

HONG KONG / JUDGMENT

RE RAINBOW GATE LTD

COURT

Court of First Instance

DECIDED

20 December 2007

CASE / FILE NUMBER

HCCW593/1998

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bjbj HCCW 593/1998 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 593 OF 1998

IN THE MATTER of RAINBOW GATE LIMITED and IN THE MATTER of the Companies Ordinance
(Cap. 32)

Before: Hon Kwan J in Chambers Date of Hearing: 20 December 2007 Date of Decision: 20
December 2007

DECISION

This is a summons for the removal of Steven Todd Krause as the liquidator of Rainbow Gate Limited (the Company) and consequential orders, under sections 196(1), 202(2A), 204(1) and 276 of the Companies Ordinance, Cap. 32 and rule 167 of the Companies (Winding-up) Rules and the inherent jurisdiction of the court. The summons was issued by the Official Receiver on 26 October 2007 and was served on Mr Krause by hand at his last known address on 16 November 2007. Mr Krause has not appeared today. A liquidator appointed under section 194 may be removed by the court on cause shown under section 196(1). This provision confers a wide discretion on the court and the Official Receiver has locus to apply (Re Liote Property Management Limited [2006] 2 HKLRD 106 at 108G to 109A). Further, under section 202(2A), the court has a discretion to remove a liquidator where he retains any sum in contravention of section 202(2)(a) or (b), unless he explains the retention of the money to the satisfaction of the court. It is also provided in section 202(2A) that a liquidator who has failed to pay to the Companies Liquidation Account money received by him as liquidator in contravention of section 202(2) is liable to disallowance of all or such part of his remuneration as the court may think fit, and shall pay interest on the amount retained at the rate of 20% per annum. The Company was

wound up by an order made on 7 October 1998. Mr Krause and Geoffrey Alan Bourne were appointed joint and several liquidators without a committee of inspection on 27 November 1998. Mr Bourne passed away in April 1999 and, since then, Mr Krause has been acting as the sole liquidator. The Official Receiver is of the opinion that Mr Krause is not a fit and proper person to act as the liquidator on the basis that he has committed serious misconduct and failed to conduct the liquidation of the Company effectively, efficiently and vigorously, in that

- (1) he failed to pay to the Companies Liquidation Account money received by him as liquidator in accordance with sections 202(1) and (2);
- (2) he misapplied the assets of the Company for unlawful payments;
- (3) he failed to submit the liquidator's accounts in accordance with section 203(1);
- (4) he failed to send the Official Receiver reports on the position of the liquidation of the Company in accordance with rule 162(1);
- (5) he failed to proceed with the liquidation with reasonable expedition; and

(6) he persistently failed to respond to the enquiries and the reminders raised by the Official Receiver in the exercise of the Official Receiver's functions and powers under Cap. 32. Failure to pay to the Companies Liquidation Account the money received On 2 December 1998, the Official Receiver wrote to the liquidators that they were authorised to open a current bank account and retain an amount not exceeding \$20,000; in the event the amount was exceeded, they must pay the money into the Companies Liquidation Account in accordance with sections 202(1) and (2). This authority ceased to have effect from 11 November 1999 by a subsequent circular issued by the Official Receiver. On 22 December 1999, the Official Receiver issued a fresh circular, by which the liquidators are authorised to hold a fund balance not exceeding \$10,000 for administrative convenience. Mr Krause opened a current account in the name of the Company in liquidation with the Hong Kong and Shanghai Banking Corporation Limited on 12 December 1998. The Company received distributions of dividend from the estate of a debtor of the Company under bankruptcy proceedings in the United States on 23 March 2001 and 25 January 2002 in the sums of \$23,245.15 and \$46,640.30. No payment was made into the Companies Liquidation Account by Mr Krause. The Official Receiver asked Mr Krause to remit to the Companies Liquidation Account the amount held in excess of \$10,000 by letters dated 31 January 2002, 18 July 2003 and 29 July 2003. No reply was received. The Official Receiver has no information on the latest position of the current account of the Company. Misapplication of the assets of the Company for unlawful payments Mr Krause has made unlawful payments of liquidator's fees and disbursements. He authorised payment of liquidator's fees and disbursements out of the assets of the Company without first seeking the approval of the court on the liquidator's bill as required by section 196(2)(b) and without observing the priority of payment of costs prescribed under rule 179. According to the 7th liquidator's account, as at 6 April 2002 payment of liquidator's fees and disbursements of \$74,378.82 was made during the accounting period out of the current account of the Company. Other than \$2,300 which

represented reimbursement of ad valorem fee paid to the Official Receiver on 1 March 2002, the balance was unlawful in that there was no evidence of approval by the court. Under rule 179, the Official Receiver's fees have priority over the liquidator's remuneration. The Official Receiver's fees for his office as the provisional liquidator of the Company have not been paid, and are estimated at about \$17,997. In addition, ad valorem fee of \$4,700 payable to the Official Receiver has not been paid. The Official Receiver demanded Mr Krause to pay \$72,078.02 with interest by a letter dated 6 November 2006. No reply has been received to date. Failure to submit liquidator's accounts Mr Krause submitted the 1st to 8th liquidator's accounts from 27 November 1998 to 6 October 2002. He had delayed in submitting the 3rd and 7th accounts. No accounts were submitted after 7 October 2002, despite repeated reminders of the Official Receiver. Failure to send the Official Receiver reports on the position of liquidation of the Company The reports from Mr Krause were up to 6 October 2002. No further reports were sent to the Official Receiver thereafter, despite repeated reminders. Failure to proceed with the liquidation with reasonable expedition Mr Krause has not finalised the liquidation to date. The 1st to 8th reports do not show much progress in the liquidation. He has still not answered the Official Receiver on the position of outstanding investigations, outstanding assets to be recovered and outstanding matters to be settled before the conclusion of administration. There has been a lapse of nine years since his appointment as liquidator and a lapse of five years since his last report. It is doubtful if he has in fact completed works on investigation, recovery and realisation of assets. Persistent failure to respond to enquiries raised by the Official Receiver Due to the inaction of Mr Krause, the Official Receiver issued a summons under section 204(1) on 1 August 2002 for him to answer queries raised by the Official Receiver on the 4th liquidator's account and to submit the 6th and 7th accounts then outstanding. An order was made by the court on 30 October 2002, in compliance of which Mr Krause answered queries on the 4th liquidator's account and submitted the 6th and 7th accounts on 14 November 2002. Thereafter, he persistently failed to respond to other demands and queries of the Official Receiver. On 30 March 2006, the Official Receiver gave a warning letter that he would seek Mr Krause's removal as liquidator if he failed to answer the audit or examination queries and submit outstanding liquidator's accounts within 14 days thereof. There was no reply from Mr Krause. Removal as liquidator and consequential orders upon removal I am satisfied that the conduct of Mr Krause is such to warrant his removal as the liquidator of the Company. I will make an order accordingly. Other orders sought by the Official Receiver are set out in paragraph 66 of his report. The Official Receiver seeks an order that Mr Krause's remuneration be disallowed under section 202(2A) and the inherent jurisdiction of the court. The Official Receiver proposes that the fees of Mr Krause be disallowed and that disbursements be allowed conditional upon his delivery up of the books and documents of the Company to the Official Receiver within a specified time and the filing of a schedule of the disbursements incurred for the approval of the court. I will make an order as proposed. Other orders sought by the Official Receiver are for the payment of the cash balance held by Mr Krause to the Companies Liquidation Account under section 202(1), delivery up of the up-to-date liquidator's accounts and supporting documents under sections 203(1) and (3),

payment of interest on the money retained in excess of \$10,000 at the rate of 20% per annum under section 202(2A), payment of the money misapplied in the sum of \$72,078.02 with interest at the judgment rate under section 276 as from 6 April 2002. I make these additional orders as sought. There will be an order in terms of paragraph 66 of the Official Receiver s report. I order Mr Krause to pay the Official Receiver s costs of the application, which I have assessed on a gross sum basis at \$44,000. I also give liberty to apply. (S Kwan) Judge of the Court of First Instance High Court Ms Polly Yip for the Official Receiver Mr Steven Todd Krause, the liquidator, absent PAGE - A B C D E F G H I J K L M N O P Q R S 1udk 1udk D E F G H I J K L M N O P Q R S T U V i\$&` 5<>| HCCW.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 25 October 2026 · Esheria