

HONG KONG / JUDGMENT

RE HENDERSON INVESTMENT LTD

COURT

Court of First Instance

DECIDED

5 June 2007

CASE / FILE NUMBER

HCMP917/2007

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REASONS FOR DECISION

This is the hearing of a petition presented by Henderson Investment Limited (the Company) seeking the confirmation by the Court of a proposed reduction of its share premium account in the amount of HK\$5 billion, pursuant to section 60 of the Companies Ordinance (Cap. 32). The reduction was resolved on by a special resolution passed at an extraordinary general meeting of the Company held on 14 May 2007. If the reduction is confirmed, the Company intends to use the credit generated thereby to pay a special dividend of HK\$5 per share to each of its shareholders. At the hearing of the summons of directions in respect of this matter on 22 May 2007, I gave directions dispensing with the settlement of a list of creditors, and for the advertising of the hearing of the petition. It appears from the further evidence filed for this hearing that this hearing has been duly advertised. No creditors have appeared today to oppose the petition. The background to the reduction is as follows. The Company, which is listed on the main board of the Stock Exchange of Hong Kong Limited, is a diversified holding company that, through its subsidiaries, operates a range of businesses in (among other things) infrastructure investment, property investment and development, security guard services and hotel operations. It is part of a large group of companies headed by Henderson Land Development Company Limited (), which is also listed on the main board of the Stock Exchange. At the extraordinary general meeting held on 14 May 2007, the company s shareholders (other than HLD and its associates) approved of a very substantial transaction by which the Company disposed of a broad range of its then current businesses to the HLD group, by disposing of its interests in various subsidiaries which directly or indirectly held investments in such businesses. As a result of this transaction, the Company will receive a purchase consideration of some HK\$12.106 billion, giving rise to profits of HK\$6.483 billion on the disposal. After the disposal, the Company s remaining business will be much reduced, and will be concentrated in companies which will not require financial support from the Company. As a result, the Company will be in possession of substantial surplus capital,

which it will not require for operational purposes, and which it therefore wishes to distribute to its shareholders. The dividend will be paid in part out of the profits from the disposal, and in part from the credit arising from the reduction of the share premium account. For a reduction of capital (which includes a reduction of share premium account) to become effective, three statutory requirements, which are set out in section 58 of the Ordinance, must be met. First, the Company must be authorized by its articles to reduce its share capital; second, the reduction must have been resolved on by special resolution of the Company; and, third, the reduction must be confirmed by the Court. The first two of these requirements are met in this case. The Company's articles of association contain the power to reduce its capital in clause 63(b), and the necessary special resolution was duly passed at the extraordinary general meeting on 14 May 2007. As to the third requirement, the authorities establish that the Court will exercise its discretion to confirm a reduction of capital if it is satisfied that four conditions are met. These are as follows:-

- (1) the shareholders are treated equitably;
- (2) the shareholders have had the proposal properly explained to them so that they could exercise an informed judgment when voting on it in general meeting;
- (3) the interests of the company's creditors are safeguarded and
- (4) the reduction is for a discernible purpose. (See, e.g., *Re Cheuk Nang Technologies (Holdings) Limited* [2001] 4 HKC 571 at 573A-574C) So far as the first condition is concerned, all shareholders are treated equally, and therefore equitably, as they will all be entitled to the payment of the dividend that is proposed to be paid. As to the second condition, the proposals were comprehensively explained in a detailed circular sent to the shareholders for the purpose of the extraordinary general meeting at which the underlying transaction and the capital consideration were to be considered and voted upon. As to the third condition, the Company has undertaken what appears to be an extensive exercise to identify its creditors. All of the Company's financial creditors, and a number of its other creditors, have consented to the reduction. The remaining, non-consenting, creditors consist of shareholders who are entitled to unclaimed dividends (dividend cheques sent to them having either been returned in the post or not having been presented for payment), or former shareholders of Henderson Cyber Limited (Cyber), an associated company of the Company, to whom payments are due in respect of the consideration payable by the Company under a scheme of arrangement in respect of Cyber, but who have not claimed the payments due to them. So far as the non-consenting creditors are concerned, their claims stand in the total sum of HK\$1,475,873. In order to protect their position, the Company has paid this amount into a trust which it has created by a Trust Deed dated 25 May 2007 under which the monies can only be used for the purpose of paying such creditors, subject only to the possibility that some part of the trust monies may be returned to the Company at the expiry of six years from the date on which the reduction of capital is confirmed. This will not prejudice such creditors, as their claims to such unclaimed dividends or consideration will by then be lost, because (so far as dividends are concerned) the Company has the power

(which it has previously exercised), pursuant to clause 157 of its articles of association, to forfeit unclaimed dividends which have lain unclaimed for six years or more; and (so far as the consideration under the Cyber scheme of arrangement is concerned) the scheme itself provides for the release of the Company's liability to pay the consideration after the expiry of six years from the effective date of the scheme, which was 8 December 2005. Finally, the reason for the capital reduction in this case, namely, the return of excess capital to shareholders, clearly constitutes a discernible purpose for the purposes of the exercise of the court's discretion to confirm a capital reduction. I am therefore satisfied that it would be appropriate to exercise my discretion to confirm the Company's reduction of its share premium account. So far as the terms of the order are concerned, the draft order provides that the capital reduction is to be confirmed conditionally upon completion of the transaction with HDL. Mr Scott, who appeared for the Company, informed me that all the conditions of that transaction had been complied with, save that there was a condition as to the continuing truth of warranties that had been given which remained in effect for some further period. He also informed me that the Registrar of Companies had been consulted on the terms of the draft order and had no objection to it. In these circumstances, I think that it would be appropriate to make an order in terms of the draft provided. (Aarif Barma) Judge of the Court of First Instance High Court Mr John Scott, SC, instructed by Messrs Woo, Kwan, Lee & Lo, for the Petitioner

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