

HONG KONG / JUDGMENT

RE WAH YING CHEONG CO LTD

COURT

Court of First Instance

DECIDED

5 October 2007

CASE / FILE NUMBER

HCCW225/1996

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bjbj HCCW 225/1996 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 225 OF 1996

IN THE MATTER of WAH YING CHEONG COMPANY LIMITED and IN THE MATTER of the
Companies Ordinance, Chapter 32

Before: Hon Kwan J in Chambers Date of Hearing: 5 October 2007 Date of Decision: 5 October
2007

DECISION

This is the adjourned hearing of the remaining part of an application for a validation order by Wah Ying Cheong Company Limited (the Company). The payment sought to be validated is \$8.4 million, being special interim dividends of \$3,500.00 per share to be paid to the shareholders as per the resolution of the board dated 5 October 2006. The Official Receiver has no comments on the application. The petitioners, who are the minority shareholders, oppose the application. They have filed in April 2007 a 23-page affirmation of Francis Chan Tak Sun. Three days before the hearing, they sought to adduce a further affirmation made by Francis Chan on 28 September 2007 of 7 pages. I have allowed that affirmation to be relied on notwithstanding the objection from the Company. I have also allowed the Company to produce to the court without the need of an affidavit the letter of its solicitors in reply dated 27 September 2007 to the letter of the petitioners solicitors dated 19 September 2007, which was not exhibited to Francis Chan s latest affirmation for reason unknown. The petitioners counsel has provided to the court a written skeleton of some 13 pages, closely written. I have read and carefully considered the affirmations and submissions of the petitioners. I wish to say for the record that affirmations should not consist of arguments and submissions. The deponent should confine himself to facts within his knowledge,

information and belief. Speculations, suppositions and innuendos have no place in an affirmation. This should have been clear to the petitioners legal advisers. If this should happen again in future, the court will consider exercising its power to remove an affirmation or strike out parts of an affirmation not in compliance with the rules. For the background of the Company and previous applications for validation orders, I refer to my decision on 14 March 2003. The applicable legal principles in this situation, where I am concerned with a solvent company, are stated in *Re Burton and Deakin Limited* [1977] 1 All ER 631 at 636 g to j, and 637 d to e. In short, the court will not inter t necessary or expedient in the interests of the company and an intelligent and honest man could reasonably hold this view, unless there is compelling evidence from the opposing shareholder that the disposition is in fact likely to injure the company. The Company s financial position may be stated as follows. It has not engaged in business since July 1991. Its only income is from interests in bank deposits. As at the end of financial year 2005, being the period of the latest available audited accounts placed before the court, the Company had net assets of about \$16 million. With the payment of the proposed special interim dividend, if sanctioned by the court, the Company would be left with net assets of about \$8 million for future expenses. The petitioners contention, raised in the affirmations of Francis Chan, is that the solvency of the Company will be put seriously at risk if the proposed dividends are paid, as the legal costs incurred and to be incurred in six legal proceedings are likely to use up the remaining funds of \$8 million in the net assets. I do not accept this. The evidence adduced by the petitioners fall far short of being compelling that the proposed payment of dividends is likely to injure the Company or to render the Company insolvent. I do not propose to set out in detail the progress in each of the six proceedings and the petitioners contentions as to the costs that have been incurred or are likely to be incurred in respect of each. And I do not see why I should be concerned with the many criticisms levied by the petitioners against the board in the conduct of these legal proceedings. Of the six proceedings, except for one action brought in January 2006, the others were all commenced in 1990s. One has not been proceeded with, and was replaced by the action brought in 2006. One has been dormant since 1995 or 1996. Two actions were stayed since July

1997. One action, concerned with the distribution of sale proceeds of a trust property in Shanghai Street, has reached the stage in which an order was made in March 2004 for advertising notices regarding the entitlement and distribution of trust monies and the Company has taken all steps to facilitate the distribution. I understand no one has come forward to claim the entitlement or for the appointment of representation for the past three years. I am unable to see how substantial legal costs, to the tune of millions, are going to be paid for these legal actions. There is no reason to doubt the evidence on oath of the director who made the affirmation for the Company that, by and large, legal fees have been paid for the remaining active proceeding (being the action commenced in 2006), that there are no incurred but unbilled legal fees in respect of most of the inactive proceedings, and in any event costs incurred but unbilled are not substantial for the remaining inactive proceedings. I agree with the submission of the Company s counsel that in view of the nature of the work to be done in the one remaining active proceeding, and after taking into account the Company s operational expenses, which are fairly stable for a dormant

company with no business activity, the net assets should be more than sufficient to cover the expenses and liabilities likely to be incurred. The complaint of alleged prejudice to the petitioners, that the majority shareholders represented on the board have been dragging their feet in disposing of the trust monies held by the Company so that the petitioners are not able to resume the prosecution of the winding-up petition which has been stayed since July 1997, is not a relevant consideration. Regarding the allegation of the petitioners that the Company has contingent liability of \$4 million to the plaintiff in High Court Action 109 of 1993 for which provision should be made, I note from the order dated 1 April 1993 that the Company was required to pay into court within 30 days of that order \$14.25 million and all future dividends payable on the shares in dispute. The Company had paid into court \$14.25 million on 25 April 1993 and further sums between 21 July 1993 and 6 December 1999, making a total of \$23,050,000.00. In the latest affirmation of Francis Chan, he pointed to an amended statement of claim of the plaintiff in that action on 13 April 1993 to say that as the total claim for dividends was \$27,704,600.00 and the amount paid into court was only \$23 million odd, there is a shortfall of \$4 million for which the Company might be liable and that reasonable provision should be made. The defence of the Company to that action has not been exhibited. I note the Company's contention in the letter of its solicitors dated 27 September 2007 that the Company does not hold any unpaid dividends pertaining to the shares in dispute, as sums had either been paid to the 2nd defendant in the action or the father of the 2nd defendant or had been paid into court. Further, the last payment into court was made on 6 December

1999. If indeed there were a shortfall, I would have expected the other parties in that action to complain. There is no evidence of any such complaint. I do not think the evidence available is sufficient to justify a compelling inference that a provision of \$4 million should be made for this alleged claim. Applying the legal principles for a solvent company, there is no reason not to exercise my discretion in the normal way and sanction the proposed disposition. I make the order as sought by the Company. There is no reason why the petitioners should not pay the Company's costs of the adjourned summons and of the hearing today. I order the petitioners to pay the costs of the Company's forthwith instead of in any event. I do so for two reasons. The first reason is that no evidence was adduced by the petitioners in opposition before the first hearing of the application on 1 March 2007. The second and more important reason is because I take the view that the opposition is entirely lacking in merits. (S Kwan) Judge of the Court of First Instance High Court Miss Michelle Lam, instructed by Messrs Augustine C Y Tong & Co., for the Petitioners Miss Terry S C Chan, instructed by Messrs Vincent T K Cheung, Yap & Co., for the Company
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