



By fax (2869 6794) and by mail

Your ref : CB1/BC/12/00

7th November, 2001

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Clerk to Bills Committee on Companies (Corporate Rescue) Bill
Legislative Council Secretariat
3rd floor, Citibank Tower
3 Garden Road
Hong Kong

Attn : Mr. Anthony Wong

Dear Sir,

**Re : Bills Committee on Companies (Corporate Rescue) Bill
Follow-up to meeting on 22nd October 2001**

Thank you for your letter dated 23rd October 2001.

Schedule 2, Subsection 3(d) states that Trust Fund should be exclusively used to pay all debts and liabilities owing by virtue of the employment of those whose contract will be terminated on or after the relevant day and to pay all work wages owing to existing employees.

For those employees who are not kept on, it would mean that one would have to provide for their notice in lieu, arrears of salaries, holiday pay and severance pay etc. in accordance with their contract and the Employment Ordinance. This could be a considerable sum of money.

If the provisional supervisor does not terminate any staff nor has any intention to terminate any employees, then it would appear that one is merely talking about the arrears of wages.

The vast majority of companies that I have dealt with in over 20 years of insolvency have had limited cash and therefore they have not been in a position to meet these requirements. Many companies that are restructured in Hong Kong are asset rich, that is they own properties or factories (mainly in China). These assets, depending on the circumstances, may not be quickly realisable therefore it would be very difficult to comply with the Trust account provision.

If we assume that a company wants to undertake restructuring but is not able to comply with the Trust account, it could still try to arrange a voluntary restructuring by having discussions with its major creditors.



This is what happens at present. Will companies undergo voluntary restructuring in the future? In my opinion, they will not.

The reason for this is the provision concerning Insolvent trading, which has the assumption of insolvency for up to twelve months immediately preceding the date of winding up.

Any professional advisor when consulted by Directors, whose companies have considerable assets but no cash, will be advised that they are not able to undertake provisional supervision.

An example of this would be a property company in Hong Kong that had received a demand from one of its Banks. The Directors consult their professional advisor and are informed that they do not have sufficient cash in order to comply with the Trust account but however, in order to protect the Directors from personal liabilities, they must immediately place the company into liquidation.

In my view, taking these two elements of the proposed legislation together, the Trust account and Insolvent trading will create the position that many companies in the future will go into liquidation rather than being restructured. This, I believe, is the opposite intention of the proposed legislation but unfortunately will be the practical outcome.

In the verbal submissions that were made on 22nd October 2001, there was some discussion involving myself and the Official Receiver concerning Fraudulent trading and the new proposed legislation of insolvent trading. The Official Receiver was quite right when he stated that the level of proof required to obtain a judgment in a Fraudulent trading case is higher than a normal civil case and I was quite right when I stated that Fraudulent trading does not necessarily involve a criminal act.

I would refer you to the case of :

**AKTIESELSKABET DANSK SKIBSFINANSIERING v
WHEELOCK MARDEN & CO LTD & ORS**

in the Court of Appeal, it was held and I quote :

“For proof of fraudulent trading in a civil case, the court must be satisfied, on a preponderance of probability, that those accused of it were guilty of the charge. Having regard to the seriousness of the charge, the more cogent would be the evidence required to overcome the unlikelihood of what was alleged and thus to prove it. Proof beyond reasonable doubt was not required.”

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Although the history of Fraudulent trading versus Insolvent trading is interesting, the point at issue is the impact in Hong Kong of this presumption of guilt, which would affect not only those that are guilty but also the innocent Directors as well. Whether they be independent non-executive Directors or executive Directors.

Taking into account people's reluctance to take on personal liability and the difficult hurdle that one has to overcome in order to ensure that there is sufficient cash available for all the employees, it follows that this proposed legislation, in my view, may have a negative impact on the economy of Hong Kong.

Yours faithfully,

Jim Wardell

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Managing Director

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