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WINDING-UP OF A FOREIGN COMPANY ON THE JUST AND EQUITABLE GROUND

Re Yung Kee Holdings Ltd[1]

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Yung Kee Restaurant on Wellington Street in Hong Kong is justly famous for the delicious goose it serves to hungry diners beating a path to its doors. In *Re Yung Kee Holdings Ltd* (CFA), the family which founded Yung Kee Restaurant and has operated the restaurant for three generations served up a seminal case involving how a court should approach a petition to wind up an unregistered foreign company on the just and equitable ground. Petitions to wind up such foreign companies tend to be creditor petitions on the ground that a company has not been able to pay its debts. Yung Kee Holdings Ltd ("the Company") was an ultimate holding company, and was incorporated in the British Virgin Islands ("BVI"). The famous restaurant, various properties and other business interests were held by Hong Kong entities, and were indirectly held by the subject company through another intermediary BVI company, Long Yau Ltd. In granting the petition to wind up the Company, the Hong Kong Court of Final Appeal signed the order for the present restaurateurs to sing their swan song.[2] Significantly, the joint judgment written by Geoffrey Ma CJ and Lord Millett NPJ is important for its repudiation of the suggestion that the judicially developed precautionary principles for exercising the power to wind up foreign companies should *not* be more stringently applied in petitions based on the just and equitable ground than in petitions based on the company's inability to pay its debts. Rather, the facts should be sifted for matters relevant to the ground relied on and sensitively analysed to ascertain whether they pass muster by the criteria of the precautionary principles. The decision demonstrates the importance of framing the issues accurately, so that precepts like contractual responsibility and the separate legal personality principle are not over-extended at the expense of the just and equitable

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1 [2015] 6 HKC 644 (CFA) [*Re Yung Kee Holdings Ltd* (CFA)].

2 On appeal from *Re Yung Kee Holdings Ltd* [2014] 2 HKC 556 (CA). The first instance judgment can be found at *Re Yung Kee Holdings Ltd* [2012] 6 HKC 246 (CFI) [*Re Yung Kee Holdings Ltd* (CFI)].

norm contained in the statutory provision for the winding-up of unregistered foreign companies.

I. Background to the Litigation and the Final Outcome

Originally a cooked food stall in Sheung Wan, Yung Kee Restaurant was established in 1942 by the patriarch, the late Kam Shui Fai. The business prospered and a corporate structure developed with its fortunes. Since 1994, the restaurant business has been run by Yung Kee Restaurant Group Ltd ("YKRG"). The corporate structure with a BVI company as the ultimate holding company finds its origins in the patriarch's desire to avoid estate duty. Following the demise of the patriarch in 2004 and the abolition of estate duty in 2006, the corporate structure was reorganised. All but one of the Hong Kong asset holding companies were held by Long Yau Ltd, the other BVI-incorporated company, which was in turn held by the Company. Of the 20 shares issued by the Company, nine came to be held by the older son, Kam Kwan Sing ("Sing"), nine by the younger son, Kam Kwan Lai ("Lai"), and two by their sister through a company.

As is usual with family businesses, members of the family were put in charge of different aspects of the business. Sing oversaw the day-to-day running of the restaurant business, while Lai was responsible for the building, corporate and investments aspects of the business.[3] With the patriarch's passing in 2004, the family business came to rest on the shoulders of the two brothers. The trial judge found that the family business was run on the basis of mutual understanding between the brothers, and that each would fully participate and be properly consulted.[4] Relationships soured when Lai progressively took steps to appropriate power to his side of the family. The Company's Articles of Association were changed. Whereas they formerly required the presence of all directors to constitute a quorum, this was amended to provide for a quorum if half of the total number of directors were present. Lai's son was appointed to the boards of the Company, Long Yau Ltd and *inter alia*, YKRG. Lai also appropriated power to himself by appointing himself as the authorised representative of the Company; by this move, he was able to exert control over Long Yau Ltd and thereby, the companies held by Long Yau Ltd. Other acts which demonstrated Lai acting unfairly towards Sing included granting salary increases to his own children under the employ of YKRG while withholding the same from Sing's children. Further, against the objections of Sing, Lai's children were allowed to use certain industrial properties free of charge.

Against the backdrop of Lai's conduct which extended beyond the Company to the group of companies, Sing sued. Sing passed away at the conclusion of the trial, before judgment was delivered.[5] Thereafter, the action was carried on by

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3 More precisely, there were five respondents in the lawsuit. These included Lai's son, Carrel, and three companies in the group. The dispute was principally between the two brothers.

4 *Re Yung Kee Holdings Ltd* (CFI), *supra* note 2 at para 115.

5 Before the trial judge and the Court of Appeal, the parties agreed that Sing's death had no bearing on the litigation. The matter was raised for the first time before the Court of Final Appeal; the Court held that it was too late to raise submissions on Sing's death: *Re Yung Kee Holdings Ltd* (CFA), *supra* note 1 at para 62.

Kam Leung Sui Kwan, the personal representative of Sing's estate (the petitioner). Sing's principal plea was for the court to order the buy-out of his interests on the ground of Lai's unfairly prejudicial conduct against him under s 168A of the *Companies Ordinance*.[6] Where a company is incorporated outside Hong Kong, the right of action is only available if such a company "establish[es] a place of business in Hong Kong".[7] In the view of the Court, purely internal organisational changes to the governance of the Company could not amount to 'establishing a place of business'. As such, this element was not satisfied, and the action for unfair prejudice was unavailable to Sing. This explains why the final decision turned on whether it was just and equitable to wind up the Company.

The Company falls within the definition of "unregistered company", and is liable to be wound up under the grounds specified in s 327(3) of the *Companies Ordinance*.[8] These include the circumstance where "the company is unable to pay its debts", and where "the court is of opinion that it is just and equitable that the company should be wound up".[9] The statutory formula providing that an unregistered company "*may* be wound up… *if the court is of opinion*…" indicates that the power is a discretionary one.[10]

Nonetheless, as the jurisdiction of incorporation is arguably the most appropriate jurisdiction to order the winding-up of the company, a court purporting to wind up a company not incorporated in its jurisdiction risks the accusation that it asserts "exorbitant" jurisdiction and that it is "usurping" the role of the courts of the jurisdiction of incorporation.[11] To anticipate such criticisms, common law courts have laid down three essential requirements before a court should be prepared to order the winding-up of a foreign company under its statutory jurisdiction.[12] As summarised

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6 Cap 32, LN 82 of 2005, HK [*Companies Ordinance*]. Now ss 722-726 of the *Companies Ordinance* (Cap 622, LN 163 of 2013, HK) [*Companies Ordinance* (Cap 622)].

7 More precisely, the provision applies to a "specified corporation", which is defined as (a) "a company" (*ie* a company incorporated under the Hong Kong *Companies Ordinance*), or (b) a "non-Hong Kong company". The latter is defined as a company incorporated outside Hong Kong which "establish[es] a place of business in Hong Kong": *Companies Ordinance*, *supra* note 6 (LN 187 of 2007), s 332 (now *Companies Ordinance* (Cap 622), *supra* note 6, s 2).

8 *Supra* note 6 (LN 267 of 2003). Now s 327(3) of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32, ER 1 of 2014, HK). Cognate provisions in other jurisdictions include: *Insolvency Act 1986* (UK), c 45, s 221(5); *Companies Act 1993* (NZ), 1993/105, s 342 read with s 241(4)(d); and *Companies Act* (Cap 50, 2006 Rev Ed Sing), s 351(1)(c). *Cf Corporations Act 2001* (Cth), Part 5.7 (particularly s 583) which applies to a foreign company that is registrable under the Act and is either (a) registered under Division 2 of Part 5B.2 or (b) not registered but carries on business in Australia: definition of a 'Part 5.7 body' found in s 9. As such, the jurisdiction to wind up a foreign corporation would appear to be narrower in Australia than in the United Kingdom ("UK"), New Zealand and Singapore. For a successful challenge by a foreign company on the ground that it was not carrying on business in Australia, see *TPG Newbridge Myer Ltd v Deputy Commissioner of Taxation* [2011] FCA 1157.

9 *Companies Ordinance*, *supra* note 6 (LN 267 of 2003), ss 327(3)(b), (c) respectively.

10 *Ibid*, s 327(3)(c) [emphasis added].

11 *Re Yung Kee Holdings Ltd* (CFA), *supra* note 1 at para 19.

12 *Re Real Estate Development Co* [1991] BCLC 210 at 217 (Ch), and approved by the English Court of Appeal in *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at paras 27, 30, 31 (CA) [*Stocznia Gdanska SA*]. In Hong Kong, these requirements in *Re Real Estate Development Co* were earlier adopted in *Re Zhu Kuan Group Co Ltd* [2004] HKCU 1047 at paras 22-26 (CFI).

in *Re Beauty China Holdings Ltd*[13] by S Kwan J, they are that:

(1) [T]here had to be a sufficient connection with [the jurisdiction], but this did not necessarily have to consist in the presence of assets within the jurisdiction;
(2) [T]here must be a reasonable possibility that the winding-up order would benefit those applying for it; and
(3) [T]he court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.[14]

In *Re Yung Kee Holdings Ltd* (CFA), the issue arose as to whether the winding-up of a solvent foreign company should be regarded as exceptional and consequently, requires the stringent application of the precautionary principles. The suggestion that the just and equitable ground for winding up foreign companies should be sparingly applied is found in *Hollington on Shareholders' Rights*:

> Nearly all the authorities are concerned with creditors' petitions to wind up on the insolvency ground… In the case of solvent companies sought to be wound up by an aggrieved shareholder, *it would have to be a very exceptional case for the court to exercise its jurisdiction to wind it up*.[15]

Both the trial judge and the Court of Appeal took the view that a more stringent connection should be demanded in a shareholders' petition than in a creditor's petition. The Court of Final Appeal disagreed. The key lies in whether there is a sufficient connection between the place of incorporation and jurisdiction where the winding-up order is sought. While the nature of the dispute and the purpose for which the winding-up order is sought may mean that the factors relevant to establishing the connection are different, the touchstone remains establishing a 'sufficient connection'.[16] Taking a holistic view of all the assets directly and indirectly held by the Company, the sources of income for the group ultimately controlled by the Company, and where the shareholders and directors resided, the Court found that there was a sufficient connection and that it was proper for the Hong Kong courts to exercise their powers to wind up the Company.

It then proceeded to consider whether the just and equitable ground for winding up the Company was established. The analysis went along orthodox lines predicated by *Ebrahimi v Westbourne Galleries Ltd*[17] and *O'Neill v Phillips*.[18] However, a closer analysis of why the Court reversed the decision of the Court of Appeal reveals that the difference lies in a more legalistic approach adopted by the Court of Appeal compared to the more open textured consideration of the equitable considerations stemming from Sing's legitimate expectation to participate in the family business.

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13 [2009] 6 HKC 351 (CFI).
14 *Ibid* at para 23. Kwan J's summary is a restatement of the three core requirements articulated by Knox J in *Re Real Estate Development Co*, *supra* note 12 at 217.
15 Robin Hollington, *Hollington on Shareholders' Rights*, 7th ed (London: Sweet & Maxwell, 2013) at para 12-05 [emphasis added].
16 *Re Yung Kee Holdings Ltd* (CFA), *supra* note 1 at paras 26, 30.
17 [1973] AC 360 (HL).
18 [1999] 1 WLR 1092 (HL).

II. 'Sufficient Connection'—No More Stringent for the Just and Equitable Ground than for Creditor Petitions

The repudiation of the suggestion that 'sufficient connection' is to be more stringently applied is, with respect, correct. Indeed, given the precautionary role served by the core judicial requirements, there is no reason why the court should be more stringent in cases involving the just and equitable ground than in cases of insolvency. The concerns which attend both grounds are similar. The jurisdiction of incorporation is logically the most suitable forum for ordering the winding-up of a company.[19] For one, this avoids the conflict of laws problem that arises if the winding-up order by the court is contested whether in the jurisdiction of incorporation, or in a third jurisdiction. The exercise of the power necessarily means that the court is not deferring the matter to be dealt with under the jurisdiction of incorporation. There must thus exist good reasons for exercising the power.

In conferring on the courts the jurisdiction to wind up foreign companies, it must be within the contemplation of the legislature that conflict of laws issues might arise. How the considerations of comity should be balanced against other considerations arguing for the assertion of jurisdiction has been left to the courts. Accordingly, the courts have formulated core requirements which reflect the circumspection due. Underlying the three core requirements—sufficient connection, identifiable benefit to the applicant, and jurisdiction over persons charged with administering the assets—is, it is submitted, the concern that the jurisdiction in which the winding-up petition is made demonstrates that it has sufficiently strong reasons to assume jurisdiction, sufficiently strong for the court not to direct the litigants to resolve the dispute in the state of incorporation.

Do these core requirements go to the jurisdiction of the court? This notion stems from the presumption that Parliament intends for its laws to operate on a territorial basis, and that there must be established links in territoriality.[20] As put by Knox J in *Re Real Estate Development Co*, "[t]hroughout the investigation into whether the court has jurisdiction, the aim is to discover a sufficient connection with this jurisdiction".[21] Yet, when the sufficient connection requirement extends beyond the carrying on of business in the jurisdiction and assets within jurisdiction to include business interests in the form of indirectly held assets, the notion of territoriality is stretched rather thin. It is also hard to see how the benefit requirement is an outworking of the territoriality principle. On the other hand, the requirement that the court is able to exercise jurisdiction over one or more persons interested in the distribution of assets can readily be satisfied if a claimant submits to the jurisdiction of the court. This raises the question as to whether the requirement really serves as a substantive check on territoriality. In *Re Yung Kee Holdings Ltd* (CFA), Geoffrey Ma CJ and Lord Millett NPJ preferred "to treat them as a part of the court's

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19 See *eg*, *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] 1 Ch 112 at 125, 126 (CA) (Evershed MR): "[a]s a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries."

20 *Re Real Estate Development* Co, *supra* note 12 at 212.

21 *Ibid* at 217.

discretion".[22] This is, with respect, the preferable way of dealing with the statutorily conferred discretionary power. The requirements summarised in *Re Beauty China Holdings Ltd*,[23] constituting as they do the justification for *exercise* of the court's power, should be seen as relating to the *propriety* of exercising such power; provided that the statutory grounds for exercise of the power are satisfied, the self-imposed judicial conditions should not affect the court's assumption of jurisdiction over the subject matter or the existence of its power to exercise the statutorily conferred discretion.

What can be regarded as precautionary judicial principles are of sufficient generality to apply whether the petition is presented by a creditor or by a shareholder. It does not follow from the fact that the power to order the winding-up of a foreign company is more usually exercised in scenarios involving indebtedness that the conditions are to be more stringently applied to the rarer scenarios. Such scenarios may mean that the relevant facts for the purposes of satisfying the judicial requirements are different, but it does not follow that the judicial requirements are to be more stringently applied.

Certainly, the nature of the dispute and the purpose of the litigation inform how the judicial requirements are to be applied. They inform what should be regarded as relevant connections, just as they frame what should be regarded as identifiable benefit. While the benefit to the applicant would usually consist of the company's assets within jurisdiction available for distribution, the benefit can be of a different kind. In *In re Eloc Electro-Optieck and Communicatie BV*,[24] the petition to wind up the foreign company was made by the employees not for the purpose of liquidating the assets of the company, but to satisfy a condition for accessing a redundancy fund set up by the Department of Trade and Industry. The purpose of the litigation persuaded the court that 'sufficient connection' could be founded on the past activity of the company in the UK, and that the absence of assets within the UK did not present an obstacle to the finding of 'sufficient connection'.

In a scenario where creditors seek to wind up an unregistered company, a relevant factual consideration is whether there is a debt owing and corollary to that, whether there are assets within the jurisdiction of the court for satisfaction of the indebtedness. The presence of assets within jurisdiction, unsurprisingly, readily passes muster under the requirement for sufficient connection with the jurisdiction.[25] The appointment of a liquidator pursuant to the winding-up order brings into being a person accountable to the court, and assures the court that there is an effective mechanism for the achievement of the purpose—the enforcement of the debt owing to the creditor.

Where the petition to wind up an unregistered company stems from a dispute between the shareholders and proceeds on the just and equitable ground, what count as relevant facts for the purposes of the core requirements must necessarily be

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22 *Supra* note 1 at para 21. This view resonates with the Singapore position: *Re Griffin Securities Corp* [1999] 1 SLR (R) 219 (HC). In *Stocznia Gdanska SA*, *supra* note 12, Morritt LJ referred to the issue but chose not to draw a distinction between whether the core requirements were "pre-conditions for the existence of the statutory jurisdiction or principles to be observed in considering its exercise": *ibid* at para 30. What mattered to the court was that the three conditions must be satisfied.

23 *Supra* note 13.

24 [1982] 1 Ch 43 (Ch).

25 Even then, it has been repeatedly stressed that this is not essential: *Re Real Estate Development Co*, *supra* note 12 at 217; *In re A Company (No 00359 of 1987)* [1988] 1 Ch 210 at 222 (Ch).

re-calibrated. In a creditor petition, whether the assets are directly held by the debtor company puts into question whether there is a sufficient connection. Moreover, if the assets are held through subsidiaries, the separate legal personality principle poses a doubt as to whether there might be an identifiable benefit to the petitioner. It is not a bar for there may yet be residual value left for the creditors of the parent company after creditors of the subsidiaries are paid.[26] By contrast, if the applicant shareholder alleges that the affairs of a group of companies are being conducted in an unjust manner and that the locus of control is to be found in the foreign company, whether the foreign company holds the Hong Kong-based assets directly or indirectly through another entity assumes a different significance from the circumstance of a creditor petition, for there may be other more relevant connecting factors.

What is needed to constitute sufficient connection necessarily needs to be re-calibrated with the change in the ground for winding up. The different grounds require a consideration of what facts are relevant for the core requirements; there is no reason why the core requirements should be applied more strictly or restrictively.

In *Re Yung Kee Holdings Ltd* (CFA), even though the petition was to wind up the ultimate holding company incorporated in the BVI, the arguments for why it was just and equitable to make the order related to the governance of the entire group of companies, of which the locus of ultimate control lay with the Company. As such, a holistic view should be taken of how the group's affairs were conducted. This, therefore, is the difference between the approaches taken by the Court of Appeal and the Court of Final Appeal. The Court of Appeal took a more formalistic approach. Having chosen to incorporate the ultimate holding company in the BVI, the incorporators were then taken to have intended that the termination of the Company should be governed only by the rules of the jurisdiction of incorporation. If the parties had applied their minds to the matter and indicated that the law of incorporation was to exclusively govern the winding-up of the Company, such deliberated consent should certainly persuade the court not to intervene. However, what the Court of Appeal did was to read the choice of the jurisdiction of incorporation to also determine the law for winding-up of the Company. Such a consent-based approach should be seen for what it is—constructed consent. Accordingly, the Court of Final Appeal was right to examine whether the constructed consent had gone too far. Insofar as the operating subsidiaries and the parties carried out their activities in Hong Kong, such constructed consent is probably at variance with the expectations of the parties. After all, given the close ties to Hong Kong, it is hard to imagine that the parties had intended to exclude the legal and statutory rights conferred by the law of their domicile. Once one goes beyond deliberated consent to constructed consent, one must be cautious not to interpret the parties' intentions beyond legitimate bounds.

III. 'Sufficient Connection' for the Just and Equitable Ground—Peeping through the Separate Legal Personality of the Subsidiaries

A crucial difference between the determination of the Court of Final Appeal and the lower courts lay in the treatment of the interposition of Long Yau Ltd, the

[26] In *Re Beauty China Holdings Ltd*, *supra* note 13, the *possibility* of recovering debts owed by an indirectly held subsidiary to the parent company satisfied the benefit requirement for a creditor's petition to wind up the parent even though accounts showed that the liabilities exceeded the assets: *ibid* at paras 46-48.

BVI-incorporated subsidiary of the Company which held the Hong Kong assets. The lower courts held that the holding structure meant that the Company's assets consisted only of Long Yau Ltd shares and these were situated in the BVI. Accordingly, there was insufficient connection with Hong Kong. The Court of Final Appeal disagreed. The key question is whether there is sufficient connection. The distinct identities of the shareholders and the Company are maintained even as one looks through the corporate structure to ascertain whether there is sufficient connection between the Company and Hong Kong. In other words, for the purpose of the inquiry, both direct and indirect holdings are relevant connections.

What the Court of Final Appeal did not explain was that peeping through the corporate veil was a legitimate exercise in the context of establishing sufficient connection for the inquiry whether it is just and equitable to wind up the Company. Indeed, the purpose of the exercise contemplates and permits looking at connections beyond whether the Company holds assets in Hong Kong. Insofar as the just and equitable ground allows for equitable considerations extending to the conduct of the family business, it is permissible to examine connections of the family business as a whole with Hong Kong. Given that the income generating assets were located in Hong Kong, it would have been myopic to confine the 'sufficient connection' inquiry to the assets directly held by the ultimate holding company.

It is important to recognise *when* the separate legal personality principle is properly to be invoked in a legal inquiry. At its core, the separate legal personality principle prevents the conflation of the shareholders with the corporate entity and an attempt to treat them as one and the same person. Importantly, the separate legal personality principle serves to partition assets of one entity from those of another. When the distinct identities are maintained and the legal rights and liabilities of each entity respected, the separate legal personality principle is *prima facie* honoured. When the very inquiry posits a less formal legal approach—as is contemplated in the 'just and equitable' ground—its applicability needs to be carefully considered.

IV. Conclusion

At first glance, *Re Yung Kee Holdings Ltd* (CFA) seems like a prosaic application of the judicially developed core requirements to winding-up of a foreign company on the just and equitable ground. Upon deeper examination, the judgment is far more radical. First, its characterisation of the core requirements as a part of the court's discretion points the way to their true function—precautionary principles to taking a course of action which more naturally should be undertaken by a court in the jurisdiction of incorporation. Second, even as core requirements are applied no more stringently to a winding-up on the just and equitable ground than for an inability to pay debts, the judgment demonstrates how the former ground informs what count as relevant factors for the sufficient connection requirement. Third, it alerts one to the dangers of over-extending consent-based arguments and to be sensitive to the limits of the separate legal personality principle in the context of the specific sufficient connection inquiry. The decision deserves to be analysed closely in jurisdictions with cognate provisions.