

HCCW915/2000

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO. HCCW 915 OF 2000

IN THE MATTER of Gold Delta
Development Limited
(In liquidation)

Coram: Master A Ho in Chambers
Date of Hearing: 28 October 2004
Date of Decision: 28 October 2004 at 11.20 am
Present: Mr S Briscoe, the Joint and Several Liquidators of
Gold Delta Development Limited (In liquidation)
Ms P McKenna, of the Official Receivers Office

D E C I S I O N

COURT:

1. On 6 August 2004, I gave my decision in respect of a review by the Joint and Several Liquidators of Gold Delta Development Limited ("the company"). The review relates to my decision in disallowing the remuneration claimed by the secretaries under invoice no. D15610. In my decision, I confirmed that the liquidators were not entitled to charge separately for work done by their secretaries. I also directed the liquidators to render a written explanation as to whether the liquidators had given a 10 per cent reduction in relation to the charge out rate claimed by the fee earners as required by the court order dated 11 February 2003.
2. On 13 September 2004, the liquidator wrote to the court in compliance with the court's directions. From the said letter, it transpired that the subject invoice under review, namely, D15610, in fact, relates to remuneration of the provisional liquidators appointed under section 194(1A) of the Companies Ordinance, Cap.32 ("the Ordinance"). As such, the said invoice, D15610 should not have been submitted by the Official Receiver to the court for determination or taxation as remuneration of the provisional liquidators appointed under section 194(1A) should be dealt with by the Official Receiver under section 196(1A).

Section 196(1A) reads as follows:

"A provisional liquidator appointed under section 194(1A) shall be remunerated (a), in accordance with a scale of fees approved from time to time by the Official Receiver; or (b), on such other basis as the Official Receiver approves in writing."

3. According to the said letter from the liquidators, the court made a winding-up order against the company and appointed the Official Receiver as the provisional liquidator of the company on 27 December 2000. On the same day, Mr Nicholas Hill and Mr Damian Hodgkinson were appointed joint and several provisional liquidators of the company by the Official Receiver under section 194(1A) of the Ordinance. As the assets of the company appeared to be less than \$200,000, an application was made by the provisional liquidators for a summary procedure order pursuant to section 227F of the Ordinance.
4. The summary procedure order was granted on 10 January 2002. However, it was subsequently revealed that the company assets exceeded \$200,000 in value. As such and on 9 September 2002, the joint and several liquidators applied to the court for a rescission of the summary procedure order, and this was granted on 14 September 2002. Under section 227F(2), of the Ordinance, the summary procedure order would be treated as if it had not been made.
5. On 11 February 2003 and pursuant to an application made by the provisional liquidators, the court appointed Mr Hill and Mr Briscoe as the joint and several liquidators of the company. And following the rescission of the summary procedure order, and the order for the appointment of liquidators dated 11 February 2003, the appointment of the provisional liquidators effectively ceased on 10 February 2003.
6. However, as the subject invoice D15610 relates to the remuneration of the provisional liquidators for the period from 27 December 2000 to 31 December 2001, such invoice should have been referred to the Official Receiver for approval under section 196(1A) of the ordinance. And the court does not have jurisdiction to tax such invoice.
7. The same applies to the other 8 invoices submitted by the Official Receiver to the court for taxation, namely, D15386, D14787, D15357, D15593, D13474, D13017, D12900, D12795. However, Miss McKenna for the Official Receiver takes a different view of the matter. She submitted to the court that despite the wordings of section 196(1A), the court does have inherent jurisdiction to fix the remuneration of the provisional liquidators.

8. She submitted to the court that it has jurisdiction to exercise a supervisory role over the provisional liquidator, and that would extend to a supervisory role concerning the remuneration of the provisional liquidator who is an officer of the court.

9. Miss McKenna submitted that on a strict literal interpretation of section 196(1A), it arguably confines the role of the Official Receiver to fixing the basis of the remuneration only and gives the Official Receiver no locus to determine the quantum.

10. And on a purposive interpretation, Miss McKenna submitted that section 196(1A) allows the Official Receiver to set the basis and fix the quantum. Miss McKenna further submitted that under the purposive interpretation of section 196(1A) and also based on the inherent jurisdiction of the court, the Official Receiver shall have recourse to the court for taxation in the following situations: (a), where there is substantial dispute, or (b), where the amount of assets involved or of remuneration/expenses claimed proves to be substantial, or (c), where the Official Receiver considers it otherwise appropriate.

11. Miss McKenna argued that if the court does not accept this purposive interpretation, the literal interpretation of section 196(1A) must be taken to mean that the Official Receiver can only determine the basis and quantum falls to be determined by the court under section 196(2) of the ordinance.

12. With respect, I do not agree with the submissions of Miss McKenna above. In my view, there are two types of appointment of provisional liquidators under the Companies Ordinance. First, appointment under section 193 and second, appointment under section 194(1A) of the ordinance.

Section 193(1) of the ordinance reads as follows:

"Subject to the provisions of this section, the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition."

Subsection (2) reads:

"The appointment of a provisional liquidator may be made at any time before the making of a winding-up order, and either the Official Receiver or any other fit person may be appointed."

Subsection (3) reads:

"Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him."

Section 194(1A) reads as follows:

"Where the Official Receiver is the provisional liquidator of the company, by virtue of subsection (1) (a), and is of the opinion that the property of the company is not likely to exceed in value \$200,000, he may, at any time, appoint one or more persons as provisional liquidators in his place."

13. I have no doubt that in respect of the provisional liquidators appointed by the court under section 193 of the ordinance, the court does have inherent jurisdiction to determine the remuneration of the provisional liquidator, during the entirety of his term of office, whether pre or post the making of a winding-up order. This is, in fact, the decision of Le Pichon J, as she then was, in Re Peregrine Investment Holdings Limited, HCCW20, 22 and 32 of 1998. This is an unreported decision dated 27 May 1999 at page 9.
14. But for provisional liquidators appointed by the Official Receiver pursuant to section 194(1A), it is, in my view, a completely different category, and the question of remuneration is governed by the express provision of section 196(1A).
15. As referred to above, section 196(1A) expressly stated that a provisional liquidator appointed under section 194(1A) shall be remunerated in accordance with a scale of fees approved from time to time by the Official Receiver, or on such other basis as the Official Receiver approves in writing.
16. I would emphasise that under section 196(1A), the word "shall" is used, which in my view, means that the provisional liquidator appointed by the Official Receiver under section 194(1A) must be remunerated in accordance with the terms of section 196(1A).
17. In my view, the fixing of the basis of remuneration by the Official Receiver must necessarily include the calculation of the quantum according to the basis of remuneration fixed by the Official Receiver. In my judgment and on the clear wordings of section 196(1A), the court has no jurisdiction to determine the remuneration of the provisional liquidators appointed by the Official Receiver pursuant to section 194(1A) of the ordinance.
18. In the course of the argument, Miss McKenna has referred the court to the case of Re Kansa General International

Insurance and Re Peregrine Investment Holdings Limited in support of her contention that the court has inherent jurisdiction to fix the remuneration of the provisional liquidators. But it should be noted that in both these cases cited, the provisional liquidators were appointed by the court, not by the Official Receiver pursuant to section 194(1A) of the ordinance.

19. And as the court has no jurisdiction to deal with the subject invoice under review as well as the other eight invoices above, I now rescind my decision in respect of the review. I also rescind the certificate of taxation dated 13 June 2003 in respect of all the above invoices which includes the subject invoice under review, namely, D15610.

(Proceedings from 11.38 am not required)

Hearing concludes - 11.38 am
28 October 2004

I/we certify that to the best of our ability and skill, the foregoing is a true transcript of the audio recording of the above proceedings


L M Man

Date: 5 November 2004