HCMP 833/2017

[2018] HKCFI 277

**IN THE HIGH COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 833 OF 2017

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 IN THE MATTER of an application for recognition and assistance by the Joint Liquidators of Supreme Tycoon Limited (in liquidation in the British Virgin Islands)

 and

IN THE MATTER of the inherent jurisdiction of the Court

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Before: Hon Harris J in Chambers

Date of Written Submission: 21 July 2017

Date of Decision: 8 February 2018

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| D E C I S I O N |

Introduction

1. This application raises an issue on which there is as yet no authority in Hong Kong, namely whether a foreign insolvent liquidation commenced by a shareholders’ resolution is eligible for common law recognition and assistance in Hong Kong.
2. On 9 May 2016 the East Caribbean Supreme Court (“**Supreme Court**”) ordered the winding-up of China Culture Media International Holdings Limited (“**China Culture**”), which is incorporated in the British Virgin Islands (“**BVI**”), and appointed Mr Paul Pretlove and Mr Gwynn Hopkins as the joint liquidators. China Culture is the sole shareholder of Supreme Tycoon Limited (“**Company**”), which is also incorporated in the BVI.
3. On 6 September 2016, Mr Pretlove, acting as joint liquidator and on behalf of China Culture, passed a written shareholders’ resolution to wind up the Company, and to appoint himself and Mr Hopkins as joint liquidators of the Company.
4. On 20 February 2017, the Supreme Court appointed Mr Bruno Arboit a joint liquidator of the Company, in place of Mr Hopkins.
5. The applicants, namely Mr Pretlove and Mr Bruno Arboit as the joint liquidators of the Company, would like to obtain information, books and records about the Company’s affairs from various third parties in Hong Kong. There may also be assets in Hong Kong to recover. Hence the applicants’ need to obtain this Court’s recognition and assistance.
6. Accordingly, the applicants obtained the Supreme Court’s letter of request to this Court for recognition of the applicants’ appointment. The letter of request was issued on 17 March 2017.

Nature of the Company’s Liquidation

1. In his affidavit in support of the application, the applicants’ BVI legal advisor explains the nature of the Company’s liquidation under BVI law as follows:

(1) The Company’s liquidation is an insolvent liquidation.

(2) Although the Company was put into liquidation by a shareholders’ resolution, it is a fully court-supervised liquidation.

(3) The liquidators of the Company are officers of the Supreme Court.

(4) The powers and duties of the liquidators are the same as liquidators appointed by the Supreme Court.

1. Therefore, it appears that the Company’s liquidation is in all respects akin to a compulsory winding-up, although its entry route was via a shareholders’ resolution.

Common Law Power of Assistance – Voluntary Liquidation

1. In *Singularis Holdings Limited v PricewaterhouseCoopers*,[[1]](#footnote-1) the Privy Council (by a majority) suggested *obiter* that the common law power to recognise and assist foreign insolvency proceedings would not extend to voluntary liquidations:

“[T]here is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, *it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement* and although subject to the directions of the court is not conducted by or on behalf of an officer of the court.” (*Emphasis added*.)

1. However, the Singapore court in *Re Gulf Pacific Shipping Ltd*[[2]](#footnote-2) declined to follow the Privy Council’s dicta and proceeded to recognise a Hong Kong creditors’ voluntary liquidation. The Singapore court reasoned as follows:

“[T]he foundational doctrine in the recognition of foreign insolvency proceedings is the promotion and facilitation of the orderly distribution of assets, as well as the orderly resolution and dissolution of the affairs of entities being wound up. The traditional, territorial focus on the interests of local creditors no longer has primacy over more internationalist concerns. Thus, the precise mode of the winding up would not generally be material, and no distinction should be drawn between voluntary and compulsory processes, or between in court and out of court dissolution. That, I believe, was the philosophical basis of the approach in *In re Betcorp Ltd* [400 BR 266 (Bankr D Nev 2009)], in which Judge Markell considered a broader approach to the interpretation of the relevant provisions of the US Bankruptcy Code, international usages and the UNCITRAL Model Law.” [[3]](#footnote-3)

1. With respect, I too would not follow the Privy Council’s dicta, for the following reasons.
2. As I explained in *Joint Official Liquidators of A Company v B*,[[4]](#footnote-4) the rationale underlying the common law power of assistance is modified universalism. In the conventional case, one would expect an insolvent company to be wound up in its place of incorporation and for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong. In the case of liquidators appointed in jurisdictions with similar insolvency regimes to Hong Kong, the assistance may extend to granting orders that give the foreign liquidators substantially similar powers to, for example, investigate the affairs of a company by examination and orders for the production of documents as a Hong Kong liquidator would have. Indeed, as recognised by the Privy Council, the common law power of assistance exists for the purpose of surmounting the practical problems posed for a worldwide winding-up of the company’s affairs by the territorial limits of the powers of each country’s court.[[5]](#footnote-5)
3. It is not obvious that the above rationale and purpose of cross‑border insolvency assistance would call for a distinction between compulsory and voluntary winding-up.
4. The Privy Council’s *obiter* objection to recognising foreign voluntary winding-up seems to be that the foreign liquidator is not an officer of the foreign court and the winding-up is thus merely a private arrangement. However, while there is no doubt a difference between compulsory and voluntary winding-up in terms of the level of court supervision, the difference is one of degree, not of kind. The classic statement explaining the difference between the two forms of winding-up is as follows:[[6]](#footnote-6)

“In the case of voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditors’ liquidation, the creditors, through their committee of inspection, are in control as against the contributories; while in the case of a members’ voluntary winding up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that in both forms of voluntary winding up the court is in the background to be referred to if the necessity should arise. In the case of a winding up by the court, however, different considerations arise. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control.”

1. In my view, what matters for cross-border insolvency assistance is not whether the foreign insolvency officeholder is or is not an officer of the foreign court. What matters is whether the foreign proceeding is collective in nature, in the sense that it is “a process of collective enforcement of debts for the benefit of the general body of creditors”.[[7]](#footnote-7) It is with collective insolvency proceedings that the principle of modified universalism is concerned.[[8]](#footnote-8)
2. Furthermore, the purpose of cross-border insolvency assistance consists in meeting the foreign insolvency officeholders’ practical needs. As recognised by the Privy Council, the common law power of assistance is available only when it is necessary for the performance of the office‑holder’s functions.[[9]](#footnote-9) Where a foreign insolvency proceeding is a collective proceeding and the foreign insolvency officeholders need the Hong Kong court’s assistance to discharge their functions, it would seem arbitrary and unduly restrictive to insist that they are not entitled to assistance merely because they were not appointed by the foreign court. Indeed one commentator cited by the applicants argues thus:

“It is suggested that the discrimination against non-court appointed officeholders is unhelpful. Insolvency representatives may be officers of the court without court appointment and they need the same information for the performance of their functions as their court-appointed counterparts.” [[10]](#footnote-10)

1. Therefore the mere fact of a foreign liquidation being a voluntary liquidation is no bar to the Hong Kong court recognising and assisting that liquidation under the principle of modified universalism. However, if the foreign liquidation is a solvent liquidation (for instance, a members’ voluntary liquidation), it would not fall within the principle of modified universalism. A foreign solvent liquidation is not a collective insolvency proceeding, and is more akin to the “private arrangement” the Privy Council was referring to. In this connection, with respect, I agree with Lord Neuberger’s dissenting observations in *Singularis*.[[11]](#footnote-11) Accordingly, unlike the Singapore court, I would not rely on the US Bankruptcy Court’s decision in *In re Betcorp Limited*[[12]](#footnote-12) which concerns an Australian members’ voluntary liquidation being recognised under Chapter 15 of the US Bankruptcy Code. At any rate, it appears that *Betcorp* is a controversial decision even from the perspective of the UNCITRAL Model Law on Cross-Border Insolvency: see Look Chan Ho, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*,[[13]](#footnote-13) pp 185–189; UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross‑Border Insolvency (2013) at [73].
2. In the present case, if the Company’s liquidation in the BVI were a compulsory winding-up, there would be no question that this Court could recognise the applicants as joint liquidators of the Company and assist them in carrying out their functions. It follows from above principles that there is no bar to this Court recognising and assisting the applicants as joint liquidators of the Company, despite the fact that the Company’s liquidation was commenced by a shareholders’ resolution. The Company’s liquidation in the BVI is a collective insolvency proceeding. In any event, as the applicants are officers of the Supreme Court, though not appointed as such by the Supreme Court, they probably could be recognised even under the Privy Council’s more restrictive approach in *Singularis*.[[14]](#footnote-14)

Conclusion

1. For the reasons I have given, I consider that there is no impediment to granting the recognition order the applicants seek and I shall so order.

 (Jonathan Harris)

 Judge of the Court of First Instance

 High Court

Mayer Brown JSM, for the applicants

1. [2014] UKPC 36; [2015] AC 1675 at [25]. [↑](#footnote-ref-1)
2. [2016] SGHC 287. [↑](#footnote-ref-2)
3. At [10]. [↑](#footnote-ref-3)
4. [2014] 4 HKLRD 374. [↑](#footnote-ref-4)
5. *Singularis Holdings Limited v PricewaterhouseCoopers*, *supra*, at [25]. [↑](#footnote-ref-5)
6. *Re Phoenix Oil and Transport Co Ltd (No 2*) [1958] 1 Ch 565, 570. [↑](#footnote-ref-6)
7. *Re Lines Bros Ltd* [1983] Ch 1, 20. [↑](#footnote-ref-7)
8. *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings* [2007] 1 AC 508. [↑](#footnote-ref-8)
9. *Supra*, at [25]. [↑](#footnote-ref-9)
10. Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), p 230 (footnote omitted). [↑](#footnote-ref-10)
11. *Supra*, at [158]. [↑](#footnote-ref-11)
12. 400 BR 266 (Bankr D Nev 2009). [↑](#footnote-ref-12)
13. 4th ed, Globe Law and Business, 2017. [↑](#footnote-ref-13)
14. *Supra*. [↑](#footnote-ref-14)