

LEGALUPDATE

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CASE UPDATE

Hong Kong Highest Court Rules On Court's Wide Power To Order Production Of Documents In Liquidation Proceedings

The Joint & Several Liquidators of Kong Wah Holdings Limited (in compulsory liquidation) v The Grande Holdings Limited & Ors [2006] HKCU 2083

Background

Following the collapse of a number of entities within the Akai group of companies (the “**Companies**”) in what the court described as the largest corporate insolvency in the history of Hong Kong, the liquidators of the Companies commenced investigations into the Akai group’s complex structure and the dubious evaporation of substantial assets. In that connection, the liquidators applied under section 221 of the Hong Kong Companies Ordinance (“**Section 221**”) for orders compelling the production of documents and the examination on oath of certain former officers of the Companies. The liquidators succeeded in obtaining the orders sought before both the court at first instance and the Hong Kong Court of Appeal.

Appeal to the Hong Kong Court of Final Appeal

The Companies appealed to the Hong Kong Court of Final Appeal, challenging the court’s jurisdiction to grant the orders sought under Section 221 on various grounds. Central to the Companies’ arguments were the caselaw and principles relating to discovery, subpoenas, witness summonses and letters of request, which included contentions to the effect that:

- the orders amounted in practice to discovery orders;
- the documents had not been specified with sufficient detail / certainty; and
- the orders should not have been made if it was unclear as to whether the documents sought actually existed.

Decision of the Hong Kong Court of Final Appeal

The appeal was unanimously dismissed by the Court of Final Appeal.

The court noted at the outset that the object of discovery, subpoenas, witness summonses and letters of request were so fundamentally different from the procedure under Section 221 that “*authorities on the one provide no guidance to the other*”. The former are concerned with adversarial litigation or arbitration and are aimed at ensuring that the court or tribunal has all relevant evidence to determine the dispute in question. By contrast, Section 221 is intended to enable a liquidator to gather information as part of a continuing process of investigation. The court noted that the powers under Section 221 are, by design, “*extraordinary*” as the liquidator is usually a stranger to the affairs of the company and has to embark on “*fishing*” or speculative expeditions in order to reconstitute the state of the company’s knowledge, to

unearth information on potential claims against third parties and/or to amass sufficient knowledge to report on potential action to be taken against persons responsible for the companies' failures.

Against this backdrop, the Court of Final Appeal held that Section 221 enabled the court to order the production of all documents "*relating to the company*", unfettered by the rules on discovery applicable in litigation proceedings. There is no requirement for a liquidator to identify the documents with sufficient particularity; he must show that he is reasonably entitled to require production of the documents in the terms by which they are described whilst the court would "do what it can" to define them as closely as possible consistently with making the order effective. A liquidator is entitled to enquire as to the whereabouts of missing documents so that he can seek their production. There is no requirement that a liquidator who seeks the production of a document must establish affirmatively that the document exists and is in the possession, custody or power of the party ordered to produce them – it is for the party from whom production is ordered to satisfy the court that the document does not exist.

Comment

Section 285 of the Singapore Companies Act is substantially similar to Section 221. The wide powers under section 285 of our Companies Act and its inquisitorial nature have been recognised in the Singapore High Court of *Liquidator of W&P Piling Pte Ltd v Chew Yin What & Ors* [2004] 3 SLR 164.

However, the applicability (or otherwise) of the principles relating to discovery, subpoenas, witness summonses and letters of request in the context of section 285 of our Companies Act has not been canvassed in detail in a Singapore reported judgment. The Hong Kong Court of Final Appeal's observations that liquidators are justified in engaging in "fishing" or speculative expeditions to prise information on the company's affairs are also interesting. Liquidators would welcome the adoption of such an approach in Singapore to combat the daily challenges faced by them in carrying out their investigative functions and duties.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our website), or any of the following lawyers:

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