

HONG KONG / JUDGMENT

RE HOMAN CPA LTD

COURT

Court of First Instance

DECIDED

18 December 2007

CASE / FILE NUMBER

HCCW589/2006

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bjbj HCCW 589/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 589 OF 2006

IN THE MATTER of HOMAN CPA LIMITED and IN THE MATTER of the Companies Ordinance
(Cap. 32), Laws of Hong Kong

Before: Hon Kwan J in Court Date of Hearing: 13 December 2007 Date of Handing Down of
Judgment: 18 December 2007

J U D G M E N T

This is a creditor s petition to wind up Homan CPA Limited (the Company) presented by Hwuashing Chinese Watch Company Limited, on the basis of a demand served on the Company on 9 October 2006 for HK\$1,645,089.00. As payment was not made, the petition was presented on 31 October 2006. The debt in the demand was particularised in an earlier letter of the petitioner s solicitors to the Company s solicitors dated 16 August 2006. It was alleged that the petitioner had granted a licence at will to the Company to occupy office premises at Room 303, 3rd floor, Car Po Commercial Building, Nos. 18 to 20 Lyndhurst Terrace, Central, Hong Kong (the Premises) since May 2003, subject to the payment of licence fees, utilities charges, management fees and the salaries of a driver, the rates of which were agreed from time to time by the petitioner and the Company and the breakdown of which was given in the schedule enclosed to the said letter. It was further alleged that the licence was terminated on 8 August 2006. The debt demanded was the total amount payable for the period from May 2003 to 8 August 2006. The Company opposed the petition on the basis that there is a bona fide dispute of the petitioning debt on substantial grounds. The Company admitted that it was in occupation of the Premises from October 2003 to August 2006, but asserted that it was under no obligation to make any payment to the petitioner

for the use and occupation of the same, or to pay outgoings and the driver's salaries. It asserted there was no agreement for payment of any fees to the petitioner, nor had the Company requested or used the services of the petitioner's driver. The background I will first set out the relevant background matters that are not controversial. The Company was incorporated on 28 May 2003. Its subscribers were Luk Wai Hong and Ma Man Wai. They were the only shareholders and directors at all times. Luk held one share and Ma held one share. Luk was the managing director of the Company. The Company was established to carry on the business and to perform any of the functions of a certified public accountant, including the provision of auditing and taxation services to clients. Luk is a certified public accountant, Ma is an accountant although not a certified public accountant. At the time the Company was formed, Ma was a director of two other companies Top C Consulting Limited (Top C) and SME Secretarial Services Limited (). Top C provided general consulting and corporate services to clients, and SME provided secretarial services. Sy Wai Shuen Doris was also a director of these companies. Miss's father, Sy Sik Chow is the majority shareholder of the petitioner, and the petitioner is the registered owner of the Premises and two adjacent units at Rooms 304 and 305. Top C and SME occupied the Premises with the Company at all times. After the Company was formed, on 16 June 2003, Ma resigned as a director of Top C and SME and concentrated on his work in the Company, to accumulate sufficient practical experience to qualify as a certified public accountant. During 2003 to 2006, the Company and Luk's company, W.H. Luk & Co., had provided professional services in accounting, auditing and taxation to the petitioner and a number of companies owned or controlled by one or both of Miss Sy's parents Concorde Gold & Jewellery Co Limited, Konford Jewellery & Gold Company Limited and Poly Talent Asia Limited. The relationship between Luk, Ma and Miss Sy broke down in mid 2006. Miss Sy terminated the Company's right to occupy the Premises on 8 August 2006. Ma proposed to dissolve the Company. A dispute arose between the Company and the petitioner about the petitioner's seizure and detention of various items, which the Company asserted belonged to it. On 23 October 2006, the Company issued a generally indorsed writ against the petitioner in High Court Action No. 2366 of 2006, seeking delivery up of all its assets and chattels wrongfully detained by the petitioner in the Premises and damages for seizure and detention. The petitioner filed an acknowledgment of service on 3 November 2006 stating its intention to contest the proceedings. No further step has been taken by the Company in the writ action. The petitioner's case There was no written agreement between the Company and the petitioner as to the terms on which the Company was allowed to occupy the Premises. The Company did not at any time pay the petitioner for its use and occupation of the Premises or reimburse the petitioner for the outgoings. According to Miss Sy, who represented the petitioner in dealing with the Company, in May 2003, she discussed the arrangement with Luk and they reached agreement on these matters:

- (1) the Company would occupy about 60% of the area comprising the Premises, Rooms 304 and 305 (collectively the Area) and the fee payable by the Company to the petitioner for its use and occupation would be HK\$11.00 per sq ft (the Licence Fee);
- (2) the Licence Fee would be reviewed annually and paid annually;

- (3) in addition, the Company would pay the management fees and utilities charges and the use of furniture and equipment (the Charges);
- (4) the driver of the Sy family would also work for the Company as a dispatcher at the Company s request from time to time, in return the Company would pay the petitioner HK\$7,000.00 a month for his services;
- (5) the Licence Fee and the Charges would be incurred as from 1 May 2003. For the year 2003, the Licence Fee calculated at HK\$20,196.00 per month would be rounded off at HK\$20,000.00 per month. Management fee was at HK\$3,333.00 per month and electricity charges and use of furniture and equipment were calculated by reference to the number of employees of the Company and agreed at HK\$2,500.00 per month. Miss Sy further alleged that the Licence Fee and Charges were reviewed and revised at the meetings she had with Luk at the end of 2003, 2004 and 2005. She alleged she had requested Luk to settle the outstanding Licence Fee and the Charges on a number of occasions. In the beginning, she acceded to his request for time to pay as the Company was a newly established business. Later, he made excuses and came up with delay tactics that he would settle as the Company was going to collect certain accounts receivables. He assured her he would be responsible for the amounts outstanding. She claimed it did not occur to her that the Company would deny liability to pay when the Company was carrying on business in a normal way and that Luk is a certified public accountant. When she learned that the Company might be dissolved in August 2006, she demanded payment of all outstanding sums and denied Luk s access to the Company s files and chattels in the Premises unless he or the Company settled the outstanding Licence Fee and the Charges. All of the above matters alleged by Miss Sy were denied by the Company. The petitioner has produced its debit notes issued to the Company in December 2003, March 2004, December 2004, March 2005, December 2005 and March 2006. The Company denied it had received any of the debit notes. As for the transfer vouchers produced by the petitioner showing payments due from the Company as accounts receivables in the books of the petitioner, Luk alleged that when he performed audit works for the petitioner, he had never come across any ledgers in the management accounts that recorded any of the debit notes allegedly issued to the Company. However, the petitioner s accounts for 2004 to 2006 were not audited until August 2007, for the purpose of the present proceedings. Miss Sy asserted that the accounts were not required to be audited as the Inland Revenue Department had notified the petitioner in a letter dated 24 December 2003 that it was not required to submit profits tax return as its business did not give rise to assessable profits. Mr. Chan, SC submitted on behalf of the Company that if the petitioner were indeed entitled to receive the Licence Fee and the Charges from the Company, the petitioner should be chargeable to profits tax or property tax. That would be a matter between the Commissioner of Inland Revenue and the petitioner. What is material for present purpose is that Luk s allegation that he had audited the accounts of the petitioner during the relevant period was shown to be incorrect. The Company s case The Company s evidence came from Luk. Ma has made an affirmation supporting the petitioner s case. Luk denied there was any agreement between him and Miss Sy for the payment of any fees to the

petitioner as alleged or at all. On the contrary, an agreement was reached between him, Ma and Miss Sy in 2003 that the Company was to use and occupy the Premises free of any payment in the following circumstances:

- (1) Ma proposed to Luk and Luk agreed to set up a company to carry out the business of a certified public accountant that would be allied with Top C and SME in providing a full range of professional services to clients (the Team Arrangement), and Ma would work as an audit staff in the new company to accumulate practical experience to qualify as a certified public accountant;
- (2) Top C and SME had been occupying parts of the Area free of charge, not even the outgoings, as a gesture of support from Miss Sy s father. For the convenience of operation and to work as a team, the Company was invited to operate in the Premises with Top C and SME on the same basis, namely, at no cost to the Company;
- (3) Miss Sy and Ma assured Luk that the Company would not have to pay any fees or charges and if the petitioner should subsequently seek payment from the team for their occupation of the Area, Top C and SME would bear the fees and charges;
- (4) in return for the Company s occupation of the Premises free of charge, the Company provided accounting, auditing and taxation services to Top C and SME free of charge. In addition, the Company provided free taxation services to the petitioner and several other companies owned or controlled by one of Miss Sy s parents. The Company also seconded staff to Top C and SME to perform work free of charge for the clients of Top C and SME. Ma and Miss Sy denied and disputed the above matters in their affirmations. Ma claimed that the only co-operation among the Company, Top C and SME was that Top C and SME would introduce clients to the Company for audit services as they were unable to provide services in this area and the Company promised it would not provide any other services which Top C and SME were capable of providing to the clients of these companies. They alleged there was no Team Arrangement. Luk claimed that until the events in August 2006, the petitioner had never demanded payment of any fees or charges relating to the Company s occupation of the Premises for close to three years. Mr. Chan placed great emphasis on the fact that the Company was permitted to remain in occupation for close to three years notwithstanding that it had made no payment at all towards any of the sums claimed by the petitioner, not even the outgoings which had to be paid by the petitioner every month. The conflicting evidence There is thus conflict on the affirmations filed by the petitioner and the Company as to the verbal agreements alleged on either side on the basis on which the Company was permitted the use of the Premises. On the assertions made by Luk that Top C and SME had been occupying part of the Area free of charge and that the Company or W.H. Luk & Co. had provided services free of charge to Top C, SME, the petitioner and other companies connected to Miss Sy s family, documentary evidence has been adduced on both sides for and against these assertions. It would appear from the financial statements of Top C and SME that SME paid rent for the year ended 31 March 2003, and Top C paid rent for the year ended 31 March 2004 and thereafter. These audited financial statements were prepared by

Luk. The allegation of the Company that no payment whatsoever was made by Top C and SME in respect of their occupation of parts of the Area does not appear to be borne out by the above documents. Mr. Chan however pointed out inconsistencies in other documents adduced by the petitioner. In the ledgers of the petitioner for the year ended March 2004, there was an entry showing that rental from SME for the year 2002/03 was still outstanding as accounts receivable, contrary to Miss Sy's assertion in her affirmations that rental of HK\$100,000.00 had been paid by SME. He also drew attention to the fact that in the exhibited ledgers of the petitioner, it was not shown that Top C had paid rent for 2004 and thereafter. As the argument raised by the Company that only one of Top C and SME, and not both, had paid rent, I do not think much of it, or of the contention that as some payment was made by Top C and SME, the Company should come under no liability for its own use and occupation of the Premises. On the provision of accounting, auditing and taxation services to Top C and SME free of charge, it would appear from the audited financial statements that audit fees of Top C for the period from December 2001 to March 2003 (of HK\$3,000.00) and for the year ended March 2004 (of HK\$50,000.00) were paid, and that audit fees for the year ended March 2005 (of HK\$65,000.00) were booked as accounts payable in the audited financial statements prepared by the Company for Top C. According to Miss Sy, the fees in 2004 and 2005 were made up of the audit fees and the expenses of the staff seconded by the Company to Top C and SME. Likewise, it would appear from the audited financial statements of SME that audit fees for the period from May 2002 to March 2003 (of HK\$5,000.00) were paid and audit fees for the year ended March 2004 (of HK\$5,000.00) were at least booked as accounts payable in the audited financial statements even though there is no documentary evidence of actual payment. The Company's allegation that the above services were rendered free of charge is not borne out by the documents. It seems that Luk had shifted ground when he claimed in his 2nd affirmation there was a subsequent agreement with Ma and Miss Sy that the Company and W.H. Luk & Co. could charge for auditing work because of a dramatic increase in business turnover of Top C and SME. If the matter had rested with the above evidence, Mr. Harris, SC candidly acknowledged that the petitioner might have difficulty in showing that this is an appropriate case to petition for the winding up of the Company instead of pursuing the Company by a writ action. He submitted however that the letters written by the Company's solicitors in August 2006 demonstrated that the present denial of debt made in Luk's affirmations is not a bona fide defence. The right approach in law Before I turn to the correspondence in August 2006, I wish to deal with Mr. Chan's submission regarding the burden of proof and the right approach in law. Mr. Chan submitted that the burden is on the petitioning creditor to establish a genuine demand for a debt. If I understand him correctly, it would seem to be implicit in his submission that the company is not required to prove anything, at least until the creditor can establish he is entitled to serve a demand under the statute. In support of this, he cited *Re a Company* [1984] 3 All ER 78 at 81b to 82j and *In re London and Paris Banking Corporation* (1874) LR 19 Eq 444 at 445 to 446. He further contended that even if the defence raised by the company is shadowy, it would still amount to a bona fide dispute on substantial grounds, citing, among other cases, *In re L.H.F. Wools Ltd.* [1970] 1 Ch. 27 at 36B to F. I do not think his submission

is correct. The dicta in *L.H.F. Wools Ltd.* were lifted out of context, they were said in the context of a cross-claim, which the court emphasised, must be genuine, and do not provide any support for the last proposition advanced. As submitted by Mr. Harris, where a demand is served under section 178(1)(a) and there is neglect to pay or to secure or compound for it to the creditor's satisfaction within three weeks, the company is deemed insolvent and may be petitioned to be wound up. If the company can demonstrate a bona fide dispute on substantial grounds about the existence of the debt, the company's court does not determine the dispute and the petition will be dismissed. It is therefore incumbent on the company to establish a bona fide dispute on substantial grounds by adducing sufficiently precise factual evidence. That onus is not discharged by arguing hypotheses of fact or raising a cloud of circumstantial matters (*Re ICS Computer Distribution Ltd.* [1996] 1 HKLR 181 at 183F to J). If it is contended there was no neglect to pay the debt demanded because the debt is bona fide disputed by the company, that must be established by the company. Nothing that was said in *Re a Company or London and Paris Banking Corporation* could be regarded as support to the contrary. The letters written by the Company's solicitors I will first give the background in which the relevant letters were written. On 8 August 2006, Miss Sy telephoned Luk who was in Fuzhou. According to Luk, she demanded the Company to vacate the Premises forthwith by collecting all its files and the belongings of its staff. He immediately returned to Hong Kong and had a meeting with Ma, Miss Sy and Mrs. Sy on 9 August 2006. It was agreed that the Company could retrieve its files and belongings to enable the Company to continue to operate in the meantime and Luk was to respond to the proposals of Ma to dissolve the Company or buy out Ma's share by 18 August. Luk understood that the Company could no longer operate in the Premises so he immediately rented another office. On 14 August 2006, Luk went with others to the Premises to retrieve files and collect belongings but they were denied access. He had a meeting with Ma and Miss Sy and the latter demanded an immediate response to the proposals of dissolution or buy-out, otherwise he would still be denied access to the Premises. On 17 August 2006, Luk went to the Premises with others in an attempt to retrieve files and belongings and was again denied access. He later had a meeting with Ma, Miss Sy and Mrs. Sy and Miss Sy repeated her demands on 14 August 2006. According to Luk, at no time during the meetings on 9, 14 and 17 August 2006 did Miss Sy or Mrs. Sy mention anything at all about the debt allegedly owed to the petitioner by the Company. Miss Sy said she had demanded payment from the Company when she telephoned Luk on 8 August 2006, and during the meetings with him on 9, 14 and 17 August 2006. She denied she had ever demanded Luk to accede to Ma's request as alleged or at all. I now come to the letters. The first was a letter dated 15 August 2006 from the Company's solicitors to the petitioner. The solicitors stated they were instructed that the Company had been in occupation of the Premises since about May 2003 subject to payment of an annual rental. They further stated that on 8 August 2006, Miss Sy notified the Company it should surrender possession forthwith or she would arrange to dispose of all the files and belongings and that on 9 August 2006, the parties agreed the dispute should be resolved amicably and Mrs. Sy did not impose any deadline for the Company to move out. The solicitors requested the petitioner to allow the Company to remain in the Premises until 31

August 2006, as Luk had found a new office and it would take about two weeks for re-location. They asked the petitioner to confirm in writing the amount of outstanding rent/payable by the Company up to and inclusive of 31 August 2006. It is pertinent to note the following about this letter, apart from those parts I have quoted verbatim. If Luk's assertion in his affirmations were to be believed, namely that the petitioner had not demanded rent in any of the meetings in August 2006, the subject of payment of rent brought up by the Company in this letter was not in response to any demand for rent. Further, according to this letter, rent was to be paid annually, which accords with the petitioner's case. Luk has not explained how he got the idea rental was payable on an annual basis. Luk attempted to explain this letter in his second affirmation. He said it was meant to be an expedient way to gain access to the Premises so he could retrieve the files urgently required by the Company, and as the files were a matter of life and death to the Company and his professional reputation, he had no choice but to make peace by offering to pay some money to the petitioner. Assuming Luk was indeed minded to make some payment to the petitioner to retrieve the Company's files, I find it difficult to comprehend why he should find it necessary to tell the Company's solicitors that the Company had agreed to pay rent on an annual basis, if this were not true as he subsequently asserted in his affirmations. Mr. Harris has a fair point this would make no sense at all, if Luk knew it had been expressly agreed that no rent was payable by the Company. Also on 15 August 2006, the same solicitors wrote to Ma on behalf of the Company and Luk, making the same statement on instructions that the Company used the Premises since its incorporation in May 2003 upon payment of an annual rental to the landlord company. The petitioner replied to the letter of 15 August by the letter of its solicitors dated 16 August 2006, mentioned in the beginning of this judgment. They demanded payment of HK\$1,645,089.00, the breakdown of which was given, by 17 August 2006. In the meantime, the petitioner would exercise its right of lien against the Company's properties in the Premises. Luk said in his first affirmation that the above reply demanding payment of HK\$1.6 million was to [his] further astonishment and he was shocked as the Company was under no obligation to pay anything for its use and occupation of the Premises. This claim of astonishment is inexplicable and unbelievable, as the Company's solicitors had just written to the petitioner the day before, stating on Luk's instructions that the occupation of the Premises was subject to payment of an annual rental. The next letter in the sequence is a letter from the Company's solicitors to the petitioner's solicitors dated 18 August 2006 in response to the petitioner's letter of 16 August 2006. It was stated that [the Company] has caused its officer responsible for the matters to review the Company's records and shall revert to [the petitioner's] letter as soon as possible. If the Company was never under any obligation to pay, there is no reason why it was unable to give a substantive response without further ado. According to Luk's affirmations, he had reached an agreement with the petitioner that no payment would be made by the Company. Luk would not need to check with Ma on an agreement made by him before he could refute the petitioner's demand for payment. On 21 August 2006, the Company's solicitors wrote to the solicitors for Ma (who acted for the petitioner subsequently), stating that they were instructed since the incorporation of the Company, the terms of the tenancy of the Office by

the Company and its annual renewal were liaised between [Ma] on behalf of the Company and Ms Doris Sy on behalf of the landlord, that throughout the past 3 years, [Ma] has represented to Mr. Luk of [the Company] that the rentals were duly settled, and that at no time [Ma] has mentioned to [Luk] that a huge outstanding amount remains due and payable by the Company to the landlord. The Company's solicitors requested Ma to provide them with all relevant documents including but not limited to payment records and an explanation, to enable them to give a substantive reply to the letter of the petitioner dated 16 August 2006. Mr. Harris queried why the above instructions were given by Luk to the Company's solicitors if he had agreed with the petitioner at the outset that no payment was to be made by the Company at all. I think this is a valid criticism. On 25 August 2006, Ma's solicitors wrote in reply to the letter of 21 August denying the allegations and asserting that Luk was personally involved and had personal knowledge of the tenancy matter. On 1 September 2006, the Company's solicitors replied to the letter of the petitioner's solicitors dated 16 August 2006 stating that the Company denied there are any arrears of rent/licence fees and other related charges due and payable. It was only in the letter of the new solicitors for the Company to the petitioner's solicitors dated 2 November 2006 that an assertion was made there has never been any agreement between [the Company and the petitioner] for payment of any fees, charges or salaries. Conclusion and order The instructions given by Luk to the Company's solicitors in the letters were manifestly inconsistent with the case of the Company subsequently made in his affirmations. There is no satisfactory or credible explanation for the complete reversal in the Company's position. I cannot be satisfied that the reasons advanced by the Company subsequently to dispute the debt are bona fide reasons. I find that the Company has failed to raise a bona fide dispute on substantial grounds. I order the Company to be wound up. The petitioner's costs are to be paid out of the Company's assets. (S Kwan) Judge of the Court of First Instance High Court Mr Jonathan Harris, SC and Mr Brian Wong, instructed by Messrs Hastings & Co, for the Petitioner Mr Chan Chi Hung, SC and Mr Lee Tung Ming, instructed by Messrs Michael Li & Co, for the Company The Official Receiver, attendance excused

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