

HONG KONG / JUDGMENT

RE GLORY RISE LTD

COURT

Court of Appeal

DECIDED

5 June 2007

CASE / FILE NUMBER

CACV381/2004

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bjbj cacv 381/2004 in the high court of the hong kong special administrative region court of appeal civil appeal no. 381 of 2004 (on appeal from HCCW No. 568 OF 2002 AND HCA No. 285 of 2003) HCCW 568/2002 IN THE MATTER of s.168A and s.177(1)(f) of the Companies Ordinance (Cap. IN THE MATTER of the Glory Rise Limited (the Company BETWEEN LUO XING JUAN ANGELA Petitioner THE ESTATE OF HUI SHUI SEE, WILLY, DECEASED 1st Respondent HUI MI CHI 2nd Respondent GLORY RISE LIMITED 3rd Respondent AND HCA 285/2003 BETWEEN GLORY RISE LIMITED Plaintiff LUO XING JUAN ANGELA Defendant (HEARD TOGETHER) Before: Hon Rogers VP, Le Pichon JA and Suffiad J in Court Date of Hearing: 29 May 2007 Date of Judgment: 29 May 2007 Date of Handing Down Reasons for Judgment: 5 June 2007 REASONS FOR JUDGMENT Hon Rogers VP: This was an application for leave to appeal to the Court of Final Appeal from a judgment of this court handed down on 27 December 2006. The application was made under the provisions of both section 22(1)(a) and (b) of the Court of Final Appeal Ordinance Cap. 484 (the Ordinance). At the conclusion of the hearing of this application leave was refused with reasons to be given in writing. The judgment of this court was on an appeal from a judgment of Kwan J given on 17 November 2004 whereby the judge had ordered that the company, Glory Rise Ltd, the plaintiff in HCA 285 of 2003, be wound up and that action HCA 285 of 2003 by the company be dismissed and that the defendant was not liable to pay mesne profits. The action by the company, HCA 285 of 2003, was a claim for possession of premises and for payment of mesne profits by the defendant in respect of the period from 22 February 2001 together with a declaration that the defendant held 3,500 shares in the company on trust for the estate of Hui Shui See, Willy. This court s judgment was handed down on 27 December 2006 and upheld the judgment of Kwan J. The first basis of the application for leave to appeal was under section 22(1) (a) of the Ordinance. It was said that underlying the proceedings there was the entitlement to a flat the value of which was at least \$6 million or at least to a third proportion of that amount. That may be so but the winding up proceedings were simply that. In the action, HCA 285 of 2003, the claim for mesne profits and possession was, at best, unliquidated. A shareholder s right in respect of shares is to a share in the surplus assets available for distribution upon a winding up; a shareholder, as such, has no right to, or interest in, assets of the company. In these circumstances those claims were, at best, for unliquidated amounts. In a series of cases the Court of Final Appeal has indicated that a claim for an unliquidated amount does not come within

section 22(1)(a) of the Ordinance: see *Bill Chao Keh Lung v Don Xia*, FAMV 6/2004, 15 June 2004. The same point arose in the decisions in *Cheng Lai Kwan v Nan Fung Textiles Ltd* (1997-98) 1 HKCFAR 204, and *Shum Kam Fai v Lam Chi Wai* FAMV No. 38 of 2002, 16 December 2002. These were referred to by this court in *Wong Hoi Chung v LKK Trans Ltd* CACV 116/2004, 8 February 2005, which was confirmed without further elaboration in *LKK Trans Ltd v Wong Hoi Chung* FAMV No. 6 of 2005, 30 May 2005. Although specifically invited to address this court on these authorities, Mr Wong who appeared on behalf of the applicants for leave to appeal, declined to do so. It was then said that the leave should be given under section 22(1)(b) on the basis that of the or otherwise limb of section 22(1)(b) of the Ordinance. Reference was made to the case of *Cheng Lai Kwan v Nan Fung Textiles Ltd* (1997-98) 1 HKCFAR

204. It was said that it was a matter of virtual certainty or utmost probability that the amount involved would be in excess of \$1 million. Grant of leave under this provision is a matter of exercise of discretion by the court and therefore the point must be considered in conjunction with the other matters raised. Since there are concurrent findings of fact in this case and the matters at issue are matters of fact it would not, in my view, be appropriate for this court to give leave. Hon Le Pichon JA: I agree. Hon Suffiad J: I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (A.R. Suffiad) Judge of the Court of First Instance Mr Eugene Fung, instructed by Messrs Dibb Lupton Alsop, for the Petitioner (in HCCW 568/2002) and Defendant (in HCA 285/2003)/Respondent Mr Jason Wong, instructed by Messrs Ko & Co., for the 1st to 3rd Respondents (in HCCW 568/2 1udk 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 1udk 2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 27 October 2026 · Esheria