HCCW 164/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO. 164 OF 2002

IN THE MATTER of King Pacific International Holdings Limited (Company Number F 5143)

and

IN THE MATTER of the Companies Ordinance, Cap.32

Before: Hon Kwan J in Chambers

Date of Hearing: 17 July 2002

Date of Decision: 17 July 2002

D E C I S I O N

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1. On 3 June 2002, I made a winding-up order against King Pacific International Holdings Limited ("the Company") upon the petition of Goodragon Limited on the ground that the Company is unable to pay its

debts. On 14 June 2002, the Company filed a Notice of Appeal against the winding-up order. On 24 June 2002, the Company issued a summons under O. 59 r13 of the Rules of the High Court and/or the inherent jurisdiction of the court, seeking a stay of the winding-up order pending appeal.

2. At the hearing today, I gave leave to amend the summons by adding two applicants: Ocean Palace Restaurant and Nightclub Limited and Yiu Wing Construction Company Limited. I understand from Mr Swaine, who appeared for all the applicants, that one of the additional applicants is a subsidiary of the Company and the other is an indirect subsidiary of the Company and that both are creditors of the Company.

3. The additional applicants apply for a stay of the winding-up proceedings under s.209 of the Companies Ordinance, Cap.32.

4. The application is opposed by the petitioner, the Official Receiver as provisional liquidator, and a number of creditors who had supported the petition and who have appeared today.

5. A point was raised by the petitioner as to the jurisdiction of this court, whether it has power to stay the winding-up proceedings pending appeal on an application made by the Company. As mentioned earlier, the application made by the Company is not made under s.209 of Cap.32. This section provides as follows:

> "The court may at any time after an order for winding up, on the application either of the liquidator, or the Official Receiver, or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either

> altogether or for a limited time, on such terms and conditions as the court thinks fit."

6. The Company is not among those who may apply for a stay of the winding-up proceedings under this provision. Hence the Company has sought to apply for a stay under O. 59 r13 and/or the inherent jurisdiction of the court.

7. Mr Carolan who appeared for the petitioner has referred me to *Bank Negara Indonesia v. Interasian Traders Finance Limited* [1980] HKLR 622, a decision of the Court of Appeal, where Cons JA dealt with the argument there was no jurisdiction to grant a stay of winding-up proceedings made on the application of the company. Counsel who appeared for the company had relied on r210 of the Companies Winding-up Rules which provides as follows:

> "In all proceedings in or before the court, or any Registrar or officer thereof, or over which the court has jurisdiction under the Ordinance or rules, where no other provision is made by the Ordinance or rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, be in accordance with the rules and practice of the court."

8. It was contended that as s.209 does not expressly provide for a stay pending appeal, the court is bound to fall back on O. 59 r13. This argument was rejected by Cons JA who stated as follows:

> "As I see it, provision is made by s.209 and it covers all stays. It is not open to a party to come and say 'We have a particular kind of stay in mind which is not specifically mentioned in s.209 and therefore we are able to rely on Order 59.' I see no reason to think that when the legislature passed s.209 it chanced to overlook stays pending appeal. On the contrary, the actions that follow the making of a winding-up order incline me to the view that the omission was deliberate."

9. Huggins JA concurred with the judgment of Cons JA. Bewley J agreed that the order granting the stay should be set aside following the practice in *Re A & B C Chewing Gum Limited* [1975] 1 WLR 579 and stated that he did not wish to express a view on the question of jurisdiction.

10. I am bound by the decision of the Court of Appeal. I hold that I have no jurisdiction to grant a stay of the winding-up proceedings pending appeal on the application of the Company.

11. That leaves the application made by the two alleged creditors connected with the Company. Mr Glen for the Official Receiver has drawn my attention to the fact that in the Statement of Affairs filed on behalf of the Company on 16 July 2002, these applicants are not stated as unsecured creditors and that they have not filed any proof of debt up to 13 July 2002.

12. I understand from Mr Swaine that the Statement of Affairs was made by one Frederick Chen Yee Yong who is one of the defendants in HCA No. 1732 of 2002 and that he is subject to an injunction obtained by the Company restraining him from holding himself out as a director. The Statement of Affairs may or may not reflect the true position on the debt allegedly owed to these applicants by the Company. For the purpose of this application, I am prepared to accept the additional applicants are creditors and that they have locus to apply for a stay under s209.

13. I turn to consider whether I should exercise my discretion in granting a stay. The practice of the English courts is not to grant a stay of

winding-up proceedings pending appeal, the reasons for this practice as stated by Plowman J in *Re A & B C Chewing Gum* are as follows:

> "But there are very good reasons for the practice of never ordering a stay and they are these: as soon as a winding-up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at date of the presentation of the petition, having regard to the possible repercussions of s227 of the 1948 Act; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.
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> Supposing there is an appeal and the winding-up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered; it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, really no additional harm has been done once the winding-up order has been made by refusing a stay…. Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss. Of course, if the business can only be carried on at a loss - it should not be carried on at a loss, obviously."

14. This practice has been followed in Hong Kong, see for instance, *Re Cirtex Company Limited* [1987] 3 HKC 21. It does not appear to me that the reasons given by Plowman J do not apply in this instance. As I understand Mr Swaine's submission, he has contended that there are special circumstances in this case that would make it appropriate not to follow the usual practice.

15. It was submitted on behalf of the applicants that a stay pending appeal should be granted for these reasons. Firstly there is a meritorious appeal afoot. Secondly, there is a real prospect of a corporate rescue which may benefit creditors and that the Official Receiver as the provisional liquidator has not acted expediously or at all to facilitate the

proposed debt restructuring which would require the Company to maintain its listed status. If a stay of winding-up proceedings is not granted the Company will lose its listed status and the appeal would be rendered nugatory.

16. On the merits of the appeal, I will be very brief about this. Suffice it to say that I have considered the Notice of Appeal and on the ground of appeal that the winding-up order was made without jurisdiction in that the locus of the petitioner as creditor is in dispute, I am prepared to say that there is a serious argument on this ground of appeal.

17. I turn to consider the special circumstances to justify a stay. It was submitted there are real prospects of a corporate rescue. On the information made available to this court, the Company has received an indication of interest from a potential investor, Thing On Holdings Limited, on 6 June 2002. The investor set out in broad terms its proposal for debt restructuring. It proposed to enter into a subscription agreement with the Company and the directors. The investor would inject cash up to HK$50 million. Upon completion, the investor would own not less than 75% of the enlarged issued share capital of the Company. It was intended that part of the cash injection would be applied to repay outstanding debts and that the remaining debts to banks would be partly discharged and partly converted into new shares.

18. All this is subject to discussion between the investor and bank creditors and following due diligence investigation by the investor as to the financial, legal, taxation and business position of the Company, which is envisaged would take two months. This is not a concrete proposal, the

proposal is at a very preliminary stage. I would not regard this as a real prospect of a debt restructuring proposal.

19. The trading of the shares has been suspended since November 2000. The Company is in the second stage of de-listing. The shares would be de-listed on 4 September 2002, unless an extension of the deadline for de-listing is granted by the Hong Kong Stock Exchange. If an application is sought for an extension of time, the HKSE would have to be satisfied there is a viable proposal worthy of serious consideration. A lot more work would have to be done about the proposal from the potential investor to satisfy the HKSE about its viability.

20. The Official Receiver was not informed of the restructuring proposal received on 6 June 2002 at the first opportunity. The Official Receiver was notified of this only when he received the two supporting affirmations of this application filed on behalf of the Company on 24 June 2002.

21. There is no mention in any affirmation that the Official Receiver was approached regarding the restructuring proposal. Instead, both deponents stated that they are not aware that the Official Receiver has any plan to apply for special managers to be appointed to deal with negotiations with the potential investor on the restructuring proposal and with the HKSE for extension of time for de-listing. This seems to me an odd way of dealing with things. I would have thought that if the management had received what they thought to be a serious offer, they would have taken the initiative to put the Official Receiver and the major creditors in the full picture and provided cogent reasons why special

managers should be appointed as soon as possible to protect the assets, including the listed status, for the benefit of creditors.

22. I have asked Mr Swaine in the course of submissions if the Official Receiver has been approached with a request to appoint special managers. Mr Swaine informed me on instructions there were discussions but they were fruitless. Mr Glen has ascertained from his colleague who is handling this liquidation that there was one discussion with the solicitor for the applicants regarding the appointment of special managers. The gist of that discussion was that the Official Receiver informed the solicitor that there are no funds to pay for the appointment of special managers and that the Official Receiver must be put in funds for a start. On top of that, the Official Receiver must be satisfied that this is an appropriate case to apply for the appointment of special managers.

23. It would appear to be the case that things have not moved forward at all since that preliminary offer was received on 6 June 2002. Mr Swaine has confirmed this when I asked him about any further progress. I note that there is no involvement of any major creditor or bank creditor in the restructuring proposal. Mr Glen has confirmed that the investor has not approached the Official Receiver either.

24. Mr Carolan and Mr Glen are both skeptical about the proposal. Mr Glen submitted that he could detect no sense of urgency of any action required from the Official Receiver. From what has happened in this case, I agree that is a fair assessment. The Official Receiver has also informed me that he has received an unsolicited offer from another investor

introduced by Winbest Resources Limited, a supporting creditor, on 16 July 2002.

25. I have no reason to doubt that the Official Receiver would not take appropriate action including seeking an order to appoint special managers if the Official Receiver is in put in funds and if he is satisfied on the information placed before him that there is need for such action.

26. I am not persuaded there are special circumstance here to depart from the usual practice of not granting a stay of winding-up proceedings pending appeal.

27. For the above reasons, I dismiss the application.

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

Mr Paul Carolan, instructed by Messrs Siao, Wen & Leung, for the Petitioner

Mr John J E Swaine, instructed by Messrs Simon Siu, Wong, Lam & Chan, for the Company

Mr E Chan, of Messrs C Y Chan & Co., for Whole Earth Holdings Ltd, Wong Yim Wah, Frank Yu, Li Pui Kwan, Sit Yik Leung, Wilson Tang, Cheng Kwok Wo, Chan Shing Yip Alan, Man Yuk Yi and Lee Pik Chun, ten supporting creditors.

Ms C Por, of Messrs Stevenson Wong & Co., for Messrs Stevenson Wong & Co, a supporting creditor

Mr Cheng Moon Hing, of Messrs Livasiri & Co. for the Industrial and Commercial Bank of China, a supporting creditor

Mr Cheung Chi Wah, of Messrs Tony Kan & Co., for Winbest Resources Limited, a supporting creditor

Mr J Glen, for the Official Receiver