanding the past breach has been reasonably remedied. There is no deadline imposed whether in previous judgments or otherwise for Harbour Front to remedy its previous wrongs.

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Serious issues to be tried

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32. In my view, there are the two key issues in these proceedings, namely (a) whether the steps so far taken by Harbour Front, considered together, are adequate enough to be regarded as satisfactory remedy of its past breach of the shareholders agreement as found in the previous

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A judgments, and (b) whether as a result of the remedy of the breach, Harbour
B Front's right to equal participation in the control and management of Fonfair
C and Money Facts under the shareholders' agreement has then been restored
D or can then be exercised. Whilst these issues are to be determined at
E the hearing of the Petition, for the purpose of this application, I find the
F evidence adduced by Harbour Front, particularly regarding the steps that it
G has taken since after the hearing before Harris J in HCCW 111/2015 and
H HCCW 116/2015 in June 2017, has demonstrated a good arguable case that
I Harbour Front's exclusion from participating in the management of Money
Facts and Fonfair notwithstanding its satisfactory remedy of its past breach
of the shareholders' agreement is unfairly prejudicial to its interest as a
member of both companies.

J 33. Given that the material events raised in these proceedings took
K place after the trial before Harris J in June 2017, namely remedial steps
L taken by Harbour Front since July 2017 and the Public Tender which will be
M closed on 30 November 2018, there is no question of re-litigating disputes
in previous proceedings as argued by Y K Leung.

N 34. However, I would add one rider. It is trite that in cases where
O the grant or refusal of an interlocutory injunction will finally dispose of the
P action in favour of the successful party to the application, the Court should
Q approach the matter on a broad principle that it should endeavour to do what
R will avoid injustice, but that the applicant has to show at least that they are
S likely to succeed at trial and that this requires a stronger evidential case than
T is required in ordinary matters to which the *American Cyanamid* principles
U apply: see *Sunlink International Holdings Ltd v Wong Shu Wing* [2010] 5
V HKLRD 653, paragraph 10, *per* Harris J.

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35. Ms Lok drew to my attention that the three substantive reliefs sought in Harbour Front's summons (paragraphs 1, 2 and 3) are reliefs sought in the Petition (prayers 6, 7 and 8).

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36. Mr Clifford Smith SC (with Ms Sabrina Ho and Ms Jacqueline Law), Counsel for Harbour Front, submit that the grant or refusal of the summons would not effectively dispose of the Petition in its entirety because the interlocutory injunction sought does not include any request for the reconstitution of the boards of directors of Money Facts and Fonfair to enable Harbour Front to participate in the management of the companies, which is part of the substantive relief sought in the Petition (prayer 5), and whether Harbour Front has fully remedied its past breaches of the shareholders' agreement remains a matter to be resolved at trial.

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37. Unless and until it is determined by the Court at the hearing of the Petition that Harbour Front has remedied its breach satisfactorily and that it is now entitled to assert its rights under the shareholders' agreement, Harbour Front, as held in previous judgments, would still be regarded as justifiably excluded from the management of Fonfair and Money Facts. As such, this Court should be acute not to grant at this interlocutory stage such rights and entitlements to Harbour Front as if it has succeeded at the trial. This would be premature.

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38. In the circumstance of the present case, the primary objective should be to preserve the *status quo*, so that in the event Harbour Front succeeds at trial, the reliefs that it obtains will not become nugatory.

"of no value or importance"

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39. If the Yau Tong Property is sold before the determination of the Petition, in the event that Harbour Front succeeds at trial, given that it is the only material asset of Fonfair and that Fonfair, as held in Kwan J's 2004 Judgment, is in substance a quasi-partnership between Y K Leung and Harbour Front in light of the background and purposes in setting up the company as explained above, in my view, the reliefs to Harbour Front in re-participating in the management of the company may become practically meaningless. Therefore, I consider it is essential to preserve the *status quo* by restraining the Yau Tong Property from being sold or disposed of before the determination of the Petition, unless the parties consult each other and agree otherwise.

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40. I do not consider it is necessary to compel Y K Leung to disclose to Harbour Front details of the Public Tender such as proposals from agents, appointment terms of agents, the tender document, reserve price, intended completion date and payment conditions, private offers from potential buyers as sought in paragraphs 2 and 3 of the summons. This would effectively give Harbour Front a substantial part of the right to participate in the management of Fonfair, which Harbour Front is not entitled at this stage.

Damages inadequate

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41. In light of the unique background of Fonfair as a family company, the quasi-partnership nature of Fonfair and Money Facts, and the implied agreement (as found in Kwan J's 2004 Judgment) of equal entitlement to management and no exclusion unless for good reasons, it is apparent that deprivation of such equal right to participate in management is not a right that is quantifiable in monetary term.

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42. This view is fortified by Mr Smith's submission with which I agree, that the situation in the present case is analogous to the right of a partner, in an appropriate case, to seek an order for specific performance or, more usually, an injunction to compel his co-partners to adhere to the terms of their agreement whilst the partnership is continuing. An injunction could be granted if a partner excludes his co-partner from exercising his right to participate in the management of the partnership affairs: see *Lindley & Banks on Partnership* (20th ed), paragraphs 23-48, 23-139 and 23-140 and *Araci v Fallon* [2011] EWCA Civ 668 at paragraphs 36 – 39 *per* Jackson LJ and paragraphs 69 – 75 *per* Elias LJ. Of course, the analogy would only be applicable to the present case if and only if the Court is satisfied that Harbour Front's past breach has been remedied.

43. I therefore do not accept Ms Lok's submission that financial compensation after the sale of the Yau Tong Property will be adequate remedy for wrongful exclusion of Harbour Front from participating in management of Fonfair (if so found by the Court after trial).

44. Ms Lok relies on the following passage in the Court of Appeal's Reasons for Judgment in CACV 260/2008 dated 18 September 2008, *per* Rogers VP:

"Finally, I would for completeness just make the point that the application for interim injunctions (whether pending appeal or as sought in the appeal proper) was objectionable on the basis that, clearly (and as Mr Fung, I think, accepted) damages were an adequate remedy."

45. On clarification Ms Lok accepts that this is not a passage binding on this Court because it is a finding of fact in the context of the application in that appeal. I also agree with Mr Smith that this passage is *obiter dictum*, made for completeness. The paramount fact underlying

"that which is said in passing" i.e. incidental

A the decision in this judgment was described by Rogers VP at paragraph 6
B of the judgment, that:

C “The matters going to misconduct that were held against Harbour
D Front after the hearing of the winding up petitions have never been
rectified. None of the debt owing has been paid or discharged.”

E As held in above, there is now a serious issue to be tried on whether the
F breach has been remedied.

G *Balance of convenience*

H 46. Ms Lok submits that the following factors should be weighed
I against the grant of the injunction against the sale of the Yau Tong Property
“unless with the prior approval or consent of Harbour Front”.

J 47. Firstly, she submits that financial compensation would be
K adequate. I disagree, for the reasons stated above on damages being
L inadequate.

M 48. Secondly, she submits that there was delay in taking out this
N application. I disagree. The delay (if any) was not substantial —
O Harbour Front first learnt of the closing date of the Public Tender (ie
P 30 November 2018) from newspaper advertisements on 2 October 2018.
They took out this application about 6 weeks later, on 12 November 2018.

Q 49. Thirdly, she submits that if injunction is granted and Harbour
R Front fails in the end in these proceedings, it would create false signal to the
S market that Fonfair had no authority to deal with the Yau Tong Property.
I disagree. The advertisements for the Public Tender have stated clearly
T that the land may be sold privately prior to the tender closing or the
U invitation may be withdrawn.
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50. In this connection, as explained, the Court should be acute not to give Harbour Front any substantive right of management prematurely at this interlocutory stage. By the same token, Y K Leung's right to management of Fonfair should not be unnecessarily disturbed (except for the actual sale or disposal of the Yau Tong Property, which should be restrained for the reasons explained above). Therefore, I am minded not to restrain the continual proceeding with and marketing of the Public Tender (ie paragraph 1(a) of the summons) as well as the offering or continual offering the Yau Tong Property for sale (ie paragraph 1(c) of the summons). Of course, if the best bid received upon the closing of the Public Tender (or indeed any private offer from potential buyers) is considered by Y K Leung to be so commercially attractive that it would be in the best interest of Fonfair to accept that bid (or offer), Y K Leung may consider informing Harbour Front and the parties may put their heads together to discuss and see if Harbour View could come to agreement with Y K Leung and consents to the proposed sale.

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51. Fourthly, Ms Lok submits that the injunction is tantamount to interfering with the present management of Fonfair and imposing new directors onto Fonfair. In principle I agree with Ms Lok on this factor. I am not prepared to grant any order which carries this effect. At the risk of repeating myself, I am only prepared to preserve the *status quo* — namely to keep the Yau Tong Property within the ownership of Fonfair, so that should Harbour Front succeed at the end, it will have a meaningful participation in the management of the company in accordance with the shareholders' agreement.

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52. Fifthly, she submits that as Harbour Front has previously indicated the possibility of its intention to offer to buy or to bid for the Yau Tong Property, there will be a conflict of interest on the part of Harbour Front as a director of Fonfair as well as a potential purchaser; and with grant of the prohibitive injunction the Court would effectively sanction the conflict of interest. I disagree. First, the articles of association expressly allow a director to deal with the company after appropriate declaration of interest. Second, which is more important, Harbour Front has not yet proved its case in these proceedings, and as explained above, at this interlocutory stage the Court will not grant any substantive right to Harbour Front to participate in the management of the company's affairs including obtaining internal information of any potential sale to Harbour Front's advantage.

Conclusion

53. In conclusion, for the above reasons, I am prepared to grant the interlocutory relief restraining sale or disposal of the Yau Tong Property (unless with Harbour Front's prior approval or consent) pending determination of the Petition or further order of the Court. As to costs of this application, while I would remark here that clearly a certificate for two counsel is merited, my order is that costs should be reserved for the learned judge hearing the Petition.

54. I thank Counsel for their helpful assistance.

(Kenneth Wong)
Deputy High Court Judge

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Mr Clifford Smith SC, leading Ms Sabrina Ho and Ms Jacqueline Law,
instructed by Yiu & Associates, for the petitioner

Ms Frances Lok and Mr Vincent Chiu, instructed by Ho & Ip,
for the 1st and 3rd respondents

The 2nd, 4th and 5th respondents were not represented and did not appear

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