

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHC (COM) 2011/0158

BETWEEN:

**LIAO CHEN TOH
SILVERSTATE ENTERPRISE LIMITED**

Applicants

and

TRIPLE DRAGON LIMITED

Respondent

Appearances: Mr Ian Mann for the Applicants
Mr Paul Dennis and Ms Nadine Whyte for the Respondent

JUDGMENT

[2012: 19, 27 March]

(Disputed debt –whether applicant has established standing - whether dispute on bona fide and substantial grounds – whether Company insolvent)

- [1] **Bannister J [ag]:** This is an application for the appointment of Mr Mark McDonald as liquidator of Triple Dragon Limited ('the Company') on the grounds that the Company is insolvent. The Company holds a majority interest in a group of trading companies, directed out of Taiwan but active in the PRC, producing expanded polystyrene. I was told by Mr Mann, who appeared for the applicants, Liao Chen Toh ('CT') and Silver State Enterprises Limited ('Silver State'), that the group is the largest producer in the world. The Company is not merely a holding company. The evidence shows that significant sums pass through its bank accounts and it is the evidence of CT that it has made some trading profits and is, as he puts it, financially sound. This, I may as well say at the outset, is not a very promising background for an application to appoint a liquidator on the grounds of insolvency. CT was a director of the Company but has been removed as such in the course of an acrimonious family dispute and the Company is at any rate theoretically in the hands, currently, of his brother, Liao Wentoh ('WT'), although WT says that CT refuses to accept that he has been removed from the board and retains the Company's books and papers in his possession, denying WT access to them. CT says that WT's motive in attempting to take control of the Company is to stifle recovery of a debt of some US \$29 million, guaranteed by WT, due by a company which WT owns or controls.

- [2] CT applies as a creditor of the Company. He says that since the time of the Company's incorporation in 2000 he has lent some US\$81 million to the Company to enable it to buy raw materials. There is no written loan agreement and CT produces no resolution of the Company's board resolving to accept the alleged loans. Indeed, there was never, so far as the evidence goes, any agreement that the Company would borrow a specific sum from CT or at any particular rate of interest. Rather, CT simply paid various sums from time to time for the purpose I have mentioned. CT never withdrew any sums from the Company in repayment of these vast amounts and made no demand at all for repayment until a written demand for some US\$66 million out of the total of US\$81 million was served on 12 December 2011, two days before the issue of the originating application. The reason for restricting the demand to US\$66 million is said to be that CT was unable to find supporting documentary evidence for the balance, given the fact that bank records do not exist for the earlier period. CT exhibits no financial statements for the Company, even though he does not deny that he has access to them.
- [3] The Company's defence to the application is that the payments, which certainly appear to have reached the Company from accounts in the name of CT, were not loans but were made as part of an operating arrangement set up while the father of CT, CT and WT ran the Company, under which money left the Company for investment in the PRC through designated accounts in the names of individuals connected with it (including CT and WT) and income returned through the same accounts to the Company's banks. WT, for the Company, relies upon the evidence of Yang Chin-Sheng, who was an employee of the group between 1993 and 2010 and who confirms the existence of the money-go-round. No commercial explanation is given for the setting up or operation of this system and CT says that it is a pure invention of WT. Nor does WT support his account by exhibiting transactional documents generated while his own personal accounts were being used, as he says, in operating the system.
- [4] CT relies upon the evidence of a certified accountant, Michelle Chang, who was for the period of one year CFO of the subsidiary group. She denies the existence of any scheme for circulating cash as relied upon by WT. Although she does not profess to have had any role in the financial affairs of the Company (as opposed to those of the subsidiary group), she claims to have reviewed bank statements and accounting records of the Company and to have spoken to former employees and internal personnel of the Company. As a result, she feels able to depose to the fact that the Company has an outstanding balance of at least US\$66 million owing to CT. She exhibits no copies of any of the documents she says she examined and does not make clear how properly kept accounting records would include a creditor with a debt of 'at least' US\$66,549,588, as opposed to a specific amount. CT also relies upon the evidence of Xu Li Fang, who explains that he is an accountant and that he has examined the books of certain companies in the group which, if WT's account is correct, would have passed money back up to CT for onward transmission to the Company and says he can find no evidence of such payments. No documents are exhibited to substantiate this allegation. No permission was sought or given for the introduction of this expert evidence. So that there are no accounting documents at all evidencing CT's claim to be a creditor of the Company in any sum, let alone US\$66 million (or US\$81 million). CT also relies upon the evidence of Liu Xiao Feng, who says that he is a lawyer practicing in the PRC and he says that PRC exchange control regulations are such that a system such as that described by WT would have generated documentation. He may well be right, but on its own the fact neither supports nor

contradicts the account given by either CT or WT. No permission was sought or given for the introduction of this expert evidence.

- [5] CT does, however, rely upon a purported assignment of the alleged loan to the second applicant, Silver State, which it is common ground is a company wholly owned by CT. He exhibits the Chinese version of the document together with what is said to be a translation, although the Court does not have the benefit of any certificate from an accredited translator. CT gives no reason for this assignment. The translation (if accurate) reveals an unusual transaction because the alleged debtor, the Company, is a party to it. Although it refers to 'the loan agreement annexed' to the assignment, Mr Mann accepted that no such loan agreement ever existed. Clause 5 of the assignment provides that if the Company does not proceed in accordance with the assignment, it is to pay what are described as damages to Silver State, which are said to include the loan owed by the Company to CT together with interest penalties, damages for breach of contract and other claims. The document appears to have been executed on behalf of the Company and Silver State by CT.
- [6] CT says that he entered into this assignment on 31 December 2009. The Chinese original bears what appears to be a date expressed in Arabic numerals. That date is 2010, so there may be some confusion there.
- [7] Mr Mann submits that the case made by the Company is an obvious fantasy unsupported by any reliable evidence and, in particular, unsupported by documentation. He relies upon authority showing that unexplained payments of money between strangers will be presumed to be loans. That is not this case. CT and the Company were not strangers in that sense.
- [8] In my judgment an applicant claiming to be a creditor of a Company over which he seeks the appointment of a liquidator has the burden of persuading the Court, on a balance of probabilities, that he is a creditor of the company in question. I am not satisfied that CT has discharged this burden in the present case. In the absence of any probative documentary evidence supporting that allegation, I am not prepared to accept that the payments undoubtedly made to the Company from accounts in CT's name were loans. The Company has obviously been in business in a substantial way and must, in the eleven years since its incorporation, have produced financial statements. Not a single one has been exhibited, despite the fact that CT makes no claim that such statements are beyond his access. If these payments were by way of loan, then the financial statements and accounting records of the Company will show them as such. Their amounts are clearly material. The only document referring to himself as a creditor of the Company upon which CT relies, the supposed assignment, appears to me to be no more than a self serving attempt to obtain the signature of the Company (by CT) to an admission of the supposed indebtedness. While it is not inherently incredible that CT is a creditor of the Company, it is inherently incredible that he is a creditor in the sum which he alleges, yet unable to support that allegation with any accounting documentation whatsoever, despite the fact that one of his witnesses is said to have examined the Company's accounting records.
- [9] In these circumstances I am not satisfied that CT has established that he is a creditor of the Company with standing to bring this application. The cases upon which Mr Mann relied relating to the resolution of disputes about debts do not, therefore, need to be considered.

- [10] In case I am wrong about that I must go on to consider whether the evidence establishes that the Company is insolvent within the meaning of section 8(1)(c) of the Insolvency Act, 2003. That section provides that a company is insolvent if it is proved to the satisfaction of the Court that the value of the company's liabilities exceeds its assets or that the company is unable to pay its debts as they fall due.
- [11] In a document relied upon by WT, but which is said by CT to have been a mere draft, the estate of the late father of CT and WT is shown as entitled to all the issued shares of the Company. The document, whether or not a draft, was being prepared for the Taiwanese tax authorities following the father's death. It shows the value of the shares as TWD337 million (some US\$11 million). Although CT complains about the use to which this document is put by WT, he does not challenge the figure. If that is correct, and it is unlikely in the circumstances to have been inflated, then it is clear that the Company's assets exceeded its liabilities when the document was drawn up (September 2011). There is no suggestion that the position has changed subsequently.
- [12] In paragraph 14 of his second affidavit CT says that the Company is financially sound. That can only mean not only that the Company's assets exceed its liabilities, but that it is able to pay its debts as they fall due. No company which could not pay its debts as they fall due could be described as financially sound without abusing language.
- [13] Mr Mann relies upon the Company's failure to comply with his demand of 12 December 2011 as establishing insolvency. He relies upon the general rule that a debt repayable on demand must be repaid within the time needed by the debtor to collect funds from the bank. That rule would seem to me to have no application to a case where it is not asserted that the alleged indebtedness is repayable on demand, or to an alleged debt where a substantial part of the indebtedness was incurred before December 2004 and is likely, therefore, to have been statute barred when the demand was made. There are many authorities which establish that failure by a company to pay even a single unchallenged debt may be taken as evidence of an inability to pay debts as they fall due, but none of them applies here. Although Mr Mann says that the dispute in the present case does not bear scrutiny, I decline to infer from a refusal by a company described as financially sound to pay a debt that is being challenged in the context of a bitter family dispute that it cannot pay its debts as they fall due, whatever I may think of the merits of the challenge itself. To put it another way, I decline to exercise a discretion to put an end to the life of a company on grounds of insolvency in circumstances where the person asking me to do that goes on oath to say that it is profitable and financially sound.
- [14] This application is accordingly dismissed.



Commercial Court Judge
27 March 2012