

HONG KONG / JUDGMENT

# RE LEGEND INTERNATIONAL RESORTS LTD

## COURT

Court of First Instance

## DECIDED

28 March 2007

## CASE / FILE NUMBER

HCCW1139/2004

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bjbj HCCW 1139/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 1139 OF 2004

IN THE MATTER of Legend International Resorts Limited and IN THE MATTER of the  
Companies Ordinance, Chapter 32 of the Laws of Hong Kong

Before: Hon Kwan J in Chambers Date of Hearing: 28 March 2007 Date of Decision: 28 March 2007

## DECISION

This is a summons issued by Messrs Richards Butler on 2 November 2006 for a validation order under section 182 of the Companies Ordinance, Cap. 32, in the liquidation of Legend International Resorts Limited ( the Company ). Messrs Richards Butler were the former solicitors of the Company in the proceedings. They seek a validation order regarding two payments that had been made by the Company to them in respect of legal fees and disbursements in the proceedings. The winding-up petition was presented on 3 November 2004. A winding-up order was made on 9 June 2006. On 3 November 2004, the petitioner applied for provisional liquidators to be appointed to explore the possibility of a restructuring of the Company s debts with a view to implementing a scheme of arrangement with the creditors. When the application was heard on 10 November 2004, I declined to grant the application and adjourned it with liberty to restore. The 1st payment sought to be validated by Messrs Richards Butler was made on 4 November 2004 in the sum of HK\$503,629.48. This would appear to relate to work to be done by the solicitors to oppose the appointment of provisional liquidators. Some time in December 2004, the petitioner applied to restore its application to appoint provisional liquidators. On 16 December 2004, the

Company issued an application to strike out the petition on the basis that the petitioner did not have locus as creditor and the petition was presented for a collateral purpose. Both applications were heard on 21 to 23 April 2005. I gave my decision on 6 June 2005. The application for appointment of provisional liquidators was dismissed with the costs to the Company. I took the view that notwithstanding there was jurisdiction to appoint provisional liquidators to facilitate a corporate rescue, it was not appropriate in the circumstances to make such an order at the time. The application to strike out the petition was dismissed with costs to the petitioner. I was satisfied that the petitioner did have locus as creditor. The 2nd payment sought to be validated was made to Messrs Richards Butler on 30 June 2005 in the sum of HK\$499,880.00. This would appear to relate to work done between January to April 2005. Both the Company and the petitioner appealed against the decision given on 6 June 2005. The Court of Appeal dismissed both appeals with costs on 1 March 2006. It was held that there is no power to appoint provisional liquidators to explore a restructuring without reference to the question if assets are in jeopardy. The Court of Appeal did not however disturb the discretion of the court below in refusing to appoint provisional liquidators. During November 2004 to June 2005, Messrs Richards Butler rendered 5 fee notes to the Company for fees and disbursements. They came up to the total of about HK\$1.55 million. The disbursements consisted primarily of fees of counsel for appearing at the hearings in November 2004 and April 2005. The two payments received from the Company were applied towards settlement of the fees and disbursements. All further payments received by Messrs Richards Butler on account of fees and disbursements were received from third parties related to the shareholders and all further fee notes were rendered to those third parties. At the time the petition was presented, the Company was clearly insolvent. It was however still operating its casino business in the Philippines. Prior to cessation of operations due to the forced closure of the casino in 2006, I am given to understand that the Company was generating gross revenue of US\$120,000.00 a day. The situation at the time the applications were heard in 2004 and 2005 was that both the petitioner and the Company believed that the Company should be restructured. The petitioner took the view that this should be done by independent professionals being the provisional liquidators to be appointed, and the Company sought to pursue this by the rehabilitation proceedings it brought in the Philippines. The liquidators have informed the court that cash on hand at present is about HK\$1.1 million odd. This is without taking into account the costs to be recovered from the petitioner in respect of the costs orders made in the Company's favour in opposing the appointment of provisional liquidators. Liabilities of the Company are over US\$186 million. I think it is fair to say that the greater part of work done as covered by the two payments in question related to the efforts to resist the appointment of provisional liquidators. The Company was successful in its opposition. The application involved a point of difficulty or complexity which justified the admission of specialist counsel from overseas. That part of the costs is discreet, it is not costs in opposing the petition as such. Mr. Beresford for the petitioner accepted that the costs of opposing the appointment of provisional liquidators and the costs incurred in the striking out application were not costs of the petition. I do not think I am functus officio in making any validation order for the payment of fees to the Company's solicitors sought in this application. There is delay in seeking a validation order. I do not think any valid reason was given why there was such delay when Messrs Richards Butler were alive to the need

for a validation order as early as November 2004. This, however, is not a material consideration in the circumstances. I was referred by counsel to a number of authorities, including three cases dealing with validation orders in respect of the payment of legal fees: *In re A Company* (No. 004055 of 1991) sub. nom. *Re Record Tennis Centres Ltd* [1991]1 WLR 1003; *Re Crossmore Electrical and Civil Engineering Ltd* (1989) 5 BCC 37; and *Re Surplus Trader Ltd* [2005]4 HKLRD 436. I also bear in mind the relevant principles in the exercise of the discretion of making a validation order where the company is insolvent, as conveniently set out by Fox LJ in *Re S A & D Wright Ltd*, *Denney v John Hudson & Co Ltd* [1992] BCC 503 at 504G to 505E. I have a discretion at large, to be exercised within the broad principles as stated in the authorities. Each case must be decided on its own facts. The payments insofar as incurred in opposing the appointment of provisional liquidators, were, in my view, incurred in the interests of the creditors of the Company as a whole. Notwithstanding that the Company was insolvent, its opposition to the appointment of provisional liquidators was shown to be justified. It certainly cannot be said that its opposition was improper, in the light of the judgments in the Company's favour and that the courts had awarded costs in favour of the Company against the petitioner for successfully opposing the appointment of provisional liquidators. Whether any creditors had expressed support for the Company's opposition to the appointment is not to the point. The only question is whether I should refuse to validate part of the costs where such costs were incurred in the strike out application which was unsuccessful. Mr. Barlow for the solicitors submitted that there was no question as to the genuineness and honesty of the payments to the solicitors. That is not the only consideration. There is no reason to validate the payment of legal fees where the application proposed to be made was ill advised or misconceived. Mr. Barlow submitted that the situation should not be assessed by ex post facto rationalisation, citing the dicta of Sachs LJ in *In re Clifton Place Garage Ltd* [1970]1 Ch 477 at 493B-D, and that I should look at the situation when the payment was made. Even if I were to approach the matter in that light, when substantial costs were incurred in the strike out application in April 2005, it should have been apparent to the Company and its legal advisers, on the state of the authorities at that time (the decision after trial in *The Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600 (Comm) had been delivered a week before the hearing), the application for the strike out of the petition should not have been made. In relation to the 2nd payment made in June 2005 of HK\$499,880.00, apparently for the fees incurred in the hearing in April 2005, I would refuse to validate 40% of this amount, which I regard as may be properly attributable to the strike out application, following the apportionment I made as to the hearing time in the order made on 6 June 2005. I make a validation order in respect of the whole of the 1st payment and as to 60% of the 2nd payment. I make no order as to the costs of this application, save that the costs of the liquidators are to be paid out of the assets of the Company. (S Kwan) Judge of the Court of First Instance High Court Mr Roger Beresford, instructed by Messrs White & Case, for the Petitioner Mr Barrie Barlow, instructed by Messrs Richard Butler, for the Company Mr Douglas Lam, instructed by Messrs Johnson, Stokes & Master, for the Joint & Several Liquidators

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