

How deep do you bury the golden egg?

April 2014

The Court of Appeal has declined jurisdiction to wind up Yung Kee Holdings Limited (the "**Company**"), a company incorporated in the British Virgin Islands ("**BVI**"), upholding the decision of Harris J at first instance that the Company did not have "sufficient connection" with Hong Kong.

The Company was established to act as an investment holding company and its sole asset is the shares in another BVI company. It was only through its various subsidiaries that the well-known Yung Kee Restaurant and other businesses in the Yung Kee Building were operated.

The business of the subsidiaries was disregarded on the principles of separate legal personality. The fact that various administrative decisions of the Company were made in Hong Kong did not establish a sufficient connection to Hong Kong, not least because the administrative decisions related to the very acts that were complained of by the Petitioner as being unfairly prejudicial to his interests.

The Court distinguished between a winding-up petition brought by a creditor and one brought by a shareholder, with more stringent requirements for the latter. It would take a "very exceptional case" to grant a shareholder's petition to wind-up a foreign company on "just and equitable grounds", as a shareholder would be taken to have consciously agreed to the laws of the state of incorporation of the Company as governing the legal status of the company. To then adopt a contrary position for the purposes of filing a winding-up petition outside the courts of the state of incorporation would be difficult.

The position is, however, different for a creditor's petition where creditors may justifiably seek assistance from the local court to safeguard their legitimate interests within the jurisdiction where assets are located.

Before setting up a company, it is important to carefully weigh up the benefits (such as tax benefits) of incorporating a foreign/offshore company with the potential problems that the shareholders may face in the event of a shareholders' dispute.

In this case, the complex corporate structure of the group was the result of professional advice to consciously distance the Company from Hong Kong with a view to avoiding estate duty.

In an alternative application for relief on the basis of unfair prejudice, the Court also found no jurisdiction to grant relief. On the same set of facts, it found that the Company had not "established a place of business in Hong Kong" and accordingly declined jurisdiction for relief under s.168A of the old Companies Ordinance.

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