

HONG KONG / JUDGMENT

RE JOY RICH DEVELOPMENT LTD

COURT

Court of First Instance

DECIDED

7 April 2016

CASE / FILE NUMBER

HCCW146/2013

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bjbjjs HCCW 146/2013 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) PROCEEDINGS NO 146 OF 2013

IN THE MATTER OF Joy Rich Development Limited and IN THE MATTER OF the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

Before: Hon Harris J in Chambers Date of Hearing: 2 March 2016 Date of Decision: 7 April 2016

DECISION

I have before me two summonses. The first in time was issued by two creditors of the Company, Chinese Strategic Holdings Limited (CSHL) and Fameway Finance Limited (Fameway), seeking convening of a creditors meeting for the purpose of voting on the reconstitution of the Committee of Inspection () and that five proofs of debt be admitted for voting purposes at values different to those at the last meeting of creditors. The second summons was issued by the Liquidators two months after the creditors summons and seeks the dissolution of the COI. By the time the applications came on before me it was not necessary for me to determine the value of all the proofs referred to in the first summons as the Liquidators in the light of the information that they currently have do not dispute for present purposes the value at which the creditors contend four of the five proofs should be admitted. The proof still in dispute is that of Fameway and it is that issue I shall deal with first. There is no dispute, at least for present purposes, that Fameway is a creditor of the Company in the sum of HK\$98,234,621.92. The debt is secured by a charge executed on 9 September 2010 registered at the Lands Registry over the Company s sole asset, a house in Middle Gap Road (Property), but not at the Companies Registry as required by section 80 of the Companies Ordinance, Cap 32, with the consequence that pursuant to section 80(1)

(now section 337(4) of the Companies Ordinance, Cap

- 622) the charge is void against the Liquidators or any creditors. In January 2011 the Company had drawn down a loan advanced by Greatstep International Limited for HK\$200,712,328.77, which was subsequently assigned and is currently owned by Revelry Gains Limited. This loan was secured by a floating charge executed on 26 January 2011, which was also not registered against the Company within the time specified by section 80 of the Companies Ordinance, 32, which was then in force. The date for registration was, however, extended by Master Souza by an order dated 24 September 2012 within 28 days of the date of the order. The order contained, as in common, a proviso that: The Order made under paragraph 1 is without prejudice to the rights of any creditors acquired between 1 March 2011 (being the 5 weeks prescribed by section 80(1) for registration of the Floating Charge) and the date of registration pursuant to this Order; The Liquidators in assessing Fameway's proof of debt for voting purposes have taken the view that by virtue of the proviso Fameway may have acquired priority to Revelry Gain and, therefore, be able to recover in full against the property over which it has security. Fameway says this is plainly wrong for the following reasons. The starting point is to determine the value of the property for present purposes. Fameway says that it should be assumed to be its forced sale value. This was the view taken by Kwan J (as she then was) in *Re Lau Kwok Fai*. I agree. The forced sale value is HK\$360,000,000. Revelry Gains current debt is HK\$283,361,816.49. As I have mentioned Fameway's debt is HK\$98,234,621.92. It follows that Fameway is an unsecured creditor for HK\$21,596,438.41 and that pursuant to the Proof of Debt Rules, Cap 6E, which are applicable by virtue of section 264 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, 32 (CWUO), Fameway should have been admitted to vote for this amount. The suggestion that the proviso to the Order in some way remedied the consequence of Fameway's failure to register its legal charge is misconceived. Mr Wong took me to two decisions that demonstrate this. The first is *In re Ashpurton Estates Ltd*. At page 123C to F Lord Brightman explains why this is so, although his explanation is framed in terms of an existing unsecured creditor I agree with Mr Wong that by virtue of section 80 this is how Fameway is properly characterized: It soon became established that, so long as the company was a going concern at the date of registration, the proviso did not protect, and was not intended to protect, an unsecured creditor who had lent money at a time when the charge should have been but was not registered: see *In re Ehrmann Brothers Ltd*. [1906] 2 Ch. 697 and *In re Cardiff Workmen's Cottage Co. Ltd*. [1906] 2 Ch.
627. The reason for this was that such unsecured creditor could not have intervened to prevent payment being made to the lender whose charge was not registered (whom I will call the unregistered charge). Nor could such unsecured creditor have prevented the creation of a new charge, duly registered, to take the place of the unregistered charge. The proviso was intended to protect only rights acquired against, or affecting, the property comprised in the unregistered charge, in the intervening period between the date of the creation of the unregistered charge and the registration of such charge. Such persons would include a subsequent chargee of the relevant property; a creditor who has levied execution against the

relevant property; and an unsecured creditor if, but only if, the company has gone into liquidation before registration is effected. Once the company has gone into liquidation, the existing unsecured creditors are interested in all the assets of the company, since the liquidator is bound by statute to distribute the net proceeds *pari passu* among the unsecured creditors, subject to preferential debts. The assets of the company are at that stage vested in the company for the benefit of its creditors. The unsecured creditors are in the nature of *cestuis que trust* with beneficial interests extending to all the company's property. In *Watson v Duff, Morgan & Vermont (Holdings) Ltd* at page C to E Templeman J explains that it is only rights acquired during the proviso period that acquire priority: In the present case the first argument put forward by Mr. McCulloch on behalf of the defendants was that the proviso to the order dated October 28, 1971, extending the time for registration of the first debenture, but without prejudice to the rights of any party acquired prior to actual registration, made the plaintiff's first debenture, when registered, subject to the rights acquired by the defendants under the second debenture. But from the authorities which I have already cited and in particular from *In re Ehrmann Brothers Ltd.* it appears that the rights acquired by the defendants under the second debenture do not fall within the proviso to the order because the defendants' rights were acquired on the date the second debenture was executed, and were not acquired during the period which elapsed while the first debenture was void, that is to say, they were not acquired during the period between the expiration of 21 days after the execution of the first debenture and the date of actual registration of the first debenture. I can think of no sensible reason why a creditor who has failed to register his security should acquire priority over a subsequent secured creditor who applies, successfully, to extend the date for registration of his charge. The reason why is explained by Templeman J. In my view it follows that there is no grounds for not allowing Fameway to prove as an unsecured creditor for the unsecured portion of its debt. The Liquidators have pointed out that this was not the position taken by Fameway's legal representatives at the meeting of creditors and I accept that Fameway only has itself to blame for not thinking through its position properly before the meeting of creditors and in answer to their questions telling the Liquidators they took the view that they were not fully secured (they seemed to have said the opposite) and wished to prove for the shortfall. However, Fameway now having had the benefit of more informed legal advice, is entitled to change its position at this preliminary stage of the liquidation when what is being dealt with is the admission of proofs for voting purposes only. It follows in my view that Fameway is entitled to vote the unsecured portion of its debt in the sum of HK\$21,596,438.41. The principle purpose of Fameway making the present application was to obtain an order for convening of a new meeting of creditors at which a new vote could be taken on the membership of the COI, which currently consists of three members: Pius Consulting Limited (Pius), Chan Yuen Wa and Chen Muhua. Fameway anticipates that now Madam Chan and Madam Chen's proofs are to be valued at HK\$1 they will be removed and replaced with two representatives of Fameway. The Liquidators by their summons seek the dissolution of the COI. They do so on the grounds that, ignoring Pius who are creditors for only HK\$120,000, the creditors split into two distinct camps. Companies owned by or associated with Mr Lau and on the other hand Madam Chan and Madame Chen

who are sisters. It appears to be the case of the Sisters that the Property was purchased at the instigation of Mr Lau for him to live in with Madame Chen at a time when they were lovers. Financing for the purchase of the Property seems to have been primarily arranged by Mr Lau, although Madam Chan says she provided a substantial financial contribution. Their relationship subsequently ended and their relationship would appear to be poor. It would also appear from the present evidence that Mr Lau treated the Property as his own and used it raise finance on a number of occasions. The Liquidators say that in these circumstances a COI, which would consist of Mr s representatives, would be unconstructive and difficult to work with because to date Fameway and Revelry Gains, which are associated with him, have been unhelpful in responding to questions from the Liquidators about their debts and Mr Lau is unlikely to be impartial in dealing with matters concerning the two sisters against whom there are already misfeasance summonses. Mr Wong took a preliminary point that a COI is constituted pursuant to section 206 of the CWUO and that the section provides that the creditors and contributories are to decide at their respective meetings whether or not an application be made to the Court for the appointment of a COI and its membership. Section 227B of the CWUO provides that, in certain circumstances and on the application by the Official Receiver, the Court may make a regulating order to dispense with the appointment of a COI without regard to the wishes of creditors and contributories. This is the only power to dispense with a COI even if creditors desire one. There are no express provisions in the CWUO or in the Winding Up Rules which provide for the power to dissolve a COI where it has already been constituted and appointed, and where the majority views of the creditors are in favour of the continued existence of the COI. Mr Wong argued, in my view correctly, that whilst the liquidation process is always subject to the supervisory jurisdiction of the Court, it is unclear whether in the absence of express provision within the CWUO or the Winding Up Rules the Court has the power or jurisdiction to make such an order directly against the wishes of creditors, which the language of section 227B would suggest is a matter for creditors in the absence of the Official Review taking a contrary position. Neither counsel have found any case directly on point. The Liquidators have drawn my attention to *Re Kansa General International Insurance Co Ltd* . However, in that case the COI was dissolved under the terms of a court-sanctioned scheme of arrangement, which indicates that the dissolution would have had the support of at least 75% of the creditors. Mr Wong acknowledged that the absence of a reference to a provisional liquidator or liquidator in section 227B did not necessarily prevent such an application being made at the instigation of an incumbent provisional liquidator or liquidator, but they would first have to persuade the Official Receiver to lend her name to the application. It also seems to me that there is nothing in the language of section 206, which suggests that a provisional liquidator or liquidator could not make submissions to the Court with a view to persuading it not to appoint a COI. Section 200(3) enables a liquidator to apply to the court in manner prescribed for directions in relation to any particular matter arising under the winding up. It does not seem to me that this section itself suggests that a COI can be dispensed with on the application of a liquidator. On occasions applications are made by liquidators in liquidations in which members have ceased attending meetings of the COI and it is thus not functioning,

seeking an order under section 207(7) that any vacancies need not be filled and dispensing with the COI. Such orders are granted as papers applications. Section 208 allows a liquidator, where there is no COI, to apply to the Court for directions and it is perhaps the better explanation for the way the Court deals with non functioning COIs that it is simply acknowledging the factual absence of a COI, and this enables a liquidator to seek the Court's approval for actions that would otherwise have to be approved by a COI. I do not think that there is a clear answer to this question. On balance it seems to me that the better view is that if a liquidator forms the view after a COI has been approved by the Court pursuant to section 206(1) that for any reason (other than vacancies) the COI should be dissolved he should approach the Official Receiver and ask the Official Receiver to issue the application, which will in practice be advanced by the liquidator. It follows that the Liquidators application should fail. I will, however, deal with the alternative argument, namely, that the COI would not advance constructively the liquidation. It is desirable that liquidations are conducted with the assistance of a COI. As Au J observes in *Re Planet Toys (HK) Ltd*, the COI can assist the court in its supervisory role over the liquidators and to obviate the potential need for time-consuming and costly applications to be made to the Court. It is undesirable for the Companies Court's time to be taken up with decisions that can as well, if not better, be made by creditors. It should also not be forgotten that the liquidation process is primarily intended to protect and advance the interests of creditors and COIs exist to help ensure that this is what happens. Kwan J (as she then was) makes this point in *Re Wah Nam Group Ltd* I should mention that a committee is more than just a consultative body for the liquidators, as the liquidators would appear to suggest in their affidavit. Under section 200(1), it is provided that the liquidator of a company which is being wound up by the court shall, in the administration of the assets of the company and in the distribution thereof among its creditors: have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection. The function of the committee is to assist the court in its supervisory role over the liquidators, and avoid the need for time-consuming and costly applications to the court. Similar views were expressed by Yuen J (as she then was) in *Re Goodway Ltd*, when rejecting the suggestion that a COI should not be appointed because the creditors may act in their own interests: In my view, more good than harm would result from the appointment of a committee of inspection. A committee of inspection assists the court in its supervisory role over liquidators, and ideally the need for time-consuming and costly applications to the court would be obviated. The fear that the creditors may act only in their own interests may be allayed by putting in place procedural safeguards such as prohibiting interested parties from voting in matters affecting themselves. In the event that there are any differences between the liquidators and the committee of inspection, the liquidators may refer the matter to the creditors and contributories in general meeting, and in the last resort, an application may be made to the court under s 200. The import of these decisions is clear. A COI is not to be dispensed with unless there is good reason to do so. Possible inconvenience to the Liquidators and

difficulties arising from conflicts of interest and partisan views are not of themselves a reason to dispense with a COI. They are issues to be managed. In the present case Fameway suggests that it is disingenuous for the Liquidators to now suggest that the COI should be dissolved because of concerns that the COI would be unconstructive and partisan. They point to the fact that the Liquidators were content to have a COI in which Madam Chan and her sister were in the majority and the Liquidators are now pursuing misfeasance applications against them. Be that as it may, it seems to me that the position now needs to be considered with reference to the present situation. If the COI is to continue it will be dominated by Mr s representatives. They may not be impartial in their views about Madam Chan, but one would expect them to be well informed about the Company s affairs. If anything allowing Mr Lau to play a role in the COI might encourage the provision of information rather than, as the Liquidators currently complain, generate an unhelpful and suspicious response. Insofar as the Liquidators are considering steps against any company or person associated with Mr Lau his representatives on the COI will be conflicted from taking any part in the relevant deliberations or decisions. This is the liquidation of a single purpose company; that purpose being holding the Property. It does not seem to me that there is sufficient reason to dissolve the COI even if the Liquidators are able to apply for such an order other than through the Official Receiver, which as I have already indicated, in my view they cannot. I will make an order in the terms of para 1 of the summons of 13 April 2015. The Liquidators summons I dismiss. I make a costs order nisi in respect of both summons that the Liquidators costs and the Applicants/Respondents costs of the two summonses respectively are paid out of the assets of the Company. Mr Wong asked for a certificate for two counsel, but without any disrespect Mr Wong, I am not inclined to grant one on this occasion as I think one counsel was sufficient. (Jonathan Harris) Judge of the Court of First Instance High Court Mr William Wong SC & Mr Christopher Chain, instructed by Joseph SC Chan & Co, for the Applicants Ms Janine Cheung, instructed by Stephenson Harwood, for Respondent Attendance of K & L Gates for the Intended Interveners, Chen Muhua (also known as Winky Chan) and Chan Yuen Wa, was excused HCB 11144/2004, 15/9/2005

[1983] 1 Ch 110 (CA)

[1974] 1 WLR 450

[2007] 1 HKLRD 897 at 901B per Kwan J

[2011] 2 HKLRD 101 at 106, 7(d)

[2002] 2 HKLRD 369 at 374-375, 16-17

[1999] 1 HKC 141 at 148E-G 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 A B C D E F G H I J K L M N O P Q R S T U V gd^Dc gd^Dc h^Dc h^Dc h^Dc h^Dc h^Dc h^Dc h^Dc gdm^ gdm^ hBmZ hBmZ hBmZ ho ho h~zy h~zy hzvJ gdzvJ gdzvJ hzvJ hzvJ hzvJ gdzvJ hIyn hIyn hIyn [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/

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