



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 278 OF 2020 (ASCJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF FANG HOLDINGS LIMITED

BETWEEN

(1) EVENSTAR MASTER FUND SPC
for and on behalf of
EVENSTAR MASTER SUB-FUND I SEGREGATED PORTFOLIO
(2) EVENSTAR SPECIAL SITUATIONS LIMITED

Petitioners

and

VINCENT TIANQUAN MO

First Respondent

FANG HOLDINGS LIMITED

Second Respondent

Before: The Hon Anthony Smellie

Heard: On the papers 13 September 2021 on the basis of written submissions by Ben Hobden and Sarah McLennon of Conyers Dill and Pearman on behalf of Fang Holdings Limited and by Alistair Abbot of Forbes Hare on behalf of the Evenstar Petitioners.

HEADNOTE

Pending a petition for winding up what are the considerations for the grant of approval by the Court of a disposition of a company's assets by its board of directors.

REASONS FOR DECISION

INTRODUCTION

1. Fang Holdings Limited ("the Company"), by its Summons seeks an order that any payment

of sums payable by it to Safari Group CB Holdings Limited ("SGCB") whether pursuant to the Settlement Deed entered into between the Company and SGCB dated 25 June 2021 (the "Agreement") or the Convertible Note dated 25 September 2015 and entered into by, and between, the Company and SGCB (the "SGCB Debt"), shall not be void by virtue of the operation of section 99 of the Companies Act (2021 Revision) (the "Act") in the event that an order for the winding-up of the Company is made.

2. The Company filed the Fourth Affirmation of Howard Huyue Zhang ("Zhang 4") in support of its Summons. The Company also seeks an order that the Court seals Zhang 4 on the basis that Zhang 4 refers to and exhibits commercially sensitive negotiations and material. The Company has also adduced evidence by way of the Fifth Affirmation of Howard Huyue Zhang ("Zhang 5") that has been signed, but not sworn, due to the ongoing COVID-19 pandemic. The Company has however, through Conyers, undertaken to complete the formalities of filing at the earliest opportunity. On this basis I have also had regard to the information tendered through Zhang 5.
3. It had been hoped that this matter could be dealt with consensually as between the parties. Unfortunately, consensus has not been reached. All parties other than the Evenstar Parties consent to the relief sought in the Summons. The Evenstar Parties (the "Petitioners") take a curious position. They do not oppose the relief sought, rather, they state that they do not consent to it. To that end, Forbes Hare (counsel for the Petitioners) wrote a 12 page letter to Conyers on 26 July 2021 (the "Forbes Hare Letter"), detailing the Petitioners' reasons for not consenting to the relief in the Summons (whilst not opposing the application). This was sent to me for information when considering the Company's application. I have considered the points raised in the Forbes Hare letter but for the reasons which I now explain, do not accept that they provide reasons for refusing the Company's application.

BACKGROUND

4. The relevant facts for the purposes of determining the Summons are as follows.
5. On 16 November 2020, the Petitioners presented an amended petition to wind up the Company on the basis that it was just and equitable to do so pursuant to section 92(e) of

the Companies Act (the "Petition" and the "Act"). The Petitioners describe themselves at [17] of the Petition as long-term investors in the Company. In summary, in the Petition the Petitioners allege that the Company's controlling shareholder Mr Mo (the First Respondent) and its board of directors have caused the Company's business to be pursued and its assets utilised for the wrongful purpose of benefitting Mr Mo and persons associated with him. The Petitioners further allege that they have caused the Company to wrongfully infringe the rights of its members, including the Petitioners' rights by, among other means, the unlawful dilution of their share interests in the Company.

6. On 8 December 2020, the Petitioners filed an application seeking the appointment of Provisional Liquidators over the Company (the "PL Application") and issued a summons seeking the appointment of a reconstituted board of directors of the Company on 21 June 2021 (the "Reconstitution Summons"). The PL Application was adjourned on a number of occasions and on 20 July 2021 I made an order, by consent of the parties, effectively facilitating the appointment to the Company of an independent director, nominated by the Petitioners. Both the PL Application and the Reconstitution Summons were thus effectively adjourned *sine die*.
7. The Petition is however, brought on just and equitable grounds and premised on the averment that the Company is solvent, thus conferring upon the Petitioners a legitimate interest were the Company to be wound up. In the event that the Company were insolvent (which all parties seem to accept is not the case), the Petitioners would lose standing and the Petition being then that of shareholders whose interest would be relegated to that of the creditors', would not be countenanced.
8. As noted in paragraphs 8 and 18-21 of Zhang 4 (and confirmed by the up to date financials exhibited to Zhang 5), the Company is indeed solvent. The unaudited financial results for the fourth quarter of 2020 and fiscal year ended 31 December 2020 show the following:
 - i. Total revenues of the Company increased 14.6% during the fourth quarter of the fiscal year as compared to the same quarter of the 2019 fiscal year;
 - ii. The Company's net loss during the fiscal year was US\$6.5 million, compared to a net loss in the 2019 fiscal year of US\$10.3 million;

- iii. The Company is cash flow solvent, having total current assets of US\$729,503,00 and total current liabilities of US\$639,999,000; thus *prima facie* meeting the commercial or “cash flow” solvency test specified by the Court of Appeal in **Re Weaving Macro Fixed Income Fund Limited**¹; and
- iv. The Company is also balance sheet solvent, having total assets of US\$1,904,930,000 and total liabilities of US\$1,239,184,000.



Thus *prima facie* also, the Company is balance sheet solvent within the meaning of the Act as it has the resources to discharge its debts as they fall due in the reasonably near future – applying the test specified by the Privy Council in **SEB v Conway and another (JOLs of Weaving)**².

9. By way of response to criticism in the Forbes Hare Letter, the Company has prepared an updated unaudited consolidated balance sheet and income statement as at 30 June 2021. These are found at pages 1-3 of exhibit HHZ-5 to Zhang 5. As is shown therein:
 - I. The Company remains cash flow solvent, having total current assets of US\$875,896,000 and total current liabilities of US\$629,416, 000; and
 - II. The Company remains balance sheet solvent, having total assets of US\$1,980,240,000 and total liabilities of US\$1,235,316,000.
10. The board of directors of the Company are averred by Mr Zhang to believe that the Company will continue to be solvent following payment to SGCB, given the Company’s current financial position.

THE PAYMENT

11. The Summons relates to one disposition only; the payment to SGCB. Whilst this is queried in the Forbes Hare Letter, it is readily apparent from the Summons that no wider or

¹ 2016(2) CILR 514 at [40] per Martin, JA.

² 2019(2) CILR 245 at 261. See also as both tests were applied more recently by Parker J in **Re Obelisk Fund SPC v Obelisk Group Gold Focus Fund** FSD 87 of 2021, 12 Aug 2021

'omnibus' validation order is sought.

12. The payment is described in detail in paragraphs 9-17 of Zhang 4 and is discussed briefly as follows.
13. SGCB purchased a Convertible Note dated 24 September 2015 in an original aggregate principal amount of US\$72,000,000 (the "Note"), the issuance of which was publicly disclosed, given that the Company is listed on the NYSE. The Petitioners were therefore presumably aware of the existence of the Note and this is not disputed. This being so, the Company however, does not accept that the Petitioners' knowledge of the Note is relevant for the purposes of the relief of the Courts sanction sought by the Summons.
14. The presentation of the Petition triggered an event of default under the Note under Article 2.4(j), as an event of default is defined as occurring thirty days after the presentation of a winding-up petition (the "Event of Default"). As a consequence of the Event of Default, 100% of the outstanding principal of, and accrued and unpaid interest on, the Note automatically became due and payable on or around 13 December 2020 pursuant to Article 2.5(a) of the Note.

Campbells, attorneys for SGCB, requested that the Company take "*such preparatory steps to repay the [SGCB] Payable in full...*" in their letter of 28 January 2021, noting that as a result of the Petition being extant for a period of more than 30 days, all amounts due under the Note (plus interest) fell due immediately.

15. SGCB as a secured creditor under the Note, were only prepared to support the Company's position in defending the Petition, if the Company repaid the debt it owed to SGCB. This is as confirmed by Campbells in a letter of 25 February 2021. Consequently, the Company entered into negotiations with SGCB in relation to payment of the debt, and the Agreement was executed by SGCB, the Company and China Index Holdings Limited (an affiliate of the Company)(the "Agreement"), which compromises the SGCB Debt.
16. Although the Company is liable to repay the whole of the SGCB Debt pursuant to the terms of the Note; under the Agreement China Index Holdings Limited will pay only 50% of the sums due under the Agreement. This, the Company submits and I accept, benefits

all the stakeholders of the Company, as otherwise the Company would be obliged to make payment of the SGCB Debt in full. This is a real and tangible benefit to the stakeholders of the Company (including the Petitioners) and it is therefore not at all clear why the Forbes Hare Letter takes issue with the compromise and/or the Summons. The Forbes Hare letter makes reference to different matters of concerns about the validity of the appointments to the Board of the Company on whose behalf sanction is sought. It also raises concerns about whether some of the assets of the Company have been misapplied to pay the legal expenses in other proceedings of Mr Vincent Mo, the Chairman of the Board. The Forbes Hare Letter does not address the important question whether the compromise of the SGCB debt would be in the interests of the Company as a whole.

17. It is indeed asserted that the Company considers that the payment to SGCB is in the best interests of the Company and that on this basis, the Directors resolved to enter into the Agreement by way of board resolution dated 21 June 2021.
18. While the Forbes Hare Letter raises concerns which it is expected will be enquired into by the Board, including the Petitioners' appointee, those concerns in my view would not justify refusal of sanction of the compromise in light of the benefit it would bring for the Company as a whole. It is also important to note that no other investors, besides the Petitioners, object. Moreover, whatever the standing of the rest of the Board may be, there is no question about the validity of Mr Mo's appointment and it is he who brings the application on behalf of the Company. Against that background I now turn to consider the relevant law.

THE LAW

19. Section 99 of the Act provides that:

“When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.”

20. Section 99 does not prohibit a company from trading or making payments once a winding-up petition has been presented against it and pending the hearing of the petition. In the case of a solvent company (as is the case here), it is often in the interests of all members,

and fair to the directors who would otherwise be at potential risk of personal liability, that the company continues to trade as usual.

21. This point is clearly articulated at paragraph 26-006 of **Fletcher**³ which states:

“Pending determination of the petition it is permissible for the company to trade, provided that it does so in a bona fide and regular manner and with necessary regard to the implications for all interested parties (including the potential liability of the directors) if a winding-up order is made by the court when the petition is heard.”

22. The longstanding practice of the court is to validate payments made by a company whilst a winding-up petition is pending if the payment is made honestly, for the benefit of the company, and in the ordinary course of business: see **Re Burton & Deakin Ltd**⁴.

23. **Re Burton & Deakin Ltd** was expressly approved by Henderson J in **Fortuna Development Corporation**⁵. In that case at [5], Henderson J articulated four elements which must generally be established before an applicant is entitled to a validation order:

“First, the proposed disposition must appear to be within the powers of the directors...Secondly, the evidence must show that the directors believe that the disposition is necessary and expedient in the interests of the company...Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.

24. In **Cybervest**,⁶ I added a fifth consideration to this list; in the context of an application to validate a specific payment that was not in the ordinary course of business and where irregularities in the conduct of the affairs could be shown. Thus, even if the company is clearly solvent, payment may not be validated where irregularities in the conduct of the affairs of the company can be shown. (*Ibid* at para [29])

It has subsequently been said of the dicta from **Fortuna Development** and **Cybervest**

³ *Fletcher, The Law of Insolvency*, Fifth Edition, 2017

⁴ [1977] 1 All ER 631

⁵ [2004-2005] CILR 533 [AB/T4], the test in *Fortuna* and the principles to be applied have been confirmed and approved by the Court of Appeal of the Cayman Islands in *In re Torchlight Fund LP* (C.A.), 2018 (1) CILR 290

⁶ *In the matter of the Cybervest Fund* [2006] CILR 80

that “these guidelines are neither exclusive nor necessarily applicable to every case⁷”.

For the sake of clarity and completeness, it is noted that these guidelines, while not dissimilar to those which would apply to the grant of sanction for a liquidator’s disposition of assets, are not the same. In the context of a liquidation the legal principles which apply to the exercise of sanction of a liquidators’ powers were most recently considered in **Re Premier Assurance Group SPS Ltd (in off. liq)** FSD 264 of 2020 (ASCJ), 10 September 2021, following and applying in **Re DDD Growth Premium 2X Fund** 2013(2) CILR 361 at [30] and **Re Trident Microsystems (Far East) Ltd** 2012(1) CILR 424. .

SATISFYING THE REQUIREMENTS OF THE CASE LAW

25. I accepted that the Payment should be validated. The requirements set out in **Fortuna Development** are plainly met and the present case can be distinguished from **Cybervest** as the proposed payment for validation is within the ordinary course of business of the Company, irregularities have not been shown (although the question of the validity of the payment of Mr Mo’s legal expenses is to be investigated) and the validation application is unopposed.

The Payment is within the powers of the directors

26. That the Payment is within the powers of directors (assuming they are validly appointed) is also clear from the terms of Article 101.1 of the Company’s Fifth Amended and Restated Memorandum and Articles of Association, which provides as follows:

“The business of the Company shall be managed and conducted by the Board, which may pay all expenses incurred in forming and registering the Company and may exercise all powers of the Company (whether relating to the management of the business of the Company or otherwise) which are not by the Statutes or by these Articles required to be exercised by the Company in general meeting, subject nevertheless to the provisions of the Statutes and of these Articles and to such regulations being not inconsistent with such provisions, as may be prescribed by the Company in general meeting, but no regulations made by the Company in general meeting shall invalidate any prior act of the Board which would have been valid if such regulations had not been made. The general

⁷ *In the matter of Freerider Limited* [2010 (2) CILR [154]

powers given by this Article shall not be limited or restricted by any special authority or power given to the Board by any other Article.”

27. The Forbes Hare Letter makes much of this particular requirement and questions whether the Payment is one that is within the powers of the directors. On behalf of the Petitioners, it is asserted that independent directors of the Company were not validly appointed. The Company disputes this, and in any event, any such issues will be resolved beyond doubt following the forthcoming general meeting of the Company when the appointments will be up for ratification or not.
28. In respect of the relief sought here, the issue raised in the Forbes Hare Letter is in my view, besides the point. Even if the assertion that the independent directors are not validly appointed is correct (and as already noted this is not admitted) at no point has Mr Mo's status as a director of the Company been questioned. It was Mr Mo, the undisputed Chairman of the Board, who signed the Agreement on behalf of the Company (as he was authorised to do so). His authority not being questioned, there can in my view, be no question that the payment is within the power of the Board to make.

The Payment is in the interests of the Company

29. That the Payment is in the interests of the Company is also spoken to in the evidence. As is set out at paragraphs 24-26 of Zhang 4⁸, the Board of the Company is of the belief that the Payment is in the best interests of the Company. The Company acknowledges that the sums under the Note are now due and owing. It considers that non-payment would be detrimental to the Company and result in the risk of SGCB presenting a creditor's winding up petition (or supporting the Petition), notwithstanding the Company's solvency. In the event that any petition were successful and the Company was placed into Official Liquidation, the Board considers that it would result in considerable destruction of value that may result in the Company being unable to satisfy all of its creditors in full.
30. Furthermore, and as is set out above, the terms of the Agreement oblige the Company to make payment of only 50% of the Payment. Plainly in my view, these commercial terms

⁸ [HB/T7]

are in the best interests of the Company.

The directors are acting in good faith, the burden of showing bad faith is on those opposing the application and the payment is one that an honest and intelligent director would make

31. The validation application is unopposed despite the equiparation of the Forbes Hare Letter. As such, nobody is suggesting that in seeking to make the Payment the directors are acting otherwise than in good faith or not as any honest and intelligent director would act, as per **Fortuna Development** (above).

The Cybervest consideration

32. In **Cybervest** (above) the petitioner opposed a validation order application in part. It did not oppose the validation order regarding third party payments but opposed validation of the payment of certain management fees, claiming that they were not necessary for the running of the company to continue and there was a risk of transactions having been made in bad faith. The Court refused to validate payment of the management fees because where there could be shown to be irregularities in the conduct of a company's affairs, it by no means followed that because the company was solvent and able to pay its debts as they fell due, the conduct of the company's business should be continued, potentially at the expense of its investors. I stated that, in respect of the management fees:

"I do not consider that the directors could properly hold that these dispositions are necessary or expedient in the interests of the company at this time"⁹


33. Whilst the Forbes Hare Letter makes reference to **Cybervest**, the concerns and circumstances that gave rise to the extra, fifth consideration therein, are plainly not present or applicable here. The Payment is one that is necessary, the application is unopposed, there are no allegations of bad faith made in opposition and the directors are demonstrably entitled to consider that the Payment is necessary and expedient at this time.

⁹ Ibid at para 33.

34. As spoken to in the evidence at paragraphs 25 and 26 of Zhang 5, the repayment of the Company's debt obligations is, in the Company's view, a payment in the ordinary course of business, to a party unrelated to the Company or any of its officers. In the circumstances, it is necessary and expedient for the Payment to be made. Indeed, it is in the interests of the investors for the Payment to be made, so as to prevent the presentation of a petition or support of the Petition by SGCB.

Sealing of evidence

35. As the evidence refers to and exhibits commercially sensitive negotiations as well as the Agreement, which contains confidentiality obligations, the Company seeks an order that the evidence be sealed.
36. I considered that such an order is justified in this case and so I granted it.



Hon. Anthony Smellie
Chief Justice



13 September 2021