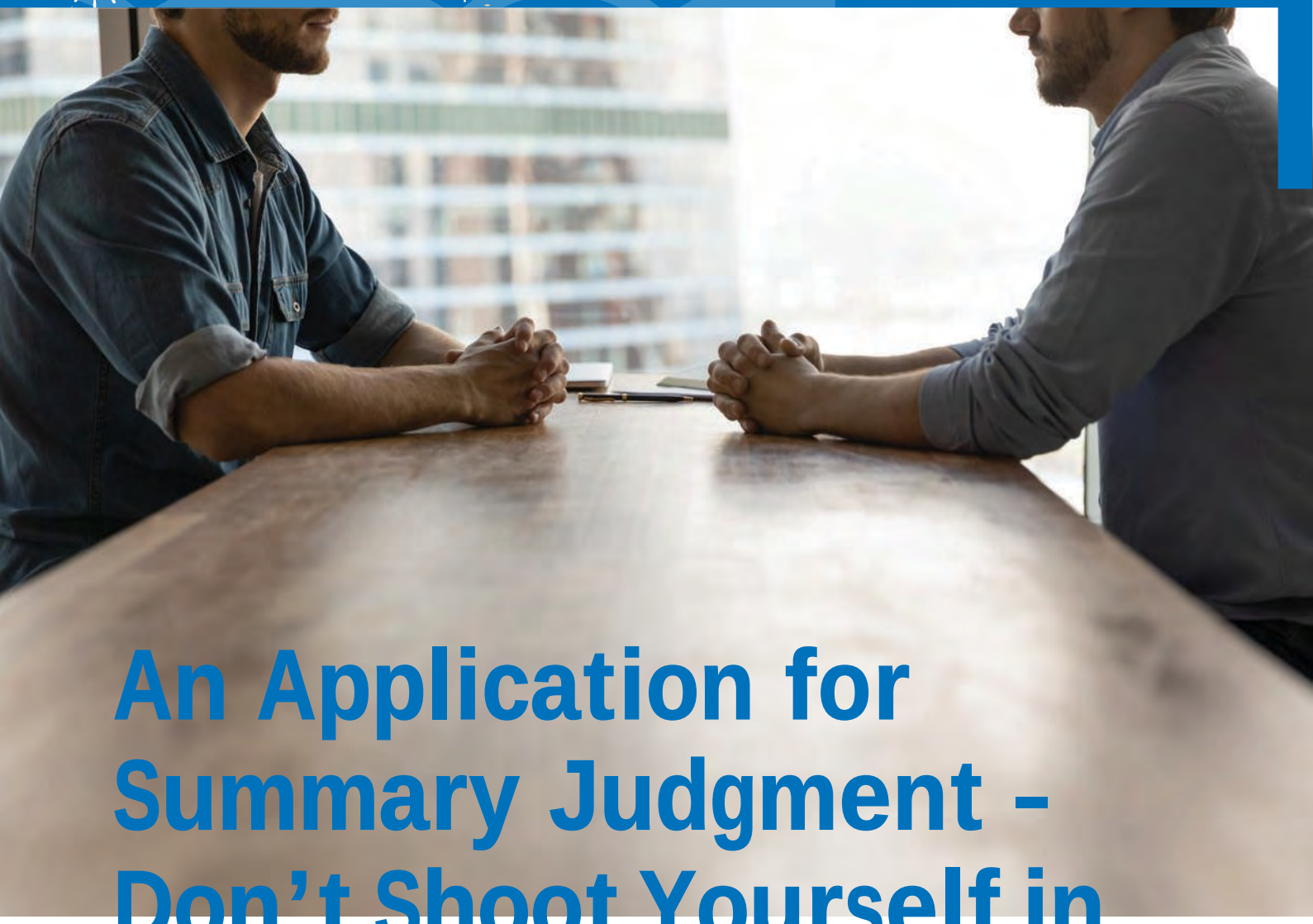


An Application for Summary Judgment – Don't Shoot Yourself in the Foot!

By Carmen Tang, Partner, Hugill & Ip

"By failing to prepare, you are preparing to fail" – Benjamin Franklin

In the recent judgement in *Tang Chack Wing v Yung Woon Kwai* (2021) HKCFI 2566, the decision handed down by Master Alan Kwong has made it clear that careful consideration should be undertaken by the plaintiff in an Order 14 Application. Subsequent proceedings may prove detrimental to the Order 14 Application and such action may be in breach of an agreement entered into by two parties.

What Exactly is an Order 14 Application?

An Order 14 Application is the summary judgment procedure (Order 14 of the High Court Civil Procedure Rules) in Hong Kong which enables a plaintiff to apply for final judgment on his claim without having to proceed to the full expense and delay of proceeding to a full trial. In essence, the plaintiff will have to prove that there is no defence to the claim by the defendant (clear cut cases).

In order to dismiss a summary judgment application, the defendant has to argue to the judge that there are 'triable issues' such that it is only appropriate for the case to proceed to trial. It is only where the judge considers that the issues raised by the defendant are 'unbelievable' that summary judgment will be granted.

So, What Happened?

The background facts of this case concern an Order 14 Application to seek summary judgment on 4 May 2021 by the Plaintiff (the "Action").

The Plaintiff and the Defendant are the co-founders of a group of companies. The Plaintiff and the Defendant respectively owns 50% shareholding in four companies within the group of Companies (the "Companies").

On 15 August 2019, the Plaintiff agreed to sell, and the Defendant agreed to buy, the Plaintiff's shares in the Companies (the "Agreement") at the consideration of HK$1 billion (the "Total Sum"). In short, the Agreement had the following key terms:

1. the Total Sum was to be paid in installments; and

2. Clause 3.3 of the Agreement stated that if the Defendant failed to pay any installment, he shall give 7 days' advance notice to the Plaintiff, and the Plaintiff shall give the Defendant a period of 2 months for payment of the installment that is due and payable. If the Defendant still fails to make payment, all outstanding balance of monies payable under the Agreement would become immediately due.

On 15 September 2019, the Defendant paid the first installment in the amount of HK$10 million to the Plaintiff. However, the Defendant failed to pay the second installment. The Plaintiff gave the Defendant a period of 2 months to pay. The Defendant still failed to pay the 2nd installment, therefore, all the sums that will be payable under the Agreement became immediately payable. The total amount was HK$990 million (the "Outstanding Sum").

On 16 October 2020, the Plaintiff, through his solicitors, issued a letter demanding the Defendant to pay him the Outstanding Sum. Due to the Defendant's failure to pay the Outstanding Sum to the Plaintiff, on 29 October 2020, the Plaintiff commenced the present Action. In the Statement of Claim, neither acceptance of repudiation nor damages has been pleaded. Instead, the Plaintiff makes it clear that he claims for the Outstanding Sum pursuant to the contractual terms of the Agreement, and the Plaintiff even seeks "a decree of specific performance".

When the Defendant continued to default on the second installment after the grace period, the Plaintiff should decide whether (i) he would accept the Defendant's repudiatory breach and treat the Agreement as discharged; or (ii) affirm the contract and seek to enforce Agreement.

This was not clearly pleaded in the Statement of Claim, but it appears that the Plaintiff has affirmed the Agreement despite the Defendant's breach in light of the reliefs pleaded in the Statement of Claim. However, the Plaintiff only dealt with the 'payment acceleration' mechanism under Clause 3.3 of the Agreement when the Defendant defaulted on the payment of any instalment but failed to consider the transfer of shares when the Action commenced.

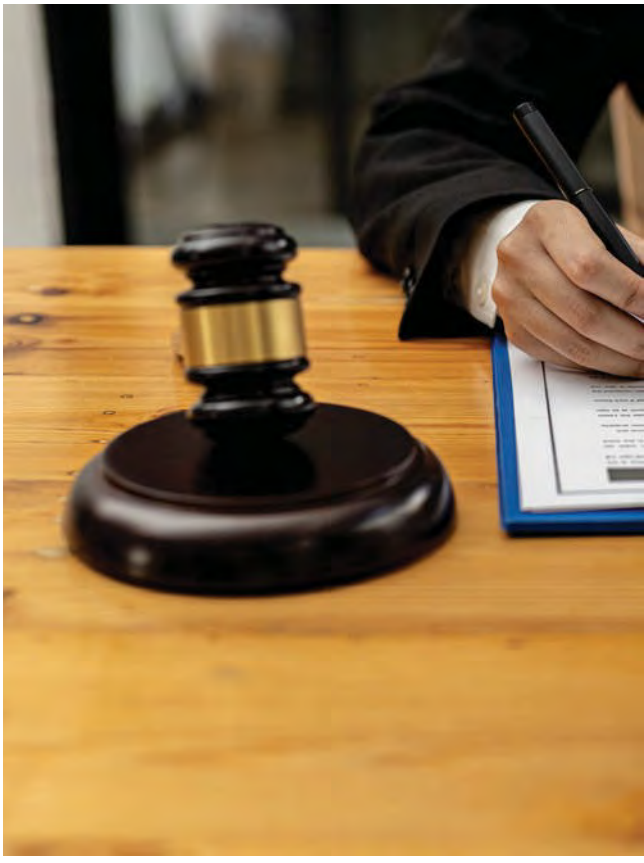
However, on 28 April 2021, the Plaintiff commenced winding-up proceedings (the "Winding-up Proceedings"). He sought to wind-up two of the Companies on just and equitable grounds.

Analysis

The Defendant relied upon the defence arising from the subsequent development that took place after the present Action was commenced (i.e. the Winding-up Proceedings).

The Plaintiff argued that the Winding-up Petitions were irrelevant. This is because by commencing the present Action or issuing the pre-action letter, the Plaintiff had already accepted the Defendant's earlier breach for failure to make payment pursuant to the Agreement. Hence, the Winding-up Proceedings were irrelevant.

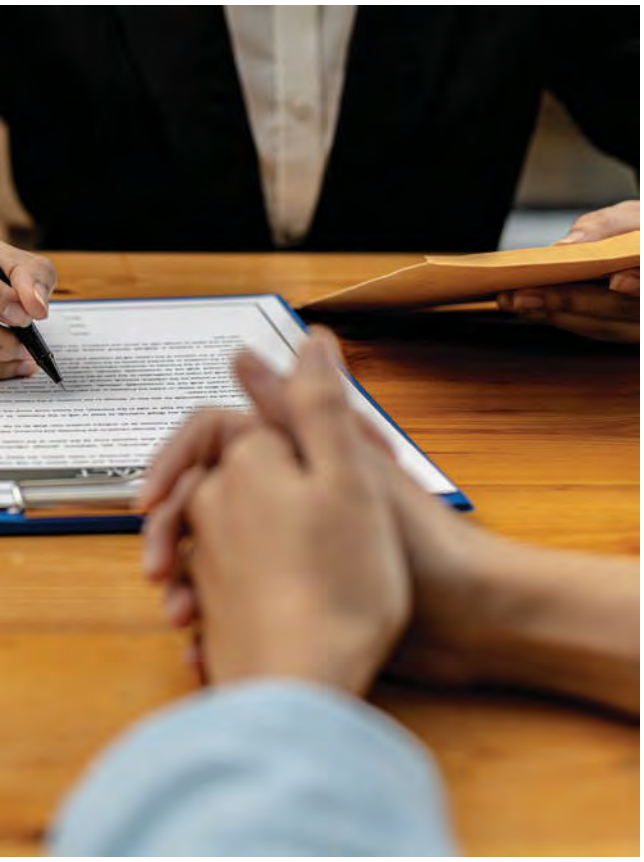
The Court was not convinced that the Plaintiff had accepted the Defendant's breach by commencing this Action or issuing the pre-action letter. On the contrary, Master Kwong stated that they were acts of enforcing the Agreement. The Plaintiff had kept the Agreement alive, so that he could sue to claim the



Outstanding Sum against the Defendant. The Plaintiff did not seek to claim damages upon acceptance of repudiation. Instead, the Plaintiff made it clear that he claims for the Outstanding Sum pursuant to the terms of the Agreement.

The Court referred to *Doherty v Fanigan Holdings Ltd* [2018] EWCA 1615 to state that the Defendant's duties to pay and the Plaintiff's duties to deliver the shares are "dependent obligations", in that "neither party [is] entitled to enforce the performance of the other's except against a perform of his/its own". Master Kwong suggested that it would be unreasonable if the Plaintiff were entitled to the Outstanding Sum without honouring his contractual obligations to deliver or transfer the shares in the Companies to the Defendant. Therefore, if the Plaintiff takes steps to destroy the value of the shares or is unable to deliver the shares, he risks breaching the terms of the Agreement.

Master Kwong took the view that it was likely that the implied terms do exist, i.e. the Plaintiff shall not do anything



which would diminish, negatively affect and/or destroy the value of the shares, and shall not do anything that would affect the Companies' ability to operate.

The next question to consider is whether it is arguable that the Plaintiff breached the implied terms of the Agreement by commencing the Winding-Up Proceedings. Master Kwong agreed with this argument for the following reasons:

1. Logically, clients or customers would not wish to deal with a company that is being subject to winding-up proceedings. They would wish to avoid the risks and uncertainty involved. A winding-up petition may cause severe harm to a company;

2. If a winding-up order is made, a liquidator will be appointed to take over the affairs of the company. The directors of the companies would be stripped of their powers. The liquidator may dispose of the assets of the company, and the company will cease to operate; and

3. There is an imminent risk that the Companies listed under the Agreement would be severely damaged or even destroyed. If this happened, the Defendant would not receive what he bargained for and this would defeat the purpose of the Agreement.

Master Kwong could not conclude that no 'triable issues' arose from the Plaintiff's acts of taking out the Winding-up Petitions.

Furthermore, he suggested that it also seems arguable that the Plaintiff had shown an intention that he no longer wished to be bound by the terms of the Agreement:

1. the Plaintiff said, in his affirmation, that he took out the winding-up petitions to protect his interest, i.e. if the Defendant did not pay him, he could realise his shareholding through the winding-up process. In an email from the Plaintiff's daughter, it was also said that the Plaintiff was left with no option but to wind up the Companies so he could cash out his shares and retire;

2. although the Defendant was the party that first breached the Agreement by failing to pay, the Plaintiff would still be under a contractual obligation to transfer and deliver the 50% shareholding in the Companies; and

3. therefore, any statement that the Plaintiff sought to realize or cash out his shares would be indications that he no longer wished to be bound by the Agreement.

The 'Decision'

The 'Decision' was less shocking than the announcement made by Lebron James to play for the Miami Heat in 2010. The Court was satisfied that it is arguable that the Plaintiff had breached the Agreement and/or demonstrated an intention that he no longer wished to be bound by the Agreement. As such, the Defendant was arguably entitled to accept repudiation or termination of the Agreement on 9 July 2021. The Order 14 Application did not pass (at least Lebron does?) the test for satisfying the Court in granting the Defendant a summary judgment and Master Kwong granted unconditional leave to defend to the Defendant.

Doing things the 'right' way

An Order 14 Application is a useful tool for a plaintiff to 'shorten' the normal litigation process and to obtain a final judgment without the delay and cost of going through the normal interlocutory procedures leading to a full trial. However, parties (especially for the plaintiff) are reminded that if they subsequently proceed to commence an action (such as the Winding-up Proceedings) such action will be taken into account by the Court when considering the Order 14 Application, and may prove, as seen in this case, detrimental to the case of the plaintiff.

For the present case, if the Plaintiff has treated the Defendant as having repudiated the Agreement and proceeded to claim damages for the breach, both parties would have been discharged from further performance of the Agreement. Thus, what happens to the shares of the two companies would be irrelevant after the discharge of Agreement.

Unfortunately, despite "the skilful submissions" of the Plaintiff's Counsel at the substantive hearing of the Order 14 Application, there is no denying that the Plaintiff had in fact affirmed the Agreement (i.e. elect to treat it as ongoing) and sought to hold the Defendant to it since day one.

"If the innocent party subsequently failed to perform his side of the bargain, he took the risk that the initial wrongdoer might turn the tables on him." – Chao Keh Lung v Don Xia [2004] 2 HKLRD 11

In short, a meritorious court application may no longer be a "sure-win" if things start off on the wrong foot. ■

簡易判決：第 14 號命令

作者：高葉律師行合夥人鄧嘉敏

“沒有準備的人，就是在準備失敗。”－本傑明 •富蘭克林

在近期 *Tang Chack Wing v Yung Woon Kwai* (2021) HKCFI 2566 一案中（“案件”），鄺嘉彤聆案官清楚的表達了原告人在申請簡易判決時需要做到詳細及周全的考慮。如沒有做到詳細及周全的考慮，之後的聆訊不但會對原告人的申請帶來不利的結果，也有可能會違反各方之間約定的協議。

什麼是第 14 號命令

簡易判決的程序是通過申請第 14 號命令。第 14 號命令使原告人能夠不用通過整個庭審的程序直接申請最終判決。 要成功申請第 14 號命令，原告人需要證明被告人沒有任何的合理的抗辯。

為了要使法官駁回簡易判決的申請，被告人必須提出爭辯的理由為此案有可審理的爭論點。 如果被告人提出來的爭論點是“不可信的”，簡易判決會批准給原告人。

案件摘要

此案講述的是在 2021 年 5 月 4 日尋求簡易判決的第 14 號命令申請。

原告人和被告人是一群公司的聯合創始人。原告人與被告人在這一群公司裡面的四家公司各持 50% 的股份。

在 2019 年 8 月 15 日，原告人同意出售，被告人也同意買入，原告人在這四家公司的股份（“買賣協議”），價格為 10 億港幣（“總價格”）。以下是買賣協議的重要條款：

1. 總價格以分期付款的方式支付
2. 買賣協議條款 3.3 陳述如果被告人未能支付任何一期的分期付

款，他必須給原告人 7 天的提前通知。原告人也必須給被告人 2 個月的時間支付到期的款項。如果被告人在 2 個月的期間依然無法支付，所有未結算且應支付的款項會立即到期支付（“加速支付條款”）

在 2019 年 9 月 15 日，被告人繳付了首期款項 1 千萬港幣給原告人。但是被告人未能繳付第二期的款項。原告人隨後給了被告人兩個月的期限去完成第二期款項的繳付。 然而，被告人依然未能繳付第二期款項。因此， 所有未結算且應支付的款項立即到期支付。此時，所有未結算且應支付的款項為 9 億 9 千萬港幣（“未償金額”）

在 2020 年 10 月 16 日， 原告人發出一封信函要求被告人繳付未償金額。然而， 被告人依然未能繳付未償金額。因此在 2021 年 5 月 4 日， 原告人展開了簡易判決的第 14 號命令申請。在申索陳述書中，原告人既沒有接受被告人的廢除性違約也沒有對於任何損害賠償作訴。反而，原告人只表明了他申索未償金額是根據買賣協議條款並且原告人還索求被告人強制履行合約。然而，當被告人繼續拖欠第二期款項時，原告人應當決定他是否要接受被告人的廢除性違約然後將買賣協議視為已解除 ； 或者繼續承認買賣協議然後在索求執行買賣協議。

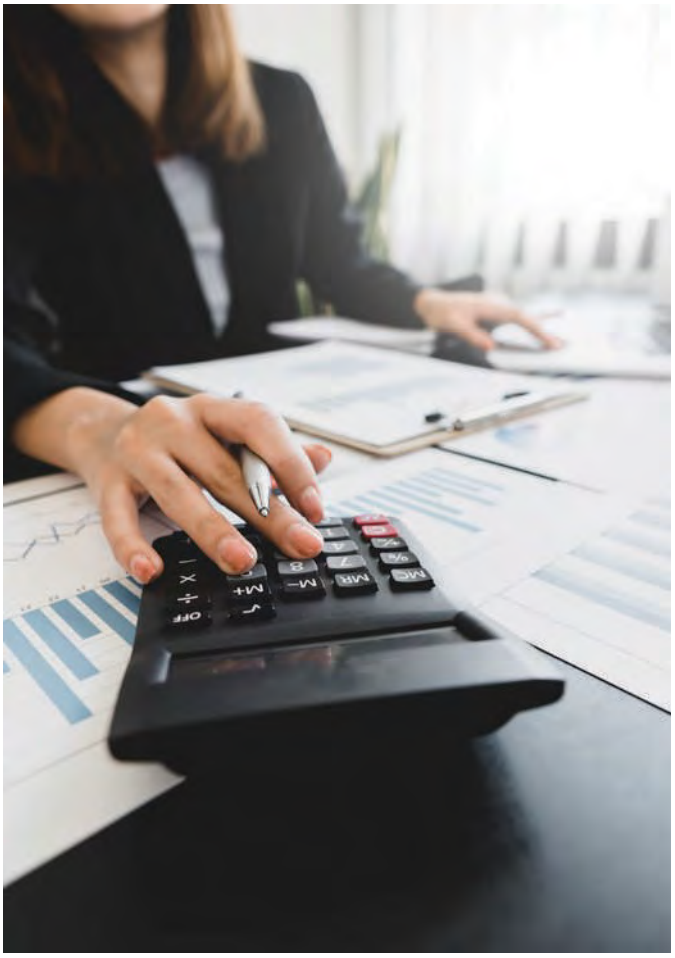
原告人並沒有把以上的事宜在申索陳述書中清楚陳述，而只於申索陳述書中索求執行買賣協議。在這前提下，原告人似乎已確認了該買賣協議仍生效。 不過，當被告人未有履行買賣協議中的支付義務時，原告人卻只著重在買賣協議條款 3.3 中的加速條款進行成述，反而忽略了於協議中其責任，即股份轉讓的相關事宜。

在 2021 年 4 月 28 日，原告人展開了清盤程序。原告人試圖將其中兩家公司以法院認為將公司清盤是公正公平為理由進行清盤。

案件分析

被告人運用本簡易判決的第 14 號命令申請開始後發生的清盤程序為其抗辯。

原告人另一方面爭辯清盤程序在此第 14 號命令申請毫無關聯。其理由為當展開了此簡易判決的第 14 號命令申請亦或是發出了訴訟前的信件，原告人已經接受了被告人早前未按買賣協議付款的違約行為。因此，清盤程序與本第 14 號命令申請毫無關聯。



然而法院並不采納原告人的陳述。 相反的，鄺嘉彤聆案官表示展開此簡易判決的第 14 號命令申請亦或是發出了訴訟前的信件實則是執行雙方的買賣協議， 以便原告人可以向被告人索取未償金額。原告人並無向被告人索取損害賠償，反而清楚的表明了他主張被告人繳付未償金額。

法院引用了 *Doherty v Fanigan Holdings Ltd* [2018] EWCA 1615 一案闡述了被告人的繳付責任和原告人的交付股份責任為從屬義務。鄺嘉彤聆案官說明了如果原告人有權獲得未償金額而沒有履行其向被告人交付或轉讓公司股份的合同義務， 那將是不合理的。所以，如果原告人未能交付公司股份，他將承擔違反買賣協議條款的風險。

鄺嘉彤聆案官認為隱含條款很可能確實存在在買賣協議中 ； 隱含條款為原告人不得做出任何會造成負面影響和 / 或破壞股份價值的事情，和不得做出任何會影響公司經營能力的事情。

下一個要考慮的問題是，原告人展開清盤程序是否違反了買賣協議的隱含條款。鄺嘉彤聆案官同意了這個論點，理由如下：

1. 客戶不希望與一家以在清盤程序中的公司做生意。他們希望避免任何的風險和不確定性。清盤呈請會對公司造成嚴重損害 ；

2. 如果清盤令以批准，清盤人會接管公司事務。公司董事們的權利會被剝奪。清盤人可以處置公司的資產，然後公司將停止營運；

3. 在買賣協議裡面列出的公司會面臨著被嚴重受損甚至毀壞的風險。假使發生的話，被告人將不

會得到當初他所簽訂這個買賣協議帶來的益處。

因此，鄺嘉彤聆案官無法得出此簡易判決的第 14 號命令申請沒有可審理的爭論點。

此外，鄺嘉彤聆案官說明了原告人已表明他不再希望受買賣協議條款約束的意向似乎也有爭議：

1. 原告人在誓詞裡聲稱他展示清盤呈請為了是要保護他的利益。如果被告人沒有繳付應付金額給他，原告人可以通過清盤程序變現其股權。在一封原告人的女兒電子郵件中，原告人聲稱他只能清盤公司，以便可以兌現他的股份並退休；

2. 儘管被告人先因未能付款而違反買賣協議的一方，原告人仍須履行轉讓和交付公司 50% 股權的合同義務；

3. 所以，任何原告試圖變現或兌現其股份的聲明將表明他不再希望受該買賣協議的約束。

案件判決

法院采納了原告人已違反買賣協議和 / 或表明他不再希望受買賣協議約束的意向是可爭辯的。因此，被告人有權在 2021 年 7 月 9 日接受原告人的不履行買賣協議或是終止買賣協議。由此，第 14 號命令的申請被法院駁回，鄺嘉彤聆案官也批予了被告人無條件許可作抗辯。

案件背後的啟示

簡易判決的第 14 號命令申請是一個在訴訟中即為普遍和實用的方法，其目的為縮短了漫長且昂貴的訴訟過程。然而，當事人（尤其是原告人）需要特別注意如果在展開了第 14 號命令申請之後，任何隨後的法律行動（比如清盤程序）都將會被法院納入第 14 號命令申請的考量。從本案中充分了體現了這一點。

在本案，如果原告人將被告人未能繳付未償金額的行為視為廢除性違約並就違約行為要求損害賠償，雙方則將沒有義務再繼續履行買賣協議。因此，買賣協議解除後，兩家公司的股份的變化是與本案無關緊要的。

遺憾的是，原告人的行為實際上反映其這邊廂已確認雙方應繼續執行買賣協議，但那邊廂，原告人卻就買賣協議中的相關公司提出清盤呈請。

在 *Chao Keh Lung v Don Xia* [2004] 2 HKLRD 11 一案中，該法庭說到 "If the innocent party subsequently failed to perform his side of the bargain, he took the risk that the initial wrongdoer might turn the tables on him"

簡而言之，如果從一開始申請第 14 號命令的方向就錯誤了，這會導致本可能成功的第 14 號命令申請便不再是"十拿九穩"的了。 ■