



Hong Kong Court of Final Appeal Considers Sufficient Connection to Wind Up a BVI Company on the Just and Equitable Basis



The Hong Kong Court of Final Appeal has given judgment in the Yung Kee restaurant case¹, a dispute between brothers concerning the operation of a well-known restaurant, club and building in Hong Kong which was owned indirectly through a typical corporate structure for family holdings involving BVI companies. It has reversed the previous findings of both Harris J and the Court of Appeal and held that there was sufficient connection with Hong Kong to wind-up the ultimate BVI holding company on the just and equitable basis.

The relevant company, Yung Kee Holdings Limited, was a holding company for shares in another BVI company, Long Yau, which in turn operated two Hong Kong subsidiaries carrying on business exclusively in Hong Kong. The business had been started by the father, and after his death the two brothers owned 90% of the business with the remaining 10% being owned by their sister. The two brothers had fallen out and the older brother brought proceedings in the Hong Kong court seeking an order that his younger brother buy him out on the ground that the affairs of the company were being carried on in a manner which was unfairly prejudicial to him (section 168A of the Companies Ordinance). In the alternative he sought an order that the company be wound up on the just and equitable ground under section 327(3)(c) of the Ordinance. The Court of Appeal had held neither claim could succeed.

The Court of Final Appeal dismissed his appeal on the unfair prejudice application, agreeing with the court below that the company had not “established a place of business in Hong Kong”. They held that a “*place of business*” connotes a place where or from which the company either carries on or possibly intends to carry on business. While “business” is not confined to commercial transactions or transactions which create legal obligations, there is no reason to suppose that it covers purely internal organisational changes in the governance of the company itself. The notion that it does, seems to follow from a belief that a company must have a place of business somewhere, but (leaving aside the share transfer and registration office) there is nothing in fact or law which requires a company which does not carry on business at all to have a place of business, and there is nothing strange in finding that such a company has not established one anywhere.

This aspect of the case is not particularly remarkable. What is of greater interest is the approach of the Court to the alternative claim to wind up on the just and equitable basis. They accepted the conventional starting point that the most appropriate jurisdiction to wind up a company is the jurisdiction where it is incorporated, and that as a consequence the courts have adopted what the Court of Final Appeal referred to as “some necessary self-imposed restraints” on the making of a winding up order against a foreign company, even though it was not necessary to show that the company has ever carried on business in Hong Kong.

¹ FACV No.4 of 2015 *Kam Leung Sui Kwan v Kam Kwan Lai & Ors*, Judgment 11 November 2015





They re-affirmed the three core requirements summarized by Kwan J in *Re Beuty China Holdings Ltd.*²:

- “(1) there had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;*
- (2) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and*
- (3) the court must be able to exercise jurisdiction over one or more persons in the distribution of the company’s assets.”*

In the present case the focus was on the first requirement of a “sufficient connection with Hong Kong”.

The first point dealt with by the Court was whether there was a more stringent requirement for a shareholder’s petition, than for a creditor’s petition on the ground that the shareholder had chosen to invest in a foreign company. The Court of Final Appeal held not. The factors to be considered would be different depending upon whether the petition is brought by a shareholder or a creditor, but the test was the same and would be fact specific.

In essence, the courts below had found no sufficient connection because the Company itself merely held shares in another BVI holding company and so, having regard to the separate legal personalities, the ultimate holding company could not be said to have a connection with Hong Kong. The Court of Final Appeal found that logic less than compelling and held that there was no doctrinal reason to exclude consideration of a connection through a wholly owned subsidiary.

It drew an analogy with the Court’s previous decision in *Waddington*³ allowing a derivative action to be brought by a shareholder of a parent company in relation to a wrong done to a subsidiary, and said that the question in the present case was *“whether a foreign company, all of whose shareholders and directors live in Hong Kong, and which is the ultimate holding company of a group of indirectly held subsidiaries which carry on business in Hong Kong, has a sufficient connection with Hong Kong to justify the Hong Kong court in exercising its jurisdiction to wind it up at the suit of one of the shareholders.”*

It emphasized that *“the presence of the other shareholders within the jurisdiction is an extremely weighty factor in establishing the sufficiency of the connection between the company and Hong Kong”* and pointed out that there were 9 compelling factors which provided a sufficient connection with Hong Kong:

- (1) The Company itself is merely a holding company of a group of directly and indirectly held subsidiary companies and carries on no business of any kind whether in the BVI or Hong Kong.*
- (2) All the underlying assets of the Company, that is to say the assets of its wholly owned subsidiary Long Yau, are situate in Hong Kong.*
- (3) The business of the group is wholly carried on by the Company’s indirectly held subsidiaries, that is to say subsidiaries of Long Yau, all of which are incorporated in Hong Kong and carry on business exclusively in Hong Kong.*

² [2009] 6HKC 351 at pp.355-6 [para.23]

³ [2008] 11 HKFAR 370



- (4) *The whole of the Company's income is derived from businesses carried on in Hong Kong.*
- (5) *All the Company's shareholders and directors are and always have been resident in Hong Kong and none of them has ever set foot in the BVI where the Company is incorporated.*
- (6) *All the directors of its directly and indirectly held subsidiaries are and always have been resident in Hong Kong and none of them has ever set foot in the BVI.*
- (7) *All board meetings of the Company and its subsidiaries are held in Hong Kong and all administrative matters relating to the Company are discussed and decided in Hong Kong.*
- (8) *Crucially the dispute is a family dispute between parties all of whom are and always have been resident in Hong Kong and the events giving rise to it and the conduct of which complaint is made all took place in Hong Kong.*
- (9) *The only connection which the Company has with the BVI is that both it and its wholly owned direct subsidiary Long Yau are incorporated there. The fact that the Company's only asset, being its shareholding in Long Yau, is situate in the BVI is a consequence of this.*

Against this background the Court of Final Appeal had no hesitation in holding that a sufficient connection was established. Indeed it had been conceded that, but for the intermediate holding company there would be a sufficient connection.

This is a significant development as regards jurisdiction for winding up petitions in relation to offshore holding companies. Whilst the natural forum for such cases will always be in the offshore jurisdiction, this decision shows that there may be alternatives and prospective petitioners will need to consider the relative costs and benefits of proceeding in the offshore jurisdiction of incorporation versus proceeding onshore in Hong Kong.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information



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