



Hong Kong

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## COURT REJECTS JUDICIAL REVIEW APPLICATION TO CHALLENGE HKEX DELISTING

On 26 February 2021, the High Court dismissed the application by Bolina Holding Co., Ltd. (**Bolina**) for leave to apply for judicial review of the decision of the Listing Review Committee of the Stock Exchange of Hong Kong Limited (**HKEX**) on 4 November 2020 to cancel the company's listing for failure to satisfy the conditions for resumption of trading within the 18-month prescribed period (**Remedial Period**).

This is the latest in a line of recent High Court judicial review judgments made in favour of the HKEX which have generally endorsed its delisting procedures and the Listing Review Committee review process.

### HKEX Delisting Framework for Long Suspended Companies

Bolina was delisted under the delisting regime implemented on 1 August 2019 which allows the HKEX to delist a suspended company if it fails to remedy the issues which led to its suspension and resume trading within 18 months (for Main Board issuers) or 12 months (for GEM issuers) from the date on which the trading suspension began.

According to HKEX Guidance Letter HKEX-GL95-18<sup>1</sup> (paragraph 19), the Listing Committee of the HKEX will only extend the Remedial Period in exceptional circumstances, that is "where:

- an issuer has substantially implemented the steps that, it has shown sufficient certainty, will lead to resumption of trading; but
- due to factors outside its control, it becomes unable to meet its planned timeframe and requires a short extension of time to finalise the matters. The factors outside its control are generally expected to be procedural in nature only."

The example given of where an extension would be granted is where the HKEX has approved an A1 application, but due to a delay in the court hearing for approving a scheme of arrangement, the issuer requires additional time to implement the relevant transactions. Where an extension is granted, the HKEX Listing Committee will not normally grant any further extension of the Remedial Period.

### HKEX Delistings

HKEX's introduction of the revised delisting regime in 2019 led to a significant increase in the number of listing cancellations. For the year ended 31 December 2020, 15 suspended companies resolved their regulatory issues and resumed trading while 31 suspended companies were delisted. This compares to eight suspended companies that resumed trading and 17 suspended companies that were delisted in the year ended 31 December 2019.

The increase in listing cancellation decisions in 2020 led to 19 applications by issuers for the decision to be reviewed by the

<sup>1</sup> HKEX Guidance Letter HKEX-GL95-18 "Guidance on long suspension and delisting" at paragraph 19. Available at: [https://en-rules.hkex.com.hk/sites/default/files/net\\_file\\_store/GL95-18.pdf](https://en-rules.hkex.com.hk/sites/default/files/net_file_store/GL95-18.pdf)

Listing Review Committee. Sixteen of the cancellation decisions were upheld on the basis that issuers could not demonstrate the exceptional circumstances required for an extension of the remedial period under paragraph 19 of Guidance Letter HKEX-GL95-18.<sup>2</sup>

The number of judicial reviews brought by issuers with respect to listing-related decisions also increased following the introduction of the revised delisting regime in August 2019 and the revised test for sufficient level of assets and operations under Main Board Listing Rule 13.24 and GEM Listing Rule 17.26 in October 2019. Eight applications for leave to apply for judicial review were made in 2020 of which five were dismissed and three were ongoing at the year-end.

### HKEX Delisting of Bolina

The HKEX delisted Bolina under HKEX Listing Rule 6.01A which allows the HKEX to delist a company after a continuous suspension of 18 months if it fails to remedy the issues which led to its suspension and to resume trading.

Trading in Bolina's shares was suspended on 17 September 2018 following the making of a winding-up order against the company on the ground that it was unable to settle its debts. The HKEX set a deadline of 16 March 2020 (**Resumption Deadline**) for the company to meet the following four conditions and resume trading:

- publishing all outstanding financial results and addressing any audit modifications (**Condition 1**);
- demonstrating that it has sufficient operations and assets under HKEX Listing Rule 13.24 (**Condition 2**);
- the dismissal or withdrawal of the winding-up order against the company and the discharge of the liquidators (**Condition 3**); and
- informing the market of all material information for the company's shareholders and investors to appraise its position (**Condition 4**) (collectively, the **Resumption Guidance**).

Bolina failed to satisfy the conditions by the Resumption Deadline. Instead, its financial adviser submitted a resumption proposal to the HKEX on that date proposing a restructuring of the company by way of a scheme of arrangement which would be subject to

the approval of the court, the company's shareholders and its creditors. It also explained that Bolina's audit schedule had been delayed by the outbreak of COVID-19. Bolina proposed to resume trading in December 2020 and applied for an extension of the Remedial Period to December 2020.

Bolina's application to extend the Remedial Period was rejected and the Listing Committee cancelled its listing, following which Bolina applied for a review of the Listing Committee's decision.

### HKEX Listing Review Committee Decision

The Listing Review Committee upheld the Listing Committee's decision to cancel the company's listing and reject its application for an extension of the Remedial Period. It did not consider that Bolina's situation fell within the exceptional circumstances in paragraph 19 of HKEX-GL95-18 for the following reasons:

- i) as at the date of the hearing, there was significant uncertainty as to whether the various events necessary for the implementation of the proposed restructuring (including the obtaining of approvals from the company's shareholders, creditors and the court) would take place. In particular, preliminary indications of support for the proposed restructuring by certain creditors and shareholders of the company still fell short of the requisite majority as required by law in the event that all creditors and shareholders attended the court convened meetings.
- ii) as at the hearing date, which was more than six months after the Resumption Deadline, Bolina had still not published its financial results for financial years 2018 and 2019 or for the six months ended 30 June 2019. The publication of certain financial results was expected to be subject to audit modifications, which would need to be addressed. Bolina's auditors had also indicated that they still needed to undertake further work and obtain further information (including letters of representation and/or approval from the company's future directors who were yet to be appointed) before they would be in a position to publish all the outstanding financial results.
- iii) even if Bolina was compliant with HKEX Listing Rule 13.24 on completion of the proposed restructuring (as it claimed it would be), the other aspects of the Resumption Guidance remained unresolved. Moreover, the profit forecast would only be signed off upon approval of directors who were yet to be appointed.

<sup>2</sup> HKEX. Listing Committee Report 2020 at paragraph 81. Available at: [https://www.hkex.com.hk/-/media/HKEX-Market/Listing/How-We-Regulate/Listing-Committee/Listing-Committee-Report/AnnualRpt\\_2020dec.pdf](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/How-We-Regulate/Listing-Committee/Listing-Committee-Report/AnnualRpt_2020dec.pdf)

- iv) the Listing Review Committee also questioned why the listing status was essential to the subscriber in the proposed subscription if the subscriber (as submitted by the company through its liquidators) was an industrial investor and not a financial investor and the group's existing business was viable and sustainable.

The Listing Review Committee denied the application to extend the Remedial Period. Given the issues that remained to be addressed (which were not purely procedural in nature as required by paragraph 19 of HKEX-GL95-18), it considered that Bolina had not demonstrated with sufficient certainty that it could fulfil all the outstanding Resumption Guidance within a short period of time or at all.

## Application for Leave to Apply for Judicial Review

Bolina applied for leave to apply for judicial review of the Listing Review Committee's decision on 27 November 2020. Its grounds for doing so included that:

- i) the Listing Review Committee erred in deciding that exceptional circumstances did not exist within the spirit of paragraph 19 of HKEX Guidance Letter HKEX-GL95-18 to extend the Remedial Period. Specifically, the Listing Review Committee failed to give sufficient weight to the effect of the COVID-19 pandemic on Bolina's progress in meeting the HKEX Resumption Guidance;
- ii) the Listing Review Committee erred in finding that there were significant uncertainties surrounding the obtaining of the required approvals of the company's proposed debt restructuring from, among others, the creditors, and that the company still fell short of the majority required by law in the event that all creditors attended the creditors' meeting;
- iii) the Listing Review Committee's decision was inconsistent with previous decisions in which the Listing Review Committee had allowed extensions of time to other listed companies whose situations were similar to, or worse than, the situation of Bolina and in cases where the conditions set out in the HKEX resumption guidance work prescribed by the HKEX Listing Committee had also not been fully completed by the time of the relevant resumption deadlines; and
- iv) the decision to cancel the listing was unreasonable.

## High Court's Decision to Reject Application for Judicial Review

The company's application for leave to apply for judicial review was dismissed on the basis that the grounds for judicial review had no realistic prospect of success. The judgment<sup>3</sup> raised the following points.

### HKEX Resumption Conditions Carry Equal Weight

Bolina did not dispute that it had failed to satisfy at least three of the four conditions set out in the HKEX Resumption Guidance, namely, Conditions 1, 3 and 4. However, it claimed to have satisfied Condition 2 by meeting the requirements of HKEX Listing Rule 13.24 and further argued that the Listing Review Committee should have attached more weight to the company's compliance with that rule.

The court rejected this argument: the Listing Review Committee should not place more weight on any one or more of the resumption conditions (at paragraph 46). On the contrary, it should have been clear to Bolina that it had to comply with all four resumptions conditions before the suspension of trading of its shares would be lifted.

### Strictness of Remedial Period

The court generally endorsed the strictness of the 18 month (for Main Board issuers) or 12 month (for GEM issuers) remedial period (at paragraph 34). It confirmed the position that the period would be extended only in the exceptional circumstances set out in paragraph 19 of HKEX-GL95-18. It also clarified that whether the circumstances are "exceptional" is a matter for the HKEX, not the court, to decide. On the facts, the court accepted the Listing Review Committee's view that Bolina had failed to demonstrate with sufficient certainty that it could satisfy the outstanding conditions for resumption of trading within a short period of time or at all.

The court noted that the HKEX had not adopted a proposal made during the consultation on the delisting framework that special arrangements should be made for issuers in financial distress where a liquidator is working on a resumption plan for the issuer. It had been argued that the prescribed remedial period might not be sufficient for the completion of a scheme of arrangement. The court quoted comments made in the HKEX's

<sup>3</sup> Bolina Holding Co. Ltd. (In liquidation) v The Stock Exchange of Hong Kong Limited [2021] HKCFI 460. Available at: [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=133785&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133785&QS=%2B&TP=JU)

Consultation Conclusions: Delisting and other Rule Amendments<sup>4</sup> that the HKEX's delisting framework is not intended to promote resumption of trading, but is intended to be:

*"an effective delisting framework [which] enables the Exchange to meet its statutory obligation to maintain a fair, orderly and informed market ... by delisting issuers that no longer meet the continuing listing criteria ... incentivizing suspended issuers to act promptly towards resumption ...".<sup>5</sup>*

### COVID-19 as an Exceptional Circumstance

The court accepted the guidance in HKEX-GL95-18 on the exceptional circumstances which will warrant the extension of the remedial period. It also appeared to accept that the impact of COVID-19 in delaying an issuer's ability to comply with the HKEX's resumption conditions might be a relevant factor in some circumstances. On the facts of the case, COVID-19 was not accepted as constituting an exceptional circumstance justifying an extension of the Remedial Period for the following reasons:

- i) As noted by the Listing Committee, Bolina failed to demonstrate how the COVID-19 pandemic had actually affected the audit work, including the specific aspects of the audit work that were delayed and the extent of the delay. Bolina had also failed to establish that it would have been able to satisfy the HKEX Resumption Guidance by the Resumption Deadline, but for the COVID-19 pandemic.
- ii) The suspension of trading of Bolina's shares commenced on 17 September 2018, and the Resumption Deadline was 16 March 2020. The HKEX Resumption Guidance was issued in October 2018 and supplemented in April 2019. The COVID-19 pandemic only began to affect China or Hong Kong in late 2019/early 2020. As a result, the company was, on the face of it, given sufficient time to carry out the necessary audit work prior to the outbreak of the COVID-19 pandemic.
- iii) The company would have failed to comply with Condition 1 (publishing all outstanding financial results and addressing any audit modifications) by the Resumption Deadline regardless of the COVID-19 pandemic. Bolina only appointed an auditor from 8 June 2020 (after the Resumption Deadline) to conduct the audit work and assist the company in publishing its financial results as required by the HKEX

Resumption Guidance. On 2 February 2021, the court was informed that the relevant accounts were only signed by the newly appointed directors of the company on 1 February 2021, and publication of the accounts would take place within 2 weeks.

### Lack of Certainty as to when HKEX Resumption Conditions would be Fulfilled

Bolina's proposed restructuring required (among others) the agreement of a majority in number representing at least 75% in value of the company's creditors present and voting (in person or by proxy) at a meeting ordered by the court to consider the proposed scheme of arrangement (see section 674(1)(a) of the Companies Ordinance (Cap. 622)).

At the time of the Listing Review Committee hearing, Bolina had secured the support of only around 65% in value of its creditors for its proposed scheme of arrangement. In a skeleton argument dated 27 January 2021, almost four months after the Listing Review Committee hearing, the court was informed that the 75% threshold had been achieved. However, there was no evidence to support that claim. In considering the application for leave to apply for the judicial review of the Listing Review Committee's decision, the court stated that it should look at the position as at the time the Listing Review Committee made its decision. It noted, in particular, that whether all the company's creditors would attend the meeting convened to consider the proposed scheme of arrangement was a matter beyond the control of the company and the liquidators. The Hon Chow J therefore considered that the Listing Review Committee was entitled to take the view that there still existed *"a lot of uncertainties"* and the company had not demonstrated *"with sufficient certainty that it could fulfil all the outstanding resumption guidance within a short period of time or at all"*.

Lack of certainty as to the fulfilment of resumption conditions was also a factor in the decision of the High Court to reject the application by Tenwow International Holdings Limited (**Tenwow**) for leave to apply for judicial review of the Listing Review Committee's decision to deny Tenwow an extension of time to fulfil the resumption conditions and to cancel its listing under HKEX Listing Rule 6.01A.<sup>6</sup> One of the resumption conditions imposed by the HKEX was that Tenwow should demonstrate compliance with HKEX Listing Rule 13.24. Tenwow was relying on a proposed restructuring to re-comply with HKEX Listing Rule

<sup>4</sup> HKEX. Consultation Conclusions: Delisting and other Rule Amendments. Available at [https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/September-2017-Consultation-Paper-on-Delisting-and-Other-Rule-Amendments/Conclusions-\(May-2018\)/cp2017091cc.pdf](https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/September-2017-Consultation-Paper-on-Delisting-and-Other-Rule-Amendments/Conclusions-(May-2018)/cp2017091cc.pdf)

<sup>5</sup> Ibid. at paragraph 28

<sup>6</sup> Tenwow International Holdings Limited (In provisional liquidation) v The Stock Exchange of Hong Kong Limited [2020] HCAL 2294/2020. Available at: [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=132275&QS=%28Tenwow%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132275&QS=%28Tenwow%29&TP=JU)

13.24. However, the restructuring agreement it had entered into was subject to a number of conditions precedent, including (among others) shareholders' approval, creditors' approval and resumption of trading in Tenwow's shares. There was also uncertainty as to whether, even if the restructuring did go ahead, it would enable Tenwow to re-comply with Listing Rule 13.24. The court upheld the decision of the Listing Review Committee that the company's situation did not fall within the exceptional circumstances of paragraph 19 of HKEX-GL95-18 given that there remained significant uncertainty as to whether the restructuring would enable Tenwow to re-comply with Listing Rule 13.24.

## **HKEX Listing Review Committee Decisions are not Binding**

The court stated that the question of whether an issuer should be granted an extension of time to comply with the relevant resumption conditions in any given case depends on the facts and circumstances of that case. The Listing Review Committee's decision in any particular case represents an exercise of judgment which does not set a binding precedent for future cases (at paragraph 52).

In any event, no meaningful comparison could be made between the case of Bolina and the cases on which it sought to rely (Asian Citrus Holdings Limited and National United Resources Holdings Limited): the circumstances of Bolina were substantially different from those of Asian Citrus and National United. In particular: (i) Asian Citrus and National United did not involve failure to address multiple resumption conditions; (ii) both companies

had published all outstanding financial results and taken steps to address the audit qualifications by the time of the Listing Review Committee hearing, (iii) the companies were not subject to a winding-up order by the court; and (iv) no scheme of arrangement was involved in those cases. The court noted that these matters were relevant to the question of whether the issuer had "*substantially implemented the steps required for resumption of trading and whether there was sufficient certainty that only a short extension of time would be required for the outstanding steps to be completed*" (at paragraph 53).

## **Irrationality**

The court noted the difficulty of successfully making a public law challenge based on the irrationality ground, particularly in respect of a Listing Review Committee decision on whether a company should be allowed to remain listed on the HKEX notwithstanding a prolonged period of suspension. The court considered that "*The Listing Review Committee is far better placed than the court to determine the deleterious effect, in terms of the quality and reputation of, and investors' confidence in, the market, of allowing such companies to continue to be listed on the HKEX.*" The Hon Chow J considered the Listing Review Committee's decision to cancel Bolina's listing to be lawful and reasonable.

## **Disposition**

The court dismissed Bolina's application for leave to apply for judicial review and ordered the company to pay the HKEX's costs.

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**Hong Kong Office**  
Dominion Centre  
12th Floor  
43-59 Queen's Road East  
Hong Kong  
**Tel:** + (852) 2905 7888  
**Fax:** + (852) 2854 9596

[www.charltonslaw.com](http://www.charltonslaw.com)