Ley Choon Constructions and Engineering Pte Ltd *v* Yew San Construction Pte Ltd [2020] SGHC 108

Case Number	: Companies Winding Up No 46 of 2020
Decision Date	: 26 May 2020
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Ravindran Chelliah and Ng Jie Zhen Amy (Chelliah & Kiang LLC) for the plaintiff; Yam Wern-Jhien and Bethel Chan Ruiyi (Rajah & Tann Singapore LLP) for the defendant.
Parties	: Ley Choon Constructions and Engineering Pte Ltd — Yew San Construction Pte Ltd

Companies – Winding up

26 May 2020 Judgment reserved.

Choo Han Teck J:

1 This is the plaintiff's application under s 254(1)(e) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") to wind up the defendant on the basis of an unsatisfied judgment debt. Both parties are incorporated companies. By a judgment dated 5 December 2019 in Suit No 316 of 2015 ("Judgment"), the plaintiff obtained judgment against the defendant for the sum of $663,246.73 ("judgment sum"), and interest thereon at the rate of 5.33% per annum from the date of counterclaim until the date of judgment. On 8 January 2020, the plaintiff, through its solicitors, served a statutory demand on the defendant for the judgment sum plus interest. Between 23 January and 4 February 2020, the parties attempted to negotiate (through their solicitors) the satisfaction of the statutory demand. The negotiations failed, and on 7 February 2020, the plaintiff filed the present winding up application on the basis that the outstanding debt at the time was $831,188.43, comprising the judgment sum plus interest of $167,941.70. On 21 February 2020, the defendant filed an affidavit to oppose the application.

2 This winding up application was first heard on 28 February 2020, at which hearing I granted a one-week adjournment for the defendant to make a firm proposal to the plaintiff to satisfy the statutory demand. At the second hearing on 6 March 2020, the parties' counsel informed the court that the defendant had offered to make full payment of the judgment sum plus interest by 3 April 2020, but the plaintiff had insisted upon the same being made before the second hearing itself, which the defendant did not do. More importantly, the defendant's counsel at the time sought a further adjournment of the winding up application on the basis that parties had filed a cross-appeal in respect of the Judgment and the defendant had applied for a stay of execution of the same. I granted the defendant a final five-week adjournment to 6 April 2020 for it to satisfy its debt to the plaintiff, or otherwise come to an agreement with it.

3 On 19 March 2020, the defendant's application for a stay of execution of the Judgment was heard. The court hearing that application ordered, *inter alia*, that:

(a) the judgment sum plus interest (calculated up to 20 July 2020) be paid into court by 4.30pm on 3 April 2020; and

(b) there will be a stay of execution of the Judgment, pending the appeals, unless the aforesaid payment into court is not made, in which case the stay will be automatically lifted.

4 The defendant did not make payment into court by the stipulated deadline. On 3 April 2020, the defendant filed a notice to change its solicitors to its present counsel, Mr Yam Wern-Jhien. The final hearing for the present winding up application took place on 6 April 2020. At the hearing, Mr Yam sought a further adjournment of the winding up application, pending the hearing of the appeals against the Judgment in July 2020. The plaintiff's counsel, Mr Ravindran Chelliah, asked for the defendant to be wound up immediately on the basis that it is plainly insolvent and had repeatedly failed to live up to its promises to pay the judgment sum with interest. I find that based on the unsatisfied statutory demand, the defendant is presumed unable to pay its debts under s 254(2)(a) of the Companies Act. I also find that the defendant failed to rebut this presumption based on the same reasons (as set out in [8] below) that the defendant's insolvency is made out even in the absence of such a presumption.

5 In oral submissions at the final hearing, the defendant's counsel argued for the first time that the plaintiff's statutory demand might be defective as it only demanded payment of the judgment sum plus interest, but did not state the defendant's alternative options of compounding or securing the same. Although Mr Chelliah omitted to respond to this point, I do not think it is fatal to the plaintiff's application. Mr Yam relied on the *dicta* by the Court of Appeal in *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP Paribas*") to argue that a statutory demand would be defective if it fails to state all three options available.

6 However, I do not think that is what the decision says. The Court of Appeal noted (at [11]) that under the Companies Act and the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed), there is actually no express requirement that a creditor's statutory demand must state all three options. At [12], it then referred to the Australian context where even prior to Australian legislation expressly imposing such a requirement, Australian case law had already held that a creditor must state all three options in its statutory demand. Ultimately, however, the Court of Appeal expressly refrained from suggesting (even as a matter of *dicta*) that under Singapore law, the creditor's statutory demand must state all three options (see also *United Overseas Bank Ltd v Bombay Talkies (S) Pte Ltd* [2015] SGHC 142 at [17]). Instead, it went on to say (at [14]) that:

> It is clear that, **whether or not there is a requirement to spell out all the three options**, the terms of the demand [in the present case] were **misleading** in stating that [the debtor company] would be deemed unable to pay its debts if it did not pay the sum demanded within 21 days…
>
> [emphasis added]

Having found the statutory demand in that case to be outright misleading, the Court of Appeal then appeared to imply that s 254(2)(a) of the Companies Act was not complied with. This is different from the present case, in that Mr Yam did not suggest that beyond a bare omission to state the defendant's alternative options, the wording of the plaintiff's statutory demand was misleading or untrue.

7 I therefore do not think that the decision in *BNP Paribas* goes as far as Mr Yam submitted. Apart from citing *BNP Paribas*, Mr Yam did not advance any other argument to support the strict requirement that a statutory demand must state all three options. I therefore decline to hold the plaintiff to the same, although I do not exclude the possibility that in a different case, such a requirement may be properly justified on a different basis. In the present case, even if there is such a

requirement, I do not think that it should be applied so inflexibly that the statutory demand should be held to be invalid. There is no evidence that the defendant here was actually misled by the plaintiff's omission or that there would be such substantial injustice caused by the omission that it cannot be remedied as an irregularity under s 392 of the Companies Act (see *BNP Paribas* at [14]).

8 I would also add that even if the statutory demand is invalid, the defendant's insolvency has been clearly made out. The defendant has produced a balance sheet for the financial year ending 30 September 2019, which suggests, on its face, that the defendant is balance sheet solvent insofar as its current assets ($3,617,706.99) exceeds its current liabilities ($2,479,809.02) by $1,137,897.97, which is sufficient for now to cover the judgment sum with interest. That, however, is not the end of the matter. Notwithstanding that the defendant may be balance sheet solvent, Mr Yam himself has plainly conceded that the defendant is unable to pay the judgment sum (plus interest) at this time. The defendant is clearly unable to pay its debts as they fall due, and it is cash flow insolvent.

9 Having found the defendant to be unable or deemed unable to pay its debts, the general rule, as set out in the Court of Appeal decision in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 (at [61]), is that the creditor is *prima facie* entitled to a winding up order *ex debito justitiae*. Nonetheless, this general rule is qualified. Mr Yam cited the Court of Appeal decision in *BNP Paribas* (at [16], [19] and [20]), which made clear that even if a debtor company is proved or deemed unable to pay its debts, the court retains a residual discretion not to wind it up and/or to grant an adjournment to "allow the company time to resolve the issues at hand or to seek alternative measures". In the exercise of this discretion, the court may take into account various economic and social interests that might be affected, especially where a "temporarily insolvent but commercially viable company" is concerned. Mr Yam urged this court to exercise its discretion to adjourn the application for the third time, pending the appeals of the Judgment scheduled for July 2020, for the following reasons:

(a) First, the defendant's cash flow insolvency is only "temporary". It is otherwise still "commercially viable", and has sufficient assets that it can sell to raise the necessary funds and it simply needs more time to do so.

(b) Second, the only indication of the defendant's insolvency is its inability to satisfy the debt owed to the plaintiff. On appeal, the judgment sum could be set aside, reversed, or reduced in amount, and there is hence a possibility that the defendant might be needlessly wound up.

(c) Third, winding up the defendant would adversely affect the interests of its 37 employees, as well as the public interest (since it has three ongoing public housing projects that would be disrupted).

10 I am unable to accept Mr Yam's argument that the defendant's cash flow insolvency is only "temporary". By the defendant's own admission, its plans to raise the necessary funds through the sale of its equipment have been scuppered by the ongoing pandemic. I agree with Mr Chelliah that the evidence does not disclose any real prospect that the defendant will be able to follow through with its supposed plans anytime soon. The defendant also claimed that it has three ongoing high-value projects that can generate about $3,737,829.80 in revenue over the next three to fourth months, assuming that it is able to continue its works. Its general manager, Mr Leo Kim San, stated on affidavit that based on the defendant's historical figures, its estimated profit margin is between 20% to 30%, and its estimated profits from the total balance of work undone would therefore be between $747,565.96 to $1,121,348.94. Although these figures appear substantial, Mr Leo cited no evidence at all for the calculation of these profit margins. Importantly, it is also entirely unclear what portion of these revenue streams (or profits) is available to pay the defendant's debt to the plaintiff, given that

it has many other liabilities to meet. I therefore cannot accept Mr Yam's submission that the defendant's cash flow insolvency is merely temporary.

11 Mr Yam further argued that apart from its cash flow constraints, the defendant is otherwise "commercially viable". He referred to the same balance sheet for the financial year ending 30 September 2019, which showed that the defendant had made a net profit of $135,723.41. However, as the plaintiff's Chief Financial Officer, Mr Goh Seng Huat, pointed out on affidavit, when compared to its total revenue (of $7,590,069), the defendant had a relatively low net profit margin of about 1.79%. As the plaintiff also highlighted, in absolute terms, the defendant's net profits would cover only a small fraction of the judgment sum (plus interest) owed to the plaintiff. While the defendant says that 2019 was a particularly challenging year for the construction industry, it produced no evidence to show that its position would be any better under "normal" conditions. In my view, the defendant is at the very most, just barely commercially viable and certainly fails to meet the standard required to justify the exercise of the court's discretion to adjourn the winding up proceedings despite its cash flow insolvency.

12 Turning to Mr Yam's second submission, I am unable to give it much weight either. That a judgment might be successfully appealed is undoubtedly a proper consideration in an application for a stay of execution of that very judgment. As mentioned, the court hearing that application had already ordered a stay as set out at [3] above, subject to a condition requiring payment into court, with which condition the defendant did not comply. To raise this same argument before me has little merit since the Judgment remains good (until such time it is set aside or reversed), and the judgment sum (plus interest) remains due and owing. It may be said that when a party files an appeal, he has at least a possibility, however remote, that it might succeed. I cannot accept Mr Yam's submission that such a bare possibility would automatically justify the adjournment or staying of winding up proceedings, especially in the absence of a stay of execution of the Judgment itself.

13 Lastly, Mr Yam's third submission has no merit. It is obvious that in virtually all winding up applications, the employees of the debtor company and the stakeholders in its various ongoing projects are likely to be adversely affected. Even considering these interests in the present case, I agree with Mr Chelliah there is nothing exceptional about the employment provided by the defendant nor its involvement in the mentioned public housing projects to justify a departure from the general rule.

14 Taking the factors from [9] to [13] above into consideration, I decline to exercise my discretion to grant a stay or further adjournment of this winding up application. As Mr Chelliah highlighted, I have already adjourned this matter twice before — first, for a week, and subsequently, for five weeks. I have emphasised to the defendant at every step of the way that it needs to satisfy its debt to the plaintiff, or otherwise make an offer to the plaintiff which it accepts, but the defendant has thus far either neglected or been unable to do so. Furthermore, I had considered whether it would be appropriate to grant a stay or adjournment of these winding up proceedings, pending the appeals against the Judgment, on the condition that the defendant pays the judgment sum plus interest into court by a specified date. However, this would be futile in the present case given Mr Yam's candid admission that the defendant is unable to pay the said debt at this time. Furthermore, the defendant did not say when it might be able to do so, and did not even explain its failure to comply with the same condition that had been imposed on the initial stay of execution of the Judgment.

15 For the reasons above, I grant the first, second and third prayers of the plaintiff's application (as amended according to Mr Chelliah's closing submissions) in the following terms:

(a) That a winding up order be made against the defendant;

(b) That Lau Chin Huat and Yeo Boon Keong be appointed as the joint and several liquidators of the defendant; and

(c) That the costs of the proceedings be taxed, if not agreed or fixed, and be paid to the plaintiff out of the assets of the defendant.