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To: Transport Industry Operators

Transfer of business & Lifting corporate veil

The Hong Kong District Court issued a Judgment on 26 April 2022 dealing with a case concerned with transfer of business and lifting the corporate veil, and held a forwarder and its shareholder and director jointly and severally liable for a debt of HK\$975,733.71. [DCCJ 2104/2019] [2022 HKDC 289]

This was an action brought by Global Alliance against the 2 defendants. The first defendant was Premiere Logistics (HK) Limited (the “**New Company**”). The second defendant was Mr Lau. Global Alliance claimed against the New Company and Mr Lau for the outstanding balance of the judgment debt owed by one Premiere Global Logistics (Hong Kong) Limited (the “**Old Company**”) in an earlier action, namely, HCA 3130/2016 (the “**Former Action**”) to Global Alliance. Mr Lau was both the sole shareholder and sole director of the Old Company as well as the New Company.

Background

Global Alliance’s claim in the action in question arose from and was closely related its claim in the Former Action and the judgment it obtained against the Old Company.

Global Alliance and the Old Company were in the business of providing freight forwarding and logistics services in Hong Kong. On 30 November 2016, Global Alliance commenced the Former Action against the Old Company claiming the sum of HK\$1,312,275.35 being freight charges due and owed by the Old Company to Global Alliance with interest. On 21 September 2017, Global Alliance applied for summary judgment in the Former Action for the sum of HK\$901,994.02 and interest. On 13 November 2017, the court granted summary judgment in the Former Action in favour of Global Alliance against the Old Company in the sum of HK\$901,994.02 and interest, and ordered that the remainder of the claim, namely HK\$410,283.33 be transferred to the District Court for disposal. The remainder of the claim was subsequently assigned the action number, DCCJ 88/2018.

On 28 November 2017, Global Alliance applied for and obtained a garnishee order nisi against the Old Company as the judgment debtor and HSBC as the garnishee and was able to recover the sum of HK\$332,443.46 from the account maintained by the Old Company with HSBC. On or about 11 June 2018, Global Alliance presented a petition in HCCW 148/2018 to wind up the Old Company on the basis of the outstanding balance of the judgment debt in the Former Action. On or about 15 August 2018, the court ordered the Old Company to be wound up.

On 4 October 2017, Mr Lau applied to the Companies Registry to incorporate the New Company, which was incorporated on or about 11 October 2017.

Global Alliance’s claim

Global Alliance’s case was that the Old Company had transferred its business to the New Company, and the New Company became liable to Global Alliance for the Old Company’s debt to Global Alliance.

It was Global Alliance’s further or alternative case that the New Company was set up by Mr Lau as a sham and a façade for the illegitimate purpose of assisting the Old Company in evading its liability to pay the Old Company’s debt to Global Alliance. Global Alliance sought to lift the

corporate veil between the Old Company, the Old Company's controllers (in particular, Mr Lau), the New Company and/or the New Company's controllers (in particular, Mr Lau) and to hold the New Company and Mr Lau to be jointly and severally liable for the Old Company's debt owed to Global Alliance.

The defendants' defences

As to Global Alliance's claim based on transfer of business, the defendants denied that the Old Company transferred its business to the New Company or that the Old Company and New Company shared similar or identical features. Furthermore, the defendants alleged that Global Alliance was time-barred from raising arguments based on transfer of business.

As to Global Alliance's claim based on the doctrine of lifting the corporate veil, the defendants denied that they were liable for the debt owed by the Old Company to Global Alliance.

The issues

The parties agreed that the issues for trial were as follows:-

- (1) Whether there was a transfer of business from the Old Company to the New Company?
- (2) Whether the New Company was liable to Global Alliance for the Old Company's debt pursuant to s 3 of the Transfer of Business (Protection of Creditors) Ordinance (Cap 49) (the "Ordinance")?
- (3) Whether Global Alliance's claim was time-barred pursuant to s 9 of the Ordinance?
- (4) Whether the New Company had acted as a sham and façade to evade legal obligations of the Old Company to Global Alliance and/or frustrate the enforcement of the same?
- (5) Whether Mr Lau intended to, and did, incorporate the New Company as a sham and a façade to evade liability and/or frustrate enforcement of the law;
- (6) Should the corporate veil between the Old Company, the New Company and/or Mr Lau be lifted?
- (7) Should the New Company and/or Mr Lau be jointly and severally liable for the Old Company's debt to Global Alliance and if so, what was the amount of the relevant debt?

Broadly speaking, Issues Nos (1) to (4) were concerned with the question of whether there was a transfer of business from the Old Company to the New Company, whilst Issues Nos (5) to (7) were concerned with the question of whether the corporate veil should be lifted.

Legal principles

First, a clear distinction should be drawn between the *evasion* of legal obligations and the *avoidance* of the incurring of any legal obligation in the first place. The doctrine of lifting the corporate veil seeks to prevent the former but not the latter. Using a company to evade the law or frustrate its enforcement is an abuse of the separate legal personality of the company, which the doctrine of lifting the corporate veil seeks to prevent: -

- (1) As Bokhary JA (as he then was) said in *China Ocean Shipping Co v Mitsui Bussan Kaisha Ltd* [1995] 3 HKC 123 at 127C-D:-
"Using a corporate structure to *evade* legal obligations is objectionable. The court's power to lift the corporate veil may be exercised to overcome such evasion so as to preserve legal obligations. But using a corporate structure to *avoid* the incurring of any legal obligation in the first place is not objectionable. And the court's power to lift the corporate veil does not exist for the purpose of reversing such avoidance so as to create legal obligations". [*Emphasis original.*]
- (2) In *Winland Enterprises Group Ltd v Wex Pharmaceuticals Inc* [2012] 2 HKLRD 757, the Court of Appeal said (at para 54 *per* Anthony To J, Hartmann JA (as he then was) concurring): -
"In summary, the Court will lift the corporate veil of a company if it is a façade or a puppet of the parent company used to perpetuate fraud or evade legal obligation and liability. Fraud and concealment which may have such effect are valid grounds for lifting the corporate veil. That a company is a façade or a puppet of its parent company by itself is neither here nor there. It is just some evidence from which the inference of illegitimate purpose may be drawn or on which to support a finding of the illegitimate purpose behind the façade. Unless the use of a corporate veil

for such illegitimate purpose is proved, the use of a façade or that a company is a puppet of its parent company without more does not justify lifting the corporate veil”.

Turning to transfer of business, the object of the Ordinance is to protect creditors on the transfer of businesses and to provide for the liability of transferees of businesses and the manner in which such liability may be avoided.

Pursuant to s 3 of the Ordinance, subject to other provisions of the Ordinance, a person to whom a business is transferred shall be liable for all the debts and obligations arising out of the carrying on of the business by the transferor. That provision is subject to certain limitations and exemptions in: (1) s 3(2)(b); (2) s 4 and 5; and (3) s 10.

Under s 2 of the Ordinance:-

- (1) “business” means “a business, or any part thereof, consisting of a trade or occupation (other than a profession) whether or not it is carried on with a view to profit”;
- (2) “transfer” means the transfer or sale of a business, but does not include (a) the sale of the stock-in-trade of a business in the ordinary course of its trade; (b) the creation of a charge; (c) the transfer of land or any share or interest therein; and (d) the transfer of a vessel, other than certain specified exceptions.

In *Yiu Ka Fung Vincent*, the Court of Appeal also approved (at paras 42-51) the following principles on transfer of businesses articulated by DHCJ Reyes SC in *BNP Paribas v GC Luckmate Trading Ltd* [2002] 2 HKLRD 156 at para 21 (which was subsequently endorsed by the Court of Appeal in that case: see [2003] 1 HKLRD 307):-

“In deciding whether there has been a transfer of business under the [Ordinance], the court objectively considers all surrounding circumstances. The fact that there is no document formally evidencing a transfer is not conclusive.

(2) A transfer of assets may indicate a transfer of business. But a transfer of assets does not of itself mean that there has been a transfer of business within the [Ordinance].

(3) There may be a transfer where the alleged transferee can be shown to have gained some advantage from taking over the purported transferor’s business. Such advantage will often arise because the alleged transferee is shown to have taken over a ‘going concern’. But even where an entity is on the verge of bankruptcy, an alleged transferee may perceive a real benefit to be gained from assuming some or all aspects of that entity’s business.

(4) Factors indicating that a business has been transferred from one person to another include the following:

- (a) Use of the same or similar name.
- (b) Assignment of goodwill.
- (c) Use of the same premises.
- (d) Use of the same fixtures, fittings and equipment.
- (e) Use of the same personnel.
- (f) Use of the same stock-in-trade.
- (g) Conduct of the same or similar type of business.
- (h) Conduct of business in the same or similar manner.
- (i) Servicing of the same customers.

Although the above may not be conclusive individually, the cumulative presence of a number of the foregoing factors can establish a transfer.”

There is a limitation of time for institution of proceedings under s 9 of the Ordinance, the limitation period being 1 year after the date on which the transfer in respect of which the liability arose took effect.

Whether there was a transfer of business from the Old Company to the New Company

Although it is common ground that a transfer of business is not a necessary ingredient of the doctrine of lifting the corporate veil, it is nevertheless still highly relevant to the question of whether the corporate veil should be lifted.

Applying the principles above, the Judge had no doubt, and so found, that there was a transfer of business from the Old Company to the New Company:-

- (1) The New Company, Premiere Logistics (HK) Limited, had an almost identical name to the Old Company, Premiere Global Logistics (Hong Kong) Limited. The most distinctive parts of the Old Company's name, namely "Premiere" and "Logistics", also appeared in the New Company's name;
- (2) Mr Lau was the sole director and sole shareholder of the Old Company and the New Company;
- (3) Until the Old Company changed its registered office to that of its company secretary on 4 December 2017, the Old Company's registered office and the New Company's registered office were at the same address. Under cross-examination, Mr Lau admitted that both the Old Company and the New Company operated from the same address;
- (4) From 30 November 2017, the Old Company's company secretary was Glory Stand Management. The New Company's company secretary was also Glory Stand Management;
- (5) The Old Company and the New Company were in the same line of business, namely the provision of freight forwarding and logistics services;
- (6) The Shipper's Instruction of the Old Company and the Shipper's Instructions (and Cargo Manifest) of the New Company shared the following features:-
 - (a) They both bore the same logo, which depicted the words "PREMIERE. | logistics", in the top right-hand part of the document.
 - (b) The contact details had the following overlap:-
 - (i) In both, the telephone number was the same;
 - (ii) In both, the fax number was the same;
 - (iii) In both, the email address had the same domain name, "premierehkg.com"; and
 - (c) The layout, headings, and content of the Shipper's Instructions, including the wording of the agent's acknowledgement and the shipper's declaration, were the same;
- (7) The business cards used by the Old Company and the New Company were highly similar, including with respect to the logo;
- (8) The business cards also showed that some of the staff of the Old Company went to work in the New Company, including: (a) Mr Lau (Chief Executive Officer); (b) C S Hai (General Manager); (c) M Leung (in finance); (d) K Kwan (Corporate Account Customer Services Manager); and (e) T Cheung (Operation Manager). Mr Lau admitted under cross-examination that the Old Company only had 5 to 6 staff members. Given this admission, nearly all (if not all) of the staff members of the Old Company moved to work in the New Company. It was also clear that the staff members who moved from the Old Company to the New Company held key roles in both the Old Company and the New Company;
- (9) Some customers of the Old Company came to be customers of the New Company. An example was a company called Asus Global. Mr Lau also admitted under cross-examination that some customers of the Old Company might not have placed orders with the New Company as soon as it was set up and that some of the Old Company's customers might have placed orders with the New Company several months after it was set up, including in mid-2018 or late 2018;
- (10) The New Company's Known Consignor Declaration of Compliance also displayed the same logo;
- (11) Mr Lau under cross-examination accepted that the New Company took over the Old Company's telephone number, fax number and domain name; and
- (12) The New Company by taking over the business operated at the same address was in effect taking over the goodwill of the business.

The Judge found as a fact that there was a transfer of business by the Old Company to the New Company. The Judge found on a balance of probabilities that there was a continuous transfer of business from the Old Company to the New Company including mid-2018 or late 2018 and that since the action in question was commenced on 29 April 2019 which was within the 1 year's period stipulated in s.9 of the Ordinance, it was not time-barred.

Accordingly, the Judge found that the New Company was liable to Global Alliance for all the debts and liabilities of the Old Company pursuant to s.3 of the Ordinance.

Whether the corporate veil should be lifted

Applying the principles above, the Judge had no doubt that the corporate veil should be lifted:-

- (1) The time in which the New Company was set up was revealing. It was on 4 October 2017, less than 2 weeks after Global Alliance took out the summary judgment application in the Former Action, that Mr Lau decided to incorporate the New Company. It was on 11 October 2017, shortly before summary judgment in the Former Action was entered in favour of Global Alliance against the Old Company, that the New Company was set up.
- (2) Mr Lau's own evidence made it clear that he set up and conducted business through the New Company because he had decided to let summary judgment be entered against the Old Company in the Former Action, and let the Old Company be wound up.
 - (a) Mr Lau admitted under cross-examination that he decided that rather than filing evidence in opposition to Global Alliance's summary judgment application in the Former Action, he would give up on the Old Company. He also admitted that he did not want to carry on operating the Old Company that was facing the summary judgment application.
 - (b) Mr Lau also admitted under cross-examination that when he applied to incorporate the New Company on 4 October 2017, this was part of what he did in order to not continue operating the Old Company that was facing that summary judgment application.
- (3) The Judge made the following findings of fact based on the evidence before him:-
 - (a) The New Company was incorporated and commenced business after the debt was incurred and owed by the Old Company to Global Alliance and at the time when Global Alliance was claiming against the Old Company for the debt. The New Company was incorporated to evade the liability of the Old Company to Global Alliance;
 - (b) Since the Old Company and the New Company were under the same common controller (Mr Lau), the only reasonable inference was that the common controller had already decided to give up the Old Company and the business was therefore diverted to the New Company. There was a continuous transfer of business by the Old Company to the New Company including in mid-2018 or late 2018;
 - (c) Mr Lau orchestrated the entire show including the deliberate decision not to defend the Former Action and ultimately letting the Old Company into liquidation and the diversion of the goodwill and business of the Old Company to the New Company. Thus the intention to evade liability on the part of Mr Lau could not have been clearer.

As the corporate veil was lifted, the New Company and Mr Lau were jointly and severally liable to Global Alliance for the legal obligations or liabilities of the Old Company.

Accordingly, the Judge entered judgment in favour of Global Alliance against the New Company and Mr Lau for the sum of HK\$975,733.71 together with interest at 1% over prime rate from the date of the writ to the date of judgment and thereafter at judgment rate until full payment.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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