

HONG KONG / JUDGMENT

RE NEW SHINE GROUP LTD

[2024] HKCA 946

COURT

Court of Appeal

DECIDED

18 October 2024

CASE / FILE NUMBER

CACV193/2024

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CACV 193/2024, [2024] HKCA 946

On Appeal From [2024] HKCFI 1104

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 193 OF 2024

(ON APPEAL FROM HCCW NO 321 OF 2021)

IN THE MATTER of NEW SHINE GROUP LIMITED (Company Number 2806482)

and

IN THE MATTER of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance,
Chapter 32

Before: Hon Cheung and G Lam JJA in Court

Date of Written Submissions: 20 June 2024, 4 & 15 July 2024

Date of Decision: 18 October 2024

DECISION

Hon G Lam JA (giving the Decision of the Court):

Introduction

On 16 April 2024, Anthony Chan J refused to adjourn the hearing of the summons dated 1 December 2022 (“Summons”) filed by Aron Resource Enterprise Limited (“AREL”) and proceeded to dismiss the Summons: [2024] HKCFI 1104. The Summons concerned the voting rights of AREL as a creditor in the liquidation of New Shine Group Ltd (“Company”).

AREL has lodged an appeal. By an amended summons dated 21 June 2024, AREL applies for leave to adduce further evidence in support of its appeal. The application is opposed by two other creditors of the Company, namely, New Winning Finance Co Ltd (in Liquidation) (“NW”) and Lamtex Holding Ltd (in Liquidation) (“LH”). Having considered the written materials, we consider it appropriate for this application to be determined on paper without an oral hearing.

Background

On 8 July 2022, the Company was wound up by the court. The Official Receiver, who became provisional liquidator of the Company, in turn appointed Mr Alan Cheung and Mr Bernie Suen of Wing United CPA Limited as joint and several provisional liquidators (“PLs”) in her place on the same date.

On 24 August 2022, AREL lodged its proof of debt. It claimed to be a creditor in respect of the sum of HK\$28,469,319.84 as a result of the Company’s breach of a cooperation contract with AREL dated 6 October 2020 (“Contract”), which related to a joint investment in a chemical manufacturing company in Shandong Province and its 3 projects. The total amount of joint investment was stated in the Contract to be HK\$90 million. The Company agreed to put up 49% and AREL 51%. For the first project, the investment amount was HK\$50 million, with the Company being responsible for investing HK\$24.5 million and AREL HK\$25.5 million. By late 2021, according to AREL, it had already invested a total sum of HK\$28,969,319.84 pursuant to the Contract, but the Company had only paid a deposit of HK\$500,000 and failed to make any further investment.

AREL relied on a clause in the Contract that provided (as translated):

“

Both parties understand the uniqueness of investing in a factory, and that investment funds must be fully in place on time for the factory to start operations. Therefore, if the funds promised by one of the parties fail to be in place as scheduled, work and production under this project will be halted, resulting in the serious consequence of total loss of the investment. Hence, if one party is in default, the other party may pursue the defaulting party for any liabilities arising from the default in accordance with this agreement.”

Based on this provision, AREL said the Company was liable for the loss of AREL's investment in the entire sum of HK\$28,969,319.84 less the deposit paid of HK\$500,000. Hence the proof of debt of HK\$28,469,319.84.

Initially, the PLs took the view that AREL was entitled to vote as a creditor in the amount claimed. As AREL's claim exceeded the aggregate value of the other claims, the resolutions at the meeting of creditors held on 2 September 2022 ("Meeting of Creditors") were passed in accordance with AREL's vote. In particular, it was resolved that the PLs be appointed liquidators.

NW however subsequently objected to AREL's entitlement to vote at the Meeting of Creditors. NW contended that AREL's claim was based on a breach of the Contract and was therefore either an unliquidated claim for damages or a contingent debt. For this reason, NW submitted that AREL was not entitled to vote by reason of rule 125 of the Companies (Winding-Up) Rules (Cap. 32H), which provides: "A creditor shall not vote in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained ..."

The PLs accepted NW's objection and accordingly, in their supplemental report dated 19 September 2022, reduced the value of AREL's vote from HK\$28,469,319.84 to HK\$1.00. As a result, the resolution carried was that two practitioners from a different firm, instead of the PLs, be appointed liquidators of the Company.

Against this background, AREL issued the Summons on 1 December 2022 for, inter alia, declarations that PLs' reduction of the amount of AREL's proof of debt from HK\$28,469,319.84 to HK\$1.00 for the purpose of voting is void and invalid, and that AREL was and is entitled to vote at all meetings of creditors of the Company in respect of the full amount of its proof of debt, i.e. HK\$28,469,319.84.

On 22 March 2023, directions were given by the court, by consent, on the filing of evidence for the purpose of the Summons. AREL had filed three affirmations made by its director, Mr Kwan Sik Jungaron ("Mr Kwan"), in December 2022, May 2023 and January 2024 respectively, whereas NW and LH had together filed one affirmation in opposition in September 2023.

In April 2024, shortly before the hearing on the 16th, AREL's then solicitors informed the court that it had no instructions to instruct counsel to attend the hearing and requested for an adjournment. The court was also informed that those solicitors had applied to cease to act for AREL.

At the hearing of the Summons, Mr Kwan appeared on behalf of AREL and asked for an adjournment. Anthony Chan J took the view that AREL's claim was based upon a breach of contract which would normally result in damages. The Judge held that there was no arguable basis on which AREL could contend that its claim was a liquidated debt, and as the basis of the Summons failed, it would be wrong to grant an adjournment which would merely further delay the liquidation process. Accordingly, the Judge refused to adjourn and dismissed the Summons.

The appeal

On 14 May 2024, AREL (represented by its current solicitors) filed a notice of appeal, contending that the Judge erred in concluding that the debt was unliquidated. Two principal grounds of appeal can be distilled, namely:

Ground 1: On a proper construction of the Contract, the clause set out in §5 above provides for a contractual formula or machinery by which the amount of damages due to AREL could be ascertained. Thus, AREL's claim was liquidated.

Ground 2: The Judge had failed to take into account that the Company had admitted AREL's claim for HK\$28,469,319.84 in full by its letters dated 15 November 2021 and 5 December 2021 ("Company's Letters"), which means that AREL has a liquidated claim for that sum. Furthermore, such acknowledgement was binding as it was given in exchange for AREL's forbearance from commencing arbitration proceedings against the Company.

The New Evidence Application

On the same date as the notice of appeal, AREL filed an application by summons for leave to adduce an affirmation of Mr Kwan dated 14 May 2024 and an affirmation of Mr Tang To Wong ("Mr Tang"), sole director of the Company, of the same date as further evidence in support of its appeal.

According to Mr Kwan's Affirmation:

Before the Company's letters were issued, there were numerous discussions or negotiations between him and Mr Tang, who was at all material times the sole director of the Company.

Mr Kwan was eager to recover the loss suffered by AREL and had threatened to commence arbitration against the Company pursuant to the arbitration clause in the Contract. After several rounds of negotiations, Mr Tang agreed that the Company would be liable to pay AREL the fixed sum of HK\$28,469,319.84, and in exchange, AREL would not commence arbitration or legal action against the Company ("Oral Agreement"). The Oral Agreement was reached in around November 2021, before the Company issued the letter dated 5 December 2021 to AREL. That letter stated "As our company is unable to repay in the short term the HK\$28,469,319.84 owed to you, we will actively seek external funding to continue [the project]." Mr Kwan believed the Oral Agreement was made in the interest of both AREL and the Company, to avoid litigation which neither of them could afford.

Mr Kwan has been advised that even if AREL's claim was initially unliquidated, there had since been a binding admission, acknowledgement or agreement between the Company and AREL in respect of a specific outstanding debt from which the Company had bound itself not to resile.

Mr Tang's affirmation largely echoes and corroborates the contents of Mr Kwan's. According to Mr Tang:

He was at the time (and still is) the sole director of the Company. He had, on behalf of the Company and by way of the Company's Letters, admitted liability to pay AREL the fixed sum of HK\$28,469,319.84, being the agreed compensation for the Company's failure to honour its obligations under the Contract.

Before the Company's Letters were sent, there were numerous oral discussions or negotiations between him and Mr Kwan with a view to settling the parties' disputes. At one point, Mr Kwan had threatened to commence arbitration against the Company. As it was clear to Mr Tang that the Company was in breach of the Contract, and as the Company did not have the necessary resources for arbitration or litigation, he, on behalf of the Company, agreed that it was indebted to AREL in the sum of HK\$28,469,319.84, and in exchange, AREL would refrain from commencing arbitration or legal action against the Company (i.e. the Oral Agreement). The Oral Agreement was reached in around November 2021, before the Company issued the letter dated 5 December 2021 to AREL.

Therefore, at the time of the Company's letter dated 5 December 2021, the parties' disputes had been settled and the amount of compensation to be paid by the Company was agreed at HK\$28,469,319.84.

Discussion

It is well established that there are three conditions as set out in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 for determining whether new evidence should be admitted for an appeal, namely: (1) the evidence could not have been obtained with reasonable diligence for use at the hearing below; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence must be such as is presumably to be believed or it must be apparently credible, though it need not be incontrovertible. All three conditions must be satisfied for new evidence to be admitted on appeal.

Ms Tinny Chan, counsel for AREL, submits that the *Ladd v Marshall* criteria are satisfied in the present case because:

In relation to Condition 1, while AREL had asked Mr Tang to give evidence in the proceedings below, he was reluctant to do so as he considered the Company's Letters already put in evidence by AREL to be more than sufficient to show that the Company had acknowledged the debt of HK\$28,469,319.84 and that this acknowledgement was binding on the Company. Similarly, having been advised by AREL's former solicitors, Mr Kwan had also taken the view that the Company's Letters were sufficient. Upon the dismissal of the Summons, however, AREL realised the documents alone were insufficient, and Mr Tang felt morally bound to come forward.

In relation to Condition 2, the new evidence on the Oral Agreement would lend credence to AREL's position that there was an acknowledgement by the Company of a liability to pay a specified outstanding amount to AREL. Further, even if AREL's claim was originally unliquidated, the Oral Agreement and the Company's Letters constituted a binding acknowledgement of a debt, converting the unliquidated claim into a liquidated one.

In relation to Condition 3, the new evidence as to the Oral Agreement is credible as it is common and sensible for companies in financial troubles to reach a compromise with creditors. It is supported by evidence from both AREL and the Company. It is also consistent with the Company's Letters which acknowledge the indebtedness of HK\$28,469,319.84, and merely provides an explanation how those letters came about.

Mr Adrian Lee, on behalf of NW and LH, submits that none of the 3 Ladd v Marshall conditions is satisfied in this case. In particular, he submits that the argument that there was the Oral Agreement which underpinned the Company's acknowledgment of liability in a specified sum is a new point which is not open to AREL on appeal having regard to the Flywin principles. He submits that, had the point been run below, there would have been a need to cross-examine Mr Kwan and Mr Tang as to the existence of the Oral Agreement.

We do not think Condition 1 is satisfied. Focussing first on Mr Kwan's affirmation, it is plain that the evidence could with reasonable diligence have been adduced at the hearing below.

Mr Kwan had already made 3 affirmations in relation to the Summons as mentioned above. Each of them was filed when AREL was represented by its former solicitors. In fact, AREL had solicitors on record acting for it from the time the Summons was issued until shortly before the hearing in April 2024.

There are authorities holding that an agreement relied upon for converting an unliquidated debt into a liquidated one must be a binding agreement, i.e. an agreement for consideration: see *Re Apastron Capital Limited* [2022] HKCFI 1567, §§61-70; *Truex v Troll* [2009] 1 WLR 2121, §30. It follows that AREL ought to have known that the Oral Agreement, including the threat of arbitration and the alleged forbearance in return for acknowledgment of liability, was a material fact if it wished to run that kind of argument.

The matters now deposed to are clearly within Mr Kwan's own personal knowledge. There is no reason why he could not have deposed in any of his affirmations to the alleged Oral Agreement reached between him and Mr Tang in November 2021. Indeed one would expect evidence as to how the Company's Letters came about to be included in the affirmations filed in the court below which exhibited those letters.

The explanation proffered that it was only upon the dismissal of the Summons that AREL realised it was insufficient merely to produce the Company's Letters only shows, at the highest, a misjudgment on the part of AREL or its former lawyers, which is not a valid justification for the admission of new evidence on appeal when such evidence could have been adduced at the hearing below: *Lee Ah Keung & Anor v Lee Kwok Chung & Anor* [2023] HKCA 449 at §12.

The passage in §17 of Tang VP's decision in *Dr Kwok-Hay Kwong v The Medical Council of Hong Kong* [2007] 3 HKLRD 213 is apposite:

“

Restrictions on the production of evidence on appeal is essential for finality in litigation. One aspect of finality is that litigants are required to bring forward his whole case at once and not to bring it forward piecemeal. If a second chance is readily available, litigants might put forward what they conceived to be their best case first, then should that fail, they might try another tack on appeal. ...”

While Tang VP's actual decision in that case was reversed by the full Court of Appeal because of special considerations in public law proceedings, this does not detract from the force of the above dictum.

Mr Tang's affirmation stands on the same footing. His evidence goes to the same matters, as seen from the point of view of AREL's counterparty. Mr Tang's reluctance to assist before is irrelevant, when the same matters could have been, but were not, deposed to by Mr Kwan himself: see *Yeung Man v New Winning Finance Co Ltd (in liquidation)* [2023] HKCA 156, §24.

Accordingly, AREL's application to adduce the new affirmations on appeal falls at the first hurdle. It is unnecessary for us to address the other two conditions of *Ladd v Marshall* or Mr Lee's Flywin objection. In the circumstances of this case, we consider it undesirable to say anything more about them.

Disposition

AREL's summons is therefore dismissed. We make an order nisi that AREL do pay NW and LH the costs of this application, assessed in the gross sum of \$150,000.

(Peter Cheung)

Justice of Appeal

(Godfrey Lam)

Justice of Appeal

Written Submissions by Ms Tinny Chan, instructed by ONC Lawyers, for Aron Resource Enterprise Limited, the Applicant (Appellant)

Written Submissions by Mr Adrian Lee, instructed by Michael Li & Co, for New Winning Finance Co Ltd (In Liquidation) and Lamtex Holding Ltd (In Liquidation), Opposing Creditors (Respondents)

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