

HONG KONG / JUDGMENT

RE WING FUNG CONSTRUCTION (HK) LTD

COURT

Court of First Instance

DECIDED

16 March 2007

CASE / FILE NUMBER

HCCW807/2004

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b) b) panies Ordinance, Cap. 32

Before: Hon Kwan J in Chambers Date of Hearing: 16 March 2007 Date of Decision: 16 March 2007

D E C I S I O N

I have before me a summons for a validation order issued by the 1st respondent on 2 February 2007. He seeks payment of HK\$381,020.94 to be made out of the company's bank account for the purposes as set out in the schedule annexed to his summons. The company concerned is Wing Fung Construction (H.K.) Limited (the Company). The schedule covers 5 items, the largest amount is HK\$330,715.22, being salaries from January to February 2007 of Lau Kwong Chi, Wong Ming Wah, the 1st and 2nd respondents, the severance pay for Lau Kwong Chi, the 1st and 2nd respondents, and wages in lieu of notice for the 1st and 2nd respondents. The 1st and 2nd respondents are the directors of the Company. There is also before me a summons for a validation order issued by the petitioner on 6 February 2007. There was a first hearing of both summonses on 8 February 2007. Due to the Official Receiver's opposition to both summonses, I explained to the 1st respondent it would be necessary for him to file further evidence in support of his application if he wished to proceed with it. I adjourned both summonses to today to give an opportunity to the 1st respondent to file supplemental evidence. He filed his 17th affirmation on 13 February 2007. By a letter dated 12 February 2007, the petitioner indicated to the respondents and the Official Receiver that he intended to withdraw his application for a validation order. I give leave today to the petitioner to withdraw his summons. I order the petitioner to pay the Official Receiver's costs in this application of HK\$2,000.00. I also order the petitioner to pay the 1st respondent's costs of this application, up to 12 February 2007 only, to be taxed if not agreed. I turn to the 1st respondent's summons. The petitioner's position is that no validation order should be made in view of the lack of funds in the Company's bank account, and the Company is not able to pay its debts as they fall due. The Official Receiver also opposes the application. The 1st and

2nd respondents had time and again informed the court (including at the recent hearing before the Court of Appeal on 26 January 2007) that the Company had long ago ceased business. The 1st respondent has now placed before the court the management accounts of the Company made up to 31 December 2006. According to the balance sheet, current assets stood at HK\$3.9 million, of which HK\$2 million was accounts receivable, HK\$1.5 million was debt due from other debtor, HK\$213,022.00 was debt due from Wing Fung Construction Engineering. Cash at bank and in hand only stood at HK\$153,000 odd. Current liabilities came up to HK\$8.7 million. Net liabilities amounted to HK\$4.2 million and net current liabilities were HK\$4.7 million. According to the income statement, there was no contract income from 1 April 2006 to 31 December 2006. Accumulated losses at 31 December 2006 amounted to HK\$5.4 million. The Company is clearly insolvent, and has ceased trading. By an order by consent made on 19 December 2006, a validation order was made for the sale of the Company's office in Tak Fung Industrial Centre, at Texaco Road, Tsuen Wan at HK\$563,000.00. Net proceeds of sale of HK\$340,000.00 were deposited into the Company's bank account on 2 February 2007, bringing up the cash balance to HK\$385,545.42. The 1st respondent's application seeks payment out of this bank account the sum of HK\$381,020.94. If this payment is allowed, the cash balance would be left with HK\$4,500.00 only. There is no evidence that the Company would expect to receive income in the near future. The court should not validate any transaction which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, in the absence of special circumstances making such a course desirable to unsecured creditors as a body. Here, the Company had ceased business. There is no justification why the payments sought to be validated would be beneficial to the Company and the unsecured creditors as a class. The 1st respondent says in his affirmation that he needs payment from the Company to meet his medical expenses. I am afraid that is not a consideration in the exercises of discretion in this application. As the Company is insolvent, the winding-up petition should take its course. Employees and other unsecured creditors should be paid in accordance with the statutory regime in an insolvent liquidation. If employees are able to establish their entitlement to wages on the basis they had continued to work for the Company on a daily basis even after they had received severance pay, they would be treated as preferential creditors under the statutory regime. The same applies to the 1st and 2nd respondents' claim for wages in lieu of notice and severance pay, if they can establish their entitlement. As for other items of expenses incurred by the 1st respondent and Lau Kwong Chi purportedly on behalf of the Company, they should submit their proofs of debt in the liquidation. I also agree with Miss Man for the petitioner there is difficulty about the locus of the 1st respondent in proceeding with his application today. I understand a bankruptcy order has been made against both the 1st and 2nd respondents on 14 March 2007. They cannot act as directors of or take part in the management of a company except with the leave of the court, by virtue of section 156 of the Companies Ordinance, Cap. 32. Hence, the 1st respondent should not be allowed to continue with the present application in his capacity as a director of the Company. The 1st respondent as a bankrupt cannot bring proceedings in his personal capacity either. For the above reasons, I dismiss the 1st respondent's summons. I order the 1st respondent to pay the costs of the petitioner and the Official Receiver of and occasioned by his summons. The petitioner's costs are to be taxed if not agreed. I assess the Official Receiver's costs on a gross sum

basis at HK\$5,000.00. (S Kwan) Judge of the Court of First Instance High Court Miss Pheobe Man, instructed by Messrs Tsang, Chan & Wong, for the Petitioner The 1st Respondent, Wong Tak Kwong, present The 2nd Respondent, Madam Chan Wai Chun, present Ms Polly Yip, for the Official Receiver 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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