

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

IN THE MATTER of the Companies
(Winding Up and Miscellaneous
Provisions) Ordinance (Cap 32)

and

IN THE MATTER of THE BAPTIST
CONVENTION OF HONG KONG

BETWEEN

KOO MING KOWN

Petitioner

and

THE BAPTIST CONVENTION
OF HONG KONG

Respondent

Coram: Deputy High Court Judge Hunsworth in Chambers (Open to
public)

Date of Hearing: 6 January 2017 at 10 am

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

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

P R O C E E D I N G S

COURT: Yes, Mr Cheung.

MR CHEUNG: Good morning, my Lord. I appear for the respondent
company. My learned friend Miss Tong appear for the
petitioner. I understand the position of my learned friend
today is that the petitioner is not going to oppose the
continue of the ex parte validation order granted by the --
Chan J. However, she -- the petitioner would like to
impose certain conditions on the respondent to provide the

A statement of accounts as well as the schedule of the A
disposition of the properties which I am instructed that the B
respondent is not prepared to agree to that terms because C
having regard to the position of the respondent is clearly D
solvent and the status of the validity of the petitional E
debt has a substantial grounds of disputes and the -- and F
according to the disclosed account information, the G
respondent has maintained at least \$50 million in the bank H
and there were more than sufficient to cover all the I
petitional debt if the court eventually grant -- make the J
order that this debt should be payable by the respondent. K

L This is the position of the respondent about the conditions
M that are being suggested by the -- my learned friend about
N the granting the continuity of the validation order. O

P COURT: So what order do you seek from me this morning then? Q

R MR CHEUNG: I would like to ask the court to grant the order to
S extend the validation order grant by Chan J on 28 December. T

U COURT: So you simply want me to extend that order until... V

MR CHEUNG: The...

COURT: ...what, the hearing of the petition or?

MR CHEUNG: Until the determination of the petition or further
order which are already set out in the inter partes summons,
and there was -- of course, there is a liquidator applied on
the part of the parties, if necessary.

COURT: Before you sit down, Mr Cheung, you say that your client
has a bona -- or disputes his debt on a bona fide basis, but
there is nothing before the court in terms of evidence as to
what this basis is.

MR CHEUNG: Your Honour, there is an affirmation of Mr Lui.

COURT: Yes, which I have read but which simply says the debt is
disputed because he doesn't know how the figure is arrived
at.

MR CHEUNG: Yes. And as well as according to the judgment,
Exhibit LSK-4 -- LSK-2, my Lord, according to the judgment
as -- under the paragraph 4 -- under paragraph 3, it is
ordered the respondent had to pay the judgment sum of the 20
millions (million?) which the...

COURT: Yes.

MR CHEUNG: ...respondent has already made the payment on 21
September.

A COURT: Yes. A

B MR CHEUNG: And the outstanding issue is concerning the B
C calculation of -- or entitlement of the interest. My Lord, C
D if you -- the court look at the -- subparagraph (6) of the D
E judgment, it's stated, "The 1st defendant which means the E
F respondent do pay the plaintiff interest at interest rate -- F
G at judgment rate on the sum of the 20 million for which it G
H is liable under paragraph 3 above." H

E COURT: Yes. E

F MR CHEUNG: My Lord, if look at paragraph 3 and 6 together, we F
G can see that the respondent was liable to pay the sum of 20 G
H million was on the day of 13 July 2016. This is the date of H
I judgment. So if the reading according to 3 to 6 together, I
J then it is entirely only judgment interest would be attached J
K after the date of the judgment. So this is the point one K
L that there is a dispute of the fact, a dispute of their L
M substantial dispute on the debt. M

I And secondly, my Lord, if look at subparagraph (4), there is I
J also a relief that the plaintiff which is the petitioner in J
K this case seeking for the account for all benefits and K
L profits obtained from the sum 20 millions. And so there is L
M an inconsistent(inconsistency?) between on the one hand M
N there is account for the benefits and profits from the N
O respondent and on the other hand there would -- the O
P petitioner would also entitle to have the judgment interests P
Q to be imposed on the sum of \$20 million. Q

M And these are two observations that in fact made before Chan M
N J during the ex parte application and it seems to -- on the N
O face of this document, then there is a substantial ground on O
P dispute that the respondent is not liable to pay for the P
Q judgment interest debt before the judgment day. Q

O COURT: Well, that largely depends upon what was ordered by O
P Deputy Judge Seagroatt, doesn't it? P

P MR CHEUNG: Yes. P

Q COURT: And has any attempt been made to clarify that? Q

R MR CHEUNG: There is no... R

S COURT: I mean you could read paragraph 6 saying that interest S
T has been awarded on the \$20 million from the date when, I T
U assume, the \$20 million was gifted which if you look at 4 is U
V something like 2007, and my calculation is that the amount V
of 14 million odd which is the subject of the claim is
interest on 20 million at 8 per cent for the last nine years
in rough terms, am I right, Miss Tong?

A MS TONG: Yes, that's absolutely right, my Lord. A

B COURT: So the -- and the second point that struck me is that one B
C does not normally in a judgment provide for interest post- C
D judgment because interest post-judgment is an entitlement D
E under the rules. E

F MR CHEUNG: Yes... F

G COURT: I mean, Mr Cheung, the companies winding-up rules, Rule G
H 32, require a company to file evidence in opposition within H
I seven days from the date of the filing of the affidavit I
J verifying the petition or such later time as the court may J
K direct. This petition was filed on 4 November. If I can K
L find the petition. L

M MR CHEUNG: Yes, 4 November 2016. M

N COURT: A demand was made, according to the petition, on 31 N
O August on your client for the sum, that's one, two, three, O
P four months ago, and your client appeared to have done P
Q absolutely nothing. I mean your clients are presumably a Q
R charity, are they? R

S MR CHEUNG: That is a church organisation. S

T COURT: Yes. So it's presumably a registered charity. T

U MR CHEUNG: Yes. U

V COURT: And it seems an extraordinary casual and carefree way to V
W manage the affairs of a charity, to receive a demand in W
X August, to do apparently nothing, to receive a winding-up X
Y petition in November and in breach of the rules to do Y
Z apparently nothing. I mean are you proposing to file any Z
evidence at all?

MR CHEUNG: I am...

COURT: The petition is due to be heard on 25 January, I assume.

MR CHEUNG: Yes. I am instructed that the respondent would file the opposing affidavit to...

COURT: But why haven't you complied and filed it already?

MR CHEUNG: There -- I am -- the -- it is to the understanding of the respondent that because there the petitioner has not yet obtained the Registrar's certificate for -- in relation to the present application of the petitioner for this case and therefore at this moment they are still on the way of preparing the opposing affidavit in....

A COURT: But the obtaining of the Registrar's certificate has got A
nothing to do with filing evidence in opposition.

B MR CHEUNG: Yes, and... B

C COURT: I mean, there are numerous authorities where the present C
companies judge, Harris J, has said it is important that C
companies, if they wish to oppose a petition, file their D
evidence as soon as possible. The reason being that if the D
petitioner is made aware that there is a genuine dispute, E
the petitioner can take a view as to whether it should E
continue with the petition or not. And there seems to be an F
undesirable practice that people just think that they can F
file something at the last minute before the hearing of a F
petition before the Master which in this case is, what, G
nearly November, December, two and a half months after the G
presentation of the petition, and seek the indulgence of the G
court in terms of opposing the petition.

H MR CHEUNG: Yes. Yes, my Lord, I... H

I COURT: I mean, at the moment you are asking me to exercise my I
discretion to give you a validation order, and one of the I
key aspects of the exercise of my discretion is not just J
whether you are apparently solvent, because for all I know J
there may be dozens of other creditors out there and your J
client may not be solvent, but also whether I consider on a K
-- without coming to any determined view, on a review of the K
evidence that there is a legitimate opposition to this L
petition, and how can I do that when there is absolutely no L
evidence before me from your client?

M MR CHEUNG: Yes. I am -- my Lord, the -- because I got -- this M
is the -- the present application is concerning the M
extension of validation order, and one of the key concern is N
whether the company is solvent, and in this regard the N
respondent has already produced evidence in support. And, N
as usual, the -- if there is a -- evidence before the court, O
the company is solvent, then usually the court will grant O
the validation order. I appreciate the court has concern P
about the -- any evidence before the court concerning the -- P
there -- whether there is any substantial grounds of dispute Q
of the debt. Q

R COURT: Well, first of all, that; and, secondly, the evidence R
that you've filed has been filed ex parte. Miss Tong's R
clients have received the papers, as I understand it, on S
Tuesday, is that right? So they've had frankly no time, I S
would have thought, to muster any evidence they wish to T
submit in opposition. I mean they may wish to say that the T
evidence that you've produced as to solvency, I don't know, U
but the evidence you've produced is somehow flaw or U
inaccurate, or whatever. V

A MR CHEUNG: The -- now, my Lord, because the case -- the A
respondent only came to the notice of the bank being frozen
B after the petitioner gazette their winding-up petition on 16
December and then the bank came to know the... B

C COURT: Well, I assume... C

D MR CHEUNG: ...presentation... D

E COURT: ...the banks came to know... E

F MR CHEUNG: Yes. F

G COURT: ...because the petition would have been advertised,
that's normally how banks come to know, and when banks who
H have, I am sure, teams of people who study these things... G

H MR CHEUNG: Yes. H

I COURT: ...see that one of their customers has had a winding-up
petition presented against it, they immediately freeze the
J account, that's the practice the banks operate. I

J MR CHEUNG: So -- yes, my Lord, just try to explain, because of
the sudden come to know they are frozen of the bank and
K therefore the respondent tried to make the application of
obtaining the validation order so that the -- they can meet
L the salary payment obligation before the end of the month.
In fact, on 28 December 2016, those instructing me have
M served the documents, the ex parte summons, the draft order
and inter partes summons and also the affidavit of Mr Lam --
N Mr Lam and also the submissions and authorities to the
petitioner's solicitor on 28 December 2016. We have the
acknowledged chop of the company -- of the petitioner's
solicitor about that.

O Therefore, there would be sufficient time for the petitioner
to come to know our application, ex parte application at
P least on 28 December and there would be sufficient time for
them to prepare if they are going to oppose. To my
Q understanding, today they are not going to oppose our
extension on validation order, but they would like to impose
some certain terms.

R COURT: All right. Well, perhaps I'd better hear from Miss Tong
as to what her position is before... R

S MS TONG: My Lord, your Lordship is absolutely right in terms of
the casual way in which the -- this matter has been
T conducted by the other side, and this casual manner has
permeated throughout the proceedings underlying the judgment
U as well as in these winding-up proceedings. And I -- we do
take serious issue as regards the manner in which the ex

A parte order was obtained, and if -- it would assist my Lord A
if I give my Lord some background as to how that came about.

B My Lord, the winding-up petition as you are aware was filed B
on 4 November, and pursuant to section 182 of the Companies
C (Winding-up and Miscellaneous Provisions) Ordinance, any C
D disposition of property after the filing of petition would D
be void under that section. But no application for
validation order was made at any time after 4 November until
28 December, some almost two months.

E And according to Mr Lam's affirmation made in support of the E
ex parte application, my Lord, if you have a copy of that
F affirmation, it is -- it was sworn on 21 December, and in F
G that affirmation my Lord would see that at paragraph 11 and G
H 12 of Mr Lam Sau-kwong's(?) affirmation, it has been deposed H
I to that on 19 and 20 December the respondent has been I
advised by various banks that their account has been frozen.
And despite that, this affirmation was ready and sworn on 21
December, it was not provided to us. And seven days later,
on 28 December, they sent us a letter at 4.34 pm and - can
we have a copy of that?

J COURT: Sorry, with -- just with the Christmas holidays, in terms J
of working days, the 21st was what day?

K MS TONG: 21 December was a Wednesday. Wednesday. K

L COURT: I shall -- or have got a calendar here. So that's L
Wednesday, Thursday, Friday.

M MS TONG: Yes. So they didn't make any application on Wednesday, M
Thursday or Friday which are all business days.

N COURT: And then... N

O MS TONG: And then on... O

P COURT: ...the following Wednesday. P

Q MS TONG: The following Wednesday at 4.34 pm they served us with Q
a purported notice that they would go to the deputy judge or
the duty judge that day. You will see the receipt chop.

R COURT: Sorry. This thing is dated the 28th. R

S MS TONG: Sorry, 28th. Yes. S

T COURT: So I am saying -- what I am saying is that there were T
four working days, 21, 22, 23 and 27, when nothing was done.

U MS TONG: 27, I believe, is a public holiday. U

V COURT: No. V

A MR CHEUNG: Yes. A

B MS TONG: It was. B

C COURT: Sorry, I am looking at 2017. That might make a C
D difference. You are quite right, 27 was a public holiday. D
E Right. So it's the three working days of -- before E
F Christmas... F

G MS TONG: Yes. G

H COURT: ...and then on the first working day after Christmas. H

I MS TONG: Yes. They made the ex parte application. I

J COURT: Thank you. Sorry. I've -- yes, quite right. I am J
K confusing things. K

L MS TONG: So our complaint is that if the application was indeed L
M so urgent as to justify going ex parte, they should have M
N done it on 21st, 22nd and 23rd, they did not. It was only N
O on the 28th that at 4.34 pm that they served us with this O
P letter purportedly giving notice that they will be attending P
Q to the -- an appointment with the duty judge on that Q
R afternoon to ask for an ex parte validation order. So, my R
S Lord, I am not sure at what time the hearing before Anthony S
T Chan... T

U COURT: I can tell you. U

V MS TONG: Yes. V

COURT: It was at 2.55 pm.

MS TONG: Right. So they served us with the document after they
attended the hearing, ex parte hearing, purportedly giving
the impression that the hearing had not taken place. So if
the hearing was indeed before Anthony Chan at 2-something
pm, we in effect have got no notice and this letter is
misleading. So, my Lord, we never got any proper notice of
this ex parte application, it is not a matter of secrecy, it
is not a situation of extreme urgency justifying an ex parte
application, and we say the ex parte application is wholly
unjustified.

And my Lord would also see from my learned friend's skeleton
used at that hearing that no attempt was given, was made to
explain why the application was so urgent as to justify an
ex parte application. My Lord will -- may have a copy of my
learned friend's skeleton used on the...

COURT: I do.

A MS TONG: Yes. And you would see that nothing in there in the A
B five pages of submissions was there any explanation of the B
C justification for going ex parte, nor was there any C
D explanation as to whether we were indeed informed. So... D

E COURT: But what consequences do you say should follow from this? E

F MS TONG: Well, my Lord, if I could ask my Lord to turn to the F
G case of Shanghai Liyou which I have provided a copy this G
H morning. It is a decision of Recorder Linda Chan SC and it H
I usefully summarises the relevant principles governing the I
J justification of ex parte applications. J

K And if I could ask my Lord to turn to page 16 of the K
L judgment where Mr Coleman SC who represented the party L
M asking for a discharge of an ex parte injunction order M
N summarised the provisions in the Hong Kong Civil Procedure, N
O paragraph 21/1/50, and it is stated there in the third O
P sentence: P

Q "It is contrary to the principles of natural justice Q
R that any judicial order adversely affecting ... (reads) R
S exceptional nature of the circumstances for an ex parte S
T application must be stressed." T

U And then few lines down: U

V "Such an ex parte injunction was set aside for failing V
W to demonstrate the need for urgency in Luck Continent." W

X Paragraph 37: X

Y "The above principles have repeatedly been emphasised Y
Z by the court as a reminder to the parties ... (reads) Z
AA justified in the limited and exceptional AA
AB circumstances." AB

AC And then paragraph 38 recites the case of Luck Continent v AC
AD Leonora Yung, decision of Rogers VP, as he then was, held AD
AE that: AE

AF "The plaintiff has been aware of a special general AF
AG meeting for some time but ... (reads) ex parte AG
AH injunction was set aside on this ground alone." AH

AI And paragraph 40 stresses that the plaintiff -- the burden AI
AJ is on the plaintiff to demonstrate that: AJ

AK "There was literally no time to inform the defendants AK
AL in advance of the date/time of the hearing." AL

AM And page 19, my Lord, paragraph 42, where the learned AM
AN recorder again stressed the established principles that the AN
AO burden is on the applicant to demonstrate extreme urgency to AO
AP U

A justify the exceptional course of making the application on A
an ex parte basis.

B And then paragraph 43, the learned recorder stated that B
he (she?) accepted Mr Coleman's submissions that:

C "All point to the fact that the plaintiff had adopted a C
deliberate tactic of not giving any notice of its
D ... (reads) For this reason alone, the injunction order D
must be discharged."

E And then, lastly, at paragraph 50, my Lord will see there E
that in that case it was held that:

F "In my view, the plaintiff has failed to discharge its F
duty to make full and frank disclosure in the ex parte
G ... (reads) until proper notice was given to the G
defendants."

H And on that basis the learned recorder discharged the ex H
parte injunction and refused a re-grant.

I So in this case, my Lord, I wonder what has the judge been I
told at the ex parte hearing. Was the judge told that we
J were informed? Or was the judge not told at all? And in J
yesterday's letter which was faxed to the court, my Lord
K would see the letter from Lui & Law which was faxed to the K
court attaching a letter which they sent to us. I wonder
L whether my Lord has that letter.

L COURT: I am not sure that I have. Hang on. No. I got a letter L
from your -- sorry. No. I have a letter from your -- those
M instructing you... M

N MS TONG: There was... N

O COURT: ...Ince & Co. I don't seem to have a letter from Lui & O
Law.

P MS TONG: There was a letter faxed to the court as far as we are P
aware attaching a letter which the other side's solicitors
wrote to us, so...

Q COURT: Sorry. This was sent -- it says 0449 at the top. Q

R MS TONG: Yes. R

S COURT: Does that mean 4.49 in the morning or in the afternoon? S

MS TONG: It should be in the afternoon.

T COURT: On the 5th which is yesterday. T

U MS TONG: Yes. So attached to this letter... U

A COURT: Just a moment. Well, this doesn't appear to have made
B its way to my clerk.

B MS TONG: I see. I see.

C COURT: Sorry. Well, let me just take a moment to read it.

D MS TONG: Yes.

E COURT: Yes. So...

F MS TONG: So...

F COURT: ...this is presumably in response to the letter from
G those instructing you which was sent at 3.59 yesterday
G according to the fax header at the top.

H MS TONG: Yes.

H COURT: I did receive that.

I MS TONG: Yes.

J COURT: Yes.

K MS TONG: So...

L COURT: Sorry. Yes. I've read it.

L MS TONG: My Lord, my Lord would have read their response,
M particularly the third paragraph -- or the second paragraph
M says quite erroneously that they are not obliged to prepare
N any hearing bundles for today's hearing nor serve a skeleton
N on us. That's clearly in breach of Practice Directions 5.4.
The third paragraph states that:

O "In addition, we write to inform you that during the
O hearing on 28 December, the judge had not requested us
P ... (reads) has not made any inquiry as to whether you
P have been notified of the ex parte hearing."

Q And this, with respect, is rather extraordinary. The duty
Q is on the respondent to provide full and frank disclosure to
R the duty judge as to the circumstances justifying the ex
R parte application, and clearly with this statement in Lui &
S Law's letter, they had not done so. And notwithstanding
S that, they sent us this letter at 4.34 pm on 28 December
T quite misleadingly giving the impression that the
T application, the ex parte application had not even been
made.

U So, my Lord, our submission is that there is simply no
U justification for going ex parte. They had ample time to

A write to us to give us proper notice of this intended A
application, they could have taken us out in inter partes B
summons and had the matter -- and dealt with the matter in B
the usual manner. And they have clearly failed to discharge
C their duty of making full and frank disclosure in the ex
D parte application before the duty judge to draw the judge's C
attention to the relevant principles governing ex parte
applications and the lack of exceptional circumstances to D
make such an application without giving proper notice to my
client.

E So -- and the consequence of all this, my Lord, is that the E
court should indicate its disapproval by an adverse costs F
order against the respondent, and we do respectfully invite F
my Lord to make a costs order against the respondent and
G requiring the respondent to pay the petitioner's costs of G
and occasioned by the ex parte application and of and
H occasioned by the inter partes summons today on an indemnity H
basis by reason of the extraordinary conduct in the manner
in which the ex parte application was made. And...

I COURT: Well, can we get to costs later? Are you seeking an I
order that the ex parte order made by Anthony Chan J on 28
December be discharged?

J MS TONG: Well, my Lord, we have to be practical in a sense that J
we say that there is clearly ground for a discharge.
K However, the other side may well ask for a re-grant. So the K
effect will be the same. So to save costs and time, we have
L indicated that we do not oppose the continuation subject to L
costs. But obviously we say that there is ample ground for
M a discharge of the ex parte order, but we do not want to be M
difficult in a sense that the respondent is a company which
N has an ongoing business and we do not want to interfere with N
anything that they may be entitled to do in the ordinary
course of business.

O So from a practical point of view, we have indicated our O
stance that we do not oppose the continuation. But that
P does not mean that the inappropriate conduct has no P
consequences and the consequences should be reflected in an
appropriate costs order.

Q And, my Lord, the casual attitude does not end there and I Q
would like to finish off my submission by also pointing out
R that after they obtained the order from Mr Anthony Chan -- R
Anthony Chan J on 28 December, my Lord would see the order,
S paragraph 2, if I could ask my Lord to turn that up. S

T COURT: Yes. T

U MS TONG: It says: U
V

A "As soon as practicable, the respondent shall take out A
B a summons to be heard on the return date and serve the B
C same ... (reads) on the petitioner, the Official
D Receiver and the Secretary for Justice."

C As soon as practicable, my Lord. We did not receive the C
D order or any documents on 28 December or the 29th or the D
E 30th or the 31st. These are all business days. The E
F document and the orders were served on us for the first time F
G on 3 January after 12 pm. My Lord will see the cover letter
H received at 12.30 pm on 3 January. No explanation H
I whatsoever has been given by the other side as to why they I
J could not have served the document or issued the inter J
K partes summons on the 28th, 29th or 30th. K

L In this respect, my Lord, they clearly failed to comply with L
M paragraph 2 of the judge's order that they should do all M
N these things as soon as practicable and, we say, N
O deliberately to give us as little time as possible to O
P consider the order or to file evidence in opposition if we P
Q so wish to. So after receiving these documents on Tuesday, Q
R 3 January, we receive no hearing bundles, no skeleton and R
S there were correspondence regarding the terms of the order S
T to which we receive no response and so we are here today. T
U If they had acted reasonably... U

V COURT: Sorry. You say correspondence in respect of the terms of V
K the order. K

L MS TONG: Yes, that's without prejudice correspondence. L

M COURT: I see. M

N MS TONG: Yes. N

O COURT: Yes. Sorry. O

P MS TONG: So my submission is that had they acted reasonably, had P
Q they acted promptly in serving us with the relevant Q
R documents, if they had dealt with this in the usual manner R
S by issuing an inter partes summons, the matter could have S
T been resolved, and in any case we say that the manner in T
U which they have conducted this application for validation U
V order is clearly inappropriate and oppressive. V

And, my Lord, so we say that this conduct, casual conduct, R
or in fact I should put it further, this oppressive conduct, R
should not be condoned by the court and there clearly should S
be some consequences. And we say that the costs -- the S
court should make an adverse costs order reflecting its T
disapproval of this kind of litigation tactics. T

So, those are my submissions on the issue of costs. And as U
I say, there is ample justification for a discharge and if U

A my Lord thinks it appropriate, then it -- the court may wish A
to discharge the ex parte order and consider an application B
for re-grant, if so, made by the other side. But as a B
matter of principle, we do not oppose the validation order C
in a sense that we do not have evidence to demonstrate that C
they are not a solvent company and they have exhibited C
account indicating the level of cash and so on, and we are D
not in a position to dispute that. D

E And in relation to the conditions to be imposed, the monthly E
account and the inspection, I believe that these are usual E
conditions imposed by the court even for solvent companies, F
and I've given my Lord two cases, the case of Re Selan(?) F
and the case of Re Ever Glory(?). And Re Selan is a F
decision of Godfrey Lam J in relation to a solvent company G
whereby the learned judge has ordered a validation order G
subject to reporting and inspection, and my Lord will see G
that at paragraph 12 to 14 of the judgment. H

H And there is a good reason for this because the validation H
order only allows expenses and dispositions in the ordinary H
course of business, so there must be some kind of monitoring I
and without a monthly schedule or monthly summary, there is I
no -- there is basically no means by which we can monitor J
the payments to ensure that the order is complied with. J

K And Re Ever Glory is a similar situation, also involving a K
solvent company and Mr Justice... K

L COURT: But -- sorry, I -- just looking -- I haven't had an L
opportunity to read these, but the conditions, I am also L
talking, in paragraph 13... M

M MS TONG: Yes. M

N COURT: ...where Godfrey Lam J said the conditions that the N
petitioner sought to impose are unwarranted. N

O MS TONG: No. My Lord, these are the capped amounts and my Lord O
will see at paragraph 14: "I shall make order sought subject O
to conditions on reporting and inspection." P

Q COURT: Where did the conditions as to reporting and inspection Q
appear... Q

R MS TONG: Yes. R

S COURT: ...in the judgment? S

T MS TONG: My Lord will see that paragraph 11: T

U "In fact, the petitioner does not put up a blanket U
objection to any validation order but proposes certain U

A conditions including that the total monthly withdrawals
be capped..." A

B - and this was unwarranted. And then - B

C "...secondly, that the company do provide the
petitioner with a weekly schedule on Monday, each
Monday ... (reads) identifying each payee by name and
address..." C
D

E - and so on. And at paragraph 12: E

F "The 1st and 2nd respondents do not accept these
conditions but are prepared to ... (reads) be at liberty
to inspect the documents supporting or evidencing those
payments." F
G

G And paragraph... G

H COURT: So in that case the respondents agreed... H

I MS TONG: Yes. I

J COURT: ...to the reporting... J

K MS TONG: Yes. K

L COURT: ...and inspection provisions. L

M MS TONG: Yes. For the Re Ever Glory case, there was a dispute.
Maybe we could look at that. So paragraph 18: "In respect
of safeguard" - do you see that paragraph 18? M

N COURT: Is this a -- sorry. Is this an insolvency petition? N

O MS TONG: No, this is a shareholder's petition. O

P COURT: Shareholder's petition. P

Q MS TONG: Yes. Q

R COURT: Thank you. Sorry, 18? R

S MS TONG: Paragraph 18. S

T "In respect of safeguard, in light of the serious
nature of the allegations made ... (reads) setting out
the date, amount, payee and nature of the payment" T
S

- and so on. S

T "In addition, SHI be at liberty to inspect the
documents supporting or evidencing those payments." T
U

A And it goes on, 19: A

B "I should say the resistance to allow inspection of the B
C supporting documents is quite unmeritorious in light of C
... (reads) the order for inspection was made with
agreement by the parties"

D - as my Lord has observed. D

E "I do not believe that there is any legal inhibition on E
the appropriate safeguard which can be imposed by the
court ... (reads) discretion which must be case
specific." F

F There is also another case, I believe, the official receiver F
G sent through, I am not sure whether my Lord has got that
which is the case of Re Imagist(?)... G

H COURT: Yes. H

I MS TONG: ...another case of -- I haven't got that letter, I am I
not sure whether you have it.

J COURT: I have, yes. J

K MS TONG: Yes. In Re Imagist, I believe that Harris J also made K
a similar order at paragraph 8, right at the end of the
judgment, my Lord will see at subparagraph (3):

L "The company shall provide the petitioner within 14 L
M days of the end of each calendar month a statement of
account ... (reads) of the company for the relevant
calendar month." M

N And in this case, my Lord, I should also draw attention to N
the fact that the respondent company as a matter of practice
produces monthly expenses statement which is exhibited at
LSK-9 of Mr Lam's affirmation. It's in Chinese. However,
O my Lord will take it from me that these are... O

P COURT: It's all right. I have to. P

Q MS TONG: ...monthly reports of expenses detailing the nature of Q
the expense and the amount and so on. And in the body of
the affirmation, my Lord will see at paragraph 16 that it is
R described as a financial report of the respondent for the
month of October 2016. R

S So they have a practice of preparing monthly financial S
T reports which would detail the relevant expenses made in the
ordinary course of business. So, in our respectful T
U submission, making an order requiring a monthly report would
not be in any way be oppressive or onerous and it's the only
way that our client is -- would be able to monitor whether U

A in fact expenses are actually made in the ordinary course of A
business in accordance with the validation order. So my
B Lord will also see...

B COURT: But on that point...

C MS TONG: Yes. C

D COURT: ...my clerk handed to me before I came in a draft D
order...

E MS TONG: Yes. E

F COURT: ...which I assume you have prepared. F

G MS TONG: Yes. G

H COURT: Has Mr Cheung seen this? H

H MS TONG: Yes. H

I COURT: What you ask for is that the respondent shall report to I
the petitioner on a monthly basis by way of a schedule
J setting out the date, amount, payee and nature of payment
made by it out of its bank account in the previous month. J

K MS TONG: Yes, that's the same wording as in the cases. K

L COURT: But that's slightly different, isn't it, to what is L
exhibited at LSK-9?

M MS TONG: Well, at LSK-9, they have the expenses and the nature M
of -- the nature of payment and the payee, the payee -- for
N some of the items they have the payee, certainly they have
the nature of the payments and the amount, they do not have N
the specific date for each transaction, but...

O COURT: I mean, my question really is, is a copy of this adequate O
for your client's purposes?

P MS TONG: Well, my Lord, I don't -- I haven't heard from my P
learned friend that there is any difficulty in providing the
Q summary in the usual manner in the form of how the summaries Q
are usually provided as ordered by the court. If there is
R difficulty and if my learned friend makes good that R
difficulty, then we are happy to consider an alternative
S format. But these monthly reports are aggregate figures S
rather than individual items and it doesn't provide for a
T specific date. They certainly have bank statements, for T
example, from which they could derive the relevant
transactions.

U COURT: Yes. I -- it seems to me that -- I am sure they could. U

A MS TONG: Yes. A

B COURT: But what you are asking for in this order is for every
C payment from their bank accounts, for every cheque drawn or
D remittance made that there should be a record provided of
E the date, amount, payee and the nature of payment. Now, as
F I understand it, the respondents amongst other things run a
G school.

H MS TONG: Yes. H

I COURT: So presumably there are lots of staff at the school... I

J MS TONG: Yes. J

K COURT: ...who every month get paid from the bank account of the
L respondent their salary. K

M MS TONG: Yes. M

N COURT: How does it assist your client to have particularised the
O amount, date and the name of the person for every member of
P staff of the school? Isn't it sufficient that your client
Q receive an aggregate figure... Q

R MS TONG: Yes. R

S COURT: ...staff salaries X dollars... S

T MS TONG: Yes. T

U COURT: ...rather than being particularised... U

V MS TONG: Yes. V

COURT: ...in the way that you at the moment have set out in the
draft order?

MS TONG: M'm.

COURT: I am simply trying to be practical here.

MS TONG: Yes, I totally understand it. And as long as we are --
we can be assured that the payments out of the accounts are
in the ordinary course of business...

COURT: Yes.

MS TONG: ...I think that suffices for our client.

COURT: I mean what you want to be confident of it is, and I
don't have any difficulty with your second which is
disposition of property...

A MS TONG: Yes. A

B COURT: ...because clearly that is material, but you simply want B
to be assured that the respondent company is just continuing
C its normal business and is not making significant payments C
which are outside the course of its normal business.

D MS TONG: M'm. Perhaps we could omit the date and the payee, so D
it will just be the amount and the nature of payments made
E by it out of its bank account in the previous month in the E
form of LSK-9. So there would not be any substantial
F expenses that they would have to incur in providing F
additional schedules.

G COURT: Obviously I will hear from Mr Cheung on this, but -- so G
it would be a schedule setting out the amount -- amounts.

H MS TONG: The... H

I COURT: Does the current LSK-9, excuse my ignorance of Chinese, I
but does that describe the nature of the payments in its
J present form? J

K MS TONG: They do, they broadly do, yes. K

L COURT: So amounts and nature of payment in -- if we were to add L
after "in the previous month", "In the form of the financial
M report exhibited as LSK-9..." M

N MS TONG: My... N

O COURT: I am not saying I am yet -- I am going to make this O
order, but I just... M

P MS TONG: Indeed. P

Q COURT: ...want to understand what it is that you are... Q

R MS TONG: Yes. Yes. R

S COURT: But that -- so it would read, "A schedule setting out the S
amount and -- amounts and nature of payments made by it out
T of its bank account in the previous month in the form of the T
Q financial report exhibited at LSK-9 to the affidavit of Mr Q
R Lam Sau-kong (Sau-kwong?)..." R

S MS TONG: Yes. S

T COURT: "...sworn on 21 December 2016." T

U MS TONG: The alternative, my Lord, is that you would note from U
my learned friend's skeleton at paragraph 17 which he adopts
for the present hearing that they have -- they say the
respondent is prepared to pay the sum of 13.978 million

A being the balance of the outstanding debt into court as A
security within seven days upon the granting of the
B validation order. And if my learned friend is still B
prepared to give this security, then we can dispense with
C the reporting and I think that may be a cleaner and more C
straightforward way of dealing with the matter.

D COURT: Do you accept that that figure of 13.9 odd million is the D
correct figure?

E MS TONG: It's the net balance of the petitioning debt. We do E
accept that we have received \$306,011, yes.

F COURT: Yes. Was it -- so, in summary, your position is that you F
do not object to a continuation of the order of Anthony Chan
G J subject to the reporting conditions that we have just G
considered. There is also a provision, you ask for liberty
to inspect documents.

H MS TONG: Pertaining to the relevant expenses. Well, we do not H
anticipate that there would be a need to inspect the
I documents unless something quite extraordinary comes out of I
the account.

J COURT: Yes. I have said I -- this seems to me to be perhaps J
pushing...

K MS TONG: Yes. K

L COURT: ...the envelope a little too far, I mean there is a L
provision for liberty to apply.

M MS TONG: Yes. M

N COURT: So if something were to arise which is... N

O MS TONG: I apologise. I should have mentioned that we actually O
did not receive the \$306,011. They gave us a cheque, but we
P returned the cheque on the basis that we did not know on P
what basis the payment was made. So there was no payment of
the petitioning debt, any part of the petitioning debt.

Q COURT: A wise creditor always accepts any payment on whatever Q
basis it might be.

R MS TONG: Yes. So the alternative was... R

S COURT: So that means that you are saying that the -- the full S
amount...

T MS TONG: The full amount, yes. T

U COURT: ...which is referred to in the petition. U

A MS TONG: Yes. A

B COURT: And, lastly, we -- you seek costs as you have said on an B
indemnity basis.

C MS TONG: Yes. C

D COURT: Is there anything further? D

E MS TONG: I believe that the only last point I wish to make is E
about the purported grounds for disputing the debt. I
F should mention that the very first time that we heard about F
these purported grounds to oppose the winding-up petition is
G when we received the affirmation of Mr Lam. And as my Lord G
has observed, they had not filed any affirmation in
H opposition to the winding-up petition nor was there any H
explanation in correspondence after the service of the
I statutory demand and numerous demands for payment of the
J interest. J

K COURT: Well, it's not really for me to comment because I am not K
hearing the substantive petition.

L MS TONG: Of course. L

M COURT: But the judgment of Deputy Judge Seagroatt which is M
exhibited is rather odd in that -- was there a reasons for
N judgment in this case? N

O MS TONG: No, because it was a default judgment. O

P COURT: It was a default judgment. P

Q MS TONG: Yes. Q

R COURT: I sought to find the reasons on the Judiciary website R
yesterday and failed...

S MS TONG: Yes. Yes. S

T COURT: ...and I assume that was where... T

U MS TONG: Because they breached an unless order and they agreed U
to judgment, so that's why there's no reasons. But I share
V my Lord's view... V

COURT: But the -- that -- you see, normally a provision for pre-
judgment interest would provide...

MS TONG: Yes.

COURT: ...for the date...

MS TONG: Date.

A COURT: ...from which it is to run...

B MS TONG: Yes.

C COURT: ...until the date of judgment.

D MS TONG: Yes. Yes.

E COURT: And then the judgment would be silent as to post-judgment interest because...

F MS TONG: Yes. Yes.

G COURT: ...that arises as a matter of right.

H MS TONG: Yes. Yes. So...

I COURT: And...

J MS TONG: ...our position is that...

K COURT: ...here we have this rather odd provision that -- that is, to pay interest at judgment rate but with no date, and it's also not clear to me, particularly if this is a default judgment, how interest can be necessarily claimed at the judgment rate. But I -- that is simply my observation, it's entirely up to the -- for the respondent, it seems to me, to clarify these matters with the court...

L MS TONG: Yes.

M COURT: ...as to what...

N MS TONG: Yes.

O COURT: ...what this judgment -- I mean if the judgment is said to be erroneous and that was not what Deputy High Court Judge Seagroatt intended or meant to say, well then, it's up to them to do something about it.

P MS TONG: That's right.

Q COURT: But...

R MS TONG: That's right.

S COURT: Yes.

T MS TONG: And insofar as my learned friend is alleging that we should not be entitled to pre-judgment interest because we already have a provision at paragraph 4 of the judgment for account of benefit, they have not done anything to provide

A us with any account of profit or benefit to-date, so they A
can't have it both ways really.

B COURT: Well, that's a separate matter for you... B

C MS TONG: Yes. C

D COURT: ...to take steps to... D

E MS TONG: Yes. Yes. E

F COURT: ...enforce your entitlement to an account. But it -- as F
I say, it's not helpful to the companies court to be left
G hanging somewhat in limbo as to what the grounds of G
opposition are and because no evidence has been filed nor
H attempts have been made to clarify whether this sum is due H
or not.

I MS TONG: Yes. I

J COURT: Because it does strike me that paragraph 6 of the J
judgment is somewhat ambiguous, it will be the best way I
K can put it... K

L MS TONG: Yes. J

M COURT: ...but it's not for, I think, for either you or for me to L
seek to clarify that ambiguity, that rests squarely, it
N seems to me, with the respondent. N

O MS TONG: Yes. Yes. And as I said, it is really -- we only was O
notified recently on the -- on purported grounds of
P opposition... P

Q COURT: Well, I mean it's a sort of causal... Q

R MS TONG: Yes. R

S COURT: ...line in the affirmation of Mr Lam, isn't it... S

T MS TONG: Yes. That's right. T

U COURT: ...without really anything more than that which... U

V MS TONG: These are obviously matters that we... V

COURT: Yes, correct. As I say... V

MS TONG: ...will have to resolve... V

COURT: ...it's not for me this morning, but these are matters V
which nearly -- obviously would need to be canvassed, but
it's not for me to speak to you. As I have said to Mr
Cheung, I commended him to get about filing his evidence

A sooner rather than later. Yes, Miss Tong, unless there is A
anything else.

B MS TONG: I think those are my submissions. B

C COURT: Thank you. Mr Cheung. C

D MR CHEUNG: Yes. My Lord, I would like to clarify that the D
judgment entered is not a default judgment, it is a judgment
E by consent made by the parties. During the hearing, there E
-- according to the record, there is a -- both parties were
represented by counsel before Seagroatt J. It's according
to the order made by the...

F MS TONG: But what I meant by default is that they had defaulted F
on the unless order resulting in judgment.

G MR CHEUNG: Yes. My Lord, I would like to explain the concern G
why the respondent took the application on 28 December, and H
as I mentioned before, the respondent came to know the bank H
accounts being frozen on 19 December. This is the Monday,
I and so the -- those instructing me preparing the application I
so made the application -- made the affirmation on 21
December by Mr Lam, and there is an intention of the
J respondent to make an inter partes summons with -- giving 42 J
days' notice according to Order 32.

K On that basis the respondent approached the Registry of High K
Court to obtain a hearing day(date?) on 23 December, this is
L the last working day before the Christmas, and by L
approaching the listing office and because there is no
M available of the hearing day, the respondent was referred to M
the practising master, Mr Hui, on 4 pm for a direction that
N whether the court could provide an urgent hearing day that N
allowing the respondent to have an inter parte summons
properly served to -- with 42 hours -- forty -- with two
O days' notice served to the petitioner.

O However, upon the direction of the practising master, Mr O
Hui, approaching to the listing office to enquire what date,
P the earliest date would be available for the hearing of P
inter partes summons, it was told by the listing office that
Q the earliest date would be on 6 April 2016. So on that Q
basis that would not be possible to obtain any inter partes
hearing date, so we...

R COURT: Sorry, 6th of... R

S MR CHEUNG: 6 April. 6 April. S

T COURT: 2017. T

U MR CHEUNG: 2017, yes. So that would be -- put the respondent in U
an impossible position to obtain any hearing date. So on

A that basis the respondent make the application on 28th, this A
is the first working day after the Christmas holiday, to --
B before a deputy judge which were -- we obtained, according B
to those instructing me, it's obtained before 1 pm, we
C obtained a hearing time on -- at 2.30 to be ready before C
Anthony Chan J. Meanwhile, after obtaining the hearing
D date, the -- those instructing me did make a fax -- did make D
a fax of those documents to the petitioner's solicitors at 1
E pm, about 1 pm, 1.17 pm to notify our ex parte application. E
Of course, according to those instructing me, there is no
mention of the hearing date because he could not contact
anyone in charge at that time.

F MS TONG: My Lord, we... F

G COURT: Do we have a copy of that fax? G

H MR CHEUNG: We -- yes, we do not have the copy now, but we can H
provide the fax record later. This is -- those instructing
me confirm that the firm faxed on -- faxed at 1317 to the
petitioner. We would...

I COURT: Concerning what? I

J MR CHEUNG: Saying that we have made the application of the ex J
parte summons including those documents which was
K subsequently by hands(hand?) -- deliver the documents by K
hand at 1630 which my learned friend Miss Tong mentioned
L that, "Oh, the petitioner only received the application L
material..."

M COURT: Well, is the fax in the same form as this letter of... M

N MR CHEUNG: 28th? N

O COURT: ...of 4.39? I mean, it seems to me quite important, I am O
rather surprised you don't have a copy of this document with
you that evidences the fax that -- I mean it's one thing to
P send a fax before you appear the judge albeit it gives only P
an hour or so its notice, it's quite another to send a
Q letter which Miss Tong says, I think with some Q
justification, is quite misleading because if this letter
was the first that the petitioner's solicitors knew about it
R at 4.34 which is their chop, I mean if you read your -- read R
the letter, it says, "We write to inform you we are minded
S to apply to the duty judge. We now send you various S
documents. We shall be grateful if you would indicate the
petitioner's position." And if you have already applied to
T the duty judge and have already got an order, this is a T
rather odd letter to send, isn't it?

U MR CHEUNG: Faxed. U

A COURT: But if you send a fax at 1 o'clock, then this letter A
becomes more justifiable...

B MR CHEUNG: Yes. B

C COURT: ...as it were, or your conduct of those instructing you C
becomes more justifiable.

D MR CHEUNG: Yes. I just want to put the context that the -- D
those instructing me did make the attempt to send the
E documents to the petitioner not as late at 1630 but as early E
as 1.17 on the day of the hearing of the ex parte
F application.

F COURT: But you're expecting me just to take that from you as F
evidence from the Bar table, are you?

G MR CHEUNG: And... G

H COURT: I mean as I understand, Miss Tong can ask those H
I instructing her. I mean do they accept that this fax was I
sent?

J MS TONG: My Lord, those instructing me are checking but the J
K submissions of my learned friend is(are?) actually K
L inconsistent with the latest letter on 5 January which I L
referred to during my submissions that they informed us that
during the hearing, the judge did not request us to notify
you on the date, time and venue of the ex parte hearing nor
require us to stand down the matter to give you such notice.

M COURT: But that's a slightly different point, isn't it? M

N MS TONG: Well, I'm not sure what the fax actually says. It N
could not be in the same form of the letter by hand because
it doesn't say "by hand and fax". So those instructing me
are still checking. I'll come back to my Lord.

O MR CHEUNG: Yes, my Lord, I'm just instructed to let the court O
P know the chronology of the development of the notification P
that those instructing me ask me to notify the court that on
Q 28 December, those letter by hand has -- had already sent to Q
R the petitioner's solicitor on -- at 1.17. This is the point R
that I would like to address the court to say that those
S instructing me did make effort to notify the petitioner S
although I fully agree with what my Lord has observed in
T this letter, this somehow should have mentioned the hearing T
U day or hearing time before Mr Justice Anthony Chan.

U And concerning the imposition of terms before the court U
T continues the ex parte validation order, I'm instructed the T
S respondent, if the court thinks this is necessary to impose S
the terms, and the respondent is prepared to make the payment-in
for the full amount of the petitional debt instead of making

A order of the inspection because it is -- involve a lot of A
schools and banks' accounts, and then that would have a
B great disruption on the part of the respondent's operations. B

And, finally...

C COURT: That would be the payment-in of the full... C

D MR CHEUNG: Full amount, 14 million. D

E COURT: Of 14 point, whatever it is. E

F MR CHEUNG: And within seven days from today's order. And, F
finally, according to the costs, my Lord, the respondent
G made the application as my learned friend say that my G
skeleton argument did not mention any urgency for making the
H application. In fact, my skeleton at paragraph 16 mention H
that because the respondent need to make the payment at the
I end of each month and including the other expenses, there is I
the urgency on the part of the respondent to obtain the
order on 28th at least because there are just only three
working days after the 28th: 28th, 29th and 30th.

J If the respondent could not obtain any validation order from J
the court, and then they would have difficulty to make the
K payment to the staff, and they -- and each individual staff K
would have their own obligations and commitment for making
L further payment just like the mortgage and the school fees L
for the children, and then that's the urgency that as set
out in my skeleton. Paragraph 16 justify the court to make
the urgent application on the part of the respondent.

M And so I do not agree the costs order proposed by my learned M
friend. There is no reason why this type of validation
N application would attract any indemnity costs because it is N
not unnecessary making, because it is necessary instead on
O the part of the respondent to obtain this order save it is O
for the circumstances of the case develop in this stage that
require the ex parte application.

P However, for the ex parte application, for my point, I would P
like to submit that there is no cost concern about the
Q petitioner save for the petitioner has today come before Q
my Lord to have the hearing about the
R continues(continuation?) or the extension of this validation R
order. And if this order is taken on the inter partes
S basis, then after all, the petitioner would have to come to S
here before your Lordship to hear the argument.

T So I do not see any validity for seeking the indemnity T
basis. We propose as usual order is that the costs of
U today's hearing, including the validation, the ex parte U
application should be the costs in the petition because,

A after all, if the petitioner obtain a winding-up order, then A
the costs would be to the petitioner.

B However, if the petition is coming from a non-starter or B
should not be commenced by the petitioner, and then there is
C no justification for the respondent company to bear with C
this kind of the costs. So I would suggest the usual costs
D order about the validation order would be the costs in the D
cause of the petition. This is the submission that I would
E like to make the court. Unless I can assist the court E
further.

F COURT: Yes, you can. I mean I'm very troubled about this F
because your clients don't seem to have appreciated that
G every payment that they have made since 4 November is, as G
Miss Tong has pointed out, void. It's not a question of
H being voidable. It is void. So all of the salaries which H
were paid at the end of November were void. And if a
I winding-up order in due course is made, the liquidator would I
be able to go to each of your teachers and each of your
member of staff and demand a repayment of their salaries and
every other payment of \$6 million a month which is referred
to.

J And I find it very troubling that it doesn't seem to have J
occurred to anybody, whether your clients or those advising
K them, that steps needed to be taken after the issue of the K
petition before they were notified by the various banks of
the freezing of the bank accounts.

L MR CHEUNG: Yes, my Lord, your concern has already raised by L
Mr Justice Anthony Chan and during the ex parte application.
M So, on that basis, when we had to file the affirmation of M
Mr Lui to justify this ex parte application, as set out in
N Mr Lui's affirmation, it's set out. It says that the N
management committee upon receiving the petition on
O 4 November 2016 did not consider there would be any chance O
for the respondent company would be wound up by the court
because having regard(regard to?) the cash position of the
P respondent.

Q However, it is turned out to be not correct on the part of Q
the management committee. So, on that basis, that the
R respondent made the urgent application on 28 December, and R
this ex parte application is seeking a validation order from
S the day of the petition, 4 November, up to this return day. S
And so and according to the section 182, the validation
order can be applied pre-winding-up or post-winding-up to
T ask the court to validate those disposition of the property T
of the company after presenting the winding-up petition.

U So, on that basis, the -- I would accept that this could be U
done more proper if the management committee of the
respondent, once got the winding-up petition, did present

A them and at that moment of time then seek the inter partes A
summons for the hearing. However, because it is the
B management of the respondent decided that there would not be B
any risk according to them that there would be any winding-
C up order to be made against the company because having C
regard(regard to?) the cash position and the asset of the
company which is many folds more than the petitional debt
D that's now being presented by the petitioner. D

E So on -- this is history, and I have to tell the court this E
is what the mental state according to the affirmation of
F Mr Lui about that. That's why the company made the F
application so late. E

G COURT: And what do you say to Miss Tong's submission that this G
court would be entitled and should, if she were to pursue
H this submission, discharge the ex parte order on the grounds H
of effectively material non-disclosure and the improper way
I in which the matter was presented? I

J MR CHEUNG: My Lord, as according to the -- what I have told to J
the court about the chronology of the events that's leading
K to the application of the ex parte application, the K
respondent was forced to make the application on ex parte
L because during the -- because of the holiday and the making L
the -- meeting the payment obligation, the salaries of the
M staff. This is the basis of making the urgent application. M

N However, for the notification of the matters, as I mentioned N
before, and this is a validation order and what my learned
O friend has submitted before the court is about the ex parte O
application about the injunction, injunction about the case
P that which is materially affecting the other sides which is P
subject to the interlocutory injunction or ex parte
Q injunction. Q

R However, for the present case, it is simply a petition made R
by the petitioner about the petitional debt. It is a
S recovery matter, and the application of the validation order S
is for the court to allow the company to operate normally
T during the process of the -- during the course of the T
winding-up petition being heard or to be heard, and that on
U that basis, there is ex parte application made by the U
company. It's materially affecting the company itself
V instead of affecting any interest of the petitioner. V

Having regard to the present state of the company because
the company is fully solvent and there is no question about
that there would be any default on the company if the court
wrongly grant the ex parte validation order to allow the
company to operate, instead, for our present case, for the
validation order, as exhibit by the evidence, there is a
substantially 15 million of cash that could meet any
possible liability of the petitioner.

A And so, on that basis, there I would submit that the court
B would -- should not discharge the ex parte application
C because it's different from the injunction application.
D Injunction application would materially affecting(affect?)
E those parties subject to the injunction. However, in this
F present case, the petitioner has, I would submit, has no
G material effect on the -- on his case because, after all, I
H will repeat the company is solvent. It's clearly solvent.
I Even if this case is brought to the notice of the
J petitioner, I do believe there would still no objection on
K the part of the petitioner for granting the validation
L order. This is the point that I would like to make and...

F COURT: Well, indeed and indeed your letter of 28 December from
G those instructing you foreshadows that by saying, "We would
H be grateful if you'd indicate the petitioner's position." I
I mean what Miss Tong complains about is that rather than
J seeking her consent, providing her with evidence of the
K financial status of the company, your clients simply marched
L ex parte seemingly without notice before the -- Mr Justice
M Anthony Chan to seek a validation order without giving the
N petitioner any opportunity to be heard, and it's the
O fundamental principles, the case which Miss Tong cited
P before Recorder Linda Chan SC that natural justice requires
Q the parties to a proceeding to be heard.

K Your clients seem to take the view that because they are
L solvent, they can simply ignore this petition, ignore the
M interests of the petitioner, ignore everything else because
N somehow it's all going to turn out right at the end. That's
O not how proceedings work.

M MR CHEUNG: Yes. My Lord, I just only make this submission just
N to justify that this ex parte application would have no
O material affect(effect?) on the petitioner. However, as I
P mentioned before, those instructing me did fax the
Q application material on 28 December 2016 at 1.17.

P COURT: But even if they did, they still didn't say that they
Q intended to move the court at 2.55.

Q MR CHEUNG: This is what I can say from the evidence because I
R have already obtained a message containing the fax heading
S showing the time of transmission to the petitioner's
T solicitor.

S COURT: I mean the normal basis upon which one applies ex parte
T without notice is that there is, first of all, obviously
U urgency but also there is an element of secrecy in the sense
V you might apply for a Mareva injunction because you don't
want the defendant to know because he would dissipate his
assets in the meantime.

A But in the present case, even if it was urgent and I can A
accept your submissions that notwithstanding your clients
B seem to have misunderstood the legal position when the B
winding-up petition was issued, I can understand their
C concern about paying salaries and so on but there doesn't C
seem to me to be any reason why you could not have given
D notice to those instructing Miss Tong of your intention to D
appear before Mr Justice Anthony Chan on the 28th, and I
E simply am at a loss to understand why that even if this E
letter was faxed at 1.17, it still doesn't give any
indication of an intention to appear in front of Mr Justice
Anthony Chan to make an ex parte application.

F MR CHEUNG: Yes, my Lord, those materials that are before me, I F
could only submit to that unless I can obtain the
G affirmation from those instructing me about the chronology G
why there is no communication about that. But, my Lord, I
H would like to submit one further point. It's according to H
this letter, that expressly setting out this is ex parte
application on the face of the letter.

I COURT: Well, it says, "We are minded to apply to the deputy" -- I
"to the duty judge"...

J MR CHEUNG: And... J

K COURT: ..."sitting in the Court of First Instance today on an K
urgent ex parte basis. We send you the following
documents".

L MR CHEUNG: Now, yes. L

M COURT: And it's the last line, isn't it? M

N "We shall be grateful if you would indicate the N
petitioner's position to our application at your
earliest convenience."

O But far from waiting for any indication of the petitioner's O
position, assuming this in favour of your clients that this
P letter was sent with the enclosures at 1 o'clockish on the P
28th, within two hours, you were before the duty judge.

Q MS TONG: My Lord, to assist, we confirm that there was a fax at Q
11.17 sent to us with this same cover letter but without any
R exhibit to Mr Lam's affirmation and without the skeleton. R
So we'll...

S COURT: So you have 1 -- enclosures 1, 2, 3 and 4... S

T MS TONG: 4. T

U COURT: ...but without exhibits. U
V

A MS TONG: Without exhibits. That's right. So we are in no A
position to ascertain, for example, the solvency of the
B company by reference to the accounts exhibited and so on. B
So it was only at 4.34 after the hearing before Anthony Chan
that we received the full documents by hand.

C COURT: Thank you. So it appears it was a little earlier. It C
was 11.17, did you say?

D MS TONG: Sorry, 1.17. D

E COURT: 1.17. E

F MS TONG: Yes. F

G MR CHEUNG: So, my Lord, I would like to add my submission. It's G
that there is no intention on the part of the respondent to
H make this a secret application because we did -- as H
according to the record that make -- fax the -- this letter
I at 1.17, and this shows that is not a matter of the making I
any secret application to deprive the petitioner to have any
J right to participate in here because, after all, there must J
be a return day setting out the material to him and for him
K to argue whether the -- the continues(continuation?) of the K
ex parte validation order. And I would respectfully ask the
validation order until the determination of the petition or
further order.

L COURT: Well, I think since it's nearly half past 11, I'm going L
to rise in a moment and we'll come back after coffee but I
M just want to make clear. It appears to be consensual that M
the validation order continue. Miss Tong, are you agreeable
N to this condition that there be payment-in within seven N
days?

O MS TONG: Or if it can be done sooner but... O

P MR CHEUNG: And... P

Q COURT: Well, seven days seems to me to be not unreasonable. Q

R MS TONG: Yes, yes. R

S COURT: And I think you said that you would be happy that if the S
full amount is paid in within seven days that you would
T accept... T

U MS TONG: Mm. U

V COURT: ...a continuation of the order, and there would be no V
need for the...

MS TONG: For the...

A COURT: ...reporting...

B MS TONG: ...reporting.

C COURT: ...requirements.

D MS TONG: Just with my experience in this case, if -- perhaps
E there should be a condition that if payment is not made in
F within seven days, then the validation order be discharged
G because we...

H COURT: Yes.

I MS TONG: ...we are simply not confident about matters or
J undertakings in this case.

K COURT: Yes, I take that point on board.

L MS TONG: Yes.

M COURT: So really what we are arguing about is costs.

N MS TONG: Well, and the issue as to whether the court would be
O minded to discharge the ex parte order and regrant a new
P order.

Q COURT: Well, I don't think I am because you've not asked for it.

R MS TONG: Yes.

S COURT: If you had asked for it, I would obviously have to
T consider it.

U MS TONG: Yes, yes.

V COURT: Before as you are not asking for it...

MS TONG: Yes.

COURT: ...I don't think it is appropriate for the court
necessarily of its own volition to discharge the order.

MS TONG: But as I said, my point is only primarily as a matter
of costs that they should bear the consequences.

COURT: Yes, I mean...

MS TONG: Yes.

COURT: ...what you're saying is that as you don't object to the
validation order, it's rather pointless, me discharging the
ex parte order and granting a new one...

A MS TONG: Yes. A

B COURT: ...which I accept. So if I'm with you in expressing the
C court's concern as to the way that the respondents have gone B
D about this, the appropriate way to do it would be by means
E of an order for costs. C

D MS TONG: Yes, and so far, we hear nothing from my learned friend
E as to why we were not notified of the evidence on 21, 22 or
F 23 December. D

E COURT: I understood. E

F MS TONG: Yes. F

G COURT: Anything more, Mr Cheung? G

H MR CHEUNG: Yes, and if the court is mind(minded?) to impose
I the -- unless the seven days' payment, then we have no
J objection about that. H

I COURT: Thank you. I

J MR CHEUNG: And but for the -- concerning the 21st, 22nd and
K 23rd, I have already mentioned to your Lordship about the
L chronology about it. Once the affirmation prepared on 21st
M and then those instructing me tried to appoint an inter
N partes date on an urgent application. K

L COURT: Yes, now I have them. L

M MR CHEUNG: So that's what explains why this timeslot we have not
N done anything about that. M

N COURT: Yes. I will rise now. I suggest we reconvene at
O 12 noon, and I will give my decision then. N

O Hearing adjourns - 11.31 am O

P Hearing resumes - 12.06 pm
Appearances as before. P

Q COURT: This is an application by the respondent company for an
R extension of a validation order made under Section 182 of
S what I think is now called the Companies (Winding Up and
T Miscellaneous Provisions) Ordinance, the original order
U having been made ex parte by Anthony Chan J on
V 28 December 2016. Q

The petitioner does not object to such extension of the
validation order, but seeks to impose terms. Initially, the
terms suggested by the petitioner were that the respondent
be required to report to the petitioner details of its
monthly payments and dispositions of property. T

A Alternatively, Miss Tong, representing the petitioner, said A
that the petitioner would be content to accept, in lieu of B
such reporting terms, the payment into court of the amount, B
which is claimed by the petitioner in the petition, of some
\$14 million-odd.

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

E Accordingly, there is no dispute between the parties that, E
subject to the payment in of the amount in issue, the F
validation order should continue until the determination of F
the petition or until further order.

G What remains in dispute, however, is the costs of this G
application and the manner in which the original ex parte G
application was made before Anthony Chan J.

H The petition was issued on 4 November 2016. It seemingly H
did not occur to the respondent and its directors what I
consequences flowed from the issue of the winding-up I
petition.

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

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

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

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

A On Wednesday 21 December, an affidavit of Mr Lam Sau-kong(?) A
was prepared, to be used in support of an application for a
validation order under Section 182 of the Ordinance.

B I have been told by Mr Cheung on behalf of the respondent B
that attempts were made by those instructing him to issue an C
inter partes summons for the hearing of the applications. C
They were, however, told by the practice master and the D
listing clerk that no date was available until April 2017. D

E Nothing seems to have happened on Thursday 22 or Friday E
23 December.

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

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

L Anthony Chan J duly made the ex parte order and directed L
that the respondents issue, as soon as practicable, an inter M
partes summons, and it is that summons which is before me M
this morning.

N Miss Tong, on behalf of the petitioner, submitted that the N
circumstances in which the ex parte order had been obtained O
would have justified it being discharged on the grounds of O
inadequate disclosure and the failure to give notice to the P
petitioner of the application.

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

R There may, of course, be circumstances where secrecy R
requires an application to be made without the giving of S
notice. One can think of examples such as an application S
for a Mareva injunction or the appointment of a provisional T
liquidator, where, if notice were given to the intended T
respondent, there may be dissipation of assets between the U
time of giving of notice and the making of the order. U

A To make matters worse, in this case, the urgency here was A
created entirely by the dilatoriness of the respondents in
B making this application. B

C Miss Tong submitted that it would be open to me to discharge C
the ex parte order, but also to re-grant the order. In
D those circumstances, she submitted there was little purpose D
in doing this, given the petitioner did not object in
E principle to the making - or to the continuation, rather - E
of the validation order. She submitted that the court
should express its disapproval of the manner in which the ex
parte order was made by an appropriate order for costs.

F Mr Cheung submitted that the validation order, unlike an F
injunction, did not directly affect the rights of the
G petitioner, because the respondent is solvent. That may be G
so, but it nevertheless omits the importance of the
H existence of legal proceedings and the fact that natural H
justice requires, wherever possible, that parties to those
proceedings are given notice of any application which is to
be made.

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

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

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

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

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

- A (1) Subject to compliance with the condition in
B paragraph 2 below, the ex parte order of the Hon
C Anthony Chan J dated 28 December 2016 (the "ex
D parte order") be continued until determination of
E the petition filed herein on 4 November 2016 or
F until further order, save that paragraph 1(2) of
G the ex parte order shall read 'dispositions of
H the property of the respondent made in the
ordinary course of business for proper value';
- E (2) The respondent shall pay into court within seven
days the sum of HK\$14,284,627;
- F (3) The respondent do pay the petitioner's costs of
G and occasioned by the application for the ex
H 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;

I I'm not sure we need -- do we need liberty to apply? I mean
I've always assumed there is a general liberty to apply but
if you wish to have it in the order, I don't mind.

J MS TONG: Well, it's better to have it in the order if...

K COURT: I'm...

L MS TONG: Yes.

M COURT: ...quite content then to leave that in the order then.

N MR CHEUNG: Yes, I...

O COURT: (4) Liberty to apply.

O So unless there is anything else, I think that's it. I
P understand that these types of extemporaneous judgments will be
Q extracted from the transcript in due course and typed up and
R sent to you but how long that process takes, I'm a new boy
S here. So I don't really know. So -- but you'll receive
T something in due course. But I think in the meantime, it's
U important you should get this order sealed because I imagine
V from my experience, the banks will be wanting to see a
sealed copy of the order before they will unfreeze your
accounts.

MS TONG: Grateful, yes.

COURT: Thank you both for your assistance.

A MS TONG: Thank you. A

B Hearing adjourns - 12.22 pm B
6 January 2017

C I/we certify that to the best of my/our ability C
D and skill, the forgoing is a true transcript of D
E the audio recording of the above proceedings. E

F  F

G G
H Susanna Chan H
I Date: 3 February 2017 I
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