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DCMP 7038/2024
[2025] HKDC 1066

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 7038 OF 2024

IN THE MATTER OF FAIRWIN
BROKING LIMITED (海富證券有限公司)

and

IN THE MATTER of Order 92 of the Rules
of the District Court (Cap.336H)

and

IN THE MATTER of Section 56 and 62 of
the Trustee Ordinance (Cap.29)

FAIRWIN BROKING LIMITED
(海富證券有限公司)

Applicant

Coram: His Honour Judge Harold Leong in Chambers
Date of Hearing: 30 April 2025
Date of Decision: 30 June 2025

DECISION

1. This is the second hearing of the applicant’s ex parte
Originating Summons (“OS”) filed on 20 December 2024 for an order to

pay certain unclaimed cash and securities into court and be given liberty to deal with or dispose of certain other pursuant to section 56 and 62 of the Trustee Ordinance (Cap. 29) (“TO”).

2. The applicant has filed 3 Affirmations in support (1st, 2nd and 3rd Affirmation of Chen, Weicheng, namely Chen’s 1st Aff, Chen’s 2nd Aff and Chen’s 3rd Aff) and also taken out a Summons for leave to amend the OS on 24 April 2025 (“the Summons”). These, in part, deal with various requisitions raised by Deputy District Judge Simon Ho at the first hearing in his order dated 12 February 2025 (“the Order”, Hearing Bundle A, p. 63-68).

Background

3. The applicant was a securities brokerage firm dealing with shares listed on the Stock Exchange of Hong Kong Limited (“HKEx”) on behalf of its clients and has decided to terminate its business of dealing in securities and futures contracts as a broker (but not the agency brokerage services).

4. Accordingly, the applicant has filed a notice of cessation of such business with the Securities and Futures Commission (“SFC”) on 7 May 2024 pursuant to section 135 of the Securities and Futures Ordinance (Cap. 571) (“SFO”). The cessation date, as acknowledged by the HKEx, was 9 December 2024.

5. The applicant had made the following attempts to contact its remaining clients on its cessation of brokerage business:

- a. On 13 November 2023, sending letters to each of its clients at the correspondence address in the applicant's record;
- b. On 16 November 2023, sending emails to each of its clients, if there is an email address in the applicant's record;
- c. From 13 November 2023, making telephone calls to each of its client at the telephone number(s) in the applicant's record;
- d. From 15 January 2024 to 18 January 2024, making personal attendance at the correspondence address of each of its clients in the applicant's record;
- e. On 28 February 2024 and 13 March 2024, placing advertisements in Chinese and English in two locally circulated newspapers, namely Hong Kong Economic Journal and The Standard to give notice of its cessation of brokerage business; and
- f. On 14 June 2024, placing advertisement in English in a newspaper published and widely circulating in Vancouver, Canada to give notice of cessation of brokerage business.

6. By such notice, the clients were requested to contact the applicant by 20 March 2024 to either withdraw or transfer the monies and securities in their accounts failure of which the applicant shall apply to the court for an order to dispose of the unclaimed assets under TO without further notice.

7. However, as of 31 March 2024, there were 36 clients who still maintain assets in their accounts:

- a. 11 Forfeiting Clients who are contactable and confirmed forfeiting the delisted and odd lot shares in their accounts;
- b. 1 Non-Forfeiting Client who is contactable but refused or failed to forfeit the delisted and off lot shares in the account; and
- c. 24 Uncontactable Clients.

8. In respect to the Uncontactable Clients (except for those who had lost their contacts), the applicant's solicitors have sent final notices on 13 and 17 May 2024. Except for 12 Uncontactable Clients of which letters were not returned undelivered and 1 who had predeceased and had his estates administered, the applicant was unable to locate the remaining 11 Uncontactable Clients or their administrators or executors by post, email or telephone call.

9. The OS enclosed a list of such unclaimed assets categorised under Schedules A, B, C1, C2 and C3 (Hearing Bundle A, p. 4-27).

10. During the first hearing on 12 February 2025, DDJ Simon Ho raised various requisitions which are listed in his Order and for the hearing be adjourned to this date (Hearing Bundle A, p. 63-67).

Legal principles

11. The legal principles for an application under section 62 of the TO are trite. It is described as a "flexible and pragmatic" solution for securities houses upon cessation of business and at the same time to deal with unclaimed assets in a way which protects the interests of their clients.

12. For such applications, there need to be a two-stage approach: (1) the assets in question are held by the applicant as trustee, and (2) despite reasonable endeavours, the beneficiaries cannot be contacted or are unresponsive, or the trustee is other unable to obtain instructions as to how to deal with, dispose of or return of the trust assets (*Gold Fund Securities Company Limited* [2020] HKCFI 2884).

13. For section 56 of the TO, the court has a discretion to confer on trustees any necessary power to effect any transaction (such as the sale of the trust assets) that in the opinion of the court is expedient in the management or administration of trust property (re *The Joint and Several Liquidators of Bank America Nominees*). However, the applicant should demonstrate (1) there is no power vested in it as trustee to dispose of the assets and (2) it is expedient for the court to confer that power on it (*Wing Fat Securities Limited* [2021] HKCFI 3851).

14. For unclaimed shares or cash which have little or no monetary value and shares in delisted companies which have been compulsorily wound up, dissolved or struck off and where it is not possible for new shares certificates to be issued in the name of the Registrar of the High Court, the court may give liberty to the applicant to deal with those shares as they sees fit, including forfeiture thereof (*Re Gold Fund Securities*).

15. The court may also impose terms and conditions as it thinks fit, and directs the manner in which the authorized expenditure and costs of the transactions involved are to be paid or borne between capital and income (*Lamtex Securities Ltd* [2023] HKCFI 1107).

Applicant as trustee

16. It is trite that a broker is generally held as a trustee over the money and securities it holds on behalf of its clients unless otherwise is shown (Re Gainwell Securities).

17. Further, the applicant has exhibited a standard client agreement and the wordings under paragraph 3, 3.1, 10, 10.1, 10.3, 10.4, 10.15, 13, 13.3 and 13.4 supports the notion that the applicant holds the clients' assets on trust (Hearing Bundle B, p. 146, 150-152).

18. However, various requisitions were raised by DDJ Simon Ho concerning other aspects of this application.

The requisitions

19. Bearing in mind the duty of full and frank disclosure, Miss Lau of the applicant's solicitors has taken the court through the requisitions in some details.

20. The requisitions raised under paragraph 2(1)-(4) of the Order concerns with the dealing of the "dead stock".

21. The meaning of "dead stock" was explained in paragraphs 6-8 Chen's 2nd Aff (Trial Bundle A, p. 52) as shares of a company which have completed its delisting procedures, no longer listed on the HKEx and that the physical certificates cannot be withdrawn from the Hong Kong Securities Clearing Company Limited ("HKSCC"). This was either because these were shares of less than one board lot, or that the HKSCC

does not have the requested quantity of certificates for splitting.

22. Chen also exhibited an extract of the HKSCC Operational Procedures regarding such practice (Hearing Bundle B, p. 211-215).

23. Chen also explained why delisted securities (in Schedule C2) are of little or no market value. Further, he has conducted company search to ascertain the current status of all the companies in Schedule C2.

24. He proposed that, for shares of delisted companies that have been wound up or struck off, there be leave to the applicant to dispose of such with any proceeds of sale deposited into the court. For shares of delisted company that still exist, the share certificates shall be withdrawn and deposited into the court. If the physical certificates cannot be withdrawn, there be leave to the applicant to dispose of (including selling, realizing and forfeiting) the shares and deposit the proceeds into court upon sale.

25. In the Summons, the applicant has applied to amend the OS to reflect such proposals.

26. The requisition raised under paragraph 2(4) of the Order simply sought to revise the Schedule to add a column for reason(s) of delisted and / or dead stock. The proposed amendments of the OS have also dealt with this.

27. The requisition raised under paragraph 2(5) of the Order sought for a clearer copy of a Renouncing Share Form of a client and this was produced in Hearing Bundle B, p. 272. I am satisfied that this copy is now legible.

28. Pursuant to the requisition raised in paragraphs 2(6) and 3(1) of the Order, the applicant has subsequently contacted the two clients (Li Lai Fun and Leung Chung Hin) again. They have now signed and returned the Renouncing Form (Hearing Bundle B, p. 278, Chen's 2nd Aff paragraphs 21(b) and (c), Hearing bundle A, p. 57)

29. Given that the clients has given such instructions, there is no need for the applicant to apply under section 56 of the TO for the court to confer such power. This is also reflected in the amended OS.

30. The requisition under paragraph 2(7), 3(3), 3(4) and 3(5)(b) of the Order concerns with the apportionment of costs between the clients. I note that some clients have incurred more costs because of more tracing attempts (e.g. newspaper advertisement for one particular client) or communications. I also note that Schedule C3 listed unclaimed cash from only 7 uncontactable clients.

31. Upon the explanation by Miss Lau, I am satisfied that the applicant has apportioned such between different clients and categories of clients in a reasonable and fair manner in the Draft Statement of Costs (Hearing Bundle B, p. 282-283).

32. The proposed apportionment of costs is reflected in the proposed amendments in paragraph 9 of the OS.

33. The requisition under paragraphs 2(8) and 3(5)(c) of the Order also concerned with the need for application under section 56 of the TO given that certain clients have given instructions. The applicant has confirmed with HKSCC that there is no such need. In the proposed

amendments of the OS, part of Schedule A is deleted to reflect this.

34. Pursuant to requisition raised in paragraph 3(2) of the Order, the applicant's solicitors has written further to the solicitors of the intended administrator of one client who replied that the intended administrator would not now oppose the applicant's Section 56 application because the probate procedure was still at a preliminary stage. They understood that application for payment out of court of such assets in the future might incur more costs (Hearing Bundle B, p. 309-312).

35. Pursuant to the requisition raise in paragraph 3(5)(a), the OS is amended to add a new paragraph 10 to seek leave to redact any part of the court order which reveals the personal data of other clients (including the correspondence address and account number).

36. Finally, I am satisfied that the direction in paragraph 4 of the Order has been complied with: the applicant's solicitors has written to give notice to those clients specified of this hearing. I also note that these clients did not attend this hearing.

Order

37. As such, I am satisfied that the applicant has addressed all the requisitions in the Order.

38. I would give order in terms of the Summons with paragraph 3 of the draft Amended Ex-parte OS be further amended to add the wordings underlined:

“The Applicant do have leave...In relation to Unclaimed Securities of

companies that were wound up or struck off and share certificates of which cannot be withdrawn, the Applicant...”

39. I would also order in terms of the draft order annexed to the Applicant’s Supplemental Skeleton Submission dated 25 April 2025.

40. As for costs, I would order that an updated draft summary bill of costs be lodged within 14 days of this decision and for costs to be assessed summarily by way of paper disposal thereafter.

(Harold Leong)
District Judge

Miss M T Lau, of Messrs Ravenscroft & Schmierer, for the applicant