

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD 86 of 2014

IN RE the COMPANIES LAW (2013 REVISION)

and

IN RE MAYER HOLDINGS LIMITED

Mr. R. de Lacy, QC for the Petitioner

**Mr. J. Litton, QC & Ms. C. Kish for Aspial Investment Limited
& Bumper East Limited**

Mr. S. Dawson for the Old Board

Mr. N. Hoffman for the New Board

Mr. V. Joffe, QC for Lin Hui-Mei

Henderson, J.

Hearing: October 20, 2014

Judgment: November 7, 2014



JUDGMENT

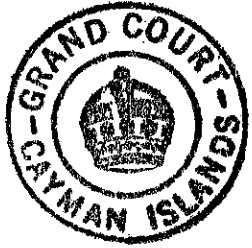
1. This winding up petition is presented by the Company's Chief Executive Officer in his capacity as a creditor. He says that advances made by him to the Company to keep it

afloat are now due but have not been repaid because the Company is unable to pay its debts. Remarkably, he has advanced a further HKD \$800,000 to the Company after filing his petition.



Facts

2. The Petition was filed August 4, 2014 by Mr. Lai Yueh-Hsing ("Mr. Lai") who asserts that he is a creditor of Mayer Holdings Limited ("the Company") by virtue of several loan agreements dated between June 27, 2013 and June 20, 2014. Mr. Lai says that he has loaned to the Company the sum of HKD \$11,030,000 to finance its continuing operations. The loans were unsecured. Mr. Lai says that each of the loans was repayable after one year or, alternatively, upon receipt by the Company of a repayment notice.
3. On July 24, 2014, Mr. Lai demanded repayment under each of the loans. Mr. Lai has received a written response from the Company on the same date acknowledging that the sum is due and owing but conceding that the Company does not have sufficient money to pay the amount owed. Mr. Lai asserts that the Company is unable to pay its debts within the meaning of section 93 of the *Companies Law* and is insolvent.
4. On August 15, 2014 I was asked to appoint provisional liquidators. That application was adjourned to August 28th, on which date it was dismissed. I granted to Mr. Lai liberty to re-apply if two conditions were not met:



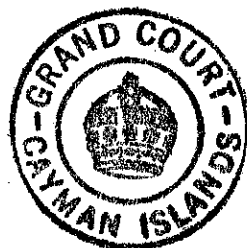
- a) the entities actively opposing the petition (Aspial Investment Ltd. ("Aspial") and Bumper East Ltd. ("Bumper")) were to pay into court an amount equivalent to the petition debt; and
- b) Aspial and Bumper were to use their best efforts to obtain for the Company an independent evaluation of an action commenced by the Company in the High Court of the Hong Kong Special Administrative Region.

5. The petition debt has been paid into court. A legal opinion had been obtained from Mr. Russell Coleman, S.C. but Mr. Coleman has found himself unable to evaluate the merits of the Hong Kong action because discovery has not been conducted and witness statements have not been exchanged.
6. Mr. Lai has been, until October 9, 2014, the chief executive officer of the Company and chairman of its board of directors. He says he owns no shares in the Company; his petition is brought solely in his capacity as a creditor. There is one other creditor, ONC, a firm of attorneys who are owed less than HKD \$400,000.
7. Ms. Lin Hui-Mei ("Ms. Lin") owns about 0.81% of the outstanding shares in the Company. She says in her affirmation that she is entirely independent of the other parties. In her view, a winding up would be in the best interest of the creditors.
8. The petition has been advertised appropriately.

9. Some background is necessary. Aspial and Bumper have been engaged in litigation in Hong Kong with Mayer Corporation Development International Ltd. ("Mayer BVI") over the ownership of 200,000,000 shares in the Company. Aspial and Bumper have now been successful in this action in the Hong Kong Court of First Instance, in the Hong Kong Court of Appeal and in the Court of Final Appeal. The trial judge found that evidence given on behalf of Aspial and Bumper was more worthy of belief than that which he received from Mr. Lai and from Tommy Chan ("Mr. Chan"), the Company's financial controller. The Court of Final Appeal refused to stay the earlier judgments and ordered Mayer BVI to pay indemnity costs.

10. Aspial and Bumper encountered resistance to the amendment of the Company's share registers to include them as members. They commenced proceedings in Hong Kong and in the Cayman Islands to effect the rectification of the register. Those actions were successful and on August 19, 2014 the register was amended appropriately.

11. On August 22, 2014 Bumper and Capital Wealth Finance Company Ltd ("Capital Wealth") served on the Company a notice of requisition requiring the board to convene two extraordinary general meetings to take place on the same day. On September 22, 2014 the requisitioners served a notice on the Company that the EGMs would take place on October 9, 2014.



12. Notice of the EGMs was sent to the members of the Company who have registered addresses in Hong Kong through ordinary post in accordance with the articles which provide that members shall receive notice of a meeting "through the post in a pre-paid letter addressed to such member at his registered address as appearing in the register." The notices specify the time and place of the meetings and the text of the resolutions to be proposed. They contain the usual notice about the use of a proxy.

13. The petitioner says that members with registered addresses outside Hong Kong have not been served in accordance with the articles and the result is that the resolutions passed at the two meetings are of no effect. Ms. Lin has commenced an action in this court seeking a declaration that the resolutions are invalid.

14. For those members outside Hong Kong, the evidence suggested initially that a notice was sent to the Company's transfer office. That would not have been sufficient. Section 164 of the articles reads as follows:

A member shall be entitled to have notice served on him at any address within Hong Kong. Any member who has not given an express positive confirmation in writing to the Company to receive or otherwise have made available to him notices and documents to be given or issued to him by the Company by electronic means and whose registered address is outside Hong Kong may notify the Company in writing of an address in Hong Kong which for the purpose of service of notice shall be deemed to be his registered address. A member who has no registered address in Hong Kong shall be deemed to have received any notice which shall have been displayed at the transfer office and shall have remained there for a period of 24 hours and such notice shall be deemed to have been received by such member on the day following that in which it shall have been first so displayed, provided that, without prejudice to the other provisions of these Articles, nothing in article 164 shall be construed as prohibiting the Company from sending, or entitling the Company not to send, notices or



other documents of the Company to any member whose registered address is outside Hong Kong.

15. I take the somewhat convoluted language of this section to mean:

- (a) any member with a registered address in Hong Kong is entitled to have notice served upon him there; and
- (b) any member with a registered address outside Hong Kong is entitled to have notice sent to him at that address; and
- (c) any member who has no registered address at all is deemed to have been served with notice after the notice has been displayed at the transfer office for twenty-four hours.

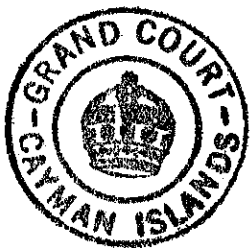
16. I now have additional evidence on the question of service. Bumper obtained a copy of the register of members from the Company's Cayman agent and then checked the Company's branch register in Hong Kong. On September 22, 2014 notice of the two EGMs together with related material was provided to REF Financial Press Ltd, a printer, with instructions to serve the material by ordinary post on all of the Company's members, both inside and outside Hong Kong, whose addresses were shown in the register. In addition, the directors were served and notices were inserted in Chinese and English language newspapers. The material was posted on the internet. The auditors were served.



17. On October 9, 2014 the two extraordinary general meetings (“EGMs”) were held. The shareholders voted to replace the board of directors which included Mr. Lai with a new board which includes Mr. Lin Jinhe (“Mr. Lin”), the sole director of Bumper. The new board dismissed Mr. Chan, the financial controller, on the same day. At the first EGM Mr. Lee Kwok Leung was appointed executive director and chairman of the Company. The result was to place control of the management of the Company in the hands of directors who are opposed to a winding up order.

18. The new board says it is now investigating aspects of the management under the old board and has resolved to oppose the petition. However, Mr. Lai challenges the validity of the two EGMs and the resolutions passed at them. The uncertainty over which group is entitled to control the board has resulted in two separate submissions by “the Company” from separate law firms at the hearing: Mr. Dawson said that the Company supports the winding up petition and concedes that it is insolvent; but Mr. Hoffman says that the Company supports the submissions of Bumper and Aspial.

19. Mr. Lai’s real concerns extend well beyond the debt owed to him. The Company is claiming rescission against Mr. Lam Chin Chun (“Mr. Lam”) and others of a contract for the purchase of a dockyard in Vietnam which is owned by a Company subsidiary. The alleged grounds for rescission include fraudulent misrepresentation and conspiracy to defraud by Mr. Lam. He was the vendor of the shares in the Company now owned by Aspial and Bumper. Mr. de Lacy argues that Mr. Lam’s indirect control of the Company (through his presumed influence upon Aspial and Bumper) will be used to cause the



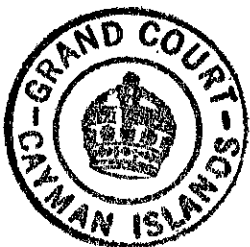
Company to abandon the action against him. He says the claim is a valuable asset and the action should be pursued. Mr. Lam is the chief executive officer of Capital Wealth, which has sued the Company in Hong Kong. Mr. Lai anticipates that the new shareholder group acting through the new board will compromise this action on terms favourable to Capital Wealth. In short, he claims that the members of the new board will serve their own interests in preference to those of the Company. Mr. Lai argues that there is a need for an “objective approach” to the litigation by an independent professional such as a liquidator.

20. The Company is listed on the Hong Kong Stock Exchange but is not trading. The main asset of the Company is its investment in Guangzhou Mayer, a subsidiary. Mr. Lai asserts that the board of Guangzhou Mayer is failing to co-operate and refuses to provide necessary financial disclosure. He also speaks of the “disappearance” of dividends owed by Guangzhou Mayer to its parent.

21. Section 92(d) of the *Companies Law (2013 Revision)* permits me to order a winding up if the Company is unable to pay its debts. Section 93 is a deeming provision:

A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;



(b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.



Is There a Debt Which is Now Due?

22. Aspial and Bumper deny that Mr. Lai has advanced any money to the Company and that anything is owing to him. A director of the company, Mr. Li Deqiang, says in his first affirmation that, although a director, he is not aware of any approval of the loan agreements by the board.

23. Mr. Lai has now produced (as exhibits to his second affidavit) remittance forms and receipts which satisfy me (taken together with affidavit evidence) that he has provided at least HKD \$11,030,000 to the Company. Mr. Chan has produced a minute of a board resolution made June 26, 2014 which confirms the Company's indebtedness in the amount of HKD \$11,030,000 to Mr. Lai and asserts that the money was advanced for "general working capital". Most of the advanced funds were used to pay legal fees but it is unclear whether all of the legal services were rendered to the Company; some of the fee payments may have been made to benefit individuals. Mr. Chan, the financial controller, has acknowledged the indebtedness. The weight of the evidence satisfies me

that Mr. Lai has advanced the petition debt to the Company and the Company has used at least part of that to pay its own legal expenses.

24. Minutes of board meetings which make reference to the loans by Mr. Lai speak of an "initial" term of one year. Much (but not all) of the debt is less than a year old: a schedule of payments appears at paragraph 17 of Mr. Lai's first affidavit. Demand for payment has been made and nothing has been repaid. Overall, I am satisfied that Mr. Lai is a creditor of the Company but the amount presently owing to him is in doubt.

25. The payment into court does not alter Mr. Lai's status as a creditor. What it does do is demonstrate that his debt might be satisfied without the need to wind up the Company. Aspial and Bumper have said they are content to have the money paid out of court to the Company which may then use it to make immediate repayment of whatever is owing to Mr. Lai. Of course, if the Company is insolvent it may not prefer one creditor over another in this manner. Although the money paid into court might be viewed as security for Mr. Lai's debt (see *W.A. Sherratt Ltd. v. John Bromley (Church Stretton) Ltd.* [1985] 1 QB 1038) the possession of a security interest does not disqualify a creditor from petitioning: see *In Re North Bucks Furniture Depositories, Limited.* [1939] 1 CH 690; and *Re Lafayette Electronics Europe Ltd.* [2007] BCC 890.



Is the Company Unable to Pay its Debts?

26. The evidence of insolvency is largely dependent upon the assertions of the financial controller, Mr. Chan, and a report commissioned by the Company referred to as the Messis Report, attached as exhibit CLYT-6 to the second affidavit of Mr. Chan.

27. Mr. Chan says the Company is insolvent. He is a close ally of Mr. Lai and his interest lies in establishing the fact of insolvency in order to support the making of a winding up order. He has been terminated by the new board and has been involved in acrimonious litigation with Aspial and Bumper. In the High Court in Hong Kong Justice Reyes was not inclined to accept Mr. Chan's evidence about the authenticity of a certain share custodial agreement. On the question of solvency, I am not prepared to act upon his opinion alone.

28. The Messis Report is signed by Mr. Li Shui Yan, the managing director of Messis Capital Limited ("Mesis"). The report begins by saying that Messis Capital Limited is a "licensed corporate [sic] registered with the Securities and Futures Commission with authority to carry out type 1 (dealing in securities) and type 6 (advising on corporate finance) regulated activities under the Securities and Futures Ordinance."



29. Messis says that it has excluded Guangzhou Mayer's financial results from its analysis due to a lack of co-operation by that entity. Management accounts for the Company and some of its subsidiaries (but excluding Guangzhou Mayer) have been examined for the years 2011, 2012 and 2013 plus the first eight months of 2014. Much of the report appears to be based upon things which were said to Messis by Mr. Lai and by Mr. Chan. The report concludes by stating that Mayer Holdings is insolvent and that liquidation "is the only feasible option".



30. The qualifications of Mr. Li Shui Yan to proffer expert opinion evidence are not provided. The admissibility of expert evidence is always dependent upon a showing that the deponent possesses qualifications (obtained through a course of study, by special experience, or both) in the area of expertise under consideration. These qualifications should be set out in full in the body of the report or attached to it in a separate document. Unless this court can determine through admissible evidence that a deponent offering expert opinion evidence is indeed qualified in the relevant field, the evidence must be disregarded. I am not satisfied that the managing director of a corporate entity which is licensed to deal in securities and advise on corporate finance is necessarily qualified to provide expert opinion evidence on the question of insolvency; further evidence describing Mr. Li's qualifications and experience would be needed to satisfy me of that. In addition, the evidence does not give me a basis for assessing the degree of independence which exists between Messis and the proponents of this

petition. The opinion contained in the Messis Report is not admissible in its present form and must be disregarded.

31. The curious fact that Mr. Lai has advanced additional money to the Company after filing his Petition is a reason for caution on the issue of insolvency. The lack of any recent and reliable financial data from Guangzhou Mayer is another. I am not prepared to infer from the (admissible) evidence that the Company is unable to pay its debts.

32. The history of acrimonious litigation between Messrs. Lai and Chan and the Aspial/Bumper group suggests, although it does not prove, that this petition is motivated by spite rather than by commercial considerations. The Aspial and Bumper group should be given some time to investigate the events of the recent past and assess the viability of the Company. In any event, winding up is a discretionary remedy. I will not exercise that discretion in favour of the petitioner on the present state of the evidence.



Order

33. The petition is dismissed. If the board of directors is satisfied, after a reasonable investigation, that the Company is solvent, the money now in court may be paid out to Mr. Lai to satisfy that portion of the petition debt which is then found to be owing.

Henderson, J.

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