

HCCW 386/2016

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**  
COMPANIES (WINDING-UP) PROCEEDINGS NO 386 OF 2016

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IN THE MATTER of the Companies  
(Winding up and Miscellaneous  
Provisions) Ordinance, (Cap 32) of The  
Laws of Hong Kong

and

IN THE MATTER of THE BAPTIST  
CONVENTION OF HONG KONG

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BETWEEN

KOO MING KOWN

Petitioner

and

THE BAPTIST CONVENTION  
OF HONG KONG

Respondent

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Before: Deputy High Court Judge Hunsworth in Chambers

Date of Hearing: 6 January 2017

Date of Decision: 6 January 2017

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**DECISION**

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A 1. This is an application by the respondent company for an  
B extension of a validation order made under Section 182 of the Companies  
C (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)(“the  
D Ordinance”), the original order having been made *ex parte* by  
E Anthony Chan J on 28 December 2016.

F 2. The petitioner does not object to such extension of the validation  
G order, but seeks to impose terms. Initially, the terms suggested by the  
H petitioner were that the respondent be required to report to the petitioner  
I details of its monthly payments and dispositions of property. Alternatively,  
J Miss Tong, representing the petitioner, said the petitioner would be content to  
K accept, *in lieu* of such reporting terms, the payment into court of the amount  
L which is claimed by the petitioner in the petition of some \$14 million-odd.

M 3. Mr Cheung, representing the respondent, had volunteered such  
N payment-in as a condition of the making of a validation order when he  
O appeared before Anthony Chan J on the *ex parte* application and he repeated  
P that offer this morning.

Q 4. Accordingly, there is no dispute between the parties that, subject  
R to the payment-in of the amount in issue, the validation order should continue  
S until the determination of the petition or until further order.

T 5. What remains in dispute, however, are the costs of this  
U application and the manner in which the original *ex parte* application was  
V made before Anthony Chan J.

A 6. The petition was issued on 4 November 2016. It seemingly did  
B not occur to the respondent and its directors what consequences flowed from  
C the issue of the petition.

D 7. To this day, no evidence has been filed by the respondent in  
E opposition to the petition, notwithstanding the provisions of Rule 32 of the  
F Companies (Winding-Up) Rules, which require the filing of evidence in  
G opposition within seven days from the date of the filing of the affidavit  
H verifying the petition or at such later date as the court may order.

I 8. The respondent seemingly carried on business in complete  
J disregard of Section 182 of the Ordinance, whereby any disposition made by  
K a company after the presentation of a petition is void.

L 9. It only seems to have occurred to the respondent that there were  
M consequences arising from the issue of a petition, when, on 19 December  
N 2016, it was notified by HSBC that its bank accounts were frozen.  
O Presumably, until that date, it had been making payments for the running and  
P operation of its business, notwithstanding these payments would  
Q subsequently be found to be void if a winding-up order were made.

R 10. HSBC was not the only bank to freeze the respondent's accounts  
S and other banks notified the respondent of its accounts being frozen on  
T 20 December. This was presumably the consequence of the banks being  
U made aware of the existence of the petition by its advertisement.

V 11. On Wednesday 21 December, an affidavit of  
Mr Lam Sau-kwong was prepared, to be used in support of an application for  
a validation order under Section 182 of the Ordinance.

A 12. I have been told by Mr Cheung on behalf of the respondent that  
B attempts were made by those instructing him to issue an *inter partes*  
C summons for the hearing of the validation application. They were, however,  
D told by the practice master and the listing clerk that no date was available  
E until April 2017. Nothing then seems to have happened on Thursday 22 or  
Friday 23 December.

F 13. On 28 December, the respondent's solicitors wrote to the  
G petitioner's solicitors, intimating an intention to apply for an *ex parte*  
H validation order. This letter, with some of the enclosures, was faxed to the  
I petitioner's solicitors at 1.17 pm. Subsequently, the letter, with a full set of  
J the enclosures, was delivered by hand and received by the petitioner's  
K solicitors at 4.39 pm.

L 14. In the meantime, however, there had been an appearance earlier  
M in the afternoon by the respondent before Anthony Chan J. An explanation  
N was given as to the urgency of the application being the necessity for the  
O respondent to pay monthly expenses, not least salaries for teachers and other  
staff at the school which it operates. No reason, apparently, seems to have  
P been given for why the petitioner was not told of the *ex parte* application  
Q being made.

R 15. Anthony Chan J duly made the *ex parte* order and directed that  
S the respondent issue, as soon as practicable, an *inter partes* summons, and it  
T is that summons which is before me this morning.

U 16. Miss Tong, on behalf of the petitioner, submitted that the  
V circumstances in which the *ex parte* order had been obtained would have

A justified it being discharged on the grounds of inadequate disclosure and the  
B failure to give notice to the petitioner of the application.

C 17. I agree. *Ex parte* orders should, as a matter of natural justice,  
D be made only in exceptional cases. They should always, if possible, be  
E made on notice, however short that notice may be.

F 18. There may, of course, be circumstances where secrecy requires  
G an application to be made without the giving of notice. One can think of  
H examples such as an application for a Mareva injunction or the appointment  
I of a provisional liquidator, where, if notice were given to the intended  
J respondent, there may be dissipation of assets between the time of giving of  
K notice and the making of the order. However, this is not such a case.

L 19. To make matters worse in this case, the urgency here was  
M created entirely by the dilatoriness of the respondent in making the  
N application.

O 20. Miss Tong submitted it would be open to me to discharge the  
P *ex parte* order, but also to re-grant the order. In those circumstances, she  
Q submitted there was little purpose in doing this, given the petitioner did not  
R object in principle to the continuation of the validation order. She submitted  
S the court should express its disapproval of the manner in which the *ex parte*  
T order was made by an appropriate order for costs.

U 21. Mr Cheung submitted that the validation order, unlike an  
V injunction, did not directly affect the rights of the petitioner, because the  
respondent is solvent. That may be so, but it nevertheless ignores the  
importance of the existence of legal proceedings and the fact that natural

A justice requires, wherever possible, that parties to those proceedings are given  
B notice of any application which is to be made. B

C 22. In this case, an *inter partes* summons for validation should have  
D been issued immediately after the presentation of the petition in November. D  
E I have little doubt that if the respondents had approached the petitioner with  
F the evidence which is now before the court as to the financial status of the  
G respondent, the petitioner would have consented to an order being made  
G under Section 182.

H 23. Even allowing for the misapprehension of the respondent as to  
I the legal effect of the issue of a winding-up petition, no explanation has been  
I given as to why the affidavit of Mr Lam, which clearly establishes,  
J *prima facie*, the solvency of the respondent and its ability to settle the amount  
K which is claimed by the petitioner, could not have been sent to the  
K petitioner's solicitors on 22 or 23 December.

L 24. In my view, this whole application was unnecessary, because if  
M proper notice had been given and an opportunity provided to the petitioner in  
N good time to consider the application, I have no doubt the matter could have  
O been dealt with by agreement. O

P 25. In those circumstances, I think Miss Tong is correct that the  
Q proper order for costs is that the costs of all these matters relating to the  
Q validation order should be paid by the respondent to the petitioner on an  
R indemnity basis. R

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26. Before the hearing commenced, I was handed a draft order and I have amended this suitably, so the order that I propose to make is as follows:

- (1) subject to compliance with the condition in paragraph 2 below, the *ex parte* order of the Hon Anthony Chan J dated 28 December 2016 (the “*ex parte* order”) be continued until determination of the petition filed herein on 4 November 2016 or until further order, save that paragraph 1(2) of the *ex parte* order shall read “dispositions of the property of the respondent made in the ordinary course of business for proper value”;
- (2) the respondent shall pay into court within seven days the sum of HK\$14,284,627;
- (3) the respondent do pay the petitioner’s costs of and occasioned by the application for the *ex parte* order and the respondent’s summons dated 3 January 2017, including the hearing on 6 January 2017, such costs to be paid forthwith on an indemnity basis, to be taxed if not agreed; and
- (4) liberty to apply.

(Nicholas D Hunsworth)  
Deputy High Court Judge

Ms Sara Tong, instructed by Ince & Co, for the petitioner

Mr Ivan Cheung, instructed by Lui & Law, for the respondent