

HONG KONG COURT OF APPEAL CONFIRMS LIQUIDATORS' WIDE- RANGING POWERS OF DISCOVERY

In another decision that will be welcomed by insolvency practitioners in Hong Kong, the Court of Appeal has affirmed that a liquidator's powers of discovery should be widely interpreted. Recent amendments to the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO) mean that similar questions of interpretation are unlikely to arise again in practice, but the Court's attitude to assisting liquidators is certainly something to note and adds to the body of recent case law helpful to Hong Kong practitioners.

BACKGROUND

The provisional liquidators of China Medical Technologies Inc (the Company) applied for the examination of Samson Tsang, the former director and chief financial officer, and the production of documents to determine whether the Company's assets had been misappropriated. They also wanted to investigate the value and recoverability of any actual or contingent causes of action that might be available to the Company.

The Company was a Cayman Islands company, not registered in Hong Kong. It was the holding company of a group of companies engaged in manufacturing and marketing medical equipment in China. The Company was wound up in the Cayman Islands in July 2012 and placed into bankruptcy in New York in August 2012. In the words of the Court of Appeal, it appeared to be "*massively insolvent*", with a deficiency in its assets exceeding US\$400 million. Acting through its Cayman Islands Joint Official Liquidators, the Company petitioned for its own winding up in Hong Kong, which was granted on 1 September 2014.

The liquidators suspected that the Company had dissipated its assets by entering into transactions with entities connected with its main beneficial shareholder. Information obtained by the liquidators suggested that two major technology acquisitions were bogus and resulted in the removal from the Company of some US\$355 million. The liquidators suspected Mr Tsang's involvement in the transactions.

Key issues

- The Court of Appeal has found the Court's powers for oral examination and document production are similar.
- Recent amendments to the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) reflect the "expanded" scope of the Court's powers.
- The Court has power to order the examination of persons and the production of documentation where a provisional liquidator is appointed, a winding up order is being made or when voluntary winding up has commenced.

In deciding the orders to be made to allow the liquidators to determine any claims available against third parties and offences which may have occurred, Mr. Justice Harris had to interpret the scope of the relevant discovery provisions in CWUMPO.

THE COURT OF FIRST INSTANCE'S DECISION

Mr. Justice Harris took the view that the ambit of section 221(3) of CWUMPO governing the production of documents is significantly narrower than the scope of section 221(2) on oral examination. Section 221(3) gave the court powers to require a person to produce documentation "*relating to the company*", while section 221(1) stated that the court may summon and examine a person on "*the promotion, formation, trade, dealings, affairs, or property of the company*".

Mr. Justice Harris applied Madam Justice Kwan's decision in *Weihong Petroleum Co Ltd (No 2), Re* [2003] 2 HKLRD 747 and found that the distinction in the wording to describe the scope of matters applicable for oral examination and document production was materially different and reflected the intention of the legislature to draw different boundaries on the coverage of each of the Court's powers.

Following a more literal interpretation of the provision, Mr. Justice Harris ordered the examination of Samson Tsang but not the production of documents. The liquidators appealed against the refusal to order the production of documents.

THE COURT OF APPEAL'S DECISION

The Court of Appeal considered the key argument in Mr. Justice Harris' decision but gave weight to *The Joint & Several Liquidators of Kong Wah Holdings Ltd v Grande Holdings Ltd* [2006] 9 HKCFAR 766, [2006] HKCU 2083. The Court noted that while the Court of Final Appeal in *Kong Wah* did not express a view as to the difference in the scope of orders for oral examination and production of documents, it is the authority on the purpose of section 221 and the need to interpret section 221 widely in light of that purpose.

The purpose of section 221, as stated in *Kong Wah*, is to enable the liquidators to carry out their functions effectively, these being (i) to collect the company's assets, settle its liabilities and distribute the remaining funds among its creditors; and (ii) to investigate the causes of its failure and the conduct of those involved in its dealings and affairs.

Lord Millett NPJ had described the section as a vital part of the insolvency regime, being "*designed to meet the difficulty usually faced by liquidators (who were usually strangers to the company) in finding out about the company's assets and the reasons for its failure.*" The legislative purpose required that the powers conferred on the Court should be wide, general and unlimited, allowing liquidators to carry out their duties as effectively, quickly and economically as possible. Considering that the goal of both methods of obtaining information is the same, the Court of Appeal was inclined to take the view that the scope of both powers should be similar.

The Court of Appeal also considered the legislative history of section 221 in coming to its decision. When section 221 was first enacted in Hong Kong, the powers to order examination and to produce documents were not divided into subsections. Such format and structure indicated that the scope of each power should be similar, if not exactly the same.

The Court of Appeal also found support from the substantially identical provision in the legislation in Singapore where case law has stated that there was no difference in the liquidator's application to produce documents and to orally examine witnesses.

IMPLICATIONS

The Court of Appeal's decision factored in the legislative purpose and history of section 221 and it is perhaps notable that this position is also in line with the recent amendments to CWUMPO.

Sections 286B and 286C of CWUMPO have now replaced section 221 on the powers to order examination of persons concerned with company property and provision of information. The wording of the two sections has been revised in a similar manner and reflects the intention that it is within the Court's power to order the examination of persons and the production of documentation relating to *the promotion, formation, trade, dealings, affairs or property of the company* where a provisional liquidator is appointed, a winding up order is being made or when voluntary winding up has commenced.

When liquidators are able to obtain oral or written information to identify the assets of the company and investigate why it is insolvent, they are able to draw a clearer picture of the situation in which the company finds itself. Liquidators should therefore be welcoming towards the "*expanded*" scope of the Court's powers in this area.

CONTACTS

Scott Bache
Partner

T +852 2826 3493
E scott.bache
@cliffordchance.com

Donna Wacker
Partner

T +852 2826 3478
E donna.wacker
@cliffordchance.com

Joanna Charter
Consultant

T +852 2826 2458
E joanna.charter
@cliffordchance.com

Robert Child
Senior Associate

T +852 2826 3509
E robert.child
@cliffordchance.com

Phoebe Lo
Senior Associate

T +852 2826 3465
E phoebe.lo
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House,
One Connaught Place, Hong Kong

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