

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO. 223 OF 2005**

**IN THE MATTER of NATIONWIDE
TREASURE (HK) LIMITED**

and

**IN THE MATTER of the
COMPANIES ORDINANCE,
CHAPTER 32**

Before: Hon. Kwan J. in Court

Date of Hearing: 24 March 2006

Date of Judgment: 24 March 2006

J U D G M E N T

1. This is a petition to wind up Nationwide Treasure (HK) Limited (“the Company”) on the ground it is unable to pay its debts. The petition was presented on 17 March 2005 by Lung Ka Cheung, who was a director of the Company. It is not clear from the evidence filed when he tendered his resignation as a director, but his resignation as a director of the holding company, Nationwide Treasure Holdings Limited (“NTHL”), was

accepted with effect from 29 June 2004. The petition is opposed on the basis that there is a bona fide dispute of the petitioning debt on substantial grounds.

2. I do not propose to cite any of the cases cited on both sides on the relevant principles and approach to be taken on a creditor's petition where the ground of opposition is premised on a bona fide dispute of the petitioning debt on substantial grounds. I do not believe there is any dispute of the legal principles. What is required for determination is the application of these principles to the facts laid before me. I fully bear in mind the legal principles.

3. The petitioning debt of HK\$970,603.02 is made up of 4 items:

- (1) HK\$671,310.24, being the aggregate amount due and payable by the Company to the petitioner comprising director's loans, auction payments, business trip expenses and corporate entertainment expenses from 30 November 2002 to 22 March 2004, as shown and particularised in the Company's management accounts as at 1 April 2004;
- (2) HK\$227,292.78, being an additional loan advanced by the petitioner to the Company and paid on 7 March 2003;
- (3) HK\$50,000.00, being director's entertainment allowance due and payable by the Company to the petitioner for April and May 2004; and
- (4) HK\$22,000.00, being acquisition costs due and payable by the Company to the petitioner in respect of 440 pieces of SWI Model 581 watches at HK\$50.00 each.

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4. The first demand in writing made by the petitioner was by a letter of his former solicitors dated 19 August 2004 and addressed to NTHL, demanding payment of items (1), (3) and (4) and other expenses.

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5. On 22 January 2005, the petitioner's solicitors served a demand on the Company under section 178(1)(a) of the Companies Ordinance, Cap. 32 for repayment of the debt in the petition and other expenses.

6. The Company replied by the letter of its solicitors dated 8 February 2005, denying liability and alleging that the petitioner has not provided documentary proof.

7. As mentioned, this petition was presented on 17 March 2005. It is not in dispute that if there is a debt which is in part above the statutory minimum of HK\$10,000.00 in section 178(3), the petition can validly be presented and a winding-up order made, even if the petitioning debt is for a larger sum, part of which is bona fide disputed. So if the petitioner can establish there is no bona fide dispute of any one of the 4 items which made up the petitioning debt, he is entitled to wind up the Company.

8. Several rounds of affirmations have been filed in these proceedings, so the parties have had ample opportunity to adduce on affirmation such verbal and documentary evidence as may be required to support his case.

The background matters

9. The background matters not in dispute may be stated as follows. The Company was incorporated on 12 June 2002 with an authorised share capital of HK\$1 million, and all of this amount has been paid up. NTHL is the parent company, holding 999,999 shares. The remaining share is held by Leonora Yung, also a director. The directors of the Company at all material times were the petitioner, Miss Yung and Fu Kwok Keung.

10. As to the members of NTHL, they are the petitioner (16,000 shares), Miss Yung (1,500 shares), Fu (7,500 shares), Horizon Investment Group Limited (21,000 shares; a company owned by Miss Yung and her husband), Alpinestar Investments Limited (2,500 shares) and Greenpine Associates Limited (1,500 shares). Apart from the Company, NTHL has a number of subsidiaries, which I am not concerned with.

11. From the incorporation of the Company until the end of May 2004, the petitioner was involved in the day-to-day management of the Company and NTHL.

12. I turn to each of the items in the petitioning debt.

Items (1) and (2) – loans made by the petitioner to the Company

13. For the purpose of this petition, the Company does not dispute that the amounts in items (1) and (2) were advanced by the petitioner to the Company. What is in dispute is whether the loans were repayable on demand as asserted by the petitioner, or whether there was any agreement or understanding as alleged by the Company that the petitioner had made

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loans to the Company as an investor on the basis that his loans would not be repayable on demand, but would be repaid only when the Company is in profit and with the agreement of the other shareholders.

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14. There is no documentary evidence directly in support of the case advanced by the petitioner or directly in support of the case advanced by the Company.

15. Each has contended that the version advanced by the other is inherently improbable. I do not think I can resolve the conflict here by reference to inherent probability.

16. Insofar as case of the Company is concerned, I do not find it inherently improbable that as a shareholder of the parent company, and therefore an indirect investor of the Company, the petitioner would agree to advance money to the Company on the basis that the loan was not to be repaid until the Company is in profit. The fact that the loans were not a lump sum but in amounts as and when required to discharge operating expenses of the Company is in my view a neutral factor, this would not make it more likely or less likely whether the loan was repayable on demand or on the basis as alleged by the Company.

17. In respect of the petitioner’s case, I do not find it inherently improbable that notwithstanding the petitioner had only received a remuneration of HK\$25,000.00 a month as he has claimed, he was willing to lend about HK\$1 million to the Company up to the time he left. As mentioned, the petitioner has an indirect stake in the Company, and an interest to keep the Company in operation, the fact that he had advanced substantial sums when he was involved in the management does not mean

that he would also have agreed his loans would not be repaid until the Company is in profit. I do not think I should attach too much significance to the fact that in the minutes of the board meeting, the petitioner mentioned he had made “a limited investment up to 1 million”, instead of referring to this as a loan repayable on demand.

18. Mr Sussex, SC submitted on the petitioner’s behalf that insufficient particulars were provided by the Company of the alleged agreement or understanding upon which the loans were made, even after 3 affirmations from Miss Yung. The Company has not given any particulars of the date, place and names of individuals involved in the discussions leading to the conclusion of the alleged agreement or understanding regarding the terms of repayment of the petitioner’s loans. The particulars given by the Company are these. Miss Yung stated in her 1st affirmation that the alleged terms were mutually agreed “prior to the incorporation of the Company”, it was agreed between the petitioner, Miss Yung and “other members of the Company”. In her 3rd affirmation she said that the agreement was made by the members of NTHL, she did not identify the individuals involved. The Company could certainly have given more details, I am not prepared to say that the information provided is so lacking in particulars that I should be driven to the conclusion the allegation made by the Company must be a sham.

19. A stronger point in the petitioner’s favour is this. The management accounts as at 1 April 2004 and as at 24 May 2004 are in the nature of a running account, showing payments made to the petitioner from time to time in the debit column. This would appear to contradict the Company’s contention there should be no repayment of the money advanced until the Company is in profit. The Company has filed evidence

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from the staff who prepared these accounts, Ms Cheng Lai Yin. She
deposed that they were prepared on an urgent basis at the petitioner’s
request when he left the Company and these management accounts were
merely drafts, she did not verify or audit the accounts printed from the
computer. She was not informed of and was unaware of any capital
injection arrangement between the members of the Company and of NTHL,
and without giving the matter any thought, she simply booked the items as
shown in the management accounts under “account payable”, “in
accordance with the usual accounting practice”.

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20. As for the general ledger produced by the Company in the 2nd
and 3rd affirmations of Miss Yung, which also showed that money paid to
the petitioner was used to set off against money advanced by the petitioner,
this ledger does not appear to have been audited, as pointed out by the
petitioner in his 5th affirmation.

21. The explanation given by Ms Cheng does not appear to me
inherently improbable, and if accepted, might go to explain why in the
management accounts money paid to the petitioner in the debit column was
used to set off money advanced by the petitioner in the credit column.

22. There is also evidence from the Company that various
shareholders of NTHL had injected funds into the Company and they had
not been repaid. Miss Yung claimed that the amounts injected by her
(through a Company of which she was the majority shareholder), the
petitioner and Fu into the Company from the time of incorporation to 2003,
were roughly in proportion to their respective shareholdings in NTHL. Mr
Chan, SC submitted that although the other shareholders of NTHL did not
contribute, this does not mean that the allegation of the Company that

contributions were made in the nature of loan capital must be doubted, as the other shareholders have a relatively small stake in NTHL, as compared to the petitioner, Miss Yung and Fu.

23. Mr Chan submitted that it is important to bear in mind the informal nature in the way that the affairs of the Company and NTHL had been conducted. But for an additional point raised by Mr Sussex for the first time this morning, I might have been inclined to think that the doubts raised by him on the documents are perhaps not sufficient to discredit the Company’s allegations completely, or that the apparent inconsistencies are such to show there can be no bona fide dispute that the petitioner’s loans must be repaid on demand.

24. The new point raised by Mr Sussex is this. According to the evidence adduced on affidavit by the Company, the agreement alleged by the Company regarding the terms of repayment of loans was a pre-incorporation contract. The common law is clear, there is no privity of contract insofar as the Company is concerned. The alleged agreement was made, according to Miss Yung in her 3rd affirmation, by the members of NTHL. I note that in the letter of the Company’s solicitors dated 8 February 2005, it was stated that the alleged agreement was made “at the pre-incorporation and post-incorporation of the Company”. However, in all the affirmations filed on behalf of the Company, Miss Yung only deposed to an agreement “prior to the incorporation of the Company” by “the petitioner and [Miss Yung] and other members of the Company”. No mention was made of any post-incorporation agreement or that the Company was party to any such agreement. The Company can only take advantage of the alleged agreement if it had, pursuant to section 32A(1)(b) of Cap. 32, after its incorporation, ratified the pre-incorporation contract as

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if it had already been incorporated at that time and the contract had been entered into on its behalf by an agent acting without its authority.

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25. Mr Sussex is entitled to raise this point on the evidence adduced by the Company. It is, after all, the Company's case there was a pre-incorporation contract and it is incumbent on the Company to adduce such evidence, after ample opportunity has been given to it to do so, to establish its entitlement to take the benefit of this pre-incorporation contract.

26. Mr Chan submitted these 3 specific acts may be regarded as acts of ratification by conduct:

- (1) the petitioner's loans were not demanded for 2 years;
- (2) the sums were advanced by the petitioner from time to time; and
- (3) the petitioner only demanded for repayment after he left the Company.

27. I am unable to see how any of these acts could amount to ratification. They are equally consistent with the loans being repayable on demand.

28. I accept the new point raised by Mr Sussex. For items (1) and (2), I find that the Company has failed to raise a bona fide dispute of the debt on substantial grounds.

Item (3) – director’s entertainment allowance

29. The petitioner’s case is that an oral agreement was made among “founder members” when the Company was incorporated that he should be entitled to entertainment allowance of HK\$25,000.00 a month as part of his remuneration package without need to submit receipts or documentary proof. Throughout the whole period as director, the petitioner did not receive any salaries or director’s fees, and the only remuneration was the fixed sum of entertainment allowance of HK\$25,000.00 a month. This was to minimize the Company’s liability for Mandatory Provident Fund.

30. The Company’s allegation is that there was an oral agreement of all the members of the Company and of NTHL that the entertainment allowance would have a ceiling of HK\$25,000.00 per director and the Company would only pay upon production of verified receipts as documentary proof. The petitioner has failed to provide any receipt or documentary evidence to support his claim of entertainment allowance.

31. I do not think this is a bare claim of the petitioner without documentary proof, notwithstanding the 2 different versions of oral agreements allegedly made.

32. I think there is substance in the submission of Mr Sussex that when the documentary evidence is examined, there is no bona fide dispute for this item.

33. It is pertinent to note these matters that are not disputed or not capable of being disputed:

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- (1) The Company had paid the monthly allowance of HK\$25,000.00 for 7 months between May 2002 and November 2002, there are cheques and bank statements produced by the petitioner. It is not good enough to say that these payments were made in 2002, and here the petitioner is claiming for entertainment allowance for 2 months in 2004, as there is no suggestion on the part of the Company that the alleged agreement was only made or had only come into force in 2004. There is no or no adequate explanation given in all the evidence filed why for 7 months, HK\$25,000.00 was paid to the petitioner each month, contrary to what was agreed on the payment of entertainment allowance as alleged by the Company.
- (2) Had there been a ceiling of HK\$25,000.00, the Company would not have allowed the petitioner to seek reimbursement of further entertainment expenses above that ceiling. As demonstrated by the management accounts, the Company did reimburse the petitioner above the ceiling in several instances. So again, the Company's allegation is contradicted by the documents.
- (3) There is no evidence to rebut the allegation of the petitioner that he had received no other remuneration apart from the fixed monthly entertainment allowance, such evidence should be easily available to the Company if the Company had remunerated the petitioner in some other way for the services he had rendered to the Company.

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B 34. I bear in mind that it was stated in Ms Cheng's affirmation the B
petitioner would usually write down his claims for disbursements on a C
blank piece of paper and require her to give him cash or a cheque C
D immediately and that she merely followed the petitioner's instructions and D
would reimburse the petitioner even though the claims were not supported E
E by documents. I do not think this is an adequate explanation of the E
F apparent contradiction between the management accounts and the oral F
G agreement alleged by the Company. Firstly, in respect of the G
H reimbursements made to the petitioner over and above the sum of H
HK\$25,000.00, it is apparent from the management accounts that no I
I immediate payment was made to the petitioner, as alleged by Ms Cheng. I
J Secondly, what alleged practice was followed in respect of reimbursements J
K over and above the amount of HK\$25,000.00 does not necessarily cast K
L doubt on the petitioner's case there was an agreement to pay him L
entertainment allowance of HK\$25,000.00 a month as remuneration
package without the need of proof of expenditure.

M 35. I disagree with Mr Chan that my determination regarding M
N items (1) and (2) should have a bearing on item (3). The nature of the debt N
O is different, the defence raised by the Company is different. O

P 36. I find in respect of this item, the Company has not established P
Q a bona fide dispute of the debt on substantial grounds. Q

R *Item (4) – acquisition costs of watch movements* R

S 37. According to the petitioner, watch movements were acquired S
T by him for a project of the Company to re-launch the SWI Model 581 T
U watches. This project involved the production of 600 watches – 500 in U
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stainless steel case and 100 in gold case. So the Company had to acquire about 800 pieces of the old watch movements of this model, as some might not fully operate and some extra would be needed as reserve for after-sale maintenance. The petitioner was authorised to purchase 790 watch movements. He was reimbursed for 250 pieces on 5 December 2003, the balance of 440 pieces was outstanding. The petitioner produced an article and an advertisement placed by the Company in newspapers, showing that more than 1,000 pieces were purchased from the market for the re-launch project of the Company.

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38. According to the evidence filed by the Company, it had only acquired about 650 pieces of old watch movements; of which 300 pieces were purchased by the Company in 2003, the petitioner was reimbursed for 250 pieces and was paid RMB 40,000 in advance for the purchase of 100 pieces in gold case. The Company exhibited payment application forms, cheques and its general ledger.

39. The petitioner says that it is untrue the Company had only acquired 650 pieces, and when he was a director the Company did not purchase 300 pieces from a single trader as purportedly evidenced by the receipt produced. Even if it did, he contended that this should not negate the fact that he had purchased 790 pieces for the Company.

40. There is a factual dispute if the petitioner had purchased a further 440 pieces of watch movements. The petitioner could only produce such documents as he has, as he has already left the Company. I would expect the Company to produce all relevant documents to support its case.

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41. I find it inherently improbable that in launching the project, the Company did not acquire a sufficient number of watch movements to leave a safe margin, to cater for the contingency that some old movements might not operate fully and that some extra movements would be needed as reserve for after-sale maintenance. No evidence was adduced by the Company how many pieces of SWI watches were produced for the project. This was not mentioned in any affirmation, and no documents have been produced, notwithstanding there is some evidence from the petitioner that 1,000 watches or watch movements were purchased for the project.

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42. I find that the Company has not discharged its burden to adduce sufficiently precise factual evidence to substantiate its allegation that only 650 pieces of old watch movements were acquired. I take the view there is no bona fide dispute on item (4) on substantial grounds.

Orders

43. On the basis of all 4 items of the petitioning debt of which there can be no bona fide dispute, I hold that the petitioner is entitled to wind up the Company. The total amount involved is HK\$970,603.02. I have no information on the financial position of the Company, except that substantial costs may have been incurred so far in opposing the petition.

44. I order the Company to be wound up. To give an opportunity to the Company to apply to rescind the winding-up order *if* it is willing and able to pay the full sum of the undisputed debt and *if* the Company is able to satisfy the court it is solvent and there are no other reasons to militate against the rescission of the winding-up order, I direct the winding-up order is not to be sealed and perfected before 31 March 2006 4 pm.

45. I order the petitioner's costs are to be paid out of the assets of the Company.

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(S Kwan)
Judge of the Court of First Instance
High Court

Mr Charles Sussex, SC and Mr Anson Wong, instructed by Messrs K C Ho & Fong, for the Petitioner

Mr Warren Chan, SC and Mr Erik Shum, instructed by Messrs Li, Wong & Lam, for the Company