

HONG KONG / JUDGMENT

CONSTELLA LTD v. SUPER EASTERN LTD AND ANOTHER

COURT

Court of First Instance

DECIDED

29 June 2007

CASE / FILE NUMBER

HCCW175/2006

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bjbj HCCW 175/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 175 OF 2006

IN THE MATTER of THOUSAND BRIGHT LIMITED and IN THE MATTER of Section 177(1)(f) of
the Companies Ordinance, (Cap. 32)

BETWEEN CONSTELLA LIMITED Petitioner and SUPER EASTERN LIMITED 1st Respondent
THOUSAND BRIGHT LIMITED 2nd Respondent

AND HCCW 176/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 176 OF 2006

IN THE MATTER of WELL PEACE TRANSPORTATION LIMITED and IN THE MATTER of Section
177(1)(f) of the Companies Ordinance, (Cap. 32)

BETWEEN CONSTELLA LIMITED Petitioner and SUPER EASTERN LIMITED 1st Respondent
JUMBO BEST LIMITED 2nd Respondent WELL PEACE TRANSPORTATION LIMITED 3rd
Respondent

AND HCCW 238/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 238 OF 2006

IN THE MATTER of MORE ELEGANT LIMITED and IN THE MATTER of Section 177(1)(f) of the Companies Ordinance, (Cap. 32)

BETWEEN KA WAH CONTAINER STORAGE LIMITED Petitioner and SUPER EASTERN LIMITED
1st Respondent JUMBO BEST LIMITED 2nd Respondent MORE ELEGANT LIMITED 3rd
Respondent

Before: Hon Kwan J in Chambers Date of Hearing: 29 June 2007 Date of Decision: 29 June 2007

DECISION

I propose to deal with the applications for validation orders taken out by the respondents first. There are a total of 4 applications in 3 winding-up petitions concerning Thousand Bright Limited (Thousand Bright), Well Peace Transportation Limited (Well Peace) and More Elegant Limited (More Elegant). These applications were ordered to be heard together. The 3 companies are joint-venture vehicles through which 2 experienced operators of car parks, Wan Chi Hing and Wong Chung Kai, operated their car park business. In Thousand Bright, Wan through his company held 35% of the issued shares, Wong through his company held 65%. In the other 2 companies, issued shares are held by the 2 camps in equal proportion. I shall refer to Wan's company or companies in this decision as the petitioner and Wong's companies as the respondents. The petitioner has petitioned to wind up the 3 companies on the just and equitable ground. All 3 companies are solvent. The validation order sought by the respondents in respect of each of the 3 companies relate to payments to Well River Limited (Well River). Well River is a service company connected with Wong, in that one of its 2 directors is Wong's brother. The particulars of payments sought to be validated in the present applications are as follows:

- (1) regarding Thousand Bright, the payment of consultancy fee to Well River up to \$17,520.00 a month as recurrent expenses in the ordinary course of business;
- (2) regarding Well Peace, the payment of consultancy fee to Well River from March to August 2006 ranging from \$16,440.00 to \$17,520.00 a month in the total sum of \$100,800.00;
- (3) regarding Well Peace, the payment of site clearance fee to Well River of \$5,400.00; and
- (4) regarding More Elegant, the payment of consultancy fee to Well River up to \$18,060.00 a month as recurrent expenses in the ordinary course of business. For the consultancy fee to Well River payable by Thousand Bright, this is in fact the subject of a validation order I made on 18 May 2006. Although the order only mentioned that a global sum up to \$184,000.00 a month is to be validated as recurrent business expenses and no breakdown was set out, it is

perfectly clear from the supporting affirmation referred to in the order that of the total sum covered by the order of \$184,000.00, \$16,440.00 per month is the consultancy fee payable to Well River for the provision of 2 workers and one substitute worker. After the order was made, the petitioner refused to co-sign cheques for the payment of consultancy fee to Well River, alleging that such payment was not covered by the order. It proposed to the respondents that instead of paying the consultancy fee to Well River, the workers should be paid directly, and that the respondents should produce to the petitioner the employment contracts of the workers provided by Well River. As a result of the petitioner's refusal to effect payment to Well River, the respondents issued a summons again on 21 June 2006 seeking validation of the consultancy fee, this time at a higher monthly rate of \$17,520.00, to avoid the necessity of coming back to court again. I find the petitioner's stance here totally unacceptable. The terms of the validation order on 18 May 2006 are entirely clear. I reject without hesitation Mr William Wong's contention that in making that order, the court has not determined the issue if consultancy fee of \$16,440.00 a month should be validated. If the petitioner's legal advisers are of the view that that part of the order was wrongly made, or if the petitioner is otherwise dissatisfied with the order, it should bring an appeal. Once a court order is made, it should be obeyed in the absence of any subsequent order staying it. I turn to Mr Wong's substantive reasons for opposing the application to validate consultancy fees payable to Well River in each of the companies. Mr Wong contended that such payment should not be validated as the court would in effect be pre-judging one of the issues in dispute raised in each of the petitions. The companies have been conducting business in this manner. The companies would submit tenders to government for short-term tenancies for the operation of car parks. After the tenancies were secured, they were distributed between the 2 camps for management. So each camp would be responsible for managing the operation of the car parks assigned to it. Wong's camp engaged Well River as management consultant of the car parks assigned to it. Well River had provided the staff for managing the car parks and it obtained reimbursement from the companies of the staff costs by charging a monthly management consultancy fee. The petitioner also had a similar practice of using its own company, On Park Parking Limited, to provide relief staff, but not full-time staff, in the car parks assigned to its management and On Park was paid a consultancy fee on a monthly basis. It is alleged in each of the petitions that the engagement of Well River as management consultant was unauthorised and wrongful, as this was done without board approval. Further, in October 2005, Wong's camp had, without board approval, increased the monthly management fee payable to Well River, alleging that the monthly wages of each of the staff provided by Well River had been increased but without producing proof. The petitioner has relied on this complaint as one of the matters to justify winding up each company on the just and equitable ground. The respondents have denied that the engagement of Well River was wrongful in any way, alleging that this was done with the knowledge and consent of the opposite camp and there was no complaint about this until their relationship deteriorated in October 2005. Mr Wong submitted that as the propriety of engaging Well River is a seriously contested issue in the petitions, to make an order to validate the payment of consultancy fees to Well River now would effectively pre-judge the issue in favour of the respondents. He

referred to a case of the Malaysian High Court in *Kok Fook Sang v Jata Villa (M) Sdn Bhd & Ors* [1996] MJLU 203. I do not find this case of much assistance. For one thing, the judge had ruled that the payments sought to be validated were not within the ambit of the statutory provision for validation. So his subsequent views that the payments to the company's contractor should not be validated, as the payments were alleged to be improper, were obiter. The allegation there was that the directors had colluded with the contractor and paid a higher price than was payable under the contract. This is a far cry from the present situation. The respondents have explained on affirmation the reasons for charging the staff provided by Well River to the companies at the rate of \$6,000.00 a month. They claimed that the rate charged by Well River is lower than the cost the companies would otherwise have to pay, which is \$6,800.00 a month exclusive of double pay and employee insurance. There is no evidence to contradict this. As experienced operators in the same business, Wan's camp ought to know whether the rate charged by Well River was excessive. There is no allegation of excessive rates. The petitioner's complaint was that the petitioner was kept in the dark about the engagement of Well River and the respondents have failed or refused to provide supporting documents, such as employment contracts, to substantiate the claim for wages. As deposed to by the respondents, Well River has over 200 employees and its main function is to provide workers to all the car parks operated by Wong, not just the car parks of the 3 companies. There would appear to be definite commercial advantages in this arrangement, instead of having a specific company that operated a car park to employ its staff directly. I see no objection in principle in validating the payment of consultancy fees to Well River in this situation. The expenses have been incurred and will continue to be incurred as expenses in the ordinary course of business. Whether this practice had been authorised by the board of directors of each of the companies in the past is a separate matter and is not an issue for determination today. Explanation has been given of the breakdown of the monthly consultancy fees. The petitioner has claimed that it is unable to verify the actual amounts incurred because it was not given the employment contracts of Well River with its staff. Mr Wong pointed to some documents and an affirmation filed by one of the workers to suggest that the workers might not in fact be paid the amount the respondents claimed they were paid. As I understand it, the difference is within \$1,000.00 per worker. It is an amount that the respondents could well repay or reimburse the company concerned if, at the end of the day, it should be established that the actual expenses incurred were less than the amount covered by the validation order. The hard fact is that the petitioner has not adduced evidence that the rates charged by Well River were in any way excessive. I see no good reason why the court should force the respondents to alter their modus operandi in running the car park business. Prejudice would not be occasioned to the petitioner, as the validation order is made with the express provision that the order is entirely without prejudice to the petitioner's contention at the trial of the petition that the engagement of Well River and the payments made to Well River were in any way improper. I will make a validation order for consultancy fees to be paid to Well River in respect of all 3 companies. The remaining item is the site clearance fee of \$5,400.00 payable to Well River. I have considered Mr Wong's objections. They are distinctly without merit. So there will also be a validation order for this

item. I decline to impose conditions that the respondents must produce employment contracts and receipts for the wages signed by the workers provided by Well River for the consultancy fees claimed and the site clearance fee. There is no reason to doubt if services were provided. There is no suggestion that the rates charged were excessive. I see no justification for imposing conditions where monitoring safeguards are not required. I will deal with the costs of each summons separately. For the summons in HCCW No. 175 of 2006 issued on 21 June 2006, I order the costs up to and including the first hearing on 7 July 2006 to be in the cause of the petition. For the costs thereafter, I order the petitioner to pay the respondents costs forthwith, on a party and party basis. I so order because of the unacceptable position taken by the petitioner in not complying with the earlier order on 18 May 2006. For the summons in HCCW No. 176 of 2006 issued on 21 June 2006, I order costs up to and including the first hearing on 7 July 2006 to be in the cause of the petition. For the costs thereafter, I order the petitioner to pay the respondents costs in any event, on a party and party basis. For the summons in HCCW No. 176 of 2006 issued on 7 June 2007, I order the costs of the summons to be in the cause of the petition. For the summons in HCCW No. 238 of 2006, I order the costs up to and including the first hearing on 14 December 2006 to be in the cause of the petition. For the costs thereafter, I order the respondents costs be paid by the petitioner in any event, on a party and party basis. The other summons before me was taken out by the petitioner for a validation order to validate payment of wages and site clearance fees in the total sum of \$330,077.00 for Well Peace. As the respondents have indicated they would not oppose a validation order for these items, I will make the order sought. Again I do so on the express provision that the order is without prejudice to the respondents contention at the trial of the petition that the payments validated are not proper business expenses of Well Peace. The reason why this matter cannot be dealt with by consent without a hearing is because of the opposing positions taken by each side as to costs. The petitioner insisted that the respondents should pay its costs, even though the respondents have indicated consent to the validation order. The respondents have proposed costs of the summons to be in the cause of the petition. This was rejected by the petitioner. I have considered the evidence filed, the correspondence exchanged and the submissions on both sides. I do not propose to set out the details. Mr Wong submitted that the respondents should have agreed to validate the payments sought by the petitioner as early as 11 August 2006, 27 October 2006 or 30 March 2007. If the respondents had done so, the petitioner would not have issued the summons seeking a validation order on 3 May 2007. I do not agree with his submissions. I reject his contention that the queries raised by the respondents solicitors on the wages and site clearance fees are unreasonable and not genuine. The queries in the letters of the respondents solicitors dated 30 August 2006, 4 January 2007 and 11 April 2007 were not responded to before the summons was issued on 3 May 2007. Even after the summons was issued, I do not think the petitioner's solicitors have dealt with the respondents request for clarification of the expenses claimed in a helpful or constructive way. The petitioner's solicitors have taken a strident and uncompromising attitude. That does not help at all if the parties are really minded to resolve their disputes in a sensible way so as to save time and costs. The hearing today is necessitated by the stance taken by the

petitioner s solicitors that the respondents should pay the petitioner s costs, and I consider this unreasonable. In respect of the costs of the petitioner s summons up to 21 May 2007, when the respondents indicated agreement to a validation order with no order as to costs, I order such costs to be in the cause of the petition of Well Peace. For the costs of the application after 21 May 2007, including the hearing today, I order the petitioner to pay the costs of the 1st and 2nd respondents in any event. (S Kwan) Judge of the Court of First Instance High Court Mr William Wong, instructed by Messrs Chow, Griffiths & Chan, for the Petitioner in HCCW 238/2006 and Messrs Or, Ng & Chan, for the Petitioner in HCCW 175 & 176/2006 Ms Linda Chan, instructed by Messrs T H Koo & Associates, for the 1st Respondent in HCCW 175/2006 and the 1st & 2nd Respondents in both HCCW 176 & 238/2006 PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&` 5<>| HCCW.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 29 October 2026 · Esheria