



DREW & NAPIER

**Safeguards to
Liquidators' Fees and
Expenses – A
Consideration in
Ordering a
Termination of a
Winding Up**

*Ascentury International Co Ltd
v Viva Capital (SG) Pte
Ltd [2024] SGHC 118*

9 May 2024

**LEGAL
UPDATE**

In this Update

In 2020, the Insolvency Restructuring and Dissolution Act 2018 (2020 Rev Ed) came into effect. Among a slew of amendments was the introduction of a statutory power for the Courts to terminate a winding up.

Recently, the High Court released its first reported decision on the exercise of such power. In *Ascentury International Co Ltd v Viva Capital (SG) Pte Ltd* [2024] SGHC 118, it was made clear that a court would only exercise its discretion to terminate a winding up if the court is satisfied that the liquidator's fees and expenses were safeguarded.

Director Blossom Hing, Associate Director Joshua Chin and Senior Associate Clarie Ong acted for the liquidators in this matter.

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INTRODUCTION

The High Court has recently held in *Ascentury International Co Ltd v Viva Capital (SG) Pte Ltd* [2024] SGHC 118 that a court would only exercise its discretion to terminate winding up proceedings pursuant to s 186(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (“**IRDA**”) if the court is satisfied that there are safeguards to the liquidator’s fees and expenses.

Director Blossom Hing, Associate Director Joshua Chin and Senior Associate Clarie Ong acted for the liquidators in this matter.

BACKGROUND

On 25 July 2023, 61 Robinson Pte Ltd (“**61R**”), a creditor of Viva Capital (SG) Pte Ltd (“**VCPL**”), filed an application to wind up VCPL on the basis that VCPL was unable to pay its debts. On 31 October 2023, VCPL was wound up.

By a Deed of Sale and Assignment of Rights dated 26 December 2023 between Ascentury International Company Limited (“**AIC**”) and 61R, AIC agreed to buy all of 61R’s rights, title, interest and benefits in (a) the debts owed by VCPL to 61R, and (b) the winding up proceedings.

Subsequently, AIC and VCPL agreed that VCPL should continue its operations and AIC agreed to apply to terminate VCPL’s winding up. By then, VCPL’s liquidators had already commenced work in the liquidation of VCPL in the discharge of their duties as the court-appointed liquidators of VCPL. Given the fees and disbursements that had already been incurred, VCPL’s liquidators put forward their position that their remuneration and disbursements should be paid from VCPL’s assets upon being notified of AIC’s application to terminate VCPL’s winding up.

DECISION OF THE GENERAL DIVISION OF THE HIGH COURT

The High Court held that VCPL’s winding up could only be terminated upon the court’s satisfaction that the liquidators’ interests, especially in relation to the liquidators’ remuneration and disbursements, had been adequately protected. Accordingly, the High Court terminated VCPL’s winding up on the basis that the termination would only take effect upon the amount of the liquidators’ remuneration and disbursements being agreed or taxed, which is to be paid out of VCPL’s assets.

Pursuant to s 186(1) of the IRDA, the court now has the power to terminate a winding up. Under the previous insolvency legislation, the court only had

the power to grant a permanent or indefinite stay of a winding up pursuant to s 279(1) of the Companies Act (Cap. 50, 2006 Rev Ed) ("**CA**").

In considering the factors the court should take into account when deciding whether to terminate a winding up pursuant to s 186(1) of the IRDA, the High Court held that the broad principles laid down in *Phang Choo Ong v Gilcom Investment Pte Ltd (LRG Investments Pte Ltd and another, non-parties)* [2016] 3 SLR 1156 ("**Phang Choo Ong**") in relation to the court's exercise of discretion under s 279(1) of the CA to stay a winding up applied equally to s 186(1) of the IRDA, with suitable modifications made to cater for the court's power to terminate a winding up under that section.

The High Court also took guidance from the New South Wales Supreme Court decision of *In the matter of Glass Recycling Pty Ltd* [2014] NSWSC 439 ("**Re Glass Recycling**") which summarised the considerations that inform the court's discretion to terminate a winding up pursuant to s 482 of the Australian Corporation Act 2001 (Cth) as the Australian provision is framed similarly to s 186(1) of the IRDA.

In particular, the High Court noted that a common consideration taken into account in *Phang Choo Ong* and *Re Glass Recycling* was the interests of the liquidator(s), specifically with regard to remuneration. The High Court also noted that the relevance of the liquidators' interests in the termination of a winding up is consistent with the Court of Appeal's reasoning in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2022] 1 SLR 771 ("**AnAn**"), which was grounded on the sound policy that as officers appointed by the court, liquidators should expect the court to provide security for their remuneration by ensuring that they are paid out of the company's assets.

KEYPOINT

A string of Singapore and Australia decisions make it clear that a court would only terminate a winding up if it is satisfied that there are safeguards to the liquidator's fees and expenses

On the facts of this present case, the High Court held that although there were good reasons to terminate the winding up of VCPL, VCPL's winding up could not be terminated unless the High Court was satisfied that the liquidators' interests, especially in relation to the liquidators' remuneration and disbursements, were adequately protected.

The High Court therefore ordered that VCPL's winding up be terminated but only take effect upon the satisfaction of the directions sought, *ie* the amount of the liquidators' remuneration and disbursements being agreed or taxed, which is to be paid out of VCPL's assets.

COMMENTARY

The High Court's decision provides welcomed clarity on the relevant considerations liquidators, creditors and contributories need to take into account before making an application to terminate a winding up.

Further, with the High Court's confirmation that the principles concerning a liquidator's remuneration and expenses set out in *AnAn* applied equally to the situation where a court is terminating a winding up order, insolvency practitioners can take comfort that their entitlement to remuneration and expenses would be safeguarded regardless of whether a winding up order is reversed on appeal or terminated upon an application to court.

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