HCCW 236/2018
[2019] HKCFI 2173

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) PROCEEDINGS NO. 236 OF 2018

IN THE MATTER of Section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32 of the Laws of Hong Kong

and

IN THE MATTER of Golden Oasis Health Limited

Before: Hon Anthony Chan J in Chambers
Date of Hearing: 26 August 2019
Date of Decision: 6 September 2019

D E C I S I O N

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1. There is before the court a Summons filed on 20 February 2019 ("Summons") by New Health Elite International Ltd ("NHE"), the opposing contributory in a winding up Petition filed on 24 August 2018 ("Petition") against Golden Oasis Health Ltd ("Company"), for an order that all further

proceedings in the Petition be stayed pending arbitration pursuant to an arbitration clause contained in a Shareholders Agreement dated 30 March 2016 ("Agreement") made between, *inter alia*, the Petitioner (Gold Swing Enterprises Ltd ("GSE")) and NHE.

Issues

2. The issues in this application concern whether NHE is entitled to rely on the agreement to arbitrate to stay the Petition. In this regard, it relies heavily on a recent judgment of Harris J in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKLRD 449 ("the *Lasmos* case"). Other matters regarding the substantive merits of the Petition are to be determined at the hearing of the Petition scheduled to take place on 15 October 2019 in the event that this application is unsuccessful.

Background

3. Much of the background facts are uncontroversial, and the essential part of which is summarised as follows. As may be apparent above, GSE and NHE are shareholders of the Company. They are holding respectively 20% and 61% of its shares. The only other shareholder is Smart Base Properties Ltd (HK) ("SBP"). It is apparent from the evidence that there is a dispute between the majority shareholder, NHE, and the other two.

4. On 14 June 2018, SBP presented a Petition to wind up the Company on the ground of insolvency and to appoint provisional liquidators. That Petition was supported by GSE. However, no further step has been taken in those proceedings since November 2018.

5. The Petition is based on a debt of HK$5,899,844 ("Debt") owed by the Company to Smart Even Ventures Ltd ("SEV"), which was assigned to the GSE by a Deed of Assignment dated 30 March 2016 ("Deed"). The Deed was part of a transaction whereby SEV sold its 20% equity in the Company to GSE, and the Debt represented the shareholder's loan[1] due from the Company to SEV. SEV was a subsidiary of China Wah Yan Healthcare Ltd ("CWY"), a listed company in Hong Kong which also owned 77.4% interest in NHE.

6. The Deed was expressly acknowledged and executed also by the Company. The material terms of the Deed are :

> "WHEREAS:-
>
> Pursuant to the sale and purchase agreement dated 16 February 2016 made between [SEV] as vendor and [GSE] as purchaser (the "Sale and Purchase Agreement"), [SEV] has agreed, inter alia, to assign to [GSE] of all [SEV's] benefits and interests of a sum of HK$6,999,844 (the "Debt") as currently due by [the Company] to [SEV] as at the date hereof.
>
> …
>
> 2. [SEV] hereby represents and warrants to [GSE] that:-
>
> …
>
> (b) the Debt is due and payable and is valid and subsisting and repayable by [the Company] to [SEV] in full on demand and free from all or any encumbrance, charge, lien, rights of set-off or counterclaim, compromise, release, waiver, option and dealing or any agreement for any of the same;
>
> (c) no event has occurred directly or indirectly whereby any part of the Debt has or may become unenforceable or any title, rights, interests and

[1] At the time of assignment, the loan was HK$6,999,844.

> benefits of [SEV] in the Debt or any of its rights or remedies have been or may become adversely affected …
>
> 3. [SEV] hereby covenants with [GSE] to pay to [GSE] immediately on receipt any payments or other money which may be received by [SEV] from [the Company] in respect of the Debt and until such payment to hold the same on trust for [GSE].
>
> 4. [The Company] hereby acknowledges to and confirm the foregoing and further undertakes to [GSE] that it will make all payments of the Debt and discharge all its obligations in respect thereof to [GSE] directly instead of to [SEV].
>
> …
>
> 7. This Deed of Assignment is governed by and shall be construed in all respects in accordance with the laws of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong") and the parties hereto irrevocably submit to the non-exclusive jurisdiction of the courts of Hong Kong in connection herewith but this Deed of Assignment may be enforced in any court of competent jurisdiction.
>
> …
>
> 9. No person who is not a party to this Deed of Assignment may enforce or enjoy the benefit of any provisions of this Agreement."

7. There is no dispute that, after taking into account a repayment of HK$1,100,000 by the Company[2], the outstanding balance of the assigned debt is HK$5,899,844.

8. On the same day when the Deed was made, the shareholders of the Company entered into the Agreement. There were at the time 4 shareholders. In addition to SBP (19%), GSE (20%) and NHE (60%),

[2] The funds came from a business majority owned by the Company (see below).

there was Giga Power Chapter Group Ltd ("Giga"), a wholly owned subsidiary of CWY. Giga's 1% share in the Company was subsequently transferred to NHE.

9. NHE relies upon the following terms of the Agreement :

Clause 4.3

"The following matters are subject to the approval of all Shareholders and/or Directors, as appropriate:

…

(i) the appropriation, directly or indirectly, of any funds or property of the Company in any manner whatsoever to or for the benefit of any Shareholder or its Associates;

…

(k) the voluntary dissolution, liquidation or winding up of the Company;"

Clause 17.1

"This Agreement shall be governed by … the laws of Hong Kong and the parties hereto submit to the non-exclusive jurisdiction of the courts of Hong Kong."

Clause 17.2

"Any party to this Agreement shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure."

Clause 17.3

"Any dispute arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

10. In addition, NHE also relies on Clause 7, which governed the raising of funds by the Company in the future, and Clause 9.8 concerning the assignment of shareholder's loans.

11. On the other hand, GSE had referred this court to the entire agreement clause (Clause 16.4).

12. It is a central feature of NHE's case, which is disputed, that the Company has a *bona fide* dispute on the nature of the Debt because "it has been the common understanding and implied agreement among the shareholders that the Company is a holding company with its interest in Mega Fitness as the sole material asset, and that shareholders' loans from the shareholders to the Company (including … the [Debt]) were to be injected into Mega Fitness as capital contribution which the shareholders are not entitled to call for repayment without consent of the other shareholders" (1st Affirmation of Mr Gaston Lam, §38).

13. To understand that evidence, one needs to go back to August 2014 on CWY's acquisition of the majority shareholding (55%) in Mega Fitness (Shanghai) Investments Ltd ("Mega"), which ran the operation of a chain of sports clubs in the Mainland. Before the acquisition, Mega was wholly owned by GSE. The acquisition was done via the Company as a corporate vehicle, ie, the 55% shares were transferred to the Company after the acquisition.

14. Initially, the shares in the Company were held by NHE (80%) and SEV[3] (20%). Later, in March 2015 (the acquisition was completed in April 2015), a wholly owned subsidiary of CWY, Giga, was transferred part of the shares owned by NHE. The Company's shareholders became NHE (60%), SEV (20%) and Giga (20%).

15. These shareholders then put up respectively HK$21 million ("M"), HK$7M and HK$7M (totalling HK$35M) in the form of shareholder's loans. HK$24M of the funds were used to pay GSE for the 55% shares in Mega. The balance of HK$11M was contributed by the Company to Mega as its working capital. GSE also made a contribution of HK$9M to Mega's working capital. The lower contribution reflected its smaller shareholding of 45% in Mega.

16. According to the evidence, there was a re-acquisition of the interest in Mega in 2016 which was precipitated by the disagreement between GSE and NHE. However, the re-acquisition took the form of sale of the shares in the Company.

17. On 16 February 2016, 19% of the shares in the Company held by Giga were sold to SBP pursuant to a Sale and Purchase Agreement. Giga's shareholder's loan to the Company was assigned to SBP as part of the transaction. There is some suggestion in the evidence that SBP is related to GSE. It is not important to resolve that point in this application.

[3] There is no evidence whether SEV was related to CWY.

18. On the same day, by another Sale and Purchase Agreement ("SPA") SEV's 20% shares in the Company were sold to GSE (see para 5 above).

19. The 2 Sale and Purchase Agreements were almost identical in terms and they each contained a Deed of Assignment whereby the vendor's shareholder's loan was assigned to the purchaser. The terms of those deeds were also almost identical. It is worthy of note that Mr Gaston Lam signed the Giga agreement on its behalf and must be aware of its terms.

Law

20. In *Lasmos*, Harris J held that a petition to wind up a company on insolvency grounds should "generally be dismissed" when 3 requirements are met :

(1) if a company disputes the debt relied on by the petitioner;

(2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) and files an affirmation in accordance with r.32 of the Companies (Winding-Up) Rules, Cap 32H, demonstrating this.

21. In a later case, *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873, the CA had expressed reservations on the *Lasmos* approach.

22. The *obiter dicta* of the CA concerned, firstly, the jurisdiction of the court to order a stay in that it is founded on the discretion of the court, and therefore it is questionable whether a firm rule in favour of a stay would be right (see §§58-67 of the judgment). Secondly, the CA expressed reservation whether the applicant for a stay should demonstrate that the petitioning debt is *bona fide* disputed on substantial grounds or, as suggested by the *Lasmos*, it is sufficient to show that the debt is not admitted (§§68-73).

GSE's contentions

23. GSE disputes the alleged common understanding and implied agreement. It says that the Company and NHE are unable to demonstrate any *bona fide* dispute on substantial grounds to oppose the Petition on its merits.

24. In respect of the reliance on the Arbitration Clause[4], GSE contends that: (i) the Company is not a party to the Agreement; (ii) the Debt did not arise from the Agreement; and (iii) the underlying contracts (the SPA and the Deed) contained no arbitration agreement.

25. Further, the scope of the Arbitration Clause does not cover any dispute in relation to the Debt or the Deed, in particular, the circumstances under which the Debt is repayable.

26. Applying the *Lasmos* approach, the Summons must be dismissed as neither NHE nor the Company can fulfil: (i) the second

[4] Clause 17.3 : see para 9 above.

requirement in light of the above; and (ii) the third requirement because NHE had failed to take any step as required by the Arbitration Clause to submit the dispute to arbitration.

Analysis

27. I propose to deal with the Arbitration Clause first. For this purpose, it is unnecessary to deal with the reservations expressed in *But Ka Chon* because I am unable to see how NHE can satisfy Requirements (2) and (3) of the *Lasmos* approach.

28. In respect of Requirement (2), the contract(s) under which the Debt arose is the Deed (and possibly also the SPA). Neither the Deed nor the SPA contained any arbitration clause. On the contrary, both contained a jurisdiction clause which conferred jurisdiction on Hong Kong courts. The jurisdiction clause in the Deed conferred such jurisdiction "in connection" therewith.

29. The issues over how Requirements (2) and (3) were fulfilled had not been properly addressed by NHE. On behalf of NHE, Mr Chan contends that the issue for the court is whether the Debt was a shareholder's loan or an injection of capital which is not repayable without the consent of all shareholders. Relying on 2 Canadian authorities[5], it was submitted that the issue is one of facts the resolution of which requires the court to take into account all relevant circumstances.

[5] *Ghassemvand v Premium Weatherstripping Inc* [2017] BCCA 309 and *Steven Elefant v Genwood Industries Ltd* [2018] QCCS 4590.

30. With respect, I am unable to agree with NHE's factual case concerning the alleged common understanding and implied agreement (see para 12 above).

31. To begin with, there is no evidence on when the alleged understanding arose. The Debt was a shareholder's loan granted by SEV to the Company. GSE was not a shareholder of the Company at the time and could not be party to any understanding or implied agreement between the then shareholders. GSE, with Mr Gaston Lam's knowledge, took the assignment of the Debt free from any encumbrance.

32. Further, only part of the shareholder's loan granted by SEV was used by the Company as injection of capital into Mega (see para 15 above).

33. Although the SPA was completed with the execution of the Deed which took place on the same day as the Agreement, it was unrelated to the Agreement save that it was the former by which GSE became a shareholder of the Company and without that status the Agreement would have nothing to do with it.

34. Therefore, if there was certain understanding or implied agreement which underpinned the Agreement, it is very difficult to see how they could have applied to the SPA and the Deed which concerned different parties. The Debt is a claim by GSE against the Company. The Company is not a party to the Agreement, its shareholders are.

35. I am unable to detect anything in support of the alleged understanding, not even in the provisions of the Agreement. Quite the contrary, the allegation is contradicted by the unequivocal terms of the Deed.

36. The Debt arose from the Deed and that document contained a jurisdiction clause which conferred jurisdiction on the Hong Kong courts "in connection" therewith. I agree with Mr Suen SC, who appeared with Mr Lam for GSE, that clause 7 of the Deed is the governing clause which is applicable to any dispute in relation to the Debt, including the Petition.

37. Apart from the lack of any relevant arbitration clause which may satisfy Requirement (2), I am unable to see that the dispute relating to the Debt or the Deed fell within the scope of the Arbitration Clause.

38. In relation to Clause 17.2 of the Agreement, any dispute relating to the Debt or the Deed is between GSE and the Company. The latter is not a party to the Agreement and has no right of recourse to any pre-arbitral referee procedure.

39. As regards Clause 17.3, I am unable to see that any dispute relating to the Debt or the Deed can be treated as "arising out of or in connection with" the Agreement. The Agreement made no mention of the Debt or the Deed and had nothing to do with them.

40. The 3rd Requirement under the *Lasmos* had received the support of the CA in *But Ke Chon* where it was held at §53 that: "[i]t would make no sense to dismiss or stay an insolvency petition on the mere

existence of an arbitration agreement when the debtor has no genuine intention to arbitrate".

41. In this case, no arbitral proceedings have been commenced by either the Company or NHE pursuant to the Arbitration Clause. This is notwithstanding the fact that GSE's Statutory Demand against the Company was issued on 18 April 2018, the Petition was issued on 24 August 2018 and the Summons was issued on 12 February 2019. It is therefore very difficult to see any genuine intention to arbitrate on either the part of the Company or NHE.

42. NHE seeks to rely on the fact that it had requested that the dispute be remitted to arbitration pursuant to the Arbitration Clause. Self-evidently, such a request did not satisfy Requirement (3).

43. Mr Chan submitted that the failure to take any step to commence the arbitration could be explained as a matter of practicality in that any such step might not be taken very far due to the dispute over the relevance of the Arbitration Clause. I am unable to accept this submission the effect of which would be to render Requirement (3) redundant. For my part, I agree with respect the view expressed in *But Ka Chon* cited above.

44. For these reasons, irrespective of whether the approach in the *Lasmos* should be followed, it is clear that the Summons must be dismissed. There is no relevant arbitration clause to support it. On the contrary, the court clearly has jurisdiction over the Debt and the Deed.

Disposition

45. Accordingly, the Summons is dismissed. There is no dispute that costs should follow the event and that a certificate for 2 counsel is justified. I order that the costs of and occasioned by the Summons be to GSE with a certificate for 2 counsel.

46. I am grateful to counsel for their assistance.

(Anthony Chan)
Judge of the Court of First Instance
High Court

Mr Jenkin Suen SC and Mr Justin Lam, instructed by Tsang & Lee, for the Petitioner

Mr Frederick H F Chan, instructed by Baker & McKenzie, for the Opposing Contributory

The Official Receiver was not represented and did not appear