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HCCW 1134/2002

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO. 1134 OF 2002**

IN THE MATTER of KEEN LLOYD
RESOURCS LIMITED (formerly
known as KEEN LLOYD
(HOLDINGS) LIMITED) (number
519236)

and

IN THE MATTER of Companies
Ordinance, Cap. 32

Before: Hon Kwan J in Chambers

Date of Hearing: 27 June 2003

Date of Decision: 29 June 2003

D E C I S I O N

1. There is before me a summons issued by Keen Lloyd Resources Limited (“the Company”) on 20 June 2003, seeking an order that the hearing of the winding-up petition on 9 July 2003 be adjourned until after the criminal trial of its directors, Mr Chin Kam Chiu and Miss

A Tsang Siu Lan. The application is opposed by the petitioner and the
 B supporting creditor.

C 2. Mr Chin and Miss Tsang were arrested by the ICAC with
 D other individuals on 14 June 2001, in connection with corruption offences
 E involving bribes offered to the officers of Sin Hua Bank Limited for
 F facilities, including the approval of 25 letters of credit issued by the bank,
 G on suspicion that transactions of goods relating to these letters of credit
 were non-existent.

H 3. No charges were laid against Mr Chin and Miss Tsang until 5
 I May 2003. On that day, they were charged by the ICAC with conspiracy
 J to furnish false information, contrary to section 19(1)(b) of the Theft
 K Ordinance, Cap. 201 and section 159A of the Crimes Ordinance, Cap. 200.

L 4. On 13 June 2003, a committal hearing took place. According
 M to the charge sheet dated 12 June 2003, Mr Chin, Miss Tsang and others
 N were charged with the two offences that I have mentioned and the
 O particulars of offence stated that they had conspired with the persons
 P named and others unknown in, *inter alia*, furnishing information or
 Q producing documents for letters of credit which, to their knowledge, were
 or might have been misleading, false or deceptive in that they purportedly
 showed that goods were sold by companies operated by Mr Chin,
 including the Company, to other companies also operated by him.

R 5. No trial date has been fixed as yet for the criminal proceedings
 S against Mr Chin, Miss Tsang and others. I am informed by the solicitors
 T for the Company that it is estimated the trial would take place at the end of
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this year at the earliest, and that the trial would be in the High Court with a jury.

6. In the affirmation of Mr Chin filed in support of the present application, he claimed that certain allegations made by the Company in these winding up proceedings are “at the center of the charge laid by the ICAC” against the defendants in the criminal proceedings and they are prejudicial to the defence of himself and Miss Tsang in the criminal proceedings. It is important to see exactly what these allegations are.

7. The allegations in question are made in paragraphs 26 to 29 of the fourth affirmation of Mr Yeung Joi Foi filed on behalf of the petitioner on 7 April 2003, in which he deposed that according to the records of the port authorities in Hong Kong, Singapore, Pasir Gudang in Malaysia, there was no record of certain vessels calling at these ports during certain periods. In view of the absence of such records, the petitioner alleges that the Company does not have a bona fide claim against Sin Hua Bank in HCA No. 10521 of 2000 for storage charges in the sum of HK\$63 million odd, in respect of nine shipments which allegedly remained unclaimed at ports due to the wrongful refusal of the bank to release the shipping documents to the Company to take delivery.

8. These allegations, which appeared in the petitioner’s affirmation in reply in April 2003, have not been answered by the Company. I have given directions on 20 January 2003 that after the filing of the petitioner’s evidence in reply, no further affirmation is to be filed without leave of the court and that the petition is to be adjourned for argument with one day reserved with no cross-examination of any of the deponents.

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9. Mr Chin’s concern, as I am given to understand, it is that the evidence that may be given by him in the winding-up proceedings relating to the bills of lading of the nine shipments may be used against him by the ICAC in the criminal trial. It would appear from the documents provided by the ICAC that a prosecution witness was interviewed regarding the nine bills of lading.

10. I am referred by Mr William Wong, who appears for the petitioner, to a line of authorities dealing with the stay or adjournment of civil proceedings owing to contemporaneous criminal proceedings. The leading authority is *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898. There is no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action merely because so to do would or might result in the defendant having to disclose in the civil action what his defence may be in contemporaneous criminal proceedings. It is a matter of discretion for the civil court whether proceedings should be stayed or adjourned, and one important factor to take into account is whether there is a real danger of the causing of injustice in the criminal proceedings. While each case must be judged on its own facts, the burden is on the defendant in the civil action to show that it is “just and convenient” that the plaintiff’s ordinary rights of having his claim processed and heard and decided should be interfered with.

11. I am quite unable to see how the winding-up proceedings, if not adjourned or stayed, would work to the prejudice of Mr Chan and Miss Tsang in the criminal trial.

12. As submitted by Mr Wong, the function of the companies court in the winding-up proceedings is to determine whether there is a

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bona fide dispute of the debt in the petition on substantial grounds. In relation to one of the cross claims advanced by the Company, being its claim for storage charges in HCA No. 10521 of 2000, it is up to the Company to adduce evidence of a sufficiently precise nature to support its case that it has a bona fide and genuine claim in this respect. The companies court is to determine whether there is in existence a substantial dispute; if there is such a dispute, the court is not to resolve this in the insolvency proceedings. As I have ordered, there will be no cross-examination of deponents in the winding-up proceedings.

13. What Mr Chin or Miss Tsang had said previously in the affirmations already filed do not meet the new allegations of the petitioner, which, according to Mr Chin, are “at the center of the charge laid by the ICAC”. So it is unlikely that their previous affirmations should in some way be used by the ICAC against them at the criminal trial, even if their affirmations are to be read in court in the course of the hearing of the petition. Besides, as submitted by Mr Hield for the supporting creditor, if there is no implied undertaking not to use these affirmations for purposes other than the winding-up proceedings as the Company has contended, and if there should be any prejudice arising out of this, such prejudice would already have been occasioned. It would make no difference if the winding-up petition is to be adjourned or stayed.

14. As for the new allegations made by the petitioner relating to the absence of arrival of certain vessels in the records of the port authorities, these are matters of public record. At the moment, it is difficult to see how Mr Chin or Miss Tsang could give relevant evidence in this regard, even if they were to seek leave from the court to file an affidavit to rebut the new allegations.

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15. It is not necessary to deal with the submission of the Company that the petition is presented in bad faith. That is one of the matters raised by the Company in its affirmations filed opposing the petition and this is disputed by the petitioner. The appropriate time to consider this is at the hearing of the petition.

16. It is also alleged by the Company that as not all the documents seized by the ICAC have been returned to the Company, this has hampered, *inter alia*, the production of the Company’s accounts and the efforts of the Company to muster an effective defence in the winding-up proceedings. I note, however, in the first affirmation of Mr Chin he stated that the ICAC has “by now released most of the seized documents and materials”. It does not appear to me that the Company has been or will be seriously hampered in opposing the petition due to incomplete documents.

17. Lastly, it is alleged that the publicity given to the present proceedings is likely to generate adverse publicity for Mr Chin, who I am given to understand is a high-profile individual. No trial date has been fixed for the criminal proceedings. I am unable to see any real danger of adverse publicity in the winding-up proceedings that may cause prejudice to Mr Chin in the criminal trial.

18. To conclude, it has not been demonstrated that there is a real danger that injustice would be caused in the criminal proceedings. As submitted by Mr Wong, there are public policy reasons why a winding up petition should proceed expeditiously as this is a class remedy affecting the general body of unsecured creditors.

19. For the above reasons, I dismiss the Company’s application to adjourn the hearing of the winding-up petition. As for the costs of this application, I order that the costs of the petitioner and the supporting creditor be paid by the Company and Mr Chin jointly and severally and that such costs are to be paid forthwith. I decide to exercise my discretion to order costs on a gross sum basis. In respect of the petitioner, the costs I have assessed as reasonable and proper are in the sum of HK\$45,500. I have disallowed the costs paid to senior counsel and reduced the amount of time that I would regard as properly spent by the assistant solicitor in the preparation for this case. In respect of the supporting creditor, the amount of costs I would allow in this instance is assessed at HK\$16,800, on the basis of six hours work done by the handling solicitor.

(S Kwan)
 Judge of the Court of First Instance
 High Court

Mr William Wong, instructed by Messrs Deacons, for the Petitioner

Mr A Chow, of Messrs Alvan Liu & Partners, for the Company

Mr Hield, of Messrs Coudert Brothers, for the Supporting Creditor

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