27-JAN-2010
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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD0019 OF 2010

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)

AND IN THE MATTER OF CHINA TIME SHARE MEDIA COMPANY LIMITED ("the Company")

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
Heard on the 22nd January 2010

Appearances: Ms. Sarah Dobbyn and Mr. Tim Clipstone of Harneys for the Petitioner

Mr. Nigel Meeson, QC and Mr. Fraser Hughes of Conyers Dill & Pearman for the Company

RULING

1. Having filed a petition for the winding-up of the Company which is due to be heard on 26th February 2010; the Petitioner now seeks an order for the appointment of provisional liquidators ("PLs") on the grounds that there is an imminent likelihood that the Company's assets will be dissipated.

2. Section 104 (2) of the Companies Law (2009 Revision) provides that the appointment of a provisional liquidator may be made where there is a *prima-facie* case for making a winding-up order and (on the basis presented here) the appointment is necessary to prevent the dissipation or misuse of the Company's assets or to prevent mismanagement or misconduct on the part of the Company's directors.

3. The Company resists the appointment of PLs because as Mr. Meeson, QC submits, squarely in opposition to the Petitioner's argument that the statutory requirements are met:

(1) the petitioner has not established that the appointment of PLs is necessary in order to either,

(i) prevent the dissipation or misuse of the Company's assets…; or

(ii) prevent mismanagement or misconduct on the part of the company's directors." (Section 104(2) of the Companies Law, 2004 Revision); and

(2) no urgency has been shown. Rather, that the evidence reveals the contrary."

4. While the application now for the appointment of the PLs is implicitly also based on the ground of urgency, the petition for the compulsory winding-up of the Company is itself presented on the ground that the Company is insolvent and unable to pay its debts. The debt owed to the Petitioner is the sum of USD 25,108,145.21 due on secured convertible notes which were issued to the Petitioner by the Company on 19th December 2007 in the principal amount of USD 20,000,000. There is now no issue taken by the Company that the debt is due and owing and that is clear from the following narrative of events.

5. On the 6th January 2010, the Petitioner served a notice to the Company that an "Event of Default" had occurred (failure to pay USD 1,005,400 then due and

owing by way of interest and continuing on account of the Company's failure to pay interest as it fell due) ("the Notice").

6. As the result of the Event of Default, all amounts of principal premium and accrued and unpaid interest relating to the Notes became immediately due and payable, together with the Early Redemption Amount (as defined in the Note Trust Deed). The Notice of 6th January 2010 also contained a formal demand to the Company for payment of all amounts of principal, premium and accrued and unpaid interest relating to the Notes together with the Early Redemption Amount; and following the issuance of the Notice, the debt of USD 25,108,145.21 became due and payable. The Company's failure to pay is ongoing and the beneficial owner, chairman and Chief Executive Officer of the Company Mr. He Ji Lun ("Mr. He") has not, in his evidence, sought to suggest that the Company (or the Group of Companies of which the Company is a part and which is mainly controlled by Mr. He based in the People's Republic of China ("the PRC")) is anything but insolvent. Rather, Mr. He resists the appointment of PLs now on the basis as first mentioned above as presented by Mr. Meeson QC even while acknowledging that, if things do not change by the time the petition comes up for hearing when it is set in 5 weeks time, the petition is likely to be granted.

7. It is apparent from all the foregoing that there is no evidence before me to support the proposition (only vaguely raised by Mr. Meeson) that the Company might be able to pay this debt before the petition is finally heard. The suggestion of a "white knight" coming along to bail the Company out in the meantime I therefore regard as being nothing but speculation.

8. On the other hand, I feel compelled to recognise that the Petitioner's concerns over the risk of dissipation of the Company's assets in the meantime are real.

9. The Company's only known assets are accounts receivable owed by other entities within its Group. These others are operating within the PRC and are in one way or another under the full control of Mr. He who is himself recorded on its books as being a substantial creditor of the Company.

10. On 8th January 2010, Mr. He wrote to the Bank of America Merrill Lynch Asia Private Equity ("BAML") – the entity in Asia that monitor's some of Bank of America's investments in Asia (including these Notes which are held on behalf of Bank of America by the Petitioner as trustee) – to the following effect in response to the demand for payment:

> *"My company in fact is unable to make payment for the wages (of its senior employees), and sums of money (owed as trading debts). As at 31 December 2009, the cash appearing on the financial statement of my company is RMB6,680,000 [US$978,260.04]. With the cash that we have, we are simply unable to bear the pressure of this urgent cash payment. If we are unable to pay these amounts in accordance with the contracts, it will cause the company's main senior employees to leave their jobs one by one in a short period of time and drag the Company into situations of custody of assets, legal proceedings and bankruptcy. In order to prevent the company not to incur greater losses because of interim cash shortage, could your company please lend my company*

seek to prefer himself as a creditor, to the detriment of the Petitioner's interests in the Company; which indirectly, through its subsidiaries, is itself also a creditor of other entities within the Group and thus having a beneficial interest in the accounts receivable.

16. This concern is regrettably not based only on what might be seen as a base instinctive response to the predicament in which Mr. He finds himself.

17. Already, there is actual evidence of liabilities owed to him on the books having been massively reduced by payments from within the Group in circumstances which suggest preferential treatment. There is also evidence of some accounts receivable owed to the wholly owned subsidiaries of the Company having been paid but without any explanation, satisfactory to the Petitioner, of what became of the proceeds.

18. While there is as yet no concrete basis for concluding that there have been fraudulent preferential payments to Mr. He; there is, I consider, sufficient basis now for the Petitioner's concern that the PLs should be put into the Company in an effort to preserve its assets for the just and proper treatment of all its creditors.

19. I note that on his behalf, Mr. Meeson has proffered a personal undertaking from Mr. He, that the Company will not dispose of assets or make any payments outside of ordinary operating expenses without providing the Petitioner with seven days advance notice. The undertaking would also extend to include payments to himself. In the circumstances of this case, I do not consider that to be sufficient assurance for the large debt owed to the Petitioner and agree with Ms. Dobbyn that it is not.

20. Apart from anything else, it is not immediately apparent how such undertakings could be enforced.

21. On the other hand, the PLs will be well positioned to take the necessary protective steps. One of them, Mr. Kenneth Krys, is based in this jurisdiction where the Company is domiciled. The other, Mr. Cosimo Borrelli, is based in Hong Kong and is a partner of Borrelli Walsh Limited, a firm of insolvency practitioners having experience in such matters within the PRC. Through Mr. Borrelli in particular, the instructions would be that steps be taken to preserve the Company's assets. This could be expected to be achieved because the Company, which stands mid-way down the ladder of its Group Corporate Structure, is the holding Company for other entities within the Group – Xi'an Time Share Technology Information Co. Ltd. and Chengdu Time Share Technology Information Co. Ltd. in particular – and which are believed to hold important assets of the Group.

22. For the foregoing reasons, I find that there is a *prima facie* case for making a winding-up order and that the appointment of the PLs is necessary to prevent dissipation of the Company's assets and the probability of mismanagement of the Company's assets by its directors. I grant the application for the appointment Messrs Krys and Borrelli as the PLs with powers essentially limited to those now needed for the preservation of the Company's assets and those of its subsidiaries, pending the hearing of the petition for the Company's winding-up. In this regard I agree with Mr. Meeson that the form of order propounded by Ms. Dobbyn is too

wide and that it must be narrowed to what powers are essential for the preservation of the Company's assets.

Hon. Anthony Smellie
Chief Justice

January 27 2010