HCMP 4914/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 4914 OF 2002

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IN THE MATTER of MATRIX INDUSTRIES LIMITED

and

IN THE MATTER of the Companies Ordinance, Cap. 32

and

IN THE MATTER of Order 102 rule 2 of the Rules of the High Court

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BETWEEN

CLASSIC ROLLS LIMITED	1st Applicant
MATRIX DISTRIBUTION LIMITED	2nd Applicant

and

KENNIC LAI HANG LUI	1st Respondent
LAU WU KWAI KING LAUREN	2nd Respondent

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Before: Hon Kwan J in Court

Date of Hearing: 24 October 2003

Date of Judgment: 24 October 2003

J U D G M E N T

The application and the parties

1. I have before me a Notice of Amended Originating Motion issued by Classic Rolls Limited ("Classic Rolls") and Matrix Distribution Limited ("MDL") on 27 November 2002, seeking all further proceedings in the winding up of Matrix Industries Limited ("the Company") be stayed; alternatively, the dissolution of the Company pursuant to section 248 of the Companies Ordinance, Cap. 32 be declared void. The application for stay of the winding up proceedings is not proceeded with. The applicants only seek the alternative relief under 290(1), the relevant part of which reads as follows:

> "… in the case of a company which has been dissolved under section … 248, the court may at any time within 2 years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

2. Under section 248, it is provided that as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, and call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the

meetings and within one week after the meetings, the liquidator shall send to the Registrar of Companies a copy of the account and shall make to the Registrar a return of each meeting. The Registrar on receiving the account and the returns shall register them forthwith and on the expiration of three months from the registration, the company shall be dissolved.

3. Here the Company has been dissolved on 17 October 2002 pursuant to section 248(4).

4. The 2nd applicant, MDL, is a registered shareholder of the Company and the beneficial owner of the only two issued shares of the Company. The 1st applicant, Classic Rolls, had entered into an agreement dated 16 October 2002 with MDL to purchase all the issued shares in the Company.

5. The 1st and 2nd respondents to the Originating Motion, Kennic Lai Hang Lui ("Mr Lui") and Lau Wu Kwai King Lauren ("Mrs Lau"), are the former liquidators of the Company. As there is no issue of any property which has since the dissolution of the Company become *bona vacantia* pursuant to section 292 and which will revert to the Company if the dissolution were declared void, it is not necessary to join the Secretary for Justice as a respondent.

6. Classic Rolls had sought to amend the Originating Motion to join the Company as a 3rd respondent, so that it would be bound by any order to be made. I have refused that application. The Company cannot possibly be a proper party to these proceedings as it has been dissolved

and has ceased to be an existing entity (*Re Workvale Ltd* [1991] BCLC 528 at 528g to h).

7. Mr Herbert Au Yeung, who appears for the respondents, has also raised the question that the Registrar of Companies should have been joined as a respondent or at least should have been informed of this application. He has referred me to *Wong Pui Sau v. Cheung Kwong Min* [2002] 2 HKC 810 at 812I to 813B, in which the court noted that although the Registrar was not made a party, he was informed of the application and had written to say that he did not propose to attend the hearing subject to the requirement in section 290(2) that a sealed copy of the order was to be delivered to him for registration within seven days of the order.

8. Where a company has not been wound up, the Registrar of Companies should be made a respondent to the application. Where a company was wound up prior to its dissolution, it is not necessary that the Registrar should be joined, although it is common practice to join him (*Practice and Procedure of the Companies Court* by Boyle and Marshall, 1997 ed., para. 5.55; *Re Test Holdings (Clifton) Ltd* [1970] 1 Ch 285 at 292G to H). There is no procedural irregularity in this instance not to join the Registrar as a respondent. As for the statutory requirement to deliver a sealed copy of this order to him within seven days, this is an obligation that would have to be complied with by the applicants, if they should succeed, regardless of whether this is made a term of the order.

9. I do not propose to adjourn the application in this instance for the applicants to notify the Registrar of Companies. I do however wish to make clear that I would endorse the practice either to make the Registrar a party or at least to inform him of the application in the situation where the Company has been wound up before its dissolution, in case the Registrar should see fit to ask the court to impose any other terms as a condition for granting the application.

10. There is no question that the Company has been dissolved and that the application is made within two years of the date of dissolution, as required by section 290(1).

11. The respondents say that they adopt a neutral stance, but as the former liquidators they regard themselves duty bound to place before the court all relevant matters for its consideration. Mr Au Yeung submitted on their behalf that although MDL is a proper applicant, Classic Rolls has no *locus* to bring this application as it is not "any other person who appears to the court to be interested" as provided in section 290(1). He also submitted that the present application does not fall within the legislative purpose of section 290, as the purpose of reviving the Company is not to enable an "overlooked asset" to be distributed and the application should be refused.

12. Before dealing with these submissions, it would be convenient to set out the relevant facts.

The background to the application

13. The Company was incorporated in Hong Kong on 24 April 1979. Its ultimate holding company is Matrix Holdings Limited ("MHL"), the shares of which are listed on Hong Kong Stock Exchange. Before the Company was wound up, it was engaged in the business of manufacturing ornaments and gift items for customers in Hong Kong and the United States, and had developed a goodwill during the 20 years in which it was in business.

14. According to the last management account for the year ended 31 December 1998, the Company suffered a loss in excess of HK$28 million for that financial year. On 13 April 1999, a resolution was passed by the directors that the Company could not by reason of its liabilities continue its business and it should be wound up under section 228A. It was also resolved that Mr Lui and Mrs Lau be appointed, jointly and severally, the provisional liquidators.

15. The first meeting of creditors was held on 5 May 1999. Mr Lui and Mrs Lau were appointed as liquidators and a Committee of Inspection consisting of five members were elected. The liquidators provided a report to the meeting. According to the information available in the accounting records as at 13 April 1999, the liabilities of the Company comprised the following: secured creditors of HK$16 million odd; preferential creditors of HK$2.3 million odd; and unsecured creditors of HK$353 million odd.

16. On 28 June 2000, the first annual general meetings of the members and creditors were held. In April 2000, a settlement had been reached in respect of the inter-company balances between the Company, MHL, MDL and other companies in the Matrix group. The Company waived its claim against various companies in the group for a total book value of HK$260 million odd and the financial creditors and the other companies in the group released and discharged the Company from their claims of HK$328 million odd. Hence MDL and MHL resigned as members of the Committee of Inspection. With the resignation of another member which was a financial creditor, the Committee of Inspection was represented by only two creditors whose aggregate indebtedness is less than HK$2.5 million, which amounted to only 4.6% of the admitted claims. The liquidators reported to the first annual general meetings that realisations of HK$13 million odd were made.

17. On 19 December 2000, a 100% preferential payment was declared to the preferential creditors. On 3 May 2001, a 12% dividend (HK$4,330,575.00) was declared to 227 ordinary creditors whose proofs of debt were in the total sum of HK$54,744,176.00.

18. The second annual general meetings were held on 29 June 2001. The assets realised by then were approximately HK$14 million. The liquidators stated in their report to the meeting that a declaration of the second and final dividend to ordinary creditors would be made within six months after the meeting.

19. On 30 July 2001, a formal proposal was received by the liquidators from MHL to implement a scheme of arrangement for the creditors. MHL was planning to acquire ownership of the Company's remaining assets including its intellectual property rights and goodwill and proposed to pay HK$360,000.00 to all the ordinary creditors in full and final settlement of all their outstanding claims against the Company and to bear all costs and expenses incurred in connection with the negotiation and implementation of the scheme. On 4 October 2001, MHL increased the sum it proposed to pay to the creditors to HK$470,000.00. Both members of the Committee of Inspection rejected the revised offer in October 2001. The liquidators had written to MHL on 17 October 2001 stating that they were willing to cap the fees and expenses incurred in relation to the proposed scheme at HK$300,000.00, on that basis that MHL was to pay the amount as a deposit and the expenses would be borne by MHL irrespective of whether or not court sanction was obtained for the scheme.

20. On 26 October 2001, the second and final dividend of 5% (HK$1,803,492.00) was declared to 227 ordinary creditors.

21. In December 2001 and February 2002, MHL requested the liquidators for further time to consider whether to revise its proposal and the liquidators agreed to wait for MHL's reply rather than to proceed with the winding up. Eventually, MHL notified the liquidators on 7 March 2002 it decided not to proceed with the proposed scheme. The liquidators therefore proceeded with the finalisation of the liquidation.

22. On 10 July 2002, the final meetings of members and creditors were held pursuant to section 248. A special resolution was passed for the liquidators to retain the books and records for three months. On 17 July 2002, the return of the final meeting of creditors was registered with the Companies Registry and the statement of account filed that the Company had no other assets. It was also on 17 July 2002 that the solicitors for the applicants wrote to the liquidators stating that they act for an unnamed client who intended to acquire the shares of the Company and an agreement for sale and purchase would be signed with the condition precedent as follows:

> "*All creditors* of the company shall give their respective consent to accept in pro rata to their respective claims the payment of HK$400,000.00 by the share purchaser in full and final discharge of the whole of the indebtedness owed by the company to all of the creditors." (emphasis supplied)

23. The letter went on to say that it was the intention of the unnamed purchaser to offer HK$400,000.00 to all of the Company's outstanding creditors on pro rata basis in full and final settlement of the debts owed to them ("the Offer") and it was prepared to bear the reasonable charges of the liquidators in the rescue proposal to a maximum of HK$350,000.00.

24. The liquidators replied on 22 July 2002 that as the winding up had been concluded and the final meeting was held, they were unable to consider the Offer.

25. On 19 September 2002, the applicants' solicitors wrote to the liquidators naming Classic Rolls as the intended purchaser and requesting

contact details of 226 outstanding creditors. The Offer was made once again.

26. On 25 September 2002, the liquidators replied that they were unable to accede to the request to purchase the shares of the Company as the winding up had been concluded and that they were not in a position to disclose contact details of the creditors without the latter's consent.

27. On 16 October 2002, Classic Rolls entered into an agreement with MDL for the sale and purchase of the only two issued ordinary shares in the Company beneficially owned by MDL. It was provided in clause 3 that completion of the sale and purchase is conditional upon fulfilment and satisfaction of all of the conditions precedent, one of them being that *all* creditors of the Company shall give their consent to accept, in pro rata to their respective claims, the payment of HK$400,000.00 by Classic Rolls in full and final discharge of the whole of the indebtedness.

28. By two letters dated 17 October 2002, the solicitors for the applicants requested the liquidators to provide contact details of outstanding creditors within three days, or to circulate the Offer to outstanding creditors of the Company. They further requested the liquidators not to destroy the books and records as they intended to apply to court to stay the winding up proceedings or to declare the dissolution void.

29. The liquidators responded by a letter of their solicitors on 28 October 2002 refusing to accede to any of the requests, as the Offer was

no better than the previous offer rejected by the Committee of Inspection, and that it would not be in the interest of the Company to delay destruction of the documents and incur extra storage costs.

30. Between 30 October 2002 to 2 November 2002, the solicitors for the applicants wrote to 48 creditors whose addresses were known to them to solicit their response to the Offer. All had responded, 43 accepted and five refused the Offer. The aggregate claims of these 48 creditors amounted to HK$17,611,381.00, being 32.17% of the total admitted claims. The 43 creditors who accepted the Offer represented 27.17% of the admitted claims.

31. On 5 November 2002, the liquidators' solicitors wrote further to say that the Offer was unrealistic, by reason of the disproportionate administrative and professional costs to be incurred and the small amount of consideration available for distribution (only one cent in a dollar). Verbal instructions were taken by the liquidators from the Committee of Inspection and the two members indicated that they would not accept any offer less than HK$2 million net of costs, so that a distribution of 5 cents in a dollar could be made to the creditors.

32. On 26 November 2002, the applicants rejected the suggestion to increase the Offer. The Notice of Originating Motion was issued the next day but for some unknown reason it was not served on the liquidators until a month later.

33. The application first came before me on 22 July 2003. It was adjourned to enable Classic Rolls, which was the only applicant at that time, to take such steps as advised to overcome the objection taken by Mr Au Yeung that it has no *locus* to bring the application.

34. What happened thereafter was on 30 July 2002, Classic Rolls entered into a supplemental agreement with MDL to vary the conditions precedent in the sale and purchase agreement. The requirement that all the creditors must consent to accept the Offer was removed. The substituted conditions precedent required only the consent of a majority of creditors of at least 75% in value present and voting in person or by proxy, and that the court should sanction the proposed scheme of arrangement with the creditors.

35. On 14 October 2003, a summons was issued to join MDL as the 2nd applicant so as to put the issue of lack of *locus standi* beyond doubt. I granted the application at the outset of this hearing.

36. With the above, I turn to consider the issues taken against the applicants.

Locus standi of Classic Rolls

37. I wish to say first of all that it is not necessary to decide in this application whether both applicants have *locus*, it is sufficient one of them has and there is no contest that MDL does have *locus*.

38. However, since extensive submissions have been made on the question of *locus* of Classic Rolls, it is appropriate that I should deal with this on an *obiter* basis.

39. Miss Linda Chan, who appeared for the applicants, asked me to contrast the relevant words in section 290(1) ("any other person who appears to the court to be interested") with section 291(7). In the latter provision, the application has to be made by "a company or any member or creditor thereof".

40. Miss Chan also cited two decisions of Megarry J in *Re Test Holdings*, *supra*. and *Re Wood & Martin* [1971] 1 WLR 293, in which observations were made about the meaning of the relevant words in section 352 of the Companies Act 1948, later replaced by section 651of the Companies Act 1985, being the equivalent to section 290(1) of Cap. 32.

41. In *Re Test Holdings*, Megarry J remarked that the relevant phrase was of "great amplitude" and went on to make this observation at 289F to G:

> "A person who after the date of dissolution acquires shares in a company, or takes an assignment of one of its debts, is not a "member or creditor" of that company within section 353(6) (see *In Re New Timbiqui Gold Mines Ltd* [1961] Ch 319), though he might well be a "person who appears to the court to be interested" within section 352(1)."

42. Mr Au Yeung pointed out that Megarry J in the above dictum was envisaging a situation where the applicant had actually acquired

shares in the company after its dissolution. This is different from the present situation as Classic Rolls has not acquired the shares in the Company as yet, notwithstanding the supplemental agreement, because completion of the sale and purchase is subject to the conditions precedent, which have not been fulfilled.

43. In *Re Wood & Martin*, Megarry J held that although the applicant who had purportedly been acting as liquidator of the company was not a liquidator within the meaning of section 352(1), he was a person "who appears to the court to be interested". He had this to say at 297E to G:

> "… it nonetheless seems to me that it would be somewhat unreal to say that this applicant has no interest of a proprietary or pecuniary nature in resuscitating the company. The situation is unusual, but the possibility of a claim being made by the applicant and the possibility of a claim being made against him, when added together, seem to me to remove him from the category of person who cannot fairly be regarded as having any proprietary or pecuniary interest of this kind. It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail: provided it is not merely shadowy, I think it suffices for the purpose of section 352. With a little hesitation, I feel justified in saying that the interest cannot be regarded as being merely shadowy, so that it appears to me that the applicant has brought himself within the terms of section 352."

The above *dicta* in *Re Wood & Martin* have been approved and applied by Hoffmann LJ (as he then was) in *Stanhope Pension Trust Ltd v. Registrar of Companies* [1994] 1 BCLC 628 at 635f to g.

44. The question here is whether the possibility of Classic Rolls successfully acquiring the shares of the Company is so low as to make its interest "merely shadowy". I do not think I should so infer on the

available evidence. The agreement for sale and purchase is conditional upon, inter alia, the consent on the part of the statutory majority of creditors voting in favour of the proposed scheme of arrangement pursuant to section section 166. Of the creditors that the applicants have been able to approach, 43 out of 48 have consented to the Offer. I cannot say there is no reasonable possibility of the conditions precedent being fulfilled for the sale and purchase to be completed.

45. I hold that Classic Rolls does have sufficient interest and therefore *locus* to bring the application.

Legislative purpose of section 290(1)

46. Mr Au Yeung also submitted that the present application is not within the legislative purpose of section 290(1), because the purpose of this application is not to enable the liquidator to distribute an overlooked asset or a creditor to make a claim which was not previously made. He placed reliance on the following statement of Hoffmann LJ in *Stanhope*, *supra*. at 632e:

> "I think it would therefore be nowadays more accurate to say that *ordinarily* the purposes of section 651 are either to enable the liquidator to distribute an overlooked asset or a creditor to make a claim which he has not previously made." (emphasis supplied)

He also cited the following statement in *Gore-Browne on Companies*, 44th ed. Vol. 1, para. 34.8.2:

> "The description a 'person interested' means a person with a proprietary or pecuniary interest in resuscitating a company, such as an insurer who has indemnified the company and wishes to sue a third party in its name or a third party with a personal injury claim against the company, but not the solicitor

> to a proposed claimant … The variety of parties who may have standing to make an application under section 651 indicates that a variety of purposes may be served by an order under the section. *The paradigm*, however, is an order enabling the liquidator to realise an asset which was overlooked during the winding up, or a creditor to make a fresh claim." (emphasis supplied)

47. I do not think the above statement of Hoffmann LJ, useful though it is, should be read as limiting the purpose of section 290(1) only to the two broad situations he has identified. He is stating there that "ordinarily" the purposes he has described are the purposes of the provisions. Similarly, the author of *Gore-Browne* is describing what is the "paradigm" in the passage quoted. As Robert Walker J has stated in *Re Oakleague Ltd* [1995] 2 BCLC 624 at 628c, that useful and accurate statement of Hoffmann LJ should not be construed like an Act of Parliament. It was held in *Oakleague* that the provision should not be limited to a situation in which a liquidator was quite unaware of an asset belonging to a company, and that it is apt to cover analogous situations such as where a liquidator was aware of an asset but unaware that that asset has any realisable value.

48. Here the former liquidators had declined to consider the Offer on the ground that a higher offer of HK$470,000.00 had already been rejected by the Committee of Inspection in October 2001 and the Committee of Inspection had also rejected the Offer when it was put to them a year later. Nonetheless, the applicants have approached those creditors whom they were able to approach and the percentage of claims represented by these creditors is just short of one-third, not an insignificant proportion. As I have observed earlier, the claims of the

Committee of Inspection amounted to less than 5% of the total claims, so the views of the Committee of Inspection might not have been sufficiently representative. The fact that the great majority of creditors who had been approached have consented to the Offer is a new development that has arisen since the dissolution of the Company. I do not think in these circumstances it should be regarded as outside the legislative purpose of section 290(1) to revive the Company to enable a scheme of arrangement to be put to all the creditors.

Removal of Liquidators

49. The applicants also seek an order to remove the respondents as liquidators as consequential relief, in the event that the dissolution is declared void. The reason put forward for removing them is that one of the applicants, who is to bear the expenses of implementing the scheme of arrangement, has not been able to reach agreement with the respondents regarding their fees for work to be done on the scheme. The applicants have secured the consent of appropriate individuals to act as liquidators in the event the application is granted and Classic Rolls has signed an undertaking to pay the fees to be incurred by the proposed liquidators in the scheme of arrangement. It is provided in the undertaking that Classic Rolls is to enter into a separate agreement with the proposed liquidators wherein the latter's costs and charges with their charging rates would be set out. I am given to understand that such an arrangement has been made but for some reason the applicants have not placed this before the court.

50. The respondents are willing to continue as liquidators only if the applicants will undertake to pay their reasonable fees for work to be done for the scheme. This the applicants are unwilling to do. On behalf of the respondents, it was submitted that the burden is on the applicants to show cause why the respondents should be removed, as the jurisdiction under section 252(2) to remove liquidators is "on cause shown". I was referred to *Re Keypak Homecare Ltd* [1987] BCLC 409. It was decided in that case that it is not a necessary condition to show personal misconduct or unfitness of the liquidator, as the wording of the statute is very wide and it would be wrong for the court to define the kind of cause which is required for removal.

51. The question here is whether the cause advanced is a sufficient cause.

52. Mr Au Yeung pointed out that the respondents had in July 2002 sought an undertaking from the applicants to pay all reasonable costs to be incurred in the proposed scheme of arrangement and this was refused by the applicants. As one of the applicants has executed an undertaking to pay the fees of the proposed liquidators, he submitted that there is a change of stance of the applicants and there is no cause for removal of the liquidators. I do not think that is the case. The applicants are willing to provide an undertaking only to the proposed liquidators but not to the respondents.

53. The question of the expenses of the respondents, if they should continue as liquidators, is unresolved. It seems to me that as

Classic Rolls will be responsible for the fees of the liquidators in the scheme of arrangement, it would not be right to insist that Classic Rolls should engage the services of the liquidators whose fees it takes objection to. Further, as the affairs of the Company have been wound up, and the only task to be performed by the liquidators is in relation to the proposed scheme, there is no compelling reason and little saving of time and costs that the former liquidators should continue as the liquidators.

54. I will order the respondents to be removed as liquidators and the individuals proposed by the applicants be appointed in their place.

Orders

55. It has been pointed out to me that the storage charges for keeping the documents in custody pending this application have not been settled by the applicants for the months of September and October 2003. I will allow this application only on the undertaking that the storage charges will be paid within 7 days hereof. Miss Chan has informed me that the applicants are willing to provide the undertaking.

56. I make the following orders:

Upon the undertaking of the applicants to pay to the respondents the storage charges of the books and records of the Company that have been outstanding for the months of September and October 2003, it is ordered as follows:-

(1) the dissolution of the Company be declared void;

(2) the respondents be removed as liquidators and there be appointed in their place as joint and several liquidators of the Company Mr James Wardell and Mr Chan Wai Dune Charles;

(3) a sealed copy of this order be delivered to the Registrar of Companies for registration within 7 days hereof; and

(4) the costs and expenses of the respondents in this application be paid by the applicants.

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

Miss Linda Chan, instructed by Messrs Alvan Liu and Partners, for the Applicants

Mr Herbert Au Yeung, instructed by Messrs David Lo and Partners, for the 1st and 2nd Respondents