HONG KONG / JUDGMENT

RE BEST GAIN ENGINEERING LTD

COURT
Court of First Instance

DECIDED
20 April 2007

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HCCW337/1999

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bjbj HCCW388, 420, 459, 508/1997, 59, 235/1998, 112, 337, 373, 374, 433, 445, 521, 538, 591, 600, 642, 648 & 754/1999 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 388 OF 1997

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Newsweb International Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 420 OF 1997

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of China Arts and Crafts Printing Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 459 OF 1997

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Philma Petroleum Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 508 OF 1997

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Rich Glory Shipping Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 59 OF 1998

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Gearland Company Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 235 OF 1998

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Pan-Win Realty Agency Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 112 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Pan-Pacific Exhibition Contractors Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 337 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Best Gain Engineering Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 373 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of T.D.A. Company Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 374 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Mondial Atelier Garment (Hong Kong) Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 433 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of On Tai Garment Factory Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 445 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Union Rise Development Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 521 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Bokey (P & S) Trading Company Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 538 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Winston Camera & Radio Company Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 591 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Phantom Records Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 600 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Frontmax Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 642 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Bilison (Asia) Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 648 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Construction & Production Systems Limited

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IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES WINDING-UP PROCEEDINGS NO. 754 OF 1999

IN THE MATTER of the Companies Ordinance (Cap. 32) and IN THE MATTER of Sun Wing Lee Hing Chan Co Limited

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Before: The Hon. Barma J, in Chambers Date of Hearing: 20 April 2007 Date of Decision: 20 April 2007

D E C I S I O N

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1. I have before me a total of 19 applications by the Official Receiver seeking retrospective ratification pursuant to section 200(3) of the Companies Ordinance (Cap. 32) (the Ordinance), or the court s inherent jurisdiction, of his appointment of agents for the purposes of the 19 liquidations in which the applications are made. The applications also seek authorisation and sanction for payment of the fees and expenses of the liquidator (in particular, the fees to be paid to the agents pursuant to the arrangements between the Official Receiver and the agents), subject to taxation, out of assets of the respective companies in liquidation.

2. Each of the liquidations in question was a summary liquidation conducted under the Panel B Scheme that the Official Receiver operated for a period of time in the second half of the 1990s.

3. The background to the Panel B Scheme is that during the early and mid-1990s there was an upsurge in the number of winding-up proceedings resulting in unprecedented numbers of companies being put into liquidation. In many cases the companies had few, if any, assets. While insolvency practitioners would often be appointed as liquidators by creditors or members where the company concerned had substantial assets out of which their fees could be paid, this would not happen where there were no significant assets. In those cases, the Official Receiver would, almost invariably, act as liquidator under the provisions of section 194 of the Ordinance as then in force.

4. The Official Receiver s office, however, did not have sufficient staff or resources to deal with the many more windings-up with which it was becoming burdened. In order to deal with these additional cases, the Official Receiver launched the Panel B Scheme by which summary winding-up cases (those in which the recoverable assets were expected to be less than HK$200,000) were outsourced to private sector insolvency practitioners who were appointed by the Official Receiver to act as his agents in relation to the liquidations.

5. The Panel B Scheme proved to be short-lived. However, while it was in place, Panel B agents were appointed in 588 cases. The terms on which Panel B agents were appointed were referred to in the standard appointment letter which was issued in each case. This included undertakings signed by the partners of the firms of insolvency practitioners on Panel B and the initial terms of the pilot scheme to contract out summary winding-up cases to the private sector. The insolvency practitioners appointed to act as the Official Receiver s agents under the Panel B Scheme were also required to report to the Official Receiver on a regular basis, the form of their report being the subject of guidelines issued by the Official Receiver.

6. Where assets were recovered, the agents would be remunerated out of the assets of the company in liquidation. Such remuneration had, however, to be taxed by the court pursuant to Companies (Winding-Up) Rules 169 and 171 before payment could be effected out of the assets. Where no assets were recovered or the assets recovered were insufficient to cover such remuneration, payment of the agent s fees (up to a limit of HK$60,000) was made out of a government subsidy.

7. In each of the 19 cases now before me, the Official Receiver was appointed provisional liquidator on the making out of the winding-up order and later as liquidator (usually under a summary procedure order) of the company concerned. In each case, on his appointment as provisional liquidator, the Official Receiver appointed private sector insolvency practitioners to act as his agents, with the appointments continuing after the Official Receiver became the liquidator of the company concerned.

8. However, on 17 November 1999, Rogers JA, as he then was, wrote to the Official Receiver expressing concern about the propriety of the Panel B arrangements. His concern was triggered by a particular case he had dealt with in which the Panel B agent who had been appointed appeared to consider that he was acting as liquidator notwithstanding that he had not been so appointed (the Official Receiver having in fact been appointed liquidator in that case). Rogers JA considered that this might amount to an impermissible wholesale delegation of the Official Receiver s functions as liquidator to his agent.

9. Although section 199(2)(g) of the Companies Ordinance permits a liquidator to, appoint an agent to do any business which the liquidator is unable to do himself, Rogers JA considered that an appointment of an agent under this provision could only properly be for a specific purpose and could not involve the handing over of responsibility for acting as a provisional liquidator [or liquidator] to a third party.

10. Having considered the matter, the Official Receiver came to the view that Rogers JA s concerns were well founded. In a letter from him to Rogers JA dated 22 November 1999 he accepted that it was impermissible for a liquidator to seek to delegate the whole of his functions to another and stated that it was clear that his office current procedures in granting a general delegation of duties to Panel B agents needed to be revisited and changed . Thereafter, the Official Receiver discontinued the Panel B Scheme. Amendments to the Ordinance (which had in fact been proposed earlier) to enable him to appoint

someone else as liquidator in his place in windings-up where there were unlikely to be any significant assets were eventually enacted as section 194(1A) of the Companies Ordinance, which came into effect on 1 July 2000.

11. Following this exchange of correspondence, the Official Receiver ceased to make any further appointments under the Panel B Scheme. However, where agents had already been appointed the Official Receiver did not seek to terminate such agencies, leaving the agents to continue to act in accordance with their terms of appointment. I am told that at the time there were some 434 liquidations still ongoing in which Panel B agents had been appointed. It seems that in the vast majority of these cases the liquidations ran their course and the agents were remunerated in accordance with their agreement with the Official Receiver either out of the assets recovered, in which case their fees would have been the subject of taxation, or out of the government subsidy.

12. However, for one reason or another, the 19 cases with which I am now concerned had not yet come to an end by the beginning of 2004. In some cases, interim payments of the agents fees have been made by the Official Receiver following taxation by the court. In all of the cases, however, there are outstanding fees to be paid. In order for the fees to be paid out of the assets recovered, it is necessary for the agents bills to be taxed. For completeness, I should add that it appears that there are a very small number of further cases still active in respect of which there are no assets out of which the agents fees can be paid. In such cases, payment will presumably be effected from the government subsidy without the need for taxation.

13. In early 2004, steps were taken in some of the outstanding cases to have the agents fees taxed so as to enable payment to be made. However, before the taxations were conducted, I gave judgment on 27 January 2005 in Re Bondfield International Limited, (HCCW 99 & 711 of 2002). Bondfield was not a Panel B case. It involved questions which arose in relation to the Official Receiver s scheme for contracting out appointments under section 194(1A) of the Ordinance which came into existence after July 2000, well after the discontinuance of the Panel B Scheme. However, in explaining the background to Bondfield I referred in my judgment to the Panel B Scheme and the reasons for its discontinuance saying, at paragraph 11 of my judgment, that: The vice with the Panel B Scheme was that under it the Official Receiver effectively sought to delegate all of his functions as liquidator to a private sector agent whom he had appointed , going on to point out that this was not permitted under the Ordinance.

14. It appears that at a taxation hearing in one of the cases now before me, the Master conducting the taxation expressed concern, apparently of his own motion, as to the propriety or legality of the appointment of the Panel B agents in these cases. In the event, the taxation was adjourned to a judge, and this is the resumed hearing of the taxation.

15. Faced with this situation, the Official Receiver decided to make the application which is now before me and to do so not just in relation to the case in which the taxation was adjourned, but also in respect of all the other cases in which the same point might arise.

16. Mr Beresford, who appears for the Official Receiver today, has indicated that whatever happens the agents will be entitled to be paid. The question is whether such payment can be effected out of the assets of the companies concerned or whether they will have to be made by the Official Receiver without recourse to such assets.

17. Mr Beresford submits that payment can be made from the assets of the company if there has been no unlawful delegation or, alternatively, if the court ratifies the appointment of the agent either under section 200(3) of the Companies Ordinance or under its inherent jurisdiction. If there has been no unlawful delegation, Mr Beresford would appear to be right given that the Official Receiver, as liquidator, has the power to appoint an agent to do acts which he cannot do for himself under section 199(2) paragraph (g) of the Companies Ordinance, a power which is exercisable without prior sanction either of the committee of inspection, if there is one, or the court.

18. However, to take this particular route to authorisation or payment of the fees in question would require a determination as to whether or not there has, in fact, been an unlawful or impermissible delegation in each individual case. As to this, Mr Beresford and the Official Receiver acknowledge that Rogers JA s criticisms were accepted and recognised as being valid. They acknowledge further that, on the face of the Panel B Scheme, a more or less wholesale delegation of the duties of the Official Receiver to his agent was envisaged. They also accept that the terms of the Official Receiver s letter of 22 November 1999 reflects this position and that the standard form letter of appointment also appears to envisage an element of delegation in relation to at least some of the functions that would involve the exercise of discretion or judgment that a liquidator would be expected to exercise.

19. On the other hand, Mr Beresford submits, on the basis of the evidence contained in the Official Receiver s report that was made for the purposes of this application, that the delegation was not, or at least may not have been, a total delegation and hence impermissible. According to the Official Receiver, the Panel B agents were not authorised to act in the Official Receiver s name and while they were required to perform a variety of acts including the realisation of assets, recovery of debts, investigation into the affairs of the company affairs and the conduct of its directors, and adjudication and payment of preferential and some ordinary claims, much of the work to be done by them was in fact ministerial in nature. Moreover, they were required to report regularly to the Official Receiver and certain duties and acts, which are set out in more detail in paragraph 31 of the Official Receiver s reports, remained entirely within the province of the Official Receiver s office. In those circumstances, it is said that while the Official Receiver did not specifically authorise every act done by every Panel B agent in every case, there was nonetheless a considerable degree of oversight and action on the part of the Official Receiver.

20. Mr Beresford says, however, that it would not be cost-effective to investigate the degree of delegation in each of the cases before me given the time that has lapsed since the commencement of the liquidations, the amount of work that will have to be done to carry out such an investigation and the assets available in the liquidations in each case. Effectively, his point is that the cost and effort of conducting that exercise will be disproportionate in terms of the funds available and the amounts at stake in these liquidations. I accept that this is the case, but it seems to me, and I think Mr Beresford agrees with this, that this means that I cannot conclude that there was, in these cases, no impermissible degree of delegation so as to hold that the appointment of the agents was an act which the Official Receiver was entitled to do under section 199(2)(g) so that the sanction of the court is not required.

21. Mr Beresford s fall-back position is that, in the circumstances of these cases, it would be appropriate for the court to give its sanction or approval for the appointment of the agents retrospectively, whether under section 200(3) of the Ordinance or under the court s inherent jurisdiction. Mr Beresford submits that for these purposes it is relevant to take into account the interests of the creditors and the liquidation generally, and to consider whether or not the actions taken by the Official Receiver in making the appointments were in the interests of the creditors and the liquidation and, if so (subject to any other legitimate concerns that may have to be dealt with) it would be appropriate for the court to exercise its discretion to ratify the appointment of the agents.

22. Mr Beresford points out that under section 200(3) the court has a wide power to authorise the payment or the making of various payments including, indeed, ex gratia payments where no legal liability to make them exists: Banque des Marchands de Moscou v Koupetcheski [1953] 1WLR 172, in which prospective sanction was given to a proposed ex gratia payment to be made to a person who had no strict entitlement to the payment but had nonetheless provided services to the liquidator and the liquidation which the court felt merited some reward.

23. Mr Beresford goes on to submit that where prospective sanction or ratification is possible, it is equally possible to give that sanction retrospectively: see Associated Travel and Leisure Services Limited [1978] 1 WLR 547, which establishes that it is possible to give retrospective sanction for acts which require the sanction of the court where such sanction has not been obtained in advance. This approach has been applied in a number of Hong Kong cases including Re Hoi Sing Construction Company Limited [2000] 2 HKC 805, Re Curruthers Limited (unreported, HCCW 709 of 2001, Kwan J, 23 February 2005) and Re Rockapetta Industrial Company Limited (unreported, HCCW 743 of 2002, Kwan J, 8 December 2005).

24. I accept that on the basis of these authorities, Section 200(3) permits the court to give retrospective authorisation for actions taken by the liquidator, which includes for these purposes the Official Receiver where he is acting as liquidator, and permits the court to authorise whether prospectively or retrospectively a variety of payments including payments in situations where there may be no legal obligation to do so, if the making of the payments is or was in the interests of the liquidation.

25. Here, it is submitted that the costs incurred in appointing the Panel B agents was an expense that was undertaken for the benefit of the creditors and the liquidations generally. As Mr Beresford points out, in liquidations it is often necessary to act promptly to recover assets. A failure to act promptly may result in assets that were once available being lost to the liquidation, or being recovered for much less than they would have been had steps to recover them been taken at an earlier stage.

26. Given the limited resources of the Official Receiver and the increase in the number of liquidation cases that he was required to handle, it is submitted, and I accept, that there was a real risk that the conduct of the liquidations and the interests of the creditors would have been prejudiced if the Panel B agents had not been appointed because the Official Receiver might well not have been able to realise the assets that were realised as quickly or as effectively. The services provided by the Panel B agents were services that were conducive to the proper and efficient conduct of the liquidations in respect of which they were appointed.

27. Mr Beresford goes on to submit that having benefited from their appointment it would be unjust if the creditors were allowed to take the benefit of the appointment of the Panel B agents without having to bear the costs of their appointment. I accept that this provides a further reason for the court to give its authorisation to the arrangements that were made in these cases.

28. It is also pointed out that there is, in these cases, no evidence of any conflict of interest and that there have been no complaints of any form of improper or unsatisfactory conduct on the part of the Official Receiver or the Panel B agents in any of the cases. Most pertinently, as Mr Beresford points out, it is and always was the intention (reflected in the terms of the Panel B arrangements) that any fees and charges raised by the Panel B agents would be the subject of scrutiny by the court through the normal process of taxation of fees in liquidations.

29. It seems to me that all of these points are valid ones, and that they suggest that the court s discretion, which I accept exists, should be exercised in favour of the Official Receiver. The Official Receiver accepts, quite fairly, that it would have been possible to seek directions earlier, and that ideally this should have been done following the discontinuance of the Panel B Scheme in relation to the Panel B cases that were then still in existence. However, I do not think that this oversight is a reason for refusing to make what is, in my view, the appropriate order now.

30. Finally, I should deal briefly with a concern that has been expressed, apparently by the Master, that the Official Receiver is now taking a different stance from that which he took in the Bondfield case, in that while he is now seeking to have the agents fees paid from the assets of the various companies concerned, his position in Bondfield the Official Receiver s was opposed to such a course of action being taken.

31. As to this, it is necessary to bear in mind that the situation in Bondfield was very different to that here. Leaving aside the fact that Bondfield was not a Panel B case, an important difference is that in that case the Official Receiver s opposition to payment being made by the liquidator in that case to the agent whom he had appointed (in excess of his powers) was based on the fact that there had been no taxation or other independent scrutiny of the agent s bills and, moreover, that no such taxation or scrutiny was proposed.

32. By contrast, here it is intended that, in accordance with the Panel B arrangements, all of the agents fees and bills should be taxed in the normal way, with payments to them being limited to the amounts that are allowed on taxation at the end of the day. It seems to me that this is the critical difference between the two situations and therefore I do not think that it can be said that the Official Receiver s approach in this case is inconsistent with the approach which he had taken in the rather different circumstances of Bondfield.

33. Thus, for the reasons which I have given, I think that it would be right to exercise my powers under section 200(3) to make orders substantially in the terms sought by the Official Receiver in each of the 19 cases before me. (Aarif T Barma) Judge of the Court of First Instance High Court Mr Roger Beresford, instructed by the Official Receiver PAGE - 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 A B C D E F G H I J K L M N O P Q R S T U V &`#$ E< l j)\l JUDGE.DOT setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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