

HONG KONG / JUDGMENT

RE MINMETALS RESOURCES LTD

COURT

Court of First Instance

DECIDED

16 February 2007

CASE / FILE NUMBER

HCMP139/2007

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bjbj 6\$N\$Q n gP 007 Date of Handing Down of Reasons for Judgment: 16 February 2007

REASONS FOR JUDGMENT

This is a petition presented by Minmetals Resources Limited, formerly known as Oriental Metals (Holdings) Company Limited (the Company), for confirmation of the cancellation of the special capital reserve account and a reduction of the share premium account, under sections 48B(1) and 59 of the Companies Ordinance, Cap. 32. The Company was incorporated on 29 July 1988. Since December 1994, its shares have been listed on The Stock Exchange of Hong Kong Limited. Its name was changed to its present name on 4 August 2005. The Company acts as an investment holding company and the principal activities of its subsidiaries are trading of non-ferrous metals and investment holding. The present capital of the Company is HK\$300,000,000, divided into 6,000,000,000 ordinary shares of HK\$0.05 each, of which 1,714,440,521 shares have been issued and are fully paid or credited as fully paid. By an order of the court made on 16 December 2003 on a petition for confirmation of reduction of capital from HK\$300,000,000 divided into 300,000,000 ordinary shares of HK\$1 each to HK\$15,000,000 divided into 300,000,000 ordinary shares of HK\$0.05 each, the Company by its counsel undertook to the court that upon the proposed reduction taking effect, an amount equal to the credit arising from such reduction would be credited to a special capital reserve account created for the purpose of eliminating or reducing in future the accumulated losses of the Company. The proposed reduction was confirmed by the court on 6 January 2004. As a result of the reduction, a sum of HK\$125,374,060.25 arose and, pursuant to the undertaking, was credited to a special capital reserve account in the books of the Company. There is at present standing to the credit of the special capital reserve account the sum of HK\$125,374,060.25. Further, there is at present standing to the credit of the share premium account of the Company the sum of HK\$3,503,361,724.99, which has arisen as a result of various issues of shares by the Company at a premium. There is provision in the articles of association that the Company may by special resolution reduce its share capital, any capital redemption reserve fund, share premium account

or other undistributable reserve in any manner authorised and subject to any conditions prescribed by law. By a special resolution duly passed at an extraordinary general meeting on 27 December 2006, it was resolved that the special capital reserve account be cancelled and the share premium account of the Company be reduced from HK\$3,503,361,724.99 to HK\$2,738,933,771.24. Prior to the meeting, a circular dated 30 November 2006 was despatched to shareholders giving the reasons for and the effects of the proposed cancellation and reduction. The proposed cancellation of the special capital reserve account and the reduction of the share premium account are to enable the Company to eliminate the accumulated losses in the profit and loss account, which on 31 October 2006 stood at HK\$889,802,014. This will bring the accounts more nearly into line with the available assets and bring forward the time when the Company will be in a position to pay dividends. At the time of the reduction of share capital in 2004, it was contemplated by the board that a proposal would be put to the shareholders as soon as practicable for the reduction of the share premium account so that the credit arising therefrom, together with the amount of credit transferred to the special capital reserve account, would be applied to eliminate the entire accumulated losses and a further application to the court would be made for this purpose. As events transpired, it has taken much longer than anticipated for the Company to put forward the proposal. Major difficulty was encountered in gathering evidence for the accumulated losses sustained by the Company from 1998 onwards, some of the relevant documentation went back even further, and a great deal of documentation was incomplete or missing. Besides, the present management team only took office in 2002 and did not have first-hand information about the Company's affairs prior to 1998. Further, the Company underwent a capital reorganisation in 2004 and spent most of its time and resources in 2004 and 2005 for that exercise. The Company and its subsidiaries had, until recently, been sustaining heavy losses, as a result of the Asian financial crisis in 1997 and the subsequent global economic downturn due to the burst of the dot com bubble. Since 2003, the financial condition of the Company and its subsidiaries has improved. For each of the five years between 1998 and 2002, there was a deficit in the profit and loss account of the Company. The manner in which these losses arose has been explained in detail year by year in the supporting evidence. The expenses or write-backs in each year which contributed towards the accumulated losses were made up of these categories:

- (1) provisions for investments in and amounts due from subsidiaries, of HK\$871,388,469;
- (2) provisions for bad and doubtful debts, of HK\$152,126,431;
- (3) provisions for impairment loss of investment in four types of listed securities, which are netted off with realised gains or losses upon disposal of the securities, of HK\$67,132,955;
- (4) provisions for impairment loss of real estate properties, of HK\$10,281,122;
- (5) interest expenses, of HK\$168,320,166;
- (6) other administrative expenses, of HK\$171,958,784;
- (7) waiver of payables in 2004, of HK\$511,216;

- (8) equity-settled share based payment, being expenses booked in 2006 in respect of share options granted to directors and employees, of HK\$21,557,795; and
- (9) taxation, of HK\$389,180. Of total accumulated losses of HK\$889,802,014 as at 31 October 2006, the Company has classified them into permanent or realised losses and non-permanent or unrealised losses. The permanent losses came up to HK\$563,822,633. The remainder of HK\$325,979,381 is regarded as non-permanent losses. I have considered the supporting evidence, including the evidence of the auditors on the accounting treatment of the employee share option expenses. I agree with the classification of permanent and non-permanent losses by the Company. To protect the interest of creditors, the Company has offered through its counsel an undertaking in the usual form, to ensure that any future recovery by the Company in respect of losses provided for which are non-permanent in nature, subject to a limit in the amount of the non-permanent component of the accumulated losses, will be placed in a special reserve which shall not be distributed except to the extent of any subsequent increase in the paid-up capital or unless and until all the existing creditors have been paid or consented to the distribution. It is contemplated in the proposed undertaking that four categories of credit to the special reserve may be created:
- (1) all retained profits accruing to the Company between 1 November 2006 and the date on which the proposed cancellation and reduction shall take effect;
 - (2) non-permanent losses in respect of provisions for investments in subsidiaries, listed securities or real estate properties and covers write-backs or realisations beyond their written down values;
 - (3) non-permanent losses in respect of provisions for bad and doubtful debts and covers recoveries; and
 - (4) potential adjustment for the share option expenses booked in 2006. The proposed cancellation of the special capital reserve account and the reduction of the share premium account do not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital or of any sum standing to the credit of the special capital reserve account or of the share premium account. So the exercise will not diminish the assets of the Company except to the extent of the costs incurred in these proceedings. At the hearing of the summons for directions on 6 February 2007, I have accepted the undertaking offered by the Company and made an order to dispense with the settlement of a list of creditors. The direction for advertisement of the notices of presentation of the petition has been complied with. There is no opposition to the petition. The proposals have been properly explained to the shareholders in the circular despatched before the extraordinary general meeting and I am satisfied they are treated equitably in the proposed reduction. The reduction is for a discernible purpose and the interests of creditors would appear to have been safeguarded. I have therefore made an order in terms of the draft submitted. (S. Kwan) Judge of the Court of First Instance, High Court Mr. Winston Poon, SC and Mr. Godfrey Lam, instructed by Messrs. Deacons, for the

Petitioner PAGE - 1udk 1udk 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
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