

HONG KONG / JUDGMENT

YEARICH LTD v. MOSTOP LTD AND OTHERS

COURT

Court of First Instance

DECIDED

21 December 2007

CASE / FILE NUMBER

HCMP847/2007

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bjbj HCMP 838/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 838 OF 2007

IN THE MATTER of STEP BY STEP LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON Petitioner and DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent STEPHEN SMOUT 3rd Respondent STEP BY STEP LIMITED 4th Respondent

HCMP 839/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 839 OF 2007

IN THE MATTER of STEP UP LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON Petitioner and DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent STEPHEN SMOUT 3rd Respondent STEP UP LIMITED 4th Respondent

HCMP 840/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 840 OF 2007

IN THE MATTER of STEP FURTHER LIMITED and IN THE MATTER of the Companies Ordinance,
Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON Petitioner and
DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent
STEPHEN SMOUT 3rd Respondent STEP FURTHER LIMITED 4th Respondent

HCMP 842/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 842 OF 2007

IN THE MATTER of GLORY SUN INVESTMENTS LIMITED and IN THE MATTER of the
Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON
Petitioner and DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd
Respondent STEPHEN SMOUT 3rd Respondent GLORY SUN INVESTMENTS LIMITED 4th
Respondent

HCMP 843/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 843 OF 2007

IN THE MATTER of STEP ONWARD LIMITED and IN THE MATTER of the Companies Ordinance,
Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON Petitioner and
DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent
STEPHEN SMOUT 3rd Respondent STEP ONWARD LIMITED 4th Respondent

HCMP 844/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 844 OF 2007

IN THE MATTER of NEW SUCCESS ENTERPRISES LIMITED and IN THE MATTER of the
Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON
Petitioner and DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd
Respondent STEPHEN SMOUT 3rd Respondent NEW SUCCESS ENTERPRISES LIMITED 4th
Respondent

HCMP 845/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 845 OF 2007

IN THE MATTER of INSOMNIA LIVE MUSIC PTE LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON Petitioner and DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent STEPHEN SMOUT 3rd Respondent LOW SOKE LENG CINDY 4th Respondent INSOMNIA LIVE MUSIC PTE LIMITED 5th Respondent

HCMP 846/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 846 OF 2007

IN THE MATTER of RICH SUN INTERNATIONAL LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN YEARICH LIMITED Petitioner and MOSTOP LIMITED 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent CRAIGSIDE COMPANY LIMITED 3rd Respondent RICH SUN INTERNATIONAL LIMITED 4th Respondent

HCMP 847/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 847 OF 2007

IN THE MATTER of NEW SUN DEVELOPMENT LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN YEARICH LIMITED Petitioner and MOSTOP LIMITED 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent CRAIGSIDE COMPANY LIMITED 3rd Respondent NEW SUN DEVELOPMENT LIMITED 4th Respondent

HCMP 848/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 848 OF 2007

IN THE MATTER of HARBOUR SUN LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN YEARICH LIMITED Petitioner and MOSTOP LIMITED 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent CRAIGSIDE COMPANY LIMITED 3rd Respondent HARBOUR SUN LIMITED 4th Respondent

HCMP 849/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 849 OF 2007

IN THE MATTER of GAIN SUN INTERNATIONAL LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN YEARICH LIMITED Petitioner and MOSTOP LIMITED 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent CRAIGSIDE COMPANY LIMITED 3rd Respondent GAIN SUN INTERNATIONAL LIMITED 4th Respondent

HCMP 850/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 850 OF 2007

IN THE MATTER of EXCEL SUN LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN YEARICH LIMITED Petitioner and MOSTOP LIMITED 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent CRAIGSIDE COMPANY LIMITED 3rd Respondent EXCEL SUN LIMITED 4th Respondent

HCMP 851/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 851 OF 2007

IN THE MATTER of STEP HIGHER LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN YEARICH LIMITED Petitioner and MOSTOP LIMITED 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent CRAIGSIDE COMPANY LIMITED 3rd Respondent STEP HIGHER LIMITED 4th Respondent

HCMP 1208/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1208 OF 2007

IN THE MATTER of SPARKLING WINE INTERNATIONAL LIMITED and IN THE MATTER of the Companies Ordinance, Cap. 32 of the Laws of Hong Kong BETWEEN ANTHONY JAMES HATTON 1st Petitioner RUSTEM LIMITED 2nd Petitioner and DOROTHY JANE FURNESS 1st Respondent RAPHAEL HOMER ECHALUCE 2nd Respondent STEPHEN SMOUT 3rd Respondent SPARKLING WINE INTERNATIONAL LIMITED 4th Respondent

HCA 2712/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE ACTION NO. 2712 OF 2006

BETWEEN STEP BY STEP LIMITED 1st Plaintiff NEW SUCCESS ENTERPRISES LIMITED 2nd Plaintiff STEP UP LIMITED 3rd Plaintiff and DOROTHY JANE FURNESS 1st Defendant RAPHAEL HOMER ECHALUCE 2nd Defendant ENTERTAIN COMPANY LIMITED 3rd Defendant MAD DOGS WANCHAI PUBLIC HOUSE LIMITED 4th Defendant

(Consolidated by the Orders of The Honourable Madam Justice Kwan dated 31 May 2007 and 26 October 2007 respectively) Before: Hon Kwan J in Chambers Date of Hearing: 21 December 2007 Date of Decision: 21 December 2007

DECISION

This is an application by the petitioners in 14 petitions to vary a costs order nisi made in the decision of the applications to strike out 11 of the 14 petitions on 26 October 2007. The 1st and 2nd respondents succeeded in having the petitions struck out for 4 petitions presented under section 168A of the Companies Ordinance, Cap. 32, they failed in respect of 7 petitions. In paragraph 97 of the decision, I decided to make a global order as the applications to strike out the 11 petitions were heard together on the same evidence and the contents of the petitions are substantially the same. Instead of ordering the petitioners to bear the respondents costs for the 4 petitions which were struck out and the respondents to bear the petitioners costs for the 7 petitions in which the respondents were not successful, in the order nisi I awarded half of the costs incurred in all the striking-out applications to the respondents, to be paid forthwith by the petitioners. The petitioners seek to vary the order nisi. They submitted that the respondents should pay all of the petitioners costs in all these applications. Alternatively, the respondents should pay a part of the petitioners costs to be apportioned, not less than 28%. The reasons advanced by the petitioners are as follows. It was contended that notwithstanding 4 petitions were struck out, the petitioners were the overall successful party. The 4 companies in respect of which petitions were struck out are shelf companies with no business activity and have no real value. They were included with the petitions presented for other companies in order to achieve a clean break between the parties. If the petitions were to proceed, it is envisaged that the parties would spend very little time on the petitions of the dormant companies and that the vast proportion of the time and costs would be spent in dealing with other companies of value and of commercial importance. Hence, the petitioners were the true winner of the striking-out applications, in that they have successfully resisted the applications for the 7 companies of real value. The general rule that the unsuccessful party should pay the costs of the successful party should be applied and the respondents should pay 100% of the petitioners costs. Alternatively, costs should be paid by the unsuccessful party to the successful party in each application. As the applications were heard together, and the petitioners were successful in 7 out of 11 applications, the petitioners should get 64% of the costs and the respondents should get 36% of the costs being

4 out of 11 applications. Applying a set-off, the respondents should pay the petitioners at least 28% of the costs. In dealing with the costs here, it is common ground that the first task is to determine who is the successful party. The petitioners cited the dicta of Bokhary PJ in *Tripole Trading Ltd & Ors v. Prosperfield Ventures Ltd & Anr* (No.

- 2) [2006] 2 HKLRD 103 at 104F to I, paragraphs 4 and 5. The question who really won? must be asked within the context of the case as it was actually fought out between the parties and by looking at the realities. I do not agree the relative value of the companies is relevant to the consideration of costs in the strike-out applications. That the party who may be ordered to purchase the shares of the shelf companies would only have to pay a nominal sum is neither here nor there to the merits of the strike-out application. Nor do I think it correct to judge who was the real winner by the number of petitions struck out. I think I should approach the question of costs by looking at the basis and issues under consideration in these strike-out applications. The broad basis for striking out all 11 petitions was identical. It was contended by the respondents that in the petitions of the 11 companies, the conduct complained of in each petition as constituting unfair prejudice was the conduct by companies or individuals other than the subject company in each petition. Hence, the matters relied on in each petition did not concern the conduct of the affairs of the subject company and could not be unfair prejudice in the conduct of the affairs of the subject company (paragraph 39 of the decision). I pause here to note that for the petitioners, the argument was advanced that the affairs of all 19 companies should be regarded as interlinked, even though they are not a group of companies as defined in Cap. 32, such that the alleged conduct of affairs of the Group would have impact on the subject companies (paragraph 67 of the decision). The arguments advanced for and against the application in each petition were largely the same, as the broad basis for striking out was the same. They were covered in paragraphs 40 to 53 of the decision. The legal issues advanced by the respondents counsel were accepted. It was then a question of applying the legal principles to the facts. As mentioned earlier, the contents of the 11 petitions are substantially the same and the complaints of unfair prejudice in each petition are identical. The allegations in the petition were analysed with regard to the dormant companies and considered at paragraphs 55 to 73 of the decision. Similar analytical exercises were repeated for the other petitions with some variations at paragraphs 74 to 94. The respondents contention that there is no arguable cause of action for the dormant companies was upheld. For the applications that the respondents failed to strike out the petitions, I do not think the respondents should be penalised by ordering them to pay all or part of the petitioners costs. The arguments advanced were on the same broad basis as for the shelf companies. The petitions were not struck out because it is not plain and obvious that the degree of interaction in the affairs of the subject companies with those of the other companies was clearly insufficient, so that the matters relied on as constituting unfair prejudice did not concern the conduct of the affairs of each of the subject companies (paragraphs 79, 82, 89 and 94 of the decision). It does not appear to me that these strike-out applications were wholly improper or unreasonable. That the respondents failed in seeking to strike out more of the petitions on the broad basis they advanced is reflected in the order

nisi that the respondents should be deprived of half of their costs. I reject the petitioners submission that the respondents should be deprived of their costs or be awarded nominal or minimal costs because the petitions they successfully struck out are in respect of the shelf companies. The fact remains that the petitioners chose to present petitions for the dormant shelf companies and to oppose the strike-out applications for all 11 companies. By and large, I would consider the respondents to be the successful party overall, and a global order would be appropriate in all the circumstances. For above reasons, I decline to vary the order nisi as to costs. I award the costs of today s applications to the respondents in any event. (S Kwan) Judge of the Court of First Instance High Court Miss Frances Lok, instructed by Messrs Allen & Overy, for the Petitioners in HCMP Nos. 838 to 840, 842 to 851 and 1208 of 2007 Miss Kim Boreham of Messrs Tanner De Witt, for the 1st and 2nd Respondents in HCMP Nos. 838 to 840, 842 to 845 and 1208 of 2007 and the 2nd Respondent in HCMP Nos. 846 to 851 of 2007 PAGE - A B C D E F G 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 1udk 1udk i\$&` r*pa 5<>| P!_HD Vx[Hi w[{t0 w[{t P!_H HCCW.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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