

Litigation Funding for Liquidators: Coming of Age in Hong Kong

by Stephen Briscoe

Over the years, liquidators in Hong Kong have frequently been faced with situations where they have established claims by the company in liquidation against third parties, but they have been unable to pursue them because they don't have sufficient money to fund the costs of litigation. What is even more frustrating is that these claims are often against persons who were responsible, to one extent or another, for the failure of the company.

Understandably creditors are reluctant to "throw good money after bad" and as a result, liquidators have had little choice, in the absence of funding, but to drop these claims and close the liquidation resulting in creditors being left out of pocket. Even if a liquidator decides to pursue a claim using his own resources, he is often effectively prevented from doing so by a security for costs application.

That appears to be about to change as a result of a recent High Court decision in the liquidation of Cyberworks Audio Video Technology Limited - HCCW 1113 of 2002. Stephen Briscoe of Briscoe & Wong Ltd was the liquidator and was advised by Gall & Lane, solicitors.

The liquidator had no funds to pursue a number of substantial claims. However, a third party was prepared to fund the claims going forward in return for a share of the proceeds if the actions were successful. The court gave the liquidator permission to enter into an agreement with the third party, who had no financial interest in the liquidation and which would be pursuing the claims for its own commercial gain.

The consideration for the sale of the litigation rights to the funder is a share of the proceeds of a successful action which will enhance the recovery for creditors of the insolvent company.

This is the first time that the Hong Kong court has considered this matter and handed down a written judgment. Previous decisions on the subject have not been in the public domain.

In the past, this type of funding has been frowned upon and indeed has been effectively prohibited by the laws of maintenance and champerty, ancient concepts designed to prevent "trafficking in litigation". However the court has recognised that these legal concepts are less relevant to the 21st century and in particular to liquidators seeking to recover assets for the benefit of creditors. It has accepted that liquidators are a special case and should be able to sell rights of action to third party funders in return for allowing the company's creditors to share in the proceeds of a successful action.

This will not extend to claims that a liquidator may have arising solely as a result of being appointed as a liquidator. These would include unfair preference claims under s.266 and for the recovery of void dispositions under s.182. However, claims for the recovery of amounts due, misfeasance actions for breach of fiduciary duty, actions to recover assets etc. would include those that could be funded by third parties in situations where the company in liquidation is bereft of funds.