

# Grande Holdings Ltd. – is an amount due under a complex derivatives arrangement a liquidated sum?

The Hong Kong Court of Appeal returns to the accepted test for admission of claims for the purpose of voting at first creditor's meeting.

In its recent decision in the winding-up of Grande Holdings Ltd.<sup>1</sup>, the Hong Kong Court of Appeal unanimously held that an amount due under a complex derivatives contract was a liquidated sum entitling the resulting creditor to vote at the first meeting of creditors.

At first instance, Harris J had held that the amount was an unliquidated sum, on the basis that the calculation involved in determining the sum due to the creditor was not a matter of mere arithmetic. Rule 125 of the Companies (Winding-Up) Rules specifically provides that a creditor cannot vote in respect of any unliquidated debt, and Harris J therefore held the creditor was not entitled to vote at the first meeting of creditors.

In reversing the first instance decision, the Court of Appeal looked to the 2012 English case of *McGuinness v Norwich and Peterborough Building Society*<sup>2</sup> for guidance, saying that a useful statement on the meaning of a debt for a liquidated sum is that it is a pre-ascertained liability under the agreement of the parties. The Court of Appeal continued on to say that this includes a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery. The Court of Appeal held that in this case although the calculation of the amount due under the derivatives contract was complex (the calculation being made by reference to future floating interest rates), this did not distract from the basic principle that the sum was calculated in accordance with a contractual formula or machinery. Accordingly the claim was for a liquidated amount and the creditor was entitled to vote at the first meeting of creditors.

Potential creditors under derivative arrangements or structured products will be relieved to see the approach taken by the Court of Appeal. The ability to vote at the first creditors' meeting can be important as it is at this meeting that the liquidator of the company is chosen.

## Key issues

- A creditor of an unliquidated debt or contingent debt cannot vote at a meeting of creditors.
- At first instance, the Hong Kong court had held that an amount due under a complex derivatives transaction was an unliquidated debt.
- In reversing the lower court's decision, the Hong Kong Court of Appeal looked to the recent approach taken by the English courts.
- A key factor: a debt for a liquidated sum is a pre-ascertained liability under the agreement of the parties, and this applies even where the calculation methodology is complex.

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<sup>1</sup> [2015] HKEC 2488

<sup>2</sup> [2012] 2 All ER (Comm) 265

The case is also an important reminder that the principles which apply when the chairman of the first meeting of creditors is considering whether to admit a claim for the purposes of voting at that meeting are different to those which apply when a liquidator is considering proof of debts for the purposes of making distributions in the liquidation. Whilst both processes require the creditor to submit a proof of debt, admission for voting purposes is determined by whether, on balance, the claim against the company is established (including that it is not an unliquidated debt or contingent debt) and if so, in what amount. The process for admitting a proof of debt for the purposes of distributions in the liquidation examines claims much more closely, but critically the effect of the winding-up is that all obligations of the company crystallise and can, in theory, be proven for. This includes contingent claims and claims for uncertain amounts, which are not admitted for the purposes of voting in the first meeting.

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