

HONG KONG / JUDGMENT

RE MOULIN GLOBAL EYECARE TRADING LTD

COURT

Court of First Instance

DECIDED

24 July 2007

CASE / FILE NUMBER

HCCW471/2005

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

b1bj f gP ^ gP 13 July 2007 Date of Handing Down Reasons for Decision: 24 July 2007

REASONS FOR DECISION

Introduction

The applicants are the liquidators of Moulin Global Eyecare Trading Ltd. (Moulin Eyecare Global), one of the companies in what for convenience can be called the Moulin group of companies. Moulin Eyecare Global was wound-up by the court on 5 June 2006. The applicants took out this summons on 19 March 2007 pursuant to s. 200(3), Companies Ordinance (Cap. 32) seeking the court's directions regarding principally two matters:-

- (a) whether the interest of provable debts should be paid up to the date of the winding-up petition, or up to the date of the winding-up order;
- (b) whether provable debts which are expressed in foreign currencies ought to be converted into Hong Kong dollars for the purpose of being admitted to proof, and if so, the date of such conversion. At the end of the hearing, I indicated that, for reasons to be given later, I agreed with the applicants' conclusion more. The parties appearing are to attempt to agree on the precise terms of the order to be made, and failing agreement, those terms are to be approved by the court. The following are the reasons for the decision. Background Facts The background leading to this summons is strictly unnecessary for the determination of this summons. It is nevertheless set out in brief for completeness. The petitioner, a licensed bank in Hong Kong, is one of the creditors of Moulin Eyecare Global. The proofs of debt include a claim for interest which was expressly provided for in the facility letters. The applicants consider interest to have been reserved or agreed for in those letters. The dates of presentation of the petition and the winding-up order were nearly one year apart. The

difference in the amount of interest payable for those two dates amounts to about \$24 million. The applicants position is that interest should be payable up to the date of the winding-up order. On the other hand, the primary view of the Official Receiver () is that it should only be payable up to the date of the petition. Provable Interest The provisions in Cap. 32 relevant to this aspect are:-

- (a) s. 263, Cap. 32;
- (b) s. 264, Cap. 32;
- (c) s. 264A, Cap. 32 (amended in 1996, 1997 and 2000);
- (d) r. 88, Companies (Winding-up) Rules (Cap. 32H) (amended in 1997 and 1998). By virtue of s. 264, with regard to several matters, the rules which prevail in the law of bankruptcy are applicable to the winding-up of insolvent companies (see para. 30 below). The provision in the Bankruptcy Ordinance (Cap. 6) relevant to this aspect has been amended in 1996: s. 71. Unless otherwise stated, references herein to the above provisions are references to their current version. It is apparent s. 264A, Cap. 32 has divided companies into solvent companies and insolvent companies . The meaning of these has been discussed in *Re Setaffa Investments Limited (In Liquidation)* [1998] 2 HKLRD 236 (citing *In re Rolls-Royce Ltd.* [1974] 1 WLR 1584), para. 8. In short, the court in *Re Rolls-Royce Ltd.* concluded that a company's status is to be determined at the time when a surplus is thrown up, irrespective of its position at the commencement of the winding-up. On the other hand, r. 88, Cap. 32H distinguishes a debt whereon interest is not reserved or agreed for from one on which interest is. The interest payable for a company which is not an insolvent company is relatively clear (see s. 264A(1)). S. 264A(2) reads:-
 - (2) Any surplus remaining after the payment of debts proved in a winding up referred to in subsection (1) shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which the debt have been outstanding, in the case of-
 - (a) a winding up by court-
 - (i) where the company has by special resolution resolved that the company be wound up, since the date of the resolution; and (ii) in any other case, since the date of the winding-up order; and
 - (b) a voluntary winding up, since the commencement of the winding up (which must be construed having regard to section 228A(5)(a) or 230, as may be appropriate) (emphasis supplied). The dates referred to in s. 264A(2)(a) and (b) are dates from which interest is payable (in other words, the commencement dates for payment). It is logical to think that the terminal date for payment should be the date of repayment of the debts. The OR accepts it to be trite law that interest on provable debts has always been payable up to the date of the petition (see para. 36 and 37 below). When queried by the court, the OR also accepted that, where s. 264A is applicable, interest on provable debts accruing between the date of the

petition and the dates set out therein should also be payable. Hence, where s. 264A(2) is applicable, the net result is as follows. A creditor is entitled to interest on a provable debt from the time when the debt falls due all the way to the time of its repayment. It should be noted, unlike r. 88 (see below), s. 264A(2) does not distinguish between debts whereon interest is not reserved or agreed for and one on which interest is. The position of provable debts whereon interest is not reserved or agreed for under r. 88 is equally relatively clear. R. 88 provides:-

- (1) On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the appropriate date, the creditor may prove for interest [rate of interest] to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.
 - (2) The appropriate date referred to in paragraph (1) is -
 - (a) in the case of a voluntary winding up, the date of the commencement of the winding up;
 - (b) in the case of a winding up by the court -
 - (i) where the company has by special resolution resolved that the company be wound up by the court, the date of the resolution; and (ii) in any other case, the date of the winding-up order .
- The dates referred to in r. 88(2) are the dates up to which interest is provable (in other words, the terminal dates). The commencement date is expressly stated in r. 88(1) to be the date when the debts become payable. The only type of debt where no express provisions can be found in Cap. 32 with regard to interest is provable debts whereon interest is reserved or agreed for (and in the case of the winding-up of an insolvent company). I agree with the applicants (and disagree with the OR) to the extent that there is no valid reason why interest on the last-mentioned debts should not be payable up to the dates same as those set out in para. 22 above. The reasons for so concluding are as follows. First, neither s. 264A(2) nor r. 88 regards the date of the petition to be of significance; instead, other dates are. For winding-up petitions which fall with s. 264A(2)(a)(ii) or r. 88(2)(b)(ii) (which appear to be the majority of winding-up petitions), the date of the winding-up order is stated by both to be the relevant date. Secondly, r. 88 expressly enables creditors whose debts have not reserved or agreed for interest to prove interest as part of the debts up to the same dates as those specified in s. 264A: see para. 21 and 22 above. There is no valid reason to conclude that creditors whose debts have in fact reserved or agreed for interest should only be entitled to prove interest payment up to the date of the petition (which usually is much earlier than the winding-up order). To do so will result in unequal treatment being given to these two types of creditors. Thirdly, the conclusion set out in para. 24 above will result in basically the same scheme for interest payment whether it be a winding-up pursuant to the provisions of Cap. 32, or bankruptcy pursuant to the provisions of Cap. 6. The relevant provisions in Cap. 6 are summarised below. S. 71(2) is very similar to s. 264A(2). Hence, where there is a surplus after

distribution in a bankruptcy, creditors are entitled to interest payment since the commencement of bankruptcy, which, by virtue of s. 30, is equivalent to the date of the bankruptcy order (not the date of the bankruptcy petition). S. 71(4) is very similar to r. 88. Hence, in a bankruptcy, creditors whose debts have not reserved or agreed for interest are entitled to be paid interest up to the commencement of bankruptcy, that is, the date of the bankruptcy order (s. 30). As stated above, s. 264, Cap. 32 which applies in the winding-up of insolvent companies, expressly adopts the law of bankruptcy. It reads:- In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section (emphasis supplied). The approach set out in para. 13 to 29 above does not require reliance on s. 264. But in case it is necessary to import the law of bankruptcy into winding-up, it is fairer to construe the reference to the date of bankruptcy order in s. 30, Cap. 6 to mean the date of the winding-up order (as opposed to the date of the petition) in the context of the winding-up of an insolvent company (see para. 26 above). I appreciate that the construction is not consistent with r. 88 (2)(a) or (b)(i) (though consistent with r. 88(2)(b)(ii)). Finally, the observation of Kwan J in *Re The Incorporated Owners of Foremost Building* [2005] 3 HKLRD 509:- The petitioning creditors are entitled to interest on the judgment debt They are the only external creditors entitled to interest. In the usual course, interest would be payable on the judgment debt only up to the date of the winding-up order (Companies (Winding-up) Rules, rule 88(1) and (2)(b)(ii)) (emphasis supplied) (para. 16) appears to be consistent with the conclusion reached in para. 24 above. I pause to note that, in this summons, no distinction has been drawn between a creditor's entitlement to prove interest as part of the debt, and his entitlement to payment of the same: cf. for example *Re The Incorporated Owners of Foremost Building*, above, at para. 20. The OR advanced several grounds in support of his primary view. The only ground worthy of further consideration is that relying on the pre-1997 case law. The pre-1997 law on a creditor's entitlement to interest in a winding-up has been variously described as:-

- (1) in a somewhat confused state of the authorities : In *re Amalgamated Property Co.* [1985] 1 Ch 349, 375E-F; (2) the provision [relating to interest when applied to the winding-up of companies] has been found to be virtually unworkable in complex liquidations, especially in the winding up of banks and other financial institutions : Report on Bankruptcy, Law Reform Commission of Hong Kong, May 1995, Ch. 19 at p. 182. The court in *In re Amalgamated Investment and Property Co. Ltd.* observed, after reviewing the textbooks and authorities:- there are now two decisions of experienced judges reached in cases in which the question was argued [referring to the decisions of Maugham J in *In re Agricultural Wholesale Society Ltd.* [1929] 2 Ch 261 and that of Bennett J in *In re Parent Trust & Finance Co. Ltd.* [1936] 1 All ER 641] and which accord with the opinion of Lord Westbury sitting as

an arbitrator and the views expressed in the leading text book. Those decisions have governed the practice in winding up for over 50 years. In the circumstances, it would be clearly wrong for me not to follow them unless I am convinced that there are compelling reasons for taking that course (p. 378C-D). Having rejected counsel's submissions, the court concluded:- I am not therefore persuaded that the decisions of Maugham J and Bennett J were wrong, far less that they were so clearly wrong that I would be justified now in not following them (p. 379E). The conclusion was a claim for interest on a debt carrying interest could only be admitted up to the date of the petition. The Hong Kong court followed the conclusion reached in *In re Amalgamated Investment and Property Co. Ltd.* in *Re Singapore Insurance Co. Ltd.* [1985] 2 HKC 244, 252-3. In doing so, the court said:- The question to be decided is whether the terminal date for interest to be calculated at the appropriate date is the date of the presentation of the petition or the date on which the winding-up order is made. the most cogent reason for adopting the cut off date as at the date of presentation of the petition is because the affairs of the company are in effect put into suspense on that date Rule 88 [which must mean the then r. 88] of [Cap. 32H] also supports the position that interest is payable up to the commencement of the winding up (pp. 252-3). The date referred to in the then r. 88 was the date of the commencement of the winding up. But there are equally forceful counter-arguments to the reasons given in *In re Amalgamated Investment and Property Co. Ltd.* and *Re Singapore Insurance Co. Ltd.* One, there were authorities indicating that the date the principal of a debt can be proved is the date of the winding-up order:-

- (a) *Warrant Finance Co's Case* (1868) 16 WR 474;
- (b) *In re British American Continental Bank Ltd.* [1922] 2 Ch 575, 582-3;
- (c) *In re Dynamics Corporation of America* [1976] 1 WLR 757;
- (d) *In re Lines Bros Ltd.* [1983] 1 Ch 1. Two, it is equally arguable that creditors should not be entitled to less interest simply because time is needed for the winding-up order to be made; see observations to this effect in *Warrant Finance Co's Case* (1868) at p. 646. It may be thought that, whether it is fairer to treat one date as opposed to the other as the terminal date depends on whether one looks from the perspective of the individual creditor of the debt in question, or from that of the notional general body of creditors (which is likely to consist mostly of the said creditors). Entitlement to more interest for each will mean less will be available from the pool of assets for distribution to all. The answer to such a dichotomy lies with a proper construction of the relevant statutory provisions. By virtue of the paragraphs above, in relation to debts on which interest has been reserved or agreed for, I conclude that the legislation must have intended the terminal dates to be the same as those set out in s. 264A(2) and r. 88. To conclude otherwise (as the OR's primary view would have it) would involve:-
 - (1) ignoring the significance placed by s. 264A(2) and r. 88 on dates other than the date of the petition;

- (2) declaring the current version of r. 88 ultra vires;
- (3) treating creditors of provable debts on which interest has been reserved or agreed for less favourably than debts on which interest has not. Conversion of Currency The parties difference over this aspect is more confined. They agreed that, because of s. 264, the law of bankruptcy is imported into the winding-up context. The provision relevant to this aspect is s. 34(3B), Cap. 6:- Where a debt provable in bankruptcy is payable in a currency other than Hong Kong dollars, the trustee shall convert the amount of the debt from the foreign currency into Hong Kong dollars at the midpoint between the selling and buying telegraphic transfer rates of exchange quoted by The Hong Kong Association of Banks on the day the bankruptcy order is made or, where no such rates are quoted, at an exchange rate determined by the court (emphasis supplied). For reasons similar to those set out above, I agree with the applicants that the relevant dates for currency conversion are the same as those set out in s. 264A(2) and r. 88. Costs At the end of the hearing, the applicants indicated they had no objection to the costs of the OR to be paid out of the assets of Moulin Eyecare Global. Those costs amounted to some \$70,000. I do not agree that those costs should be so paid. In the context of this summons, there are at least two reasons why the OR's own costs should come out of the general revenue. First, the OR's primary view has not been considered to be correct. Secondly, and more importantly, it was said that the points raised by this summons are of importance not only to the winding-up of Moulin Eyecare Global, but to the law of liquidation in Hong Kong generally. I infer from this the OR's involvement is to assist the court on matters which he considers to be of general public importance. While this is both commendable and desirable, there is no valid ground for his costs to be shouldered solely by Moulin Eyecare Global. The applicants costs, on the other hand, are to be paid out of the assets of Moulin Eyecare Global. (Andrew Chung) Judge of the Court of First Instance High Court Mr Richard Tollan, of Messrs Johnson, Stokes & Master, for the Provisional Liquidators Ms Linda Chan, instructed by Official Receiver's Office 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 1udk 1udk i\$&`G 0jl; 0jl; HCCW 471/2005 setup HCCW.dot setup Microsoft Word 9.0 HCCW 471/2005 Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=57894

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/re-moulin-global-eyecare-trading-ltd-2007>

Prepared on 27 October 2026 · Esheria