

HONG KONG / JUDGMENT

RE PLUS HOLDINGS LTD

COURT

Court of First Instance

DECIDED

17 May 2007

CASE / FILE NUMBER

HCCW612/2006

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bjbj HCCW 612/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 612 OF 2006

IN THE MATTER of PLUS HOLDINGS LIMITED and IN THE MATTER of the Companies
Ordinance, Cap. 32

Before: Hon Kwan J in Chambers (not open to public) Date of Hearing: 17 May 2007 Date of
Decision: 17 May 2007

DECISION

This is the hearing of a summons issued by the petitioner in a creditor's petition to appoint provisional liquidators for Plus Holdings Limited (the Company). The Company was incorporated in Bermuda, it was registered under Part XI of the Companies Ordinance, Cap. 32, and its shares are listed for trading in the Stock Exchange of Hong Kong Limited (HKEX). Trading in the Company's shares has been suspended since 17 December 2004. By an announcement of HKEX on 29 March 2007, the Company was put into the 3rd stage of the delisting procedures. The summons first came before the court on 11 April 2007, it was adjourned to today for evidence to be filed. I am not going to be verbose, I have been assisted by detailed submissions in writing by leading counsel on both sides. As I am able to reach a decision on this, and in case the matter should go any further, it is important that I should set out the reasons for my decision in a succinct manner. I do not propose to set out the background facts and other matters not in dispute or the legal principles for the appointment of provisional liquidators, which are well established. I have considered thoroughly the evidence put in on both sides regarding the contention of the Company that it has a bona fide dispute on substantial grounds for the petitioning debt of US\$900,000.00. I have come to the view that the petitioner has made

out a good prima facie case for a winding-up order, and Mr Whitehead, SC for the Company has accepted for the purpose of this application that the petitioner has made out a prima facie case. It was submitted by Mr Whitehead that the application should be dismissed on 2 broad grounds:

- (1) there is no jurisdiction to appoint provisional liquidators solely for the purpose to facilitate a corporate rescue; and
- (2) it is not right for provisional liquidators to be appointed in the light of commercial realities and the factual matrix of this case. I am of course mindful of the judgment of the Court of Appeal in *Re Legend International Limited* [2006] 2 HKLRD 192, which held that the statutory power to appoint provisional liquidators under section 193 must be for the purposes of the winding up and that there is a significant difference between appointing provisional liquidators on the basis that the company is insolvent and assets are in jeopardy, which is permissible, and appointing provisional liquidators solely to facilitate a corporate rescue, which is not permissible. Mr Whitehead contended that the present case falls within the latter situation. I disagree. There is clear evidence that the Company is insolvent. Its most valuable asset is its listing status. That asset is now in serious jeopardy, as the Company has been placed in the 3rd stage of the delisting procedures. Of particular relevance is the letter of HKEX to the Company dated 7 August 2006, in which the Listing Division of HKEX set out the analysis why it was considered that the Company has failed to comply with Rule 13.24 of the Listing Rules. The management of the Company has failed to submit a viable resumption proposal to HKEX for at least a year. If no viable resumption proposal is submitted to HKEX by 14 September 2007, the Company would be delisted, and the listing status as a valuable asset would be lost to the creditors. For the protection of this asset which is in jeopardy, the petitioner seeks to appoint independent professionals to take charge of the responsibility of submitting a viable proposal to the authorities. The petitioner has locus to present the petition and is proceeding with the petition, which to be heard at the end of June 2007. I am told by Mr Jat, SC for the petitioner that if there is no realistic prospect of rescuing the Company by the end of June 2007, the petitioner would seek a winding-up order on 29 June 2007. The court retains a discretion to wind up the Company, if it should transpire that the attempt to rescue the Company should fail or is unlikely to lead anywhere notwithstanding the efforts made by independent professionals. I decline to find any collateral or ulterior purpose of the petitioner in presenting this winding-up petition, as suggested by Mr Whitehead, merely on the basis that the parent company of the petitioner owns some 8.4% of the shares in the Company. I am of view that the appointment of provisional liquidators in this situation is not a departure from the traditional basis and permissible objectives of appointing provisional liquidators. The situation in *Re Legend International Limited* is clearly distinguishable. There was a finding in that case that the protection of assets basis was not made out, as there were rehabilitation proceedings going on in the Philippines that were potentially viable and a rehabilitation receiver had been appointed with specific and comprehensive powers in the rehabilitation proceedings. There was no indication that the rehabilitation receiver was not discharging properly the powers conferred on him for the purpose of protecting the assets of the Company pending the

evaluation of the rehabilitation plan. I turn to consider if it would be right in all the circumstances to make an appointment. Mr Jat submitted on behalf of the petitioner that it would be right to do so, principally for these reasons:

- (1) The management cannot be relied on to submit a viable resumption proposal to HKEX within time. They have not done so for over 2 years since the suspension of trading of the Company's shares at the request of the Company pending publication of an announcement relating to price sensitive information. No announcement of this nature has been published so far. Various draft announcements were submitted to HKEX but had not been approved.
- (2) The management is in disarray and the petitioner has lost faith in the integrity of the chairman who was convicted of an offence of intentionally creating a false or misleading appearance of active trading in shares. He is now serving a 4-month prison sentence, although he is expected to be released by the end of this month. The Company has not made any announcement regarding the chairman's conviction. He remains the chairman notwithstanding the concern raised by HKEX whether in the light of his conviction, the board of directors would still consider this individual to have the character and integrity required of a director of a listed company.
- (3) The auditors have given a disclaimer of opinion in the auditors report in November 2006.
- (4) Notwithstanding the evidence filed by the Company of negotiations with two potential investors, there is no proposal, concrete or otherwise, from either of them so far. Yesterday, letters were sent on behalf of one of the potential investors, EH Venture Capital (HK) Limited, to six major creditors. The creditors were asked to give their views how much of their debts they would like to see realised in a restructuring, whether they wished to receive payment in cash or in the form of shares in the Company after restructuring, and whether they would agree to receive cash after resumption in trading of the Company's shares. This belated opinion survey does not take matters any further.
- (5) There is urgency in submitting a viable resumption proposal. Only about 4 months are left. Time is needed to prepare and formulate a viable proposal and rescue arrangement. The sooner that independent professionals are engaged for that purpose, the better.
- (6) There is little detriment to the Company, if provisional liquidators are appointed. Trading in its shares has been suspended for over 2 years. The Company no longer maintains any significant level of operations and has little turnover. According to the annual report of 2006, the business of the subsidiaries had been conducted on an extremely conservative basis with the aim to reduce cost and financial risk. I am of the view that these are cogent reasons. I am not persuaded by Mr Whitehead I should decide otherwise. I am unable to see how unsecured creditors would be prejudiced by the appointment. 3 creditors have given their support for this application and 2 are against appointing provisional liquidators, but they have given no or no cogent explanation why they or the Company should suffer any prejudice. The fact that the petition is to be heard on 29 June 2007 is irrelevant, given the urgency in making an appointment. I am satisfied that this application was prompted by the

announcement of HKEX on 29 March 2007 and that there has been no delay in making the application. Mr Whitehead has drawn my attention to a work entitled *Insolvency in China and Hong Kong A Practitioner's Perspective* by Alan Tang (2005 edition) at paragraph 2.96 in which the author stated that the sale of listing status resulting in the investor achieving back-door listing on HKEX would now appear to be a thing of the past, with the SFC and the HKEX adopting a very stringent approach after 2004 in dealing with applications for listing by way of

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or other back-door listing arrangements. I take on board these comments by an experienced practitioner, but I am not prepared to say that it would be futile for independent professionals to explore viable methods of restructuring. In my view, the appointment of provisional liquidators for the Company is necessary and appropriate in the light of commercial realities, urgency and the balance and convenience. I would grant the application, on the undertaking as to damages by the petitioner as per the draft order submitted. As for the choice of the provisional liquidators, the petitioner has proposed alternative candidates if the court is of the view that the initial candidates have had a material professional relationship with the Company for the last two years. I do not think the initial candidates have had a material professional relationship with the Company for the last two years in the circumstances as set out in the Code of Ethics for Professional Accountants published by the Hong Kong Institute of Certified Public Accountants. However, the initial candidates have been and still are the auditors of Poly Investments Holdings Limited, the parent company of the petitioner. It was submitted by the Company that the initial candidates have strong affiliation to the petitioner's parent company, and because of this existing relationship, their objectivity could be or could reasonably be seen to be prejudiced. In these circumstances, it would be better to appoint candidates without any association to the petitioner. No issue is taken by the Company regarding the alternative candidates. I propose to appoint the alternative candidates from Ernst and Young as provisional liquidators. I would hear the parties on other terms of the draft order. (S Kwan) Judge of the Court of First Instance High Court Mr Jat Sew Tong, SC & Mr M C Law, instructed by Messrs. Tsang, Chan & Wong, for the Petitioner Mr Robert Whitehead, SC & Miss Elsie Yiu, instructed by Li & Partners, for the Company 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 R S T U V i\$&`G T![> hccw (for Susan Kwan only).dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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