in some detail does not mention the removal of graves.[2] In any event the Governor was not authorised to bind the United Kingdom by an agreement with a provincial official, and publication in the Gazette was not an act of confirmation, adoption, or ratification by the British authorities: an unofficial member of the Legislative Council had asked that the Chinese proclamation be laid on the table, and this was done six months after the document had been issued and distributed. Even if contained in a formal treaty it could not have restricted the freedom of action of the new sovereign.[3] There can be no warrant for asserting, as a commentator was quoted as asserting, that the proclamation was a supplementary agreement to the New Territories treaty, or that the British agreed to it in any sense at all, or that the Hong Kong government is thereby deprived of the power to remove graves in the New Territories.

If reliance were placed rather on Blake's notice than the Chinese document, it is surely bizarre to claim that a poster, designed to calm the fears of a peasantry about to suffer untold indignities under British jurisdiction, should inhibit government policy nearly one hundred years later when conditions in the territory have changed beyond all recognition.[4] The government has been solicitous in the past to respect graves, fung shui, and other manifestations of indigenous values, and the wishes and legitimate expectations of inhabitants must of course always be taken into account by enlightened administrators — in many cases administrative law requires it. But good government cannot be the prisoner of mouldering old documents with no authority in law.

Peter Wesley-Smith

Floating Charges and Insolvency

At first blush the Companies (Amendment) (No 2) Ordinance 1995[1] ('the No 2 Ordinance') hardly grabs the reader's attention — even if that reader has more than a passing interest in Hong Kong company law. The No 2 Ordinance is an unusually but mercifully short piece of legislation — a mere nine sections in all — and deals primarily with amendments consequential to the introduction of the Professional Accountants (Amendment) Ordinance 1995.[2] However, tacked on towards the end of the No 2 Ordinance is a noteworthy amendment to the law governing the validity of floating charges created within twelve months of the commencement of a winding up.

3 See Blake to Chamberlain, No 87, 7 April 1899: CO882/5, p 140.
4 *Vajesingji Joravarsingji v Secretary of State* (1924) LR 51 IA 357.
5 See also Carol Jones, 'The New Territories Inheritance Law: Colonialization and the Elites' in Veronica Pearson and Benjamin K P Leung (eds), *Women in Hong Kong* (Hong Kong: Oxford University Press, 1995), ch 6.
1 Ordinance No 84 of 1985.
2 Ordinance No 85 of 1995.

By virtue of s 267 of the Companies Ordinance a floating charge created within twelve months of a winding up is invalid (except to a certain extent) unless it is established that the company was *solvent* immediately after the creation of the charge. Section 267 is, of course, taken from well-known English precedents[3] and is similar to provisions still found in many Commonwealth jurisdictions.[4] The purpose of s 267 is equally well-known:[5] the section is designed to reduce the attractiveness of a floating charge, particularly where a company is experiencing financial difficulties and its directors are minded to strengthen their own position by securing any indebtedness by way of a floating charge, just in case the company later goes into liquidation. The other significant inroad affecting the attractiveness of a floating charge is contained in s 265(3B) of the Companies Ordinance, which provides that in a winding up[6] the claims of preferential creditors (eg Crown debts, workers' wages, holiday pay, etc) shall have priority over the claims of holders of floating charges.

The effectiveness of these statutory provisions was to a considerable degree undermined by the decision in *Re Brightlife Ltd*,[7] which held that if the holder of a floating charge had converted the floating charge into a fixed charge (for example, by giving notice in accordance with the terms of the debenture) the charge would not give up its priority to the preferential creditors. This was because, after the charge was converted, it was no longer a *floating* charge and accordingly no longer fell within the relevant statutory provision. In England, however, the victory of the debenture-holder was short-lived. The Insolvency Act 1986 reverses *Re Brightlife Ltd* by defining a floating charge in the relevant sections as a charge which 'as created' was a floating charge.[8] Subsequently, *Re Brightlife Ltd* was also reversed in Hong Kong by amending legislation.[9] But the Hong Kong legislation made an amendment only in respect of priority between a chargeholder and preferential creditors:[10] no amendment was made to s 267. The consequence was that, in Hong Kong, s 267 merely referred to a 'floating charge' created within twelve months of the commencement of the winding up, rather than a charge 'created as' a floating charge. Thus, as this commentator pointed out in 1993, it could still be maintained that a debenture-holder

3 For example, Companies Act 1948, s 322 later re-enacted as Companies Act 1985, s 617: this provision was replaced subsequently by s 251 of the Insolvency Act 1986.

4 For example, s 330 of the Companies Act (Revised 1988) Chapter 50, Singapore (wherein the period was six months).

5 See *Grower's Principles of Modern Company Law* (London: Stevens, 4th ed 1979), pp 477–8.

6 Where the company is not being wound up, the position is governed by s 79 of the Companies Ordinance which provides that preferential creditors will have priority where a receiver is appointed or possession is taken by or on behalf of the debenture-holders.

7 [1987] Ch 200.

8 Insolvency Act 1986, s 251. Nothing in the statutory changes takes away the power of a debenture-holder to convert a floating charge into a fixed charge, it is only the consequences of conversion that are affected.

9 Ordinance No 10 of 1987, s 9.

10 That is, only ss 265(3B) and 79 were amended: no change was made to s 267 by Ordinance No 10 of 1987.

could wholly escape the operation of s 267 by converting a floating charge into a fixed charge.[11] This commentator's view, that the failure to amend s 267 meant that a well-advised director could easily avoid s 267 altogether, did not escape the attention of the members of the profession[12] — who, of course, would generally be advising directors rather than unsecured creditors!

The No 2 Ordinance finally closes the door on *Re Brightlife Ltd.*[13] Section 267 is amended by repealing the words 'a floating charge' and substituting 'a charge which, when created, was a floating charge.' Thus whether or not a floating charge has been converted into a fixed charge no longer has any bearing upon the application of s 267 and the twelve month rule.[14]

Finally, on a personal note, this commentator is gratified that the legislature has taken up his suggestion that the Companies Ordinance required amendment. It is only to be hoped that the legislature will see fit to respond as speedily to correct a most unfortunate drafting error (concerning the disqualification of directors) that found its way in 1994 into s 168C(2) of the Companies Ordinance.[15]

*Philip Smart**

The Consultation Paper on Legal Services: A Law Foundation for Hong Kong?

Nobody has been such a consistent supporter of a law foundation for Hong Kong than the Hong Kong Law Journal. The issue was first raised by the editors in 1981.[1] It caused quite a stir. The South China Morning Post picked it up and on 30 September 1981 ran a three column article headed 'Clients' cash lines lawyers' pockets.' Perhaps the heading was unfair. It drew the expected refutations, but one solicitor respondent seemed to accept that the benefit of the existing practice to solicitors might be substantial. He thought that the

11 The New Gazette, February 1993, p 20.

12 See the note by Deane in (1993) 8 JIBL N68 passim.

13 As the explanatory memorandum relates, the amendment is to prevent circumvention of the invalidating effect of s 267.

14 As amended, s 267 now reads:

> 'When a company is being wound up, *a charge which, when created, was a floating charge* on the undertaking or property of the company *and which was also created* within 12 months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except ...' (emphasis supplied).

15 See 'Disqualification of directors: another (major) foul up,' The New Gazette, June 1995, p 42. For a more extensive analysis of the Companies Ordinance, see P Smart, 'Companies Legislation in Hong Kong: Present and Future' (1996) 17 Co Law (forthcoming).

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1 See 'Interest on Client Accounts' (1981) 11 HKLJ 292. The editorial commented on the general practice of solicitors retaining interest earned on client accounts and suggested that the interest should be paid to a central fund and then allocated for various approved purposes related to the law.