Neutral Citation Number: [2021] EWHC 3346 (Ch)

Case No: BR-2020-000410

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

Rolls Building
Fetter Lane
London, EC4A 1NL

10 December 2021

**IN THE MATTER OF LI SHU CHUNG (also known as KEN LI SHU CHUNG)**
**AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006**

**Before**:

**MR JUSTICE LEECH**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**(1) CHEN YUNG NGAI KENNETH**
**(2) SUN WING SZE**
**(as joint trustees in bankruptcy of LI SHU CHUNG also known as LI SHU CHUNG KEN)** **Applicants**

**- and -**

**LI SHU CHUNG** **Respondent**
**(also known as LI SHU CHUNG KEN)**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**James Morgan QC** and **Katie Longstaff** (instructed by **TWM Solicitors LLP**) for the **Applicants**
**The Respondent** in person

Hearing dates: 17, 18 and 19 November 2021

- - - - - - - - - - - - - - - - - - - - -

# APPROVED JUDGMENT

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

**Mr Justice Leech:**

## Introduction

1. By Amended Application Notice dated 30 September 2021 the Applicants (the "**Trustees**") apply for recognition of bankruptcy proceedings in the High Court of the Hong Kong Special Administrative Region under the Cross-Border Insolvency Regulations 2006 (the "**CBIR 2006**"). They do so in their capacity as joint trustees of the bankruptcy estate of Mr Li Shu Chung (also known as Mr Li Shu Chung Ken and Mr Ken Li Shu Chung) ("**Mr Li**"), who is a Hong Kong national.

2. Mr Lee Shu Hang, who is also known as Mr Richard Lee, and Ms Li Sin Man Seline (the "**Petitioners**") are his estranged sister and brother and the executors of their late father's estate. On 22 December 2017 they issued a statutory demand claiming that Mr Li owed a total debt of HK $5,567,128.52. The demand described the debt as taxed costs and interest payable under a bill in respect of proceedings in the High Court of Hong Kong. On the same day the Petitioners issued a second statutory demand claiming that Mr Li owed a further debt of HK $5,611,305.08. The second demand described the debt as taxed costs and interest payable under a further bill in the same proceedings.

3. On 7 September 2018 Master Hui gave leave to the Petitioners to issue a bankruptcy petition (the "**Petition**") and on 27 March 2019 the Honourable Justice Au-Yeung heard the Petition. She also heard Mr Li's application to set aside the order giving leave to issue the petition and his application to strike out Ms Seline Li's affirmation dated 11 March 2019. In a judgment dated 11 October 2019 Au-Yeung J dismissed Mr Li's applications and granted the Petition. On 11 October 2019 she also made a bankruptcy order against Mr Li. I will refer to her judgment as the "**Bankruptcy Judgment**" and the order itself as the "**Bankruptcy Order**".

4. On 13 July 2020 the Trustees issued an application in this court for recognition of those bankruptcy proceedings and I will use the term the "**Bankruptcy Proceedings**" to describe both the proceedings in Hong Kong to obtain the Bankruptcy Order and the administration of Mr Li's estate after the Bankruptcy

Order was made. On 10 August 2020 the court in Hong Kong made an order under section 30AC(1) of the Bankruptcy Ordinance providing that the relevant period for the bankruptcy was not to commence until certain conditions had been complied with, namely, that Mr Li had attended for an initial interview and provided the Trustees with information and documents concerning his affairs, dealings and property (including the information specified in the schedule). I will refer to this order as the "**Non-commencement Order**".

5. On 7 September 2020 ICC Judge Barber gave directions and the hearing of the recognition application was originally fixed for April 2021. By a consent order dated 12 April 2021 the parties agreed to vacate the hearing and it was relisted for final hearing in November 2021.

6. On 7 April 2021 the High Court of Hong Kong issued a letter of request seeking legal assistance from this court and on 26 May 2021 the Trustees issued an application under section 426 of the Insolvency Act 1986. On 8 July 2021 Mr David Rees QC (sitting as a judge of the Chancery Division) gave limited relief on that application.

7. On 14 October 2021 Chief ICC Judge Briggs made an order for cross-examination of witnesses of fact and gave further directions for the hearing of the application. On 2 November 2021 the Chancellor dismissed an application by Mr Li for security for costs. He also gave permission to the Trustees to amend the Application Notice.

8. On 9 November 2021 the High Court of Hong Kong issued a second letter of request. By letter dated 10 November 2021 the Trustees' solicitors, TWM Solicitors LLP ("**TWM**"), applied for further relief under section 426 of the Insolvency Act 1986. In the letter, TWM made it clear that this application was made in the alternative to the recognition application. Until 4 November 2021 Mr Li had been represented by solicitors and counsel. However, on that date Payne Hicks Beach LLP ("**PHB**") wrote to TWM informing them that they were no longer acting for him.

9. Between 17 and 19 November 2021 I heard the recognition application. Mr Li appeared in person. He gave oral evidence and was cross-examined by Mr James

Morgan QC (who appeared with Ms Katie Longstaff for the Trustees). Mr Chen Yung Ngai Kenneth ("**Mr Chen**"), one of the Trustees, had made an affidavit in support of the application (as required by the procedural requirements of the CBIR). He had also made two witness statements dated 30 November 2020 and 30 September 2021. However, Mr Li did not require Mr Chen to attend for cross-examination.

10. After some debate, I adjourned the section 426 applications until after I had determined the recognition application and given judgment. Mr Morgan explained that the section 426 application was very much a fall-back position and Mr Li was concerned that he would be unable to deal with it without further time. Although I may yet have to determine the section 426 application because either of the parties may appeal against this judgment, it made sense to deal with it after I had delivered judgment on the recognition application.

## Other Litigation

11. Between 2009 and 2018 Mr Li was involved in a series of actions against his family and various family companies. In this judgment I refer to a number of those actions (but not all) and I set them out below in order of issue. In the body of this judgment I will use the abbreviations in italics (below). All of the relevant claims were issued in the High Court of the Hong Kong Special Administrative Region and the actions to which I refer are as follows:

    i) *HCA 1711*: In 2009 Mr Li's father, Mr Lee Sai Nam, issued proceedings against Mr Li for declarations in relation to the beneficial ownership of Luen Tat Watch Band Manufacturer Ltd ("**Luen Tat**") and Hong Kong Pak Tat Trading Co Ltd ("**Pak Tat**"). Mr Li counterclaimed against his father and Allied Ever Holdings Ltd ("**Allied Ever**"), another family company, for a declaration that the shares were beneficially owned by him. Mr Li was unsuccessful and ordered to pay the costs of the claim.

    ii) *HCCW 497*: On 6 July 2010 an order was made winding up Luen Tat. Allied Ever applied to stay the order and Mr Li opposed that application. On 27 November 2017 an order was made permanently staying the winding up of Luen Tat.

iii) *CACV 2*: In January 2016 Mr Li appealed the decision in HCA 1711. On 19 January 2017 his appeal was dismissed and he was ordered to pay his father's costs. DS Cheung & Co ("**DS Cheung**") acted for the Petitioners and Mr Li's father in both HCA 1711 and CACV 2. K&L Gates ("**KLG**") acted for Mr Li.

iv) *HCMP 3367*: By Originating Summons dated 1 December 2016 Mr Li applied to tax the bills of his former solicitors, Stevenson Wong & Co ("**SW**"). He was now represented by B Mak & Co ("**B Mak**"). The taxation continued until 2019 until it was stayed as a consequence of the Bankruptcy Order.

v) *CACV 15*: On 22 January 2018 Mr Li appealed against the stay of the winding up order in HCCW 497. He was ordered to provide security for the appeal of HK $450,000 although the appeal has now been dismissed with the consent of the Trustees.

vi) *HCA 594*: On 14 March 2018 Mr Li issued a Writ of Summons against SW claiming damages for negligence. He was represented by Johnnie Yam, Jacky Lee & Co ("**JYJL**"). Again, the claim is now stayed as a consequence of the Bankruptcy Order.

vii) *HCA 1039*: On 7 May 2018 Luen Tat issued a Writ against Mr Li seeking a declaration that he held the sum of HK $28 million on constructive trust for the company. On 26 September 2018 Luen Tat entered judgment in default. On 15 November 2018 Mr Li applied to set aside the judgment. On 25 September 2019 that application was heard and on 4 June 2020 the Honourable Mr Justice K Yeung set aside the judgment on terms that Mr Li paid the amount claimed into court.

## Creditors

12. Following the Bankruptcy Order, a number of creditors submitted proofs of debt. 13.8% of the debts by value involved unpaid costs orders made against Mr Li which he had not satisfied. The relevant creditors, the amounts of their debt (and the relevant percentage of the total amount submitted to proof) were as follows:

i) *Luen Tat*: HK $136,557,064 (79.81%);

ii) *Mr Richard Lee and Ms Seline Li*: HK $22,629,814 (13.23%);

iii) *Allied Ever*: HK $4,706,729 (2.75%);

iv) *SW*: HK $6,003,384 (3.51%);

v) *Inland Revenue*: HK $1,085,861 (0.63%);

vi) *Amex*: HK $96,109 (0.06%); and

vii) *BOC Credit Card (Int) Ltd*: HK $32,012 (0.02%).

13. Apart from the sums which he owed to the three smallest creditors (the Inland Revenue, Amex and on his Bank of China credit card) and the costs orders Mr Li disputed the other debts. However, as Mr Morgan pointed out, if Mr Li successfully challenged any of those debts then the amounts which he owed to the Inland Revenue, Amex and Bank of China would assume a greater significance.

**Addresses**

14. Mr Morgan took Mr Li to various documents referring to a series of different addresses in Hong Kong. For ease of reference I adopt the following abbreviations to refer to those addresses:

i) *Hampton Court*: Suite 3819 38/F Hampton Court Gateway Apartments Harbour City Canton Road TST Kowloon;

ii) *3202 Sutton Court*: 3202 Sutton Court Gateway Apartments Harbour City Canton Road TST Kowloon;

iii) *3211 Sutton Court*: 3211 Sutton Court Gateway Apartments Harbour City Canton Road TST Kowloon;

iv) *The New Territories Address*: Flat A 26/F Block 19 Phase 3 Park Island Ma Wan New Territories;

v) *The Mei Foo Address*: Flat C 18/F 1 Nassau Street Mei Foo Sun Chen Kowloon;

vi) *The Kwei Shing Industrial Building*: Flat H/26 1/F Phase 1L Kwai Shing Industrial Building, 42-46 Tai Lin Pai Road Kwai Chung in the New Territories; and

vii) *The Manhattan Centre*: Room 413 4/F Manhattan Centre 8 Kwai Cheong Road Kwai Chung New Territories.

## The Law

*(1) The Model Law*

15. Regulation 2(1) of the CBIR 2006 provides that the UNCITRAL Model Law (the "**Model Law**") on cross-border insolvency (as defined in regulation 1) shall have the force of law in the form set out in Schedule 1. Regulation 2(2) also provides that the Guide to Enactment and Interpretation prepared at the request of the UN Commission on International Trade Law (the "**Guide**") may be considered in ascertaining the meaning or effect of any of the provisions of the Model Law.

16. Article 4 assigns the court's functions under the Model Law to the Chancery Division. Article 15(1) provides that a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. Article 2 defines the terms "foreign representative" and "foreign proceeding" as follows:

> "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;"
>
> "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;"

17. Article 15(2) provides that such a recognition application must be accompanied either by (a) a certified copy of the relevant decision commencing the foreign

proceeding, (b) a certificate from the foreign court affirming that decision or (c) any other evidence acceptable to the court. Article 16(1) and (3) then provide as follows:

> "1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a person or body within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume."
>
> "3. Subject to paragraph 2A, in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests."

18. Article 17(1) provides that this court is required to recognise the foreign proceeding if four conditions are satisfied. Those conditions are as follows:

> "Subject to article 6, a foreign proceeding shall be recognised if—(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2; (b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2; (c) the application meets the requirements of paragraphs 2 and 3 of article 15; and (d) the application has been submitted to the court referred to in article 4.

19. Article 17(2) provides for different forms of recognition depending on whether the foreign proceedings are taking place in the State where the debtor has "the centre of its main interests" ("**COMI**") or whether it has an "establishment" within the meaning of Article 2:

> "1. Subject to article 6, a foreign proceeding shall be recognised if—(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2; (b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2; (c) the application meets the requirements of paragraphs 2 and 3 of article 15; and (d) the application has been submitted to the court referred to in article 4.
>
> 2. The foreign proceeding shall be recognised— (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of sub-paragraph (e) of article 2 in the foreign State."

20. Mr Morgan accepted that Article 17(2) effectively imposes a further jurisdictional requirement. The court will not recognise the foreign proceeding unless the

foreign representative can demonstrate either that it is a "foreign main proceeding" or a "foreign non-main proceeding". Those terms are defined in Article 2(h) and Article 2(i) in very similar terms to Article 17(2). Article 2(e) provides that the term "establishment" means "any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services".

21. The effect of recognition by this court differs depending on whether the court finds that the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. Article 20 provides that the effect of the recognition of a foreign main proceeding is as follows:

> "1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article— (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) execution against the debtor's assets is stayed; and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
>
> 2. The stay and suspension referred to in paragraph 1 of this article shall be— (a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and (b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case, and the provisions of paragraph 1 of this article shall be interpreted accordingly."

22. Article 21 provides that the court may grant a range of relief upon recognition of a foreign proceeding (whether main or non-main) and Article 21 contains provisions designed for the protection of creditors. Finally, Article 23 provides that a foreign representative has standing to apply to court for various orders under the Insolvency Act 1986.

*(2) Public Policy*

23. Article 17 expressly provides that it is made subject to Article 6 which contains a public policy exception. It provides as follows:

> "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it."

*(3) The Guide*

24. Mr Li challenged a number of the findings or conclusions of Au-Yeung J. The Model Law does not state in terms that the English court should not go behind the judgment. But Mr Morgan submitted that the court must recognise the foreign proceedings unless to do so would be manifestly contrary to public policy. In support of this proposition he relied upon paragraphs 150 and 151 of the Guide:

> "150. The purpose of article 17 is to establish that, if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.
>
> 151. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition. This requires a determination that the proceedings are foreign proceedings within article 2, subparagraph (a). The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17."

25. I accept that submission. Article 2(2) expressly provides that I may consider the Guide to ascertain the meaning and effect of the Model Law and I therefore adopt the interpretation set out in paragraphs 150 and 151 (above). It would deprive the Model Law of much of its force if a debtor could challenge the findings of fact or law made by the foreign court before the receiving court would recognise the foreign proceeding.

*(4) COMI*

26. The Model Law does not contain a definition or explanation of COMI. But there is clear authority that the court should apply the same test under the Model Law as Regulation (EU) 2015/848 on Insolvency Proceedings (the "**EU Regulation**"): see *Re Stanford International Bank Ltd* [2011] Ch 33 at [54] (Sir Andrew Morritt C). Recitals (28) and (30) and Article 3(1) of the EU Regulation provide as follows:

> "(28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing the creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence or by making the new location public through other appropriate means."
>
> "(30)……In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation."
>
> "3(1) The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."

27. The perception of creditors is particularly important in a case where a debtor claims to have moved not only his home but also his COMI to a new jurisdiction (often leaving outstanding debts behind). For this reason Mr Morgan placed strong reliance upon both the facts and analysis of the Court of Appeal's decision in *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966 (an EU Regulation case). In that case the debtor was an accountant who had lived and practised in Dorset for 25 years. In February 2003 he made an affidavit in support of an application for an interim order pending the approval of an IVA by his creditors. He stated that his main residence was now in Spain and that he had found rented accommodation and a job there. The nominee's application to approve the IVA later failed and in October 2003 the debtor's appeal was dismissed. But as Chadwick LJ observed, the debtor could not be heard to say that his COMI was in another Member State before that date because he was invoking the jurisdiction of the English court: see [22].

28. In June 2003 a bankruptcy petition was also presented against the debtor. He made a witness statement in which he asserted that he had now settled in Spain and that was his COMI. The petition was dismissed because the debt was paid by his wife. In November 2003 he made a second witness statement in which he

asserted again that his COMI was Spain. In February 2004 a second bankruptcy petition was presented against him. This time a bankruptcy order was made. The registrar dismissed the debtor's argument that his COMI was in Spain on the basis that "if it had been suggested to his creditors at the time the debts were incurred that his centre of main interests was Spain rather than England, they would have been incredulous": see [23].

29. Mann J allowed an appeal. He accepted the debtor's evidence that he had moved his home, his life and his work to Spain and that it would not be fair to disbelieve his evidence without cross-examination: see [28] to [30]. (This was no doubt one of the factors which prompted the Trustees to apply for an order for cross-examination of Mr Li in the present case.) The Court of Appeal allowed a second appeal against that decision on the basis that the debtor had an establishment in England and this was sufficient to give the court jurisdiction to make a bankruptcy order.

30. The Court of Appeal did not, however, disturb Mann J's decision that the debtor had moved his COMI to Spain. Chadwick LJ (with whom Longmore LJ and Sir Martin Nourse agreed) provided the following guidance in a case where a debtor claims to have changed his COMI (at [55]):

> "(1) A debtor's centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings. In a case where those proceedings are commenced by the presentation of a bankruptcy petition, that time will normally be the hearing of the petition. But, in a case such as the present, where the issue arises in the context of an application for permission to serve the petition out of the jurisdiction, the time at which the centre of the debtor's main interests falls to be determined will be at the hearing of that application. Similar considerations would apply if the court were faced with an application for interim relief in advance of the hearing of the petition.
>
> (2) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. But those facts include historical facts which have led to the position as it is at the time for determination.
>
> (3) In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is

> important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory.
>
> (4) There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of "administration of his interests". He must be free to relocate his home and his business. And, if he has altered the place at which he conducts the administration of his interests on a regular basis — by choosing to carry on the relevant activities (in a way which is ascertainable by third parties) at another place — the court must recognise and give effect to that.
>
> (5) It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of "administration of his interests", that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at time when insolvency threatens. In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of "administration of his interests" are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence."

31. To this guidance Chief Registrar Baister added the following observation in *Budniok v The Adjudicator, Insolvency Service* [2017] EWHC 368 (Ch) at [81]:

> "[A] debtor does not appear to be obliged to advertise his centre of main interest but nor may he hide it. It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor" (per Deeny J in *Irish Bank Resolution Corporation Ltd v Quinn* [2012] NICh 1, [2012] BPIR 322, NI ChD at para 28)."

32. Later authorities also emphasise that international jurisdiction is based on the facts known to third parties and which would enable potential creditors to predict or calculate the risk of insolvency. In *Re Stanford* (above) [35] Sir Andrew Morritt C referred to paragraph 75 of the Virgos-Schmitt Report. He stated as follows:

> "In July 1996 there was signed what became known as the Virgós-Schmit Report on the Convention. Though never formally adopted it was and is regarded as an authoritative commentary on the Convention and the subsequent regulation derived from it. In paragraphs 75 and 76 the authors stated:
>
> > "75. The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore, ascertainable by third parties. The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."

33. In *Stanford* the registered office of the debtor was Antigua and under Article 16.3 it was presumed, therefore, that this was its COMI. At first instance, Lewison J considered that the evidence necessary to rebut the presumption had to be evidence of objective facts ascertainable by third parties. The Court of Appeal agreed. Sir Andrew Morritt C addressed this point at [56](3). In the following paragraph he also dealt with facts which were not in the public domain:

> "Thus it is conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties. Lewison J confined factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. The good sense of this conclusion is demonstrated by the cases in English domestic law relating to constructive notice and its various degrees, see, for example, Baden v Societe Generale S.A [1993] 1 WLR 509, 575 paras 250-274. To extend ascertainability to factors, not already in the public domain or apparent to a typical third party doing business with the company, which might be discovered on enquiry would introduce into this area of the law a most undesirable element of uncertainty.
>
> (4) Whether or not factors, not already in the public domain or so apparent, ascertainable on reasonable enquiry are relevant to a rebuttal of the presumption that cannot extend the range of ascertainable factors to the fraudulent Ponzi scheme. That, inevitably, is neither a matter of general knowledge nor ascertainable on reasonable enquiry. It was suggested that after the fraudulent scheme had been uncovered the facts as to its previous existence had become public knowledge and should be relevant to the rebuttal of the presumption. No doubt the COMI of a company may change as the situation of its registered office may change, but it can only do so by reference to main interests which it still

> has and facts within the public domain or so apparent at the time of their occurrence. The allegations of fraud have not yet been proved before a court of competent jurisdiction (but Mr James Davis has pleaded guilty to three counts in relation to the fraud), SIB's interests main or otherwise ceased on discovery of the alleged fraudulent scheme and the activities now said to rebut the presumption were not in the public domain or so apparent when they occurred."

34. Finally, in *Re Videology Ltd* [2018] BPIR 1795 Snowden J confirmed that the approach to the presumption in the Model Law should be the same as its approach under the EU Regulation. He also emphasised that the rationale for this approach was that given in the Virgós-Schmit Report at [75], namely, that insolvency is a foreseeable risk and it is important that international is based on a place known to the debtor's potential creditors: see [35].

*(5) Establishment*

35. In *Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA* [2015] 1 WLR 2399 Lord Sumption stated that the existence of an establishment must be determined in the same way as the location of the COMI, namely, on the basis of objective factors which are ascertainable by third parties: see [11]. He also stated that the definition in Article 2(e) (above) must be read as a whole rather than broken down into discrete elements for each element colours the others: see [13]. He continued:

> "The relevant activities must be (i) "economic", (ii) "non-transitory", (iii) carried on from a "place of operations" and (iv) using the debtor's assets and human agents. This suggests that what is envisaged is a fixed place of business. The requirement that the activities should be carried on with the debtor's assets and human agents suggests a business activity consisting in dealings with third parties, and not pure acts of internal administration. As the Virgós-Schmit report suggests, the activities must be "exercised on the market (i.e. externally)". I am inclined to think that the same point was being made by the Court of Justice when it observed in the *Interedil* case [2012] Bus LR 1582, para 49, that the activities must be "sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them". I do not think that this can sensibly be read as requiring that the debtor should simply be locatable or identifiable by a brass plate on a door. It refers to the character of the economic activities. They must be activities which by their nature involve business dealings with third parties."

36. In *Re Office Metro Ltd* [2012] BCC 829 a company's registered office in Chertsey did not amount to an "establishment" for the purposes of the Model Law. Its function was to provide guarantees for other members of the Regus group and it carried out minimal activities from the Chertsey address. Even its company formalities were carried out from a different address. Mann J held that it did not carry out economic activities in England: see [28] to [32]. He continued at [33]:

> "Even if I am wrong as to whether Office Metro's residual activities are economic activity for the purposes of the Regulation, I do not consider that they are non-transitory. They are not a consistent activity. The activities involved in paying up on guarantees do not have the character of a consistent business or business-type activity. They arise as and when needed, and were all going well in the underlying group they would not arise at all. The concept of "establishment" is the one chosen as the touchstone of sufficient presence to justify the opening of insolvency proceedings. There are three ingredients for these purposes: (i) a place where things happen, and (ii) sufficient things (iii) of sufficient quality happening there. The concept of non-transitoriness goes to the third of them. In my view the converse of something being transitory is not confined merely to things which are "fleeting" (to use one English synonym) but is also intended to encapsulate such things as the frequency of the activity; whether it is planned or accidental or uncertain in its occurrence; the nature of the activity; and the length of time of the activity itself. When measured against all these elements I consider that the activities of procuring payment on the guarantees is transitory (or not non-transitory) for the purposes of the Regulation. This is to a large extent a value judgment in respect of which one cannot be prescriptive of the elements to be fulfilled (or not fulfilled), but in my view it is plain that if the activities were otherwise economic activities they would, for these purposes, be "transitory" for the purposes of the Regulation."

*(6) Relevant Date*

37. In his Skeleton Argument and in his oral submissions Mr Morgan quite properly drew my attention to the fact that there is a question mark about the relevant date for the determination of Mr Li's COMI. He drew a distinction between the "**Commencement Approach**" (i.e. the date of issue or commencement of the relevant foreign proceedings) and the "**Filing Approach**" (i.e. the filing of the recognition application). In the present case, this makes a significant difference because the Bankruptcy Order was made on 11 October 2019. But the recognition application was not filed until 13 July 2020. In both *Stanford* and *Videology* the court adopted the Commencement Approach. See, in particular, the judgment of

Sir Andrew Morritt C in the former at [30] and the judgment of Snowden J in the latter at [49]:

> "30. Given that the Antiguan Liquidation is a foreign proceeding it will be a foreign main proceeding if, but only if, SIB's centre of main interests ("COMI") was in the state where, and at the time when, that proceeding was commenced, namely in Antigua, see Article 2(g) and *Re: Staubitz-Schreiber* [2006] ECR I 701."

> "49. Under the Model Law, a request for recognition may be made at any time after the commencement of the foreign proceedings. Accordingly, the court considering an application for recognition must determine whether the foreign proceedings for which recognition is sought are in the place that was the debtor's COMI when the proceedings commenced: see paragraph 141 of the Guide to Enactment and Interpretation of the Model Law (2013) ("the Guide to the Model Law"). Under the Recast EIR, the date at which the COMI of a company must be determined is that at which the request to open insolvency proceedings is made (see e.g. *Interdill* at paragraph [55])."

38. Mr Morgan told me that in *Re Toisa Ltd* (ICC Judge Burton, unreported, 29 March 2019) the court adopted the Filing Approach and Mr Li urged me to follow it. No report of the decision is available and it has not been transcribed. But in any event I am bound by *Stanford* and if the point remains open, I prefer to follow the decision of Snowden J for the reason which he gave. A recognition application may be made at any time after the commencement of the foreign proceedings and the critical question is what information would have been available to creditors at that date. It would make no sense for the question whether the court had jurisdiction to depend on the timing of the recognition application or what the creditors knew at that date.

39. Further, counsel for Mr Li clearly considered this point to be unarguable because he conceded it before the Chancellor on 2 November 2021. The recital to the Chancellor's order records that the parties agreed that the relevant date for determining Mr Li's COMI or whether he had an establishment in Hong Kong was the date of the Bankruptcy Order. Even if I had taken the view that the point was arguable (and I do not), it was not open to Mr Li to take the point given the agreement recorded in the order.

*(7) Relevant State*

40. Because Mr Li had a bank account in Macao and at one stage had business interests in China, there was an issue whether I should treat the People's Republic of China or the special administrative region of Hong Kong as the relevant state for the purposes of the Model Law. I am grateful to Ms Longstaff for the research which she carried out into this issue. But because of the findings which I make below, the issue is not material and I prefer not to express a view about it.

## Mr Li's Evidence

41. Mr Li made two witness statements dated 21 October 2020 and 19 August 2021. In his first statement he gave evidence that since about the middle of 2013 he had been ordinarily and permanently residing with his wife at Givons Manor, Givons Grove, Leatherhead KT22 BLY ("**Givons Manor**"). Mr Li also stated that he would be surprised if the people with whom he dealt thought that he conducted his affairs from anywhere other than that address.

42. In his first statement Mr Li gave evidence that his COMI was Givons Manor on 11 October 2019. In his second statement he asserted that his COMI was not in Hong Kong when the Petition was presented nor did he have an establishment in that jurisdiction. It is, of course, a matter of law where Mr Li's COMI was at the date of the bankruptcy order. But if the court were satisfied that the debtor was an honest and reliable witness and accepted the factual basis on which the debtor's opinion was based, then the court could attach significant weight to the debtor's own opinion.

43. Mr Li made himself available for cross-examination and Mr Morgan cross-examined him in detail about the period between 2013 to 2019. Mr Morgan accepted that for much of the time Mr Li engaged with his questions and tried to answer them truthfully. But he also submitted that Mr Li was an unsatisfactory witness and that he tried to distance himself from Hong Kong whenever he could. He gave a number of examples from Mr Li's evidence. In particular:

    i) In a Skeleton Argument dated 4 September 2020 Mr Li stated that his daughter, Charlotte, had offered him "financial support" to engage solicitors and counsel. In cross-examination he originally denied this because he wished to distance his daughter's involvement in passing on

information in Hong Kong. He then accepted that she had offered or made a loan. He then began splitting hairs over what he had meant by "financial support".

ii) In HCA 594 and HCMP 3367 Mr Li gave the New Territories Address as his address (as I explain below). However, in HCA 1039 Mr Li gave evidence that the New Territories Address was his daughter's address and that he had only used it as a correspondence address. He also stated that he was "confident that any papers that were sent there would be sent on to me by my daughter". However, when it was pointed out that his son-in-law refused to accept service of the Petition, Mr Li began to tie himself in knots. He drew a distinction between legal and non-legal papers and said that his daughter would only pass on non-legal papers. When it was pointed out that he had instructed his solicitors not to accept service, he said that his daughter took a decision about what documents to pass on to him. Mr Morgan submitted that his evidence was unconvincing and that he had used the New Territories Address when it suited him but distanced himself from it when it did not.

iii) In his first witness statement, Mr Li also tried to distance himself from the Sutton Court Address by asserting that he only stayed there as his son's guest. However, when Mr Morgan took him to the tenancy agreements in evidence, he accepted that he continued to rent apartments in Sutton Court until 2017. Moreover, all of the tenancy agreements in evidence showed that Mr Li was the tenant himself and the occupants were described as "Mr Li Shu Chung and his family".

iv) Mr Morgan took Mr Li to the annual return of Henfung Precision Technologies Ltd ("**Henfung**") dated 1 June 2016. Mr Li had signed it stating that Henfung's registered office was the Manhattan Centre. It also stated that Mr Li was the sole director and a shareholder and that his address was 3211 Sutton Court. When this was put to him, he said that it was a careless mistake and that the document was not prepared by him. He finally conceded, however, that this was his Hong Kong address.

v) The Petitioners made attempts to serve both the statutory demands and the Petition on Mr Li at Givons Manor and both were returned marked "Gone Away" and "Not known at this address" (as I explain below). Mr Li could not explain how this could have happened if Givons Manor was his permanent address. Nor could he explain why he had failed to deal with this issue in his written evidence (given that it had been raised by Mr Chen).

44. I accepted much of Mr Li's evidence. Most of the time he answered Mr Morgan's questions honestly and even when the answers were against interest. For instance, he openly accepted that he was trying to make life difficult for the Petitioners and that he was very bitter about the outcome of both HCA 1711 and the Petition. I therefore give Mr Li credit for the straightforward way in which he answered those questions. However, I also agree with Mr Morgan that Mr Li's evidence was unreliable and unsatisfactory when it came to answering questions about his residence and business affairs after 2013. I was unable to accept his evidence that the people with whom he dealt thought that he conducted his affairs from Givons Manor or that he genuinely believed that his COMI was England.

## Findings of Fact

*(1) Residence*

45. Mr Li was brought up in Hong Kong and having been to university in the UK, he returned to Hong Kong in 1986 to work in Luen Tat. He lived with his father, Lee Sai Nam (deceased) and with Mr Richard Lee and their respective families at the family home, 5A Wiltshire Road Kowloon Tong. From in or about 2008 he fell out with his father and the Petitioners and the dispute generated substantial litigation. In 2009 Mr Li moved out of Wiltshire Road and although there was no evidence before me about where he lived between 2009 and 2013, Au-Yeung J recorded that his evidence was that he had rented serviced apartments for himself and his family in Harbour City.

46. It was common ground that in 1993 or 1994 Mr Li and his wife purchased Givons Manor and were registered at HM Land Registry as the registered proprietors under title no. SY49321. He and his family also went on holiday to Cornwall frequently. However, Mr Li continued to work in Hong Kong until 2013. It was

his evidence that in 2013 or, possibly, 2014 he retired and moved to live permanently at Givons Manor.

47. Between 2013 and 2017 Mr Li continued to rent a series of apartments in Hong Kong for himself and his family. In cross-examination he was taken to the following tenancy agreements which contained the following information:

i) *Hampton Court*: By a tenancy agreement dated 17 September 2013 Harbour City Estates Ltd ("**Harbour City**") let Hampton Court to Mr Li for a term of six months from until 16 March 2014 for HK $121,600 per calendar month. The Schedule to the agreement showed that the apartment had three bedrooms.

ii) *Hampton Court*: By a tenancy agreement dated 10 February 2014 Harbour City let Hampton Court to Mr Li for the period from 17 March 2014 to 20 May 2014 for HK $123,600 per calendar month. The occupants were stated to be "Mr Li Shu Chung and his family". It also gave Henfung's address at the Kwai Shing Industrial Building as a correspondence address. Mr Li's evidence was that this was Henfung's registered office at the time.

iii) *3202 Sutton Court*: By a tenancy agreement dated 8 August 2014 Harbour City let 3202 Sutton Court to Mr Li for the period from 23 August 2014 to 22 November 2014 for HK $66,400 per calendar month. Again, the occupants were stated to be "Mr Li Shu Chung and his family" and the agreement gave the same correspondence address.

iv) *3202 Sutton Court*: By a tenancy agreement dated 12 June 2015 Harbour City let 3202 Sutton Court to Mr Li for the period from 23 June 2015 to 31 July 2015 for HK $67,400 per calendar month. Again, the occupants were stated to be "Mr Li Shu Chung and his family" and this time the correspondence address was given as the Manhattan Centre, which was now Henfung's registered office.

v) *3202 Sutton Court*: By a tenancy agreement dated 28 October 2015 Harbour City let 3202 Sutton Court to Mr Li for the period from 16 November 2015 to 15 February 2016 for HK $67,400 per calendar month. Again, the

occupants were stated to be "Mr Li Shu Chung and his family" and the agreement gave the same correspondence address.

vi) *3202 Sutton Court*: By a tenancy agreement dated 26 January 2016 Harbour City let 3202 Sutton Court to Mr Li for the period from 16 February 2016 to 27 April 2016 for HK $67,400 per month. Again, the occupants were stated to be "Mr Li Shu Chung and his family" and the agreement gave the same correspondence address.

48. Mr Li accepted that he continued to rent an apartment in Sutton Court until April 2017 and that he moved from 3202 to 3211 Sutton Court. There was an issue about the amount of time which he spent in Hong Kong during 2016 and 2017. But he accepted in evidence that he spent 159 days in Hong Kong during the 2016 calendar year (excluding days of arrival and departure), 40 days until April 2017 (again excluding days of arrival and departure) and 57 days over the entire calendar year (again excluding days of arrival and departure).

49. By letter dated 15 February 2016 DS Cheung wrote to KLG requesting security for costs in relation to Mr Li's appeal. They stated in terms that Mr Li was ordinarily residing in England and that he did not spend much time in Hong Kong. By letter dated 17 February 2016 KLG replied stating: "Our client would move back to Hong Kong for permanent residence from late March 2016." As a consequence of this letter, the Petitioners made no application for security for costs and in cross-examination Mr Li accepted that the Petitioners relied on the statement that he intended to return to Hong Kong in March 2016 and that this was his intention.

50. By a transfer dated 9 March 2016 Mr and Mrs Li transferred Givons Manor to Mrs Li and their daughter, Charlotte. The transfer stated that Mr Li had received £1,150,000 for his half share in the property. The Trustees do not accept that Mr Li received this sum for his share in the property and reserve the right to challenge the transfer. But the transfer and the official entries on the register (which are public documents) would have led an objective observer to conclude that Mr Li no longer had an interest in Givons Manor after March 2016.

51. As stated above, on 1 June 2016 Mr Li signed and filed Henfung's annual return stating that its registered office was the Manhattan Centre and that his own residential address had become 3211 Sutton Court with effect from 10 April 2016. Moreover, by two instruments of transfer dated 27 February 2017 Mr Li and his son transferred their shares in Henfung to a Mr Zhang. In the transfer which he signed Mr Li gave 3211 Sutton Court as his address.

52. The transfer of Givons Manor, Henfung's annual return and the transfer of shares are all consistent with KLG's letter dated 15 February 2016 and with Mr Li's admitted intention to return to Hong Kong and make his personal residence there. They are also consistent with the tenancy agreements and the amount of time which Mr Li spent in Hong Kong up until April 2017. I find as a fact, therefore, that Mr Li was living in Hong Kong from March 2016 and that remained his personal residence until at least April 2017. Alternatively, I find that Mr Li intended to give the impression to third parties and, in particular, to the Petitioners that he had returned to Hong Kong to avoid an order for security for costs and any enforcement action being taken against him in England.

53. However, I also find that from April 2017 Mr Li's permanent and habitual residence was at Givons Manor. It was common ground that he spent between two and three weeks in Hong Kong in October 2017. But apart from that extended stay there was no evidence that he spent more than a few days each year in Hong Kong.

*(2) Business or Commercial Interests*

54. Mr Li's evidence was that he first came to live in the UK in 1979 and graduated from university in about 1983. It was also his evidence that at about that time he married his wife Karen, who is English, and that in about 1986 he moved to Hong Kong for work purposes. He did not claim to have had any business or commercial interests in England after 1986 and if it is necessary for me to do so, I find that he did not.

55. In his first witness statement dated 30 November 2020 Mr Chen challenged Mr Li's evidence that he had retired from business in Hong Kong in 2013. His evidence was that after 2013 Mr Li had signed cheques on behalf of three Hong

Kong companies, Fortune Precision Technology Ltd, MPE Solutions Ltd and Synergy Natural Resources Ltd and that Mr Li was a director or shareholder of both Wista Accessories Co Ltd and Henfung until 7 October 2016 and 27 February 2017 respectively. Finally, Mr Chen relied on a payment of HK $50,000 which Mr Li had made to a Mr Lo Cho Kit in October 2018.

56. In his second witness statement Mr Li explained that the three companies for which he signed cheques belonged to his son and daughter-in-law or his son and that he signed the cheques for convenience or because he was entitled to payment and remained an authorised signatory. He also gave evidence that Henfung had ceased to trade at the end of June 2013 and that his involvement after that date was to wind down the company. Mr Li admitted that he was also an investor in Guofeng Hardware Products (Shenzhen) Ltd ("**Guofeng**") and had made the payment of HK $50,000 to Mr Lo. His evidence was that he did so in order to pay Miss Zhou, his mainland Chinese accountant, to deal with the tax department in China. It was his evidence that this was a historic issue and that Guofeng had also ceased to trade in 2013.

57. Mr Morgan cross-examined Mr Li about Henfung. He stood by his evidence which was that Henfung had effectively ceased to trade in 2013 or 2014 and that he only used its address for correspondence because it had taken a lease of office premises which it was unable to surrender. He also suggested that the company remained in existence but dormant because it was waiting for a tax refund.

58. Mr Morgan also suggested to Mr Li that his evidence in relation to Guofeng was false or inaccurate. He put an email dated 10 July 2015 to Mr Li which suggested that Mr Li had formed a new company in China called New Guofeng, to replace Guofeng. He also put an email chain to Mr Li dated 4 July 2019 to 16 July 2019 in which he asked Sun Honour Corporate Consultants Ltd, a company service provider, to scan documents and send a USB stick to him at an address in Effingham, Surrey. Finally, he suggested to Mr Li that the payment of HK $50,000 was suspicious because Mr Lo had originally given a false explanation for it to the Trustees.

59. I am satisfied that Mr Li continued to have material business interests in Hong Kong until (at the very least) 27 February 2017. He remained a director of Henfung until that date and it is obvious from both the tenancy agreements and Henfung's annual return dated 1 June 2016 that Henfung occupied at least two addresses during the period. Moreover, Mr Li received a payment of HK $656,694.43 from Fortune Precision Technology Ltd in May 2014, two payments totalling HK $140,000 from MPE Solutions Ltd in February and March 2015 and a salary of HK $9,500 per month from Synergy Natural Resources Ltd between January and June 2015. Mr Li dismissed these payments as trifling. But they totalled approximately £85,000 and are of sufficient size to be material.

60. I am not satisfied, however, that Mr Li continued to have any material business interests in either Hong Kong or mainland China after 2017 and, more importantly, at the date of the Bankruptcy Order. Mr Morgan did not submit that there was sufficient evidence to draw that inference and the highest that he could put it was that there was "something going on" in relation to Mr Li's affairs and that he had some continuing interests in China up to 2018. I am prepared to accept that Mr Li gave a very limited and partial explanation of his affairs in China. But there was insufficient material before me from which I could find that he had material business interests in either Hong Kong or China at the relevant date.

*(3) Other Financial Interests*

61. Mr Morgan took Mr Li to the proof of debt submitted by the Inland Revenue and the certificate dated 17 December 2019 which the authorised official had submitted in support of it. It stated that Mr Li's address was 3202 Sutton Court and that he had defaulted in payment of salaries tax which fell due for payment on 23 April 2018 and 28 March 2019. Mr Li could not remember what address he had given to the Inland Revenue before 2014 and that he did not know that it was a legal requirement to notify the Inland Revenue of a change of address.

62. Mr Morgan also took Mr Li to his Bank of China and Amex credit card statements which dated 23 October 2019 and 5 September 2019. The Bank of China statement was addressed to him at the Mei Foo address and the Amex statement addressed to him at the New Territories Address. The Bank of China statement

recorded that Mr Li was still paying life insurance premia and TV subscriptions in Hong Kong at that date. As Mr Li pointed out, the payments on the Amex card related to expenditure in England or other jurisdictions.

63. However, Mr Li's financial footprint in Hong Kong must be compared with his financial footprint in England. On 9 March 2016 Mr Li transferred his interest in Givons Manor to his daughter and he produced no evidence that he had any assets or any business or financial interests in England after that date. Moreover, by letter dated 12 December 2019 Mr Li wrote to the Trustees asserting that apart from two bank accounts in the UK all his assets were in Hong Kong. He asserted that the total amount which he held in all his bank accounts in Hong Kong, Macau and the UK was around HK $20,000.

64. In his first witness statement Mr Li gave evidence that he paid household bills in England, that he leased a Land Rover PCP from Guy Salmon, that all of his personal possessions were in England and that he was a member of a political party there. Mr Morgan cross-examined him on the bank statements for his NatWest personal account, which showed that on 20 September 2017 Mr Li received a payment of £50,000 and that he received regular payments of £10,000 per month for a period thereafter. Mr Li told me that me that they were made to him by his wife and arose from business activities before 2013.

65. I am not prepared to make findings of fact about the source of the funds which were paid into Mr Li's NatWest account. Nor am I prepared to make findings of fact about the full extent of Mr Li's assets in England because he failed to co-operate with the Trustees or to provide full disclosure of them. In particular, Mr Li failed to disclose bank statements for his HSBC account (which I understood to be an English bank account). The only reason which he gave for his lack of co-operation with the Trustees was that the Non-commencement Order had been made in Hong Kong and he was not bound to assist them.

66. Nevertheless, if Mr Li had wished to persuade the court that he had material financial interests in England, it was for him to identify them and to provide the supporting documents. Based on the limited evidence which he presented to the court, Mr Li failed to satisfy me that he had any commercial, business or financial

interests in England at the date of the Bankruptcy Order. If he had, I would have expected him to produce tax returns and evidence of investments, income or a pension. He failed to do so.

*(4) The Statutory Demands and the Petition*

67. On 22 December 2017 the Petitioners issued the statutory demands. Mr Li accepted that he knew that they were attempting to serve the demands and that he refused to give permission to his solicitors to accept service because he wanted to make life difficult for the Petitioners. He also accepted that he did not instruct Charlotte to accept service on his behalf at the New Territories Address and that the envelope containing the demands which was sent to Givons Manor was returned marked "Gone Away". He could not explain how the envelope came to be returned marked in this way.

68. In the Bankruptcy Judgment Au-Yeung J recorded various attempts which the Petitioners had also made to serve the Petition upon Mr Li. She stated this (at [92]):

> "Various attempts have been made to serve the Petition: (1) At the New Territories address – by personal visits on 3 occasions and 18 October 2019 after an appointment letter was given. The same English man cut off the intercom and shouted abuse at Tse. (2) At KLG on 9 October 2018. KLG informed the Petitioners' solicitors that KLG no longer represented Ken Li and that all communications should be directed to JYJL. (3) At JYJL on 9 October 2018. The Petitioners' Solicitors expressly asked JYJL on 29 October whether the New Territories Address was no longer used by Ken Li. Apart from a holding reply on 1 November, JYJL never gave an answer. (4) At the Surrey Address by post on 15 October 2018 but it was returned "not known at this address", consistent with the result as to service of the Statutory Demand."

69. When [92](1) was put to him, Mr Li accepted that the English man was his daughter's husband and said that he assumed that the Trustees were attempting to effect substituted service on him. When [92](4) was put to him he said that he did not know who sent the envelope containing the Petition back marked "not known at this address". He denied that he had done so himself or given instructions for this to be done. Mr Morgan reminded him that Mr Chen had dealt with the return of the Petition marked "not known at this address" in his first witness statement

and had relied on it as evidence that Mr Li was evading service. When he was asked why he had not addressed this important evidence himself, Mr Li had no answer.

70. In the Bankruptcy Judgment, Au-Yeung J also recorded that on 5 November 2018 the Petitioners applied for an order for substituted service but before an order could be made Mr Li "had already surfaced". On 14 November 2018 JYJL filed a notice to act on behalf of Mr Li in the Bankruptcy Proceedings and on 15 November 2018 the Petitioners' solicitors served the Petition on JYJL: see [95] and [96]. The judge also made the comment in [97] that: "Ken Li did not dare to state how he got hold of the Statutory Demand and Petition before 14 November 2018."

71. Both in his evidence and in his oral submissions Mr Li relied on two letters dated 21 June 2018 and 11 July 2018 from JYJL to DS Cheung as evidence that he had notified the Petitioners that he was not in Hong Kong and that he was not trying to run away from the Petition. In the first letter JYJL stated that: "our client has not visited Hong Kong since about October 2017." But they also stated that they had no instructions to accept service on his behalf. In the second letter JYJL stated: "please note that since November 2017, our client has not happened to be in Hong Kong; and our client is not reachable at the address at Harbour City."

72. I am satisfied that Mr Li returned the envelopes containing the Statutory Demands and the Petition marked "gone away" and "not known at this address" and that he either wrote these words on the envelopes himself or gave instructions for it to be done. He chose not to answer Mr Chen's evidence on this point and he could not explain why he would not have received the documents through the post or who else would have written these words on the envelopes and returned them. Finally, he could not explain to the Hong Kong court how else he could have had obtained them before 14 November 2018.

73. I am also satisfied that the letters dated 21 June 2018 and 11 July 2018 would not have alerted the Petitioners to the fact that Mr Li was permanently resident at Givons Manor and had ceased to have any material interests in Hong Kong. The difficulty which he faced was that once they had received these letters, DS

Cheung naturally attempted to serve him at Givons Manor. But rather than accepting service there, he chose to pretend that he had no connection with that address. The obvious conclusion for the Petitioners to draw was that the position stated in the letters was false and that he was playing games. When the letter dated 21 June 2018 was put to him, Mr Li openly accepted that he was trying to be as difficult as possible.

*(5) Other Litigation*

74. Mr Morgan also took Mr Li through various court documents in which he had provided an address to the court and to his opponents. I begin with the Originating Summons in HCMP 3367 dated 1 December 2016, in which Mr Li's solicitors, B Mak, stated that his address was 3211 Sutton Court. In his sixth affirmation in HCCW 497 filed on 28 November 2016 Mr Li also gave 3211 Sutton Court as his address. These statements are consistent with the tenancy agreements and the finding which I have already made about Mr Li's permanent residence. These documents would have reinforced the view of both the Petitioners and SW that Mr Li was resident in Hong Kong.

75. In the Writ of Summons in HCA 597 dated 14 March 2018 JYJM also stated that Mr Li's address was the New Territories Address. In evidence Mr Li said that this was his correspondence address and that he thought that it was good enough to give this address at the time. Mr Morgan suggested to him that SW did not apply for an order for security for costs because he gave this address. Mr Li parried this question by saying that SW were going to apply but did not do so because of the Bankruptcy Order.

76. On 29 November 2018 Mr Li made his fourth affirmation in HCMP 3367 in which he gave the New Territories Address as his address. He accepted that this was a solemn oath and that he should not have signed it if he knew it to be untrue. But he repeated his evidence that it was a correspondence address and that he thought that this was good enough at the time. He also said that JYJL were aware that it was not his residential address and did not tell him to that it was illegal or that he was committing perjury. Mr Morgan challenged this evidence and put it squarely to Mr Li that he was lying.

77. I reject Mr Li's evidence that he believed that it was permissible for him to give the New Territories Address as his address in either the Writ or his fourth affirmation because it was a correspondence address. I am satisfied that he deliberately misrepresented to SW in the Writ that the New Territories Address was his residence in Hong Kong to prevent them from applying for security for costs. I am also satisfied that he deliberately misled them again in his fourth affirmation in HCMP 3367 to maintain that pretence.

78. On 9 November 2018 Mr Li made an affirmation in CACV 15 opposing Allied Ever's application for security costs. For the first time he gave Givons Manor as his residential address. Mr Morgan did not pursue this affirmation in cross-examination. I note, however, that the Court ordered Mr Li to provide security for costs of HK $450,000.

79. On 3 December 2018 Mr Li made an affirmation in support of his application to set aside judgment in default in HCA 1039. He also gave Givons Manor as his address and stated in the body of the document that it was his permanent residential address and that he lived in England. He gave Givons Manor as his address in a second affirmation which he made on either 11 or 14 January 2019. He also placed reliance on the letter dated 21 June 2018 (above).

80. On 2 May 2019 Mr Li's sister, Ms Li, made an affirmation challenging Mr Li's evidence about his permanent residence. She pointed out that it was inconsistent with both the Writ in HCA 594 and the fourth affirmation in HCMP 3367. She also noted that the fourth affirmation had been filed as recently as 3 December 2018 and that it was disclosed to her by SW rather than by Mr Li himself. On 11 July 2019 Mr Li made a third affirmation in reply asserting that Ms Li was fully aware that he did not reside in Hong Kong. He referred again to the position in June 2018. He also relied on the fact that the Statutory Demands had been addressed to him at Givons Manor.

81. Before me Mr Li placed reliance on the evidence which he had given in HCA 1039. He submitted that whatever may have been the position before, by the end of 2018 the Petitioners were fully aware that he was permanently resident at Givons Manor and not resident in Hong Kong. I reject that submission and I find

that it was reasonable for the Petitioners to continue to believe that Mr Li remained permanently resident in Hong Kong. I do so for the following reasons:

i) In their letter dated 17 February 2016 KLG had informed DS Cheung that Mr Li intended to move back to Hong Kong permanently in March 2016. A Land Registry search of Givons Manor would have confirmed that on 9 March 2016 he had transferred his interest in the property to his daughter.

ii) The Statutory Demands and the Petition which had been sent by post to Givons Manor had been returned indicating that Mr Li no longer had any connection with that address.

iii) Mr Li had given an address in Hong Kong in all the other litigation before 9 November 2018. He had received copies of the Statutory Demands and the Petition and had instructed JYJL to file a notice to act and to accept service.

iv) On 29 November 2018 Mr Li made his fourth affirmation in HCMP 3367 giving the New Territories Address. On 3 December 2018 he made an affirmation in HCA 1039 giving Givons Manor as his address. A reasonable creditor would have drawn the conclusion that Mr Li had self-serving reasons for giving inconsistent evidence in two separate actions so close together in time.

v) Ms Li gave evidence in HCA 1039 that she had no reason to take any of Mr Li's representations about his presence (or otherwise) in Hong Kong at face value and K Yeung J accepted that evidence: see the judgment at [40](e).

82. In the Bankruptcy Judgment Au-Yeung J found that Mr Li had been ordinarily resident in Hong Kong for the three year period ending with the day on which the Petition was presented: see [26] and [51] to [52]. In the judgment in HCA 1039 K Yeung J also found that Mr Li had been deliberately evading service: see [39]. I am not bound by either judgment and Mr Morgan accepted that they did not give rise to any issue estoppel. However, in my judgment they clearly support the conclusion that the Petitioners continued to believe that Mr Li's permanent residence was Hong Kong and that it was reasonable for them to do so.

## Article 17(1)

83. Subject to Article 6, the Court is required to recognise a foreign insolvency proceeding if the four conditions in Article 17(1) are met. I am satisfied that each of those conditions is met for the following reasons:

    i) *Foreign Proceeding*: Bankruptcy proceedings in Hong Kong are very similar to bankruptcy proceedings in England & Wales. In my judgment, they obviously fall within the definition in Article 2(i) and Mr Li admitted that he had been advised that the Hong Kong bankruptcy was a foreign proceeding: see paragraph 8 of his first witness statement.

    ii) *Foreign Representative*: Likewise, the Trustees obviously fall within the definition in Article 2(j) as the relevant persons authorised to administer the reorganisation or liquidation of Mr Li's assets or affairs to act as a representative of the Hong Kong bankruptcy.

    iii) *Certified Copy*: Mr Morgan provided me a copy of the Bankruptcy Order which had been certified as a true copy by a solicitor on 4 November 2021. In my judgment, this is sufficient to satisfy Article 15(2)(a). Although it did not name the Trustees as such there was no dispute that they had been properly appointed as Mr Li's trustees in bankruptcy and I am prepared to accept the affidavit of Mr Chen as evidence of the appointment of the Trustees under Article 15(2)(c).

    iv) *The Court:* The recognition application has been made to the Chancery Division in compliance with Article 4.

## Article 17(2)

*(1) Foreign Main Proceeding*

84. I have found that from April 2017 Mr Li's habitual residence was Givons Manor in England. Given that he was habitually resident in England at the date of the Bankruptcy Order, Article 16(3) raises a presumption that England was his COMI at that date. However, Article 16(3) seems to me to be an evidential presumption only and to do no more than to place the burden of proof on the Trustees to prove

that Hong Kong and not England was his COMI. Residence remains an important factor in deciding where the debtor's COMI was at the relevant date but not the only one.

85. There is no dispute that before 2013 Mr Li's COMI was Hong Kong. I am satisfied that between 2013 and April 2017 Hong Kong remained Mr Li's COMI. He informed the Petitioners that he intended to move his permanent residence back to Hong Kong, he maintained a residence there and he spent substantial periods of time in the jurisdiction, principally engaged in litigation. I am also satisfied that he continued to have material business and commercial interests in Hong Kong from 2013 onwards until 2017. Although he spent as much or even more time in England, he was no longer registered as the joint proprietor of Givons Manor and he had no business or commercial interests in England (or which he was prepared to disclose to the Trustees). I am satisfied that if an objective observer had been asked before April 2017 where he or she perceived Mr Li's COMI to be, that observer would have said Hong Kong.

86. I accept Mr Morgan's submission, therefore, that the present case is analogous to *Shierson v Vlieland-Boddy* where the debtor was found to have moved his COMI to Spain. It seems to me that the approach which I should adopt for the period between April 2017 and October 2019 is to consider whether viewed objectively there was a change in the administration of Mr Li's interests and, if so, whether that change was based on substance rather than illusion and had the necessary element of permanence: see Chadwick LJ's principle (5) at 3986B. I also remind myself that a debtor is not obliged to advertise his or her COMI but nor may he or she hide it.

87. The real question on this application is whether the two letters dated 21 June 2018 and 11 July 2018 or Mr Li's affirmations dated 9 November 2018, 3 December 2018 and 11 June 2019 would have led a reasonable creditor to believe that Mr Li had changed his COMI permanently from Hong Kong to England and that the change was based on substance and not illusion. If Mr Li had not begun to assert that Givons Manor was his residence to avoid service of the Petition and to contest service in HCA 1039, there would have been nothing to connect him with England at all.

88. In my judgment, a reasonable creditor would not have believed that Mr Li had changed his COMI from Hong Kong to England either permanently or as a matter of substance. I have reached this conclusion for the simple reason that statements made by Mr Li about his residence (or by JYJL on his instructions) could not be trusted either then or now. The Petitioners originally relied on the letters from JYJL and attempted to serve the Petition on Mr Li at Givons Manor. But it was returned marked "not known at this address". When Mr Li asserted in HCA 1039 that his residence was Givons Manor the Petitioners did not accept it because of the inconsistent evidence which he had given in HCMP 3367 almost contemporaneously. I have also found that this reaction was a reasonable one.

89. In my judgment, a reasonable creditor would also have taken the view that the objective evidence still pointed to Hong Kong as Mr Li's COMI. So far as the Inland Revenue were concerned, he remained resident in Hong Kong and he did not claim to have any business or financial interests in England. He also claimed that apart from one bank account in Macao and one bank account in England, all his assets were in Hong Kong. A Land Registry search would also have confirmed that he was not registered as the proprietor of Givons Manor and the transfer would have confirmed that he claimed to have no beneficial interest in it either.

90. Accordingly, I find that at the date of the Bankruptcy Order Mr Li's COMI was Hong Kong and I hold that the Bankruptcy Proceedings is recognised as a foreign main proceeding for the purposes of Article 17(2)(a) of the Model Law. Although Mr Li's habitual residence is now England, he only has himself to blame for this conclusion. If he had been open and honest with the Hong Kong Court, SW and the Petitioners I might well have taken a different view. Moreover, he would have been in a much better position to contest the recognition application if he had accepted service of the statutory demands and the Petition at Givons Manor.

*(2) Foreign Non-Main Proceeding*

91. If this conclusion is wrong, I have also considered whether the Bankruptcy Proceedings were a foreign non-main proceeding because Mr Li had an establishment in Hong Kong. Mr Morgan submitted that Mr Li did have such an establishment because his regular conduct of civil proceedings amounted to an

economic activity, the human means was the Bankrupt himself and the assets employed were the funds which he used to pay his legal fees. Finally, he submitted that Mr Li was carrying out this activity from one or more addresses in Hong Kong.

92. If it were necessary for me to do so, I would be prepared to find that Mr Li was conducting economic activities in Hong Kong. In my judgment, the conduct of litigation can be "economic" and was economic in the present case. If Mr Li had been successful in HCA 1711, his claim to a very large part of the family business would have succeeded. Moreover, it was his evidence that after 2013 this was his only economic activity and I have found that after 2017 he did not have economic or commercial interests in either Hong Kong or England. I would also have been prepared to find that it was "non-transitory" because Mr Li was involved in sustained litigation over a 10 year period which exposed him to significant cost liabilities. Finally, I would have been prepared to find that he conducted this economic activity himself using his own assets to pay legal fees.

93. However, in my judgment the Trustees' argument fails because they are unable to show that Mr Li conducted litigation from a "place of operations" in Hong Kong. It is necessary for them to prove three things: (i) a place where things happen and (ii) sufficient things (iii) of sufficient quality happen there: see *Re Metro Ltd* (above) at [33] (Mann J). In my judgment, there is insufficient evidence to show that on 11 October 2019 Mr Li had a place of operations at the New Territories Address or at 3211 Sutton Court or at the Mei Foo Address. It was just as easy for him to give instructions and fund the litigation from Givons Manor and I cannot find that on a balance of probabilities he had a place of operations in Hong Kong.

## **Article 6**

94. Mr Li challenged a number of findings in the Bankruptcy Judgment and, in particular, the finding that he had been ordinarily resident in Hong Kong. He submitted that the judge had wrongly calculated the number of days in which he had been in Hong Kong in 2016 and 2017 and had ignored his evidence about the time which he had spent in the jurisdiction. He also submitted that the judge had

assumed jurisdiction even though he had never been properly served with the Petition. He felt so strongly about the judge's conclusions that he accused her participating in a fraudulent conspiracy.

95. For the reasons which I have set out above, this court must recognise the Bankruptcy Proceedings unless to do so would be manifestly contrary to public policy. I am satisfied that there are no such grounds to challenge the Bankruptcy Judgment. Au-Yeung J had to decide whether Mr Li had been ordinarily resident in Hong Kong for the three years before the presentation of the Petition. This was a different time period from the period which I had to consider and she was faced with the same unsatisfactory evidence from Mr Li as he gave on this application. Moreover, her judgment clearly records that Mr Li submitted to the jurisdiction of the Hong Kong court and that the Petition was formally served on his solicitors once they had given notice of acting. I cannot, therefore, find any obvious fault in the judge's reasoning and Mr Li did not appeal.

## Relief

96. I will grant the relief which the Trustees seek in paragraph 13(a) of the Amended Application Notice. I am prepared in principle to grant the discretionary relief which the Trustees seek in paragraph 13(c). But this is a matter of discretion and Mr Li focussed on the question of recognition at the hearing. I am, therefore, concerned to give him an opportunity to address the court on the scope of the relief which I should grant to the Trustees before making a final order.

## Disposal

97. For the reasons set out in this judgment the court will recognise the Bankruptcy Proceedings as a foreign main proceeding under the Model Law. I will hand down this judgment on Friday 10 December 2021 and neither party is required to attend. Subject to any further observation of the parties I will list the application and the section 426 applications for further hearing before me next term with a time estimate of one day. At that hearing I will deal with all outstanding issues (including costs to date). If the parties can reach agreement on relief or on the section 426 applications and consider a full day to be unnecessary, they should inform the court.