

HONG KONG / JUDGMENT

RE TAK YUE RESTAURANT LTD

COURT

Court of First Instance

DECIDED

9 November 2007

CASE / FILE NUMBER

HCCW103/2007

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bjbj HCCW 102/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 102 OF 2007

IN THE MATTER of SHU FAT LAND INVESTMENT COMPANY LIMITED and IN THE MATTER of
the Companies Ordinance, Chapter 32 of the Laws of Hong Kong

HCCW 103/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 103 OF 2007

IN THE MATTER of TAK YUE RESTAURANT LIMITED and IN THE MATTER of the Companies
Ordinance, Chapter 32 of the Laws of Hong Kong

HCCW 104/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 104 OF 2007

IN THE MATTER of KAM FAT INVESTMENT COMPANY LIMITED and IN THE MATTER of the
Companies Ordinance, Chapter 32 of the Laws of Hong Kong

(Heard Together) Before: Hon Kwan J in Chambers (Open to public) Date of Hearing: 9 November
2007 Date of Decision: 9 November 2007

D E C I S I O N

I have before me a summons to strike out the petition or certain parts of the petition in each of three petitions. All were issued by Lai Ho Pak, the 1st respondent in each of the proceedings on 30 April 2007. The 1st respondent seeks an order in each petition that :

- (1) the petition be struck out on the ground it discloses no reasonable cause of action, or is scandalous, frivolous, vexatious or otherwise an abuse of the process of the court;
- (2) alternatively,
 - (a) the prayer for winding up be struck out on the ground the petition discloses no reasonable cause of action to justify a winding-up order under section 177(1)(f) of the Companies Ordinance, Cap. 32, and/or on the ground that some other remedy is available and the petitioner is acting unreasonably in seeking winding up; and/or the buy-out relief and a direction for valuation of shares be struck out on the ground that the petition discloses no cause of action under section 168A; and/or interim directions sought by the petitioner for management of the business of the company concerned and protection of assets be struck out on the grounds as stated above; and/or paragraphs 15 to 18, 21 to 38, 44 to 46, 59 to 61 be struck out on the ground they disclose no reasonable cause of action and/or are embarrassing, irrelevant or otherwise an abuse of the process of the court. I would first set out the relevant matters necessary for the understanding of the petitions and the disposal of these applications. The three petitions were all presented on 5 March 2007, under sections 168A and 177(1)(f). They were presented by Madam Wong Oi King, the administratrix of the estate of Lai Ho Kai, deceased (deceased). The deceased was the younger brother of the 1st respondent. All three petitions are virtually identical. The three companies concerned are Shu Fat Land Investment Company Limited (Shu Fat), Tak Yue Restaurant Limited (Tak Yue) and Kam Fat Investment Company Limited (Kam Fat). The deceased and the 1st respondent were and are the only registered shareholders in all three companies. Shu Fat was incorporated on 9 January 1970 with a nominal capital of \$1 million divided into 100 shares of \$1,000 each, of which \$600,000 were paid up. Of the 600 issued shares, 220 shares are registered in the deceased s name and the 1st respondent holds 380 shares. It is described in the petition that Shu Fat is a family business with investments in landed properties, and has no other business save to hold a number of properties. On the evidence adduced by the 1st respondent, Shu Fat owns three houses in Villa Le Parc, No. 20 To Fung Shan Road, Shatin, New Territories. A valuation report in November 2006 produced by the 1st respondent gave the market value of the three houses on the basis of vacant possession at \$15.8 million, \$17.8 million and \$17.3 million. One of the houses was stated to be occupied by the owner, presumably meaning the 1st respondent. The other two houses are vacant. All three properties are unencumbered. Directors or shareholders loans were made to Shu Fat by the deceased and the 1st respondent. According to the 1st respondent, the current account of the deceased in Shu Fat has a credit balance of \$6,940,000 and the current account of the 1st respondent has a credit balance of \$8,860,000. Tak Yue was incorporated on 30 January 1957, with a nominal capital of \$150,000 divided into 150 shares of \$1,000

each, all of which were issued and paid up. The 1st respondent as the executor of the estate of Lai Wing, deceased holds 15 shares; Lai Wing was the father of the deceased and the 1st respondent. The 1st respondent in his own right holds 92 shares and the deceased 43 shares. It is described in the petition that Tak Yue is a family business operating a teahouse in Shanghai Street under the name of Tak Yue Teahouse and was founded by the father. After the father passed away, the business of Tak Yue was carried on by the two sons. In the evidence filed by the 1st respondent, he deposed that the Tak Yue has been carrying on the business of investment in real estate since its inception on 9 January 1970. The date of inception of Tak Yue does not appear to be correct. He did not say anything about the teahouse business. Kam Fat was incorporated on 3 October 1972, with a nominal capital of \$2.5 million divided into 2,500 shares of \$1,000 each, of which \$2 million were paid up. Of the 2,000 issued shares, the 1st respondent holds 1,250 shares and the deceased 750 shares. It is described in the petition that Kam Fat is a family business with investments in landed properties and has no other business save to hold a number of properties. In the evidence filed by the 1st respondent, he did not mention any landed property held by Kam Fat. The 1st respondent claimed in his affirmations that all three companies are solvent. No accounts of any kind have been produced by him. Other than what I have mentioned above, not much is known of these companies on the available evidence. The petitioner married the deceased in December 1993, she was then divorced with a young son. The deceased passed away in September 1996 with no issue, he made a Chinese will leaving his entire estate to his stepson. A probate action was brought by the petitioner and her son against the 1st respondent and his sister in 2000. On 16 August 2002, Deputy Judge A. Cheung, as he then was, gave judgment in the plaintiffs favour, and made an order decreeing probate of the will in solemn form. An appeal brought by the defendants was dismissed with costs on 3 October 2003. According to the letter of the petitioner's solicitors to the 1st respondent dated 21 November 2006, the legal battle was bitter, and there was animosity between the petitioner and the 1st respondent. The deceased's assets are tied up with the three family companies in the form of his shares, and the loan of \$6,940,000 owed to him by Shu Fat. That left the petitioner without cash to discharge the liabilities of the estate. The value of the estate was \$15.5 million odd as submitted to the Estate Duty Office in May 1997. In 2004, the estate was assessed by the Inland Revenue Department at \$29.5 million. As the petitioner is unable to pay estate duty of \$7.7 million, interest is payable on the value assessed until payment. Thus the current value of the estate, less the tax payable, has been reduced from \$29.5 million to about \$19.9 million, and the estate is being depleted at the rate of \$35,400 a month owing to penalty interest. The estate of the deceased is also liable to pay the costs of the 1st respondent and his sister in the probate action at first instance, as it was ordered that they should recover 75% of their costs from the estate. The petitioner is in no position to pay and the 1st respondent has not taken action so far to recover his costs, which have not been taxed but are understood to be over \$2 million. After the appeal was concluded, the petitioner instructed lawyers to see if it would be possible to find some funds to pay or reduce the interest payable on the estate duty. On 5 March 2003, the petitioner's solicitors issued a statutory demand to Shu Fat demanding payment of the deceased's loan. In

response, Shu Fat's solicitors proposed that the company should be wound up voluntarily, but the petitioner would first be required to apply for a grant of probate, then to request for the deceased's shares to be registered in her name, and finally to sign a resolution for voluntary winding up. A grant of letters of administration with the will annexed was made to the petitioner on 4 April 2006, and a certified copy of this was promptly forwarded by the petitioner's solicitors to the 1st respondent on 20 April 2006. The petitioner instructed solicitors to negotiate with the 1st respondent's solicitors to see if the process could be speeded up, so as to clear part of the outstanding estate duty and informal discussions were held, which were fruitless. On 2 September 2006, the petitioner's solicitors wrote to the 1st respondent's solicitors formally referring to the proposals in the letter of the 1st respondent's solicitors in March 2003. The petitioner's solicitors proposed that the petitioner should be registered as a shareholder of the deceased's shares in Shu Fat, they enclosed again a copy of the letters of administration. After the registration, the petitioner would execute the papers for voluntary winding up of Shu Fat for the assets of Shu Fat to be distributed to the shareholders. The real properties of Shu Fat would be disposed of and the debts of Shu Fat be paid from the proceeds of sale. The 1st respondent's solicitors were also asked to advise if the 1st respondent would have any objection to register the petitioner as a shareholder of the other two companies, Tak Yue and Kam Fat. As nothing was heard from the 1st respondent's solicitors, the petitioner's solicitors wrote to them on 9 October 2006. It would appear from this letter that the 1st respondent's solicitors were still waiting for instructions from him. The petitioner's solicitors remarked that the proposals in their letter in September 2006 were initially made by Shu Fat as early as the end of 2002, and were repeated in the letter of the 1st respondent's solicitors in March 2003. They requested the 1st respondent to make a decision on his proposal to wind up Shu Fat as soon as possible, to put a stop to the continuing depletion of the deceased's estate. Again, the request was made to register the petitioner in her capacity as administratrix as a shareholder in each of the three companies. On 24 October 2006, another letter was sent by the petitioner's solicitors to the 1st respondent's solicitors, as no response was received. On 8 November 2006, yet another letter was sent by the petitioner's solicitors, asking for the petitioner to be substituted as a shareholder in the register of members of the three companies, even if the 1st respondent should require a bit more time to make up his mind about the winding up of Shu Fat. There was still no response from the 1st respondent or his solicitors. On 21 November 2006, the petitioner's solicitors wrote to the 1st respondent's solicitors referring again to the 1st respondent's proposals in 2003 to wind up Shu Fat and that the parties had consented to a voluntary winding up for distribution of its assets. The petitioner's solicitors went over the same matters as in their letter of 8 November and concluded by saying that if no response was received from the 1st respondent within fourteen days, the petitioner would commence winding-up proceedings against all three companies on the just and equitable ground and for other consequential relief. This at last prompted a response from the 1st respondent's solicitors on 6 December 2006, but it was merely to ask the petitioner to make a formal request to each of the companies directly for registration as a member in her name. No mention was made of the 1st respondent's earlier proposals to wind up Shu Fat voluntarily.

and to realise its assets to pay its debts. On 20 December 2006, the petitioner's solicitors wrote to the 1st respondent's solicitors and also to each of the three companies requesting for registration of the petitioner as a member in place of the deceased, as suggested by the 1st respondent's solicitors on 6 December

2006. The petitioner's solicitors again mentioned that the 1st respondent had not given any indication if he would agree to wind up Shu Fat voluntarily as he had proposed in 2003. They stated that unless this was resolved, the petitioner might be compelled to commence winding-up proceedings against all three companies. Up to the presentation of the petition on 5 March 2007, no response whatsoever was received from any of the three companies regarding the petitioner's application to be registered as a member. It was only on 17 April 2007 that the three companies wrote in response to the letter of the petitioner's solicitors of 20 December 2006, stating that the application should be submitted pursuant to the requirement in regulation 31 of Table A. According to regulation 31, if the person becoming entitled to shares in consequence of the death of a member shall elect to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects. On 7 May 2007, the petitioner's solicitors sent three notices to the companies stating that the petitioner elected to be registered as a member, as requested by the companies. According to the 1st respondent's affirmations, none of the three companies have convened a directors meeting to consider the petitioner's notice in May 2007, the reason given was to await the outcome of the petitioner's petitions to wind up the companies. I have set out the facts which do not appear to have been disputed in some detail because although they appeared in the petitions, they have not been presented in a clear and proper manner with the right emphasis given to them. To recapitulate, the petitioner's complaint in respect of each of the three companies, which led to a loss of trust and confidence between her and the only other shareholder, being the 1st respondent, is the wrongful delay or failure to register her as a member in place of the deceased. In addition, in the case of Shu Fat, she has lost trust and confidence in the 1st respondent, as notwithstanding his proposal four years ago to wind up Shu Fat voluntarily and cause its assets to be realised to pay the loan owing to the deceased and distribute the surplus to the shareholders, the 1st respondent has deliberately delayed or failed to proceed with the winding up of Shu Fat. I turn to the grounds advanced by Mr James Cheng in the striking out applications. Mr Cheng submitted that the winding-up petitions must fail for these reasons :

- (1) There could not be a no-fault divorce, it would not be sufficient to say that mutual trust and confidence had completely broken down if that was not attributable to some fault or unfair conduct of the 1st respondent (*O'Neill v Phillips* [1999] 1 WLR 1092 at 1104-5; *Re Jayflex Construction Ltd* [2004] 2 BCLC 145). Winding up is a remedy of last resort, and would not be granted if the petitioner is acting unreasonably in insisting on it where there is an adequate alternative remedy. The petitioner has not explained why winding up is the preferred relief (section 180(1A) of Cap. 32; *Re Wong To Yick Wood Lock Ointment Ltd* [2003] 1 HKC 484; *Charles Forte Investment Ltd v Amanda* [1963] 2 All ER 940). The decision of the board of

Shu Fat not to repay the director's loan of the deceased and not to wind up Shu Fat cannot be regarded as not acting in good faith or as unfair conduct. The non-registration of shares in the petitioner's name is not unfair and prejudicial conduct as this must be subject to the prerogative of the companies. It is pertinent to bear in mind that each of the companies must be considered separately. In respect of the petitions for relief under section 168A, Mr Cheng submitted they must fail for the reasons in (1), (3) and (4) above and in addition :

- (5) The acts of the 1st respondent complained of are not acts of the companies or part of the conduct of the affairs of the companies and it must be shown that the petitioner is affected as a member of each of the companies for relief under section 168A (Re Unisoft Group Ltd (No. 3) [1993] Ch 609 at 611a to h). I will consider each of the reasons set out above. The 1st reason is not made out. Properly understood, there are complaints set out in the petitions relating to fault or unfair conduct which led to a breakdown of trust and confidence between the petitioner and the 1st respondent, as I have summarised earlier. I note the arguments advanced regarding the 3rd reason. This is a striking out application. I cannot be satisfied at this stage it is plainly unarguable the decision of the board of Shu Fat not to repay the director's loan of the deceased and not to wind up Shu Fat can be regarded as acting in bad faith or as unfair conduct. The same applies to the 4th reason. Mr Cheng relies on article 4 of the articles of association which provided that the directors may decline to register any transfer of shares to any person without giving any reason therefor. However, under regulation 33 of Table A (I have not been provided the relevant edition adopted by the companies as the articles of association and I am citing only the current edition), any person to whom the right to any share has been transmitted by operation of law shall, if the directors refuse to register the transfer, be entitled to call on the directors to furnish within 28 days a statement of the reasons for refusal. I do not consider it is plainly and obviously untenable that the delay, failure or refusal to register the petitioner as a member is improper or that the board of directors had failed to exercise their power in good faith. This leaves the 2nd reason so far as the application to strike out the petition for winding up is concerned. The argument must fail in respect of Shu Fat, as one of the complaints is that the 1st respondent has deliberately delayed or failed to proceed with the voluntary winding up of Shu Fat, notwithstanding his proposals to do so four years ago. On the available evidence, little is known about Tak Yue and Kam Fat. I only have the 1st respondent's assertion that they are solvent. I note from the provisional schedule of property of the Inland Revenue Department dated 15 November 2004 annexed to the letters of administration that the shares of the deceased in the three companies were valued as follows :

- (1) 43 shares in Tak Yue valued at \$13.8 million odd;
- (2) 750 shares in Kam Fat valued at \$482,000 odd; and
- (3) 220 shares in Shu Fat valued at \$4.1 million odd. Although there is little information regarding Tak Yue, this would appear to be the most valuable of the shares held by the deceased. Tak Yue would seem to be doing profitable business and/or holding valuable assets. Indeed, in the petition, Tak Yue was described as jewel of the family business . If the

petitioner were successful in the petitions under section 168A, the court is conferred with wide jurisdiction to make such order as it thinks fit, whether for regulating the conduct of the companies affairs in future, or for the purchase of the petitioner s shares by the 1st respondent or by the company concerned. The court may also order payment by any person of such damages and interest on those damages as the court may think fit to any member, whose interest has been unfairly prejudiced by the act or conduct complained of. Such power as may be exercised would include, in my view, an order to enter the petitioner s name on the register of members, so that the petitioner would not need to bring separate proceedings to apply for rectification of the register under section 100. Given the wide jurisdiction exercisable under section 168A, I fail to see why reliefs granted in petitions under that provision should not provide sufficient remedy to the petitioner without winding up Tak Yue and Kam Fat. In the event an order for purchase of the petitioner s shares should be made, there is no suggestion that these companies would not be able to purchase the petitioner s shares. I would strike out the prayer for winding up in paragraph (1) in the prayer for relief in the petitions of Tak Yue and Kam Fat. I have dealt with the reasons relied on to strike out the petitions under section 168A, insofar as the reasons in (1), (3) and (4) are common to the application to strike out the winding-up relief. As for the additional reason advanced in (5) that the acts of the 1st respondent complained of are not acts of the companies or part of the conduct of the affairs of the companies, this must fail in that the wrongful delay or failure of the 1st respondent to register the petitioner as a member in place of the deceased is conduct in the affairs of each of the companies affecting the petitioner s right in respect of the shares of the deceased (*Re Unisoft Group Ltd*, supra. at 623c to d). I decline to strike out the prayers in paragraphs (2) and (3) in each of the petitions for relief and consequential directions under section 168A. The 1st respondent also seeks to strike out certain parts of each of the petitions, being the prayer for interim directions for management of the business of the company concerned and protection of assets in paragraph (4) of the prayer, and paragraphs 15 to 18, 21 to 38, 44 to 46, 59 to 61 of the petition. I will not strike out the prayer for interim directions, as I am of the view that the petition under section 168A should not be struck out and I see no reason why I should exclude any application for interim directions under the jurisdiction in section 168A, if the need should arise. For those paragraphs of the petition which the 1st respondent seeks to strike out, Mr Cheng submitted that they are irrelevant and do not relate to the activities of the companies. Paragraphs 15 to 18 deal with the courtship and relationship of the petitioner and the deceased, the deceased s warm relationship with his step-son, and the petitioner s distant relationship with the 1st respondent. Paragraphs 21 to 38 deal with the discovery of the will, the circumstances under which the will was made, the events at the deceased s funeral, the 1st respondent s requirement of the petitioner to vacate the matrimonial home, and events leading to the institution of the probate action. Paragraphs 44 to 46 give details on the assessment of the deceased s estate, the interest payable due to the non-payment of estate duty and the continuing depletion of the estate. Paragraphs 59 to 61 are summing up paragraphs alleging loss of trust and confidence in the 1st respondent and the difficulties the petitioner has in offering her shares to be sold first to the 1st respondent then to outsiders

under the relevant provision in the articles of association. I decline to strike out paragraphs 44 to 46, most of paragraph 59, paragraphs 60 and 61, as I do not think they are entirely irrelevant to the complaints in the petition and what appropriate relief should be granted. I would strike out the concluding words or to take part in the business or affairs of the three family companies in paragraph 59. This relates to a complaint that there is no possibility the petitioner would be able to take part in the business or affairs of the companies. No grounds are alleged in the earlier parts of the petition that the petitioner might have any legitimate expectation to take part in the business or affairs of these companies. The petitioner had no involvement in any of the companies before the deceased's death. On the available evidence, the deceased had a close relationship with the 1st respondent, and the three companies, in which they are the only registered shareholders, might be regarded as quasi-partnerships so that equitable considerations might be superimposed on account of the agreement or understanding personal to the brothers. Even though the deceased might have legitimate expectations to participate in or be consulted about the management and affairs of the companies, such rights were personal to him and would not be transmitted to his administratrix, the petitioner (*Murray v Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd* [1993] BCLC 1437 at 1455a to c). Paragraphs 15 to 18 and paragraphs 21 to 38 should be struck out. I fail to see the relevance of the matters set out in these paragraphs, even as background matters, to the proper complaints that might be advanced to found the petitions. This leaves the costs of the applications. On the costs of each of the summonses, I order the petitioner to pay half of the respondents costs in any event. (S Kwan) Judge of the Court of First Instance High Court Mr B K Ho, instructed by Messrs S H Chan & Co, for the Petitioner Mr James C C Cheng, instructed by Messrs Kwong & Lam, for the Respondents

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