HCA 105/2021
[2022] HKCFI 3217

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO 105 OF 2021

BETWEEN

EVERGLORY ENERGY LIMITED (COMPANY REGISTRATION NO. 1794202) (IN LIQUIDATION)	1st Plaintiff
REMEDY ASIA LIMITED	2nd Plaintiff
and	
SHIH-HUA INVESTMENT CO., LIMITED	Defendant

Before: Deputy High Court Judge Le Pichon in Chambers
Date of Hearing: 5 October 2022
Date of Handing Down of Decision: 19 October 2022

D E C I S I O N

---

1. This is the appeal of Shih-Hua Investment Co Ltd ("the defendant") from the order of Master Lam dated 31 May 2022 ("the Order"). At the conclusion of the hearing, the decision was reserved which I now give.

A B C D E F G H I J K L M N O P Q R S T U V

2. Everglory Energy Limited ((Company Registration No. 1794202 (In Liquidation) ("the Company")) and Remedy Asia Limited (collectively, "the plaintiffs") sought summary judgment (A) under RHC Order 14, rule 1 in respect of their claim for (i) US $2,973,187.36 for unpaid share capital; and (ii) a loan of US $3 million; and (B) pursuant to O 27, r 3 in respect of both claims.

3. Master Lam (A) dismissed the plaintiffs' order 27 application; and (B) on the order 14 application, granted (i) summary judgment on the plaintiffs' claim for unpaid share capital; and (ii) conditional leave to the defendant to defend the claim for the loan.

OVERVIEW

4. The Company is a company incorporated in Hong Kong trading in liquefied petroleum gas (LPG) products. It has 2 shareholders, the defendant and Motivi Point Consultant Limited ("Motivi"), each holding a 50% interest. Motivi is controlled by Zhang Aidong ("Zhang").

5. Until 19 January 2017, its directors were Zhang and the defendant.

6. The defendant's complaints as against Zhang/Motivi are, *inter alia*, that it had been wrongfully excluded from participation in the management of the Company and deprived of proper access to the Company's books and records since mid-2014; and forged accounts (by the use of a forged company chop of the defendant) have been created when the Company was under Zhang's sole control.

7. Those disputes resulted in the following proceedings in Hong Kong and the BVI:

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 S T U V

(i) on 20 June 2016, the defendant presented a winding up petition (HCCW 198/2016) ("the petition") on the just and equitable grounds;

(ii) on 20 July 2016, the court granted a validation order in the petition based on Zhang's evidence, which included draft Financial Statements of the Company for the year ended 31 December 2015 stating, *inter alia,* that the Company was solvent and profitable with total cash of the US $26 million;

(iii) on 4 August 2016, Zhang on behalf of the Company presented a winding up petition in the BVI against the defendant ("the BVI proceedings") on the basis that the Company's claims against the defendant in respect of unpaid share capital and the loan were debts due and payable but the petition was dismissed by the BVI court;

(iv) on 19 January 2017, the Hong Kong court appointed Tong Piu and David James Bennett as independent directors (removing Zhang from the board and with the defendant agreeing to voluntarily remove itself) upon considering the defendant's complaints and the fact that on 13 August 2016 (less than 4 weeks after the validation order), Zhang reported that the Company's solvency was "in serious doubt";

(v) on 29 August 2018, the Company was wound up upon a creditor's petition (HCCW 173/2018) and liquidators were subsequently appointed, rendering the petition academic; and

(vi) subsequent to and on the basis of the Order, the plaintiffs have obtained judgment.

THIS APPEAL

8. The defendant seeks an order

(A) in respect of the plaintiffs' order 14 application, that it should be dismissed in relation to both claims, alternatively, that the defendant be granted unconditional leave to defend the same; and

(B) in respect of the order 27 application, that the plaintiffs should not be entitled to argue the same, alternatively, that the plaintiffs' application be dismissed.

RELEVANT BACKGROUND

9. Events material to the parties' respective submissions are set out in chronological order below:

(i) the Company was incorporated on 31 August 2012;

(ii) on 17 September 2013, the Company's board passed a resolution increasing each shareholder's holding from 500,000 to 10 million shares at US $1 per share, such shares being allotted "subject to payment in full in cash upon allotment" ("the 2013 resolution");

(iii) the additional shares were in fact allotted without any cash being paid by the shareholders;

(iv) the Company declared an interim dividend of HK$5.0791656 per share on 16 June 2014 "on 20,000,000 shares" ("the 2014 interim dividend");

(v) on 20 January 2015, Ms Song Yan Yan ("Ms Song"), Zhang's representative wrote to Zhong Jie ("Zhong") the defendant's director stating:

> "Director Zhang has directed me to deal with the issue in relation to making payment to [the Company]'s shareholder [the defendant], I will follow up with tracking and arranging this payment of US$3 million.
>
> Such payment will be paid as shareholder loan to [the defendant], and such payment will be recorded in the financial records of loan to shareholder and shall be offset with any dividends payable to shareholders in the future.
>
> For coordinating payment can [the defendant] please issue a letter in the capacity of shareholder, explains this payment of loan, and to be signed by [the defendant's] director."

(vi) the defendant replied by letter the same day:

> "As per the agreement with Mr Zhang/Ai Dong, [the defendant] would like to borrow 3 million USD from [the Company]. The payment shall be made by Jan 22nd 2014 and the interests for this borrowing is 0. This borrowing amount of 3 million USD shall be offset with any dividends paid by [the Company to the defendant] in the future."

(vii) on or about 19 May 2016, upon obtaining some books and records of the Company from its then auditor, it transpired that written resolutions approving and adopting the audited accounts of the Company for the year ended 31 December 2014 as well as the 2014 accounts themselves, only bore an in-print of the chop bearing the name of the defendant ("the forged documents");

(viii) prior to 19 May 2016, the defendant was never aware of the existence of the forged documents and reported the matter to the police, advising the Company of the same;

(ix) on 9 June 2016, after the parties had fallen out over the forged documents, Zhang's solicitors demanded (by letter) that the defendant pay the sum outstanding for the share allotment stating that, upon receiving legal advice, Zhang came to realize that payment for the allotment was necessary;

(x) in the Company's draft accounts for the year ended 31 December 2015 prepared by Zhang sent to the defendant on 11 July 2016, all the shares were still described as "Issued and fully paid"; and

(xi) Zhang convened an EGM in July 2016 to cancel the defendant's shares because of its failure to pay for the 2013 share allotment but no resolution was passed because of the deadlock.

10. In relation to the 2013 board resolution, the defendant's case is that there was a prior oral agreement between Zhang and Zhong that no payment was necessary at all.

11. At that time, Zhong was given to understand by Zhang that there was no commercial or practical need to raise any capital by allotment of shares in that the new allotment exercise was to make the Company "look good" to outsiders and that it had a lot of issued capital. Zhang further stated that

> "neither shareholder … would need to pay any money for the allotment, and the issued share capital could be treated or regarded as paid in consideration of the services and good things to be done by both [shareholders]."

12. The matters referred to in §§10-11 above are collectively referred to as "the Representation".

A B C D E F G H I J K L M N O P Q R S T U V

(A) THE ORDER 14 APPLICATION

13. It is the defendant's contention that there are triable issues and arguable defences to both claims such that the plaintiffs' application should be dismissed, alternatively the defendant should have unconditional leave to defend on both claims.

(1) Unpaid Share Capital

14. Mr Robert GM Chan, counsel for the defendant, submitted that his principal contention is that the plaintiffs do not show a clear case or a sustainable *prima facie* case for summary judgment. Secondly, the defendant has shown a believable case.

15. The Company's claim as pleaded is based on an arrangement said to be discerned from the 2014 accounts and the ledger/accounts for 2015 that payment for the share allotment would be made by the shareholders applying future dividends against each shareholder's outstanding share capital for their respective allotments, in addition to any other payments made by that shareholder[1].

16. Not only is there is no plea of an agreement between the Company and the shareholders to that effect, there is no contemporaneous document supporting the existence of such an agreement.

17. Exhibited to the plaintiffs' supporting affidavit of Bruno Arboit is a one-page document described as "Breakdown On Accounts for

[1] See the Statement of Claim ("SOC") at §5.

A B C D E F G H I J K L M N O P Q R S T U V

December 2015" ("the 2015 Breakdown") the provenance of which is not stated: it is undated, not audited and contains obvious errors[2].

18. The 2015 Breakdown bears a strong resemblance to various extracts from documents produced by JunHe acting for the Company on 3 June 2016 when the parties were at loggerheads. Interestingly, in all 3 accounting documents disclosed ("the June 2016 records")[3], payment for the new allotments comes under the heading "Loans due from shareholders" while in the 2015 Breakdown it is characterized as "Share Capital receivable".

19. The defendant's evidence is to the effect that there was an oral agreement between Zhang and Zhong that no payment was necessary at all for the new allotments and the defendant signed the 2013 resolution on that basis.

20. As earlier noted, although the 2013 resolution stated that the share allotments were "subject to payment in full in cash upon allotment", they were in fact made without any cash payments from the shareholders.

21. Consistent with the Representation, the Company's annual returns and financial reports all state that the additional shares had been "fully paid", "paid up" or "regarded as paid up" save for the 2014 audited accounts[4].

---

[2] They relate to USD equivalent to various sums expressed in HKD.

[3] See B4/60/1013-1015.

[4] The 2014 accounts simply state that "since 3 March 2014, the concept of authorised share capital no longer exists … the [Company's] share no longer have a par or nominal value … There is no impact on the number of shares in issue or the relative entitlement of any of the members as of this transition". Cf. The Company's 2014 annual return made up to 31 August 2014 and dated 1 September 2014 signed by Zhang stated that the USD20 million for 20 million issued shares has been "Paid up or Regarded as Paid up".

A B C D E F G H I J K L M N O P Q R S T U V

22. Moreover, it is significant that the 2014 interim dividend was declared on 20 million shares. Pursuant to Article 119 of the Table A, only paid up or credited as paid up shares would be entitled to receive dividends. If consideration for the allotted shares remained due and payable, it is inexplicable why the Company would resolve to declare dividends on all 20 million shares.

23. In the BVI proceedings, Judge White stated as follows:

> "Mr Meeson [QC] [the defendant's counsel] accepted before me that he could not really argue that [the defendant] was not under a liability to repay … a further sum of just under US $3 million, being the balance due, he would say, in respect of a shareholder's loan, that loan having arisen in connection with the original liability to pay for shares in cash on allotment … However, he says that there is a bona fide and substantial dispute as to whether those sums are now due and payable." (Tr. p. 32, l. 21- p.33, l. 7)

24. Judge White accepted[5] that there was sufficient evidence to raise at least a *prima facie* case as analysed by Mr Meeson, namely, that the shareholders treated the sums that each of them owed in respect of the relevant shares on allotment as having been discharged and in place of such obligations there being loan obligations.

25. It is noteworthy that the SOC makes no mention of any share allotment loan or of the 2013 accounts.

26. It was submitted that the plaintiffs have not shown a clear case for summary judgment based on the 2015 Breakdown.

27. Mr Sussex SC appeared for the plaintiffs, being the Company in liquidation and its funders. He emphasised that his instructions come from the liquidator of the Company who is seeking to realize a debt which

[5] Tr. p. 23, ll. 8-11 and p. 25, ll.10-12.

A B C D E F G H I J K L M N O P Q R S T U V

appears from the books and records of the Company to be due and owing. They do not come from Zhang.

28. The Company's case in relation to the new shares is that the return of allotments dated 17 September 2013 shows that 19 million new shares allotted to the shareholders were not paid up at the time of allotment.

29. The balance sheet of the 2013 accounts[6] shows the Company as having (in round terms) net assets of HK$256 million financed by its share capital[7] of HK $155 million comprising the 2013 allotment of 19 million ordinary shares with a value of HK $147 million and a HK $101 million surplus from its profit and loss account.

30. Its current assets included "trade and other receivables" of $444 million of which HK $147 million is an amount due from shareholders[8] corresponding exactly to the value of the 2013 allotment of 19 million ordinary shares.

31. As the 2013 accounts were approved and signed by the defendant, it must have known that there was an amount due in respect of the 2013 share allotment.

32. Section 170 of the Companies Ordinance, Cap 32 ("the CO") provides as follows:

> "(1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the

---

[6] This covered period from 31 August 2012 (the date of incorporation) to 31 December 2013.

[7] According to Note 12 of the 2013 accounts, the 20 million ordinary shares making up the Company 's share capital were "Issued and fully paid".

[8] See Note 8 to the 2013 accounts which states that "amounts due from shareholders … are interest-free and unsecured, and there is no fixed repayment term".

A B C D E F G H I J K L M N O P Q R S T U V

> company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding up … subject to the … following qualifications –
>
> …
>
> (d) in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member…"

33. The Company submitted that given that section 170 was designed to enable the liquidator of the company to realize monies for the benefit of those entitled to prove in the winding up, it must be the case that it is the substance rather than the form that matters in ascertaining whether, in reality, there is an amount "unpaid on the shares".

34. The plaintiffs submitted that section 170 triggers the obligation of present members of the Company to contribute in the winding up subject to the limitation imposed in subparagraph (d). That provision limits the amount of contribution to the "amount … unpaid on the shares". Any accounting treatment by the shareholders cannot alter the fact that in reality there is an amount unpaid for the shares allotted in 2013.

35. It was further submitted that if, as Judge White appeared to accept the shareholders treated the indebtedness as an unpaid shareholders' loan, it cannot make any difference.

36. The defendant's stance was that there was no amount "unpaid" on the shares. There was no unpaid share capital debt as it had been treated by the shareholders as "discharged" and replaced by shareholders' loans.

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 S T U V

37. The short point is whether the plaintiffs' construction is correct. There does not appear to be any case law on the proper construction of section 170. Although the defendant cited *Re Greater Beijing Region Expressways Limited* [2000] 2 HKLRD 776 at 781B-782D, that decision does not concern the point of construction that arises in the present case.

38. In the circumstances, the point of construction remains an open one.

39. The plaintiffs went on to submit that in any event the defendant's version of events is implausible.

40. It is the defendant's evidence[9] that at the time of the new allotment, the Company's business was very profitable, referring to the 2013 accounts showing profits of HK $101 million.

41. The plaintiffs referred to the minutes of the 1st shareholders' and 1st directors' meeting of the Company held on 29 January 2015 and submitted that they show otherwise. It is recorded that Hua Xue Liang an associate general manager representing management reporting on the business conditions in 2013 had to explain why there was a shortage of funds for running the business in 2013.

42. Apart from the disclosure recorded in those minutes (which did not come to light until the meeting itself on 29 January 2015), there is nothing I have been shown to suggest that the defendant had knowledge of this state of affairs when he signed the 2013 resolution believing in and relying on the Representation.

---

[9] See Zhong's affidavit dated 27 July 2022 at §20.

43. As regards the 2015 Breakdown, I have already remarked on its strong similarity to parts of the June 2016 records. Although JunHe's covering letter stated that those records were provided by the Company's auditors who were then still engaged in the preparation of the accounts for 2015 (thus explaining their provenance), the same cannot be said of the 2015 Breakdown.

44. As noted in §18 above, the characterization of the shareholders' loans as "Share Capital receivable" cannot be found in the June 2016 records and therefore the 2015 Breakdown must have come into existence after that date. I also note that it is the same document as that referred to in §13 (b) of the affirmation of Margaret Man Ting Wo filed in support *inter alia* of the plaintiffs' service out summons. The 2015 Breakdown is there referred to as the 'the Company's breakdown of accounts for 2015' but did not state where the document came from.

45. Insofar as the defendant had intimated that he had contributed in kind for the new allotment, it was not pursued at the hearing. The plaintiffs invited attention to the fact that had there been any contribution in kind[10], that would have been attributed a value and reflected in the accounts. In any event, that suggestion did not feature at the time of the BVI proceedings[11].

46. In my view, the plaintiffs have not shown a clear case for summary judgment on the unpaid share capital. There are triable issues and the defendant must be given unconditional leave to defend.

---

[10] This notion was part of the Representation: see §11.

[11] The evidence of contribution in kind did not appear until Zhong's affidavit (at §16) but the same does not feature in §15 of Yang's affirmation filed in the BVI proceedings in 2016 which is otherwise identical in substance.

A B C D E F G H I J K L M N O P Q R S T U V

(2) The Loan

47. The backdrop to the loan appears in §§49-52 of Zhong's affidavit. His evidence is that by June 2014, in view of the surplus profit of HK $101 million at the end of 2013 and the fact that based on the financial and accounting information presented by Zhang to the effect that the Company was doing well in the 1st half of 2014, the 2014 interim dividend resolution was passed, declaring an amount equal to the amount of surplus profits made in 2013 to be the 2014 interim dividend.

48. Once declared, distribution of the interim dividend should follow. However, Zhang procrastinated on the basis that the Company was still waiting for the auditor's preparation of the 2014 audited accounts. The defendant was unhappy with Zhang's explanation because there had been a clear agreement and resolution between the shareholders and directors that an interim dividend be declared and that it would be payable on 16 June 2014. Moreover, as the dividend declared was equal to the amount of profit carried forward from 2013, it could be paid out even without a set of audited accounts for 2014. However, not being in control of the management, there was little Zhong could do except to keep on pressing for some payment pending completion of the 2014 accounts.

49. In November 2014, Zhong was provided with some provisional accounting documents that indicated that the Company had a net profit of over HK $42 million in the quarter ending 30 June 2014. The defendant was eager to get some payment. After some discussion, in January 2015, the parties reached a consensus that the defendant could withdraw some money first by way of a loan. That resulted in the email exchanges recorded §9 (v)-(vi) above.

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 S T U V

50. While in Ms Song's email the relevant offset provision is translated as "shall be offset with any dividends *payable* to shareholders", in the defendant's email written at Ms Song's request, it is translated as "shall be offset with any dividends *paid* by [the Company to the defendant] in the future".

51. The defendant's case based on Zhong's evidence is that it is entitled to have 2014 interim dividend applied against the loan. The plaintiffs disagreed and submitted that the emails were addressing prospective dividends to be paid in the future. Plainly what was actually agreed cannot be determined in the absence of *viva voce* evidence.

52. In so far as it was said that the defendant has already had the benefit of the 2014 interim dividend through it having been applied to offset the unpaid share capital, that point has already been addressed: there is no evidence to support any agreement to that effect and the 2015 Breakdown is clearly problematic.

53. In my view, the defendant must be granted unconditional leave to defend the loan.

(B) THE ORDER 27 APPLICATION

54. The plaintiffs' case is based on 'admissions' by the defendant's counsel in the BVI proceedings, relying on the extract from the transcript of the Decision by Judge White. The defendant's written submissions put up a strong case that the subject matter of the admission was the shareholder's loan applied to discharge the amount due for the new allotment.

A B C D E F G H I J K L M N O P Q R S T U V

55. As noted in §24 above, Judge White accepted[12] that there was sufficient evidence to raise at least a *prima facie* case that the shareholders treated the sums that each of them owed in respect of the relevant shares on allotment as having been discharged and in place of such obligations there being loan obligations.

56. The "loan" under consideration in the extract from the Decision on which the plaintiffs rely is in fact the "share allotment loan". Therefore, what the defendant's counsel could not really argue was a liability to repay under the share allotment loan and not the share capital which had been treated as fully paid.

57. As to the share allotment loan, Judge White held there to be a bona fide and substantial dispute as to whether those sums were due and payable apart from the issue of authority.

58. I am far from persuaded that there was any admission by the defendant's counsel during the BVI proceedings that there was an obligation to pay up on the shares as distinct from potential liability in respect of the share allotment loan but whose terms "require explanation in oral evidence".

59. At the hearing, Mr Sussex wisely intimated that he was 'not pushing' the order 27 application and made no oral submissions on it.

CONCLUSION

60. Accordingly, in relation to the plaintiffs' summons for summary judgment, the defendant's appeal is allowed in respect of the unpaid share capital claim and the Order is varied in respect of the loan

[12] Tr. p. 23, ll. 8-11 and p. 25, ll.10-12.

such that leave to defend is unconditional. In all other respects the Order is affirmed.

61. There is to be an order *nisi* of costs in favour of the defendant with certificate for counsel, such costs to be summarily assessed and payable forthwith. It is further directed that the defendant lodge its statement of costs within 7 days of this Decision, the plaintiffs their objections within 14 days thereafter and the defendant its reply (if any) within 7 days thereafter.

62. Summary assessment will take place in Chambers.

(Doreen Le Pichon)
Deputy High Court Judge

Mr Charles Sussex SC and Mr Toby Brown, instructed by Lau, Horton & Wise LLP, for the 1st – 2nd plaintiffs

Mr Robert G M Chan, instructed by Alvan Liu & Partners, for the defendant