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Re Yung Kee Holdings Ltd – The End of an Era?

In *Kam Leung Sui Kwan v Kam Kwan Lai and Ors (FACV No 4 of 2015)*, the Court of Final Appeal was asked to consider the First Instance and Court of Appeal decisions in the Yung Kee Holdings saga. The long-running tale concerns the famous Hong Kong roast goose restaurant established by the petitioner's late father, Kam Shui Fai (**Kam Senior**), who bequeathed the business to his two sons, Kam Kwan Sing (the **Petitioner**), now also deceased, and the Petitioner's brother, Kam Kwan Lai, the 1st Respondent (**Kwan Lai**). In a unanimous decision, the Court of Final Appeal ordered that the business be wound up, but gave the parties 28 days to discuss a share buy-out.

The Petitioner alleged that the affairs of the business, Yung Kee Holdings Limited (the **Company**), were being carried on in a manner which was unfairly prejudicial towards him and sought an order under s. 168A of the Companies Ordinance (Cap 32) (the **Ordinance**),[1] that Kwan Lai buy his shares in the Company or alternatively that the Company be wound up on just and equitable grounds under s. 327(3)(c) of the Ordinance[2].

The Company was incorporated in 1994 in the British Virgin Islands. It is solvent and purely a holding company, carrying on no business in its own right, having no employees and no bank account. Its only asset consists of the shares in its wholly owned BVI subsidiary, which in turn held the shares of Hong Kong operating subsidiaries, yet the Company never played any part in the business of the group of which it was the ultimate holding company.

Unfair prejudice – s.168A

The Court at first instance found that given the Company's place of incorporation, it had no jurisdiction to make an order under s.168A. The Company's connection with Hong Kong was not sufficiently strong to justify the Court exercising its jurisdiction to make a winding up order. The trial judge, Mr. Justice Harris, nonetheless found that the affairs of the Company had been carried on in a manner that was unfairly prejudicial to the Petitioner, a finding rejected by the Court of Appeal.

In deciding whether to make an order under s.168A, which applies to companies *"incorporated outside Hong Kong which establish a place of business in Hong Kong",* the CFA had to consider whether the Company had in fact established a place of business in Hong Kong. In finding that there was *"no evidence where any of the company's activities were undertaken during the relevant period"*, the CFA held that it saw no reason to disagree with the findings of the lower courts that the Company (as opposed to its indirectly held operating subsidiaries) had not established a place of business in Hong Kong and that the Court therefore had no jurisdiction to order a share sale.

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[1] Now ss. 722 to 726 of the new Companies Ordinance, Cap 622.
[2] The provision is now retained as s.327(3)(c) of the newly-renamed Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32.

Winding-up – s.327

On the second part of the Petition, the CFA said the central question was whether there was a sufficient connection between the Company and Hong Kong to justify the Court in ordering the Company to be wound up despite the fact that it is incorporated in the BVI.

The Court did not agree with the lower Courts that a *"more stringent"* connection was required in the case of a shareholder's petition than in a creditor's petition, noting that *"shareholders, no less than creditors, are entitled to bring winding up proceedings in Hong Kong in respect of a foreign company".*

The CFA held that the test for winding-up a foreign company is the same in respect of both a shareholder's petition and creditor's petition, namely: (i) there is a sufficient connection with Hong Kong (usually, but not necessarily, the presence of assets within the jurisdiction); (ii) there is a reasonable possibility that the winding-up order would benefit those applying for it; and (iii) the Court is able to exercise jurisdiction over one or more persons in the distribution of the company's assets.[3]

However, the factors to which the Court will look in determining whether there is a sufficient connection between a (solvent) foreign company and Hong Kong in the context of a shareholder's petition are different to those to which it looks in the context of a creditor's petition to wind-up a (insolvent) company *"because the nature of the dispute and the purpose for which the winding up order is sought are different."* A creditor presents a winding-up petition on the premise that the company is insolvent. For a shareholder, the basis of the petition is to realise value for its shareholding but there is not a claim against the company itself.

The Court found the factors relied upon by the Petitioner to establish the connection with Hong Kong were "*compelling*". These factors included the presence of all the Company's shareholders and directors in Hong Kong (and the fact that none of them had ever set foot in the BVI), the dispute is a family dispute between parties all of whom were resident in Hong Kong and the events giving rise to it and the conduct of which complaint is made all took place in Hong Kong, and that the whole of the Company's income was derived from businesses carried on in Hong Kong. The Court therefore found there to be a sufficient connection with Hong Kong. (As an aside, the Court noted that if the Company held all its subsidiaries directly instead of indirectly through its BVI subsidiary, that alone would have provided a sufficient connection to justify the Court in exercising its jurisdiction to wind up the Company.)

Having found it had jurisdiction to determine whether the Company should be wound up, the Court turned to whether to order it to be wound up on just and equitable grounds.

The Court agreed with the trial judge that there was a mutual understanding between the brothers about how the business should be run and that the Petitioner had a *"reasonable expectation, in the light of previous practices, that his views and position within the group should be respected".* This understanding, which *"went beyond the corporate structure of the Company"*, had been breached by Kwan Lai, who, the Court remarked, preferred to *"dictate"* matters by using various procedural devices (such as passing prejudicial company resolutions) to consolidate his control. The Court decided in the circumstances to allow the appeal and order the Company to be wound up.

The Court prescribed a 28-day moratorium however to allow the parties an opportunity to consider whether, as an alternative to the winding-up, the Petitioner's shares may be purchased, and if so, on what terms. If a deal cannot be reached, it is reported that the liquidator intends to put the iconic Central restaurant up for auction, bringing an end to the 73-year history of the brand.

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[3] *Re Beauty China Holdings Ltd [2009] 6 HKC 351,* cited with approval by the CFA.

Implications

Whilst the CFA's panel of five judges, led by the Chief Justice Geoffrey Ma and Millet NPJ, found that it had no jurisdiction under s.168A to order a buy-out of shares directly (because of the lack of a *"place of business"* required under that section to found jurisdiction), the Court then went on to find it had jurisdiction to wind up the Company, citing (amongst other things) the presence of the Company's shareholders in Hong Kong as *an "extremely weighty factor in establishing the sufficiency of the connection between the company and Hong Kong".*

The CFA's decision is likely to be influential in the context of family shareholders' disputes in Hong Kong (given many Hong Kong family businesses are structured and carried-on in a similar way to the Yung Kee business) to the extent that disputing shareholders can have recourse to the draconian remedy of the winding-up of the foreign holding company to "realise their investment" – in circumstances where that company is otherwise solvent and healthy.

However, given the factors to which the Court looks to establish a connection between the foreign company and Hong Kong differ between a shareholder's petition (on the one hand) and a creditor's petition (on the other), the CFA's decision will not necessarily expand the range of circumstances in which the Hong Kong Courts will be willing to find such a connection in the context of a creditor's petition, sufficient to order the foreign company's winding-up. The main factor will usually continue to be the presence of the company's assets in Hong Kong.

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