Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation) [2004] SGHC 25

Case Number : OS 1632/2003

Decision Date : 16 February 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Andre Yeap SC and Tan Teck Wang (Rajah and Tann) for applicants; Suresh Nair and Foo Hsiang Ming (Allen and Gledhill) for respondents

Parties : Korea Asset Management Corp — Daewoo Singapore Pte Ltd (in liquidation)

Insolvency Law – Winding up – Winding up order – Principles to be considered by court when granting leave for compulsory winding up where company undergoing creditors' voluntary winding up.

Insolvency Law – Winding up – Liquidator – Role and duties of liquidator

16 February 2004

V K Rajah JC:

1 This application raises an interesting insolvency issue on which there is no direct Singapore authority: In what circumstances will the court grant leave for the initiation of compulsory winding up proceedings when the company in question is already in the process of being voluntarily wound up? This is not an obscure point of law divorced from commercial reality. Often, for a variety of reasons, the directors and/or shareholders of a company seek to voluntarily wind up the company if they are of the view that the company cannot carry on as a going business. The reasons for this are usually wholly justified: one instance may be when creditors are reluctant to take any action; another when substantial costs and time can be saved by the voluntary route. There are, however, instances when those responsible for running a company may choose the voluntary liquidation route, in order to "hijack" the liquidation process for reasons that may be viewed as less than legitimate. The voluntary route is a particularly tempting option when related entities of the company or its shareholders are the majority or significant creditors of the company. Directors may also, in certain situations, be averse to having an independent third party mount an enquiry as to the circumstances that precipitated the insolvency of the company. If the directors and management have been involved in corporate shenanigans, it can be expected that they will strenuously take steps to keep out unwelcome prying eyes. In such cases, independent minority creditors may have a legitimate sense of grievance, if their interests are disregarded or if they genuinely fear that the liquidation process may not be fairly implemented. The independence of the liquidators in such situations is often in issue. In a leading English authority, *Re Palmer Marine Surveys Ltd* [1986] BCLC 106 at 111, Hoffmann J (as he then was) observed:

> The public is frequently astonished by the ease with which unsuccessful businessmen appear to be able to transfer the assets, goodwill, premises and employees of an insolvent company to a pristine entity with which they continue trading as before, leaving the creditors unpaid. This may be the price which has to be paid for the entrepreneurial incentives of limited liability. But in cases in which it appears to have happened, thorough investigation is required. Disappointed creditors are bound to view with cynicism any investigation undertaken by a liquidator chosen by the very persons whose conduct is under suspicion.

2 The present application is unusual in the sense that the applicants, who want the company compulsorily wound up, are the undisputed majority creditor. It is not disputed that at least 70% of

the admitted outstanding debt is due to them. Notwithstanding, the company has chosen to insist on proceeding with voluntary winding up. It has asserted rather implausibly, through its present solicitors, that it is concerned about the additional costs incurred through the possible appointment of new liquidators should compulsory winding up proceedings be initiated. Given the events that have transpired to date, including the startling losses incurred by the company, I was not impressed by this disingenuous contention and readily allowed the application. While there has been no appeal, certain interesting points have emerged in this application which ought to be examined and explicated. I also think it is important to signal to company management and liquidators alike that the court will vigilantly strive to ensure that fair play and commercial morality prevail in all insolvency matters that come to its attention.

3 The facts as set out by the applicants are not really in dispute, save for the issue of the liquidators' independence and consequently their ability to effectively discharge their duties. The liquidators have in an affidavit taken issue with this. The company did not file an affidavit. I have largely adopted the facts stated in the applicants' affidavits in mapping out the factual matrix. For convenience, in these grounds of decision "the company" means the respondent.

Factual matrix

4 The company had two main areas of business:

(a) The import and export of industrial, construction and consumer products, materials and machinery; and

(b) Acting as a commission agent for the purpose of securing trade and other financing through its bankers on behalf of customers and other parties interested in purchasing or leasing equipment.

5 The company is currently wholly owned by Daewoo International Corporation ("DI"). Prior to the restructuring of the Daewoo Group in 1999/2000, the company was wholly owned by the then main holding company of the Daewoo Group, Daewoo Corporation ("DWC").

6 PriceWaterhouseCoopers ("PWC"), two of whose partners are currently the company's liquidators, has an associated entity in the Republic of Korea, Samil Accounting Corporation ("Samil"), which has been involved in the restructuring of the Daewoo Group.

7 On 26 May 2003, the directors of the company filed a statutory declaration pursuant to s 291(1) of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"), stating that the company could not by reason of its liabilities continue its business; thereby initiating a creditors' voluntary winding up. On the same day, without prior consultation with or notice to the creditors, its directors appointed three partners from PWC, jointly and severally, as its provisional liquidators ("the liquidators").

8 By the statement of affairs filed by the company on 26 May 2003:

(a) The company has admitted that it is indebted to the applicants for the sum of at least $288,063,900.59. The applicants are the single largest creditor of the company by value and account for at least 71% of the total debts of the company. The applicants have a statutory role, under Korean law, to assist in the restructuring of Korean financial institutions and corporations. In accordance with this remit, the applicants had in 1999 bought up the debts of various Daewoo entities globally.

(b) The estimated unsecured liabilities of the company amount to $406,773,291.12, while the estimated realisable assets for the unsecured creditors amount to only $4,342,602.12.

9 On 26 May 2003, the company issued a notice of meeting to the shareholders and a notice of meeting to the creditors, setting in motion the steps necessary to convene the shareholders' and creditors' meetings on 23 June 2003.

10 Sections 296(7) and 296(8) of the Act require the creditors' meeting to be held at a time and place convenient to the majority in value of the creditors. On 17 June 2003, the applicants requested that the liquidators postpone the creditors' meeting on 23 June 2003 on the basis that they, the applicants, were still evaluating their options. They also reminded the liquidators that given their status as a Korean state entity, the decision-making process could take some time.

11 The liquidators responded on 19 June 2003, stating that they would not object to an adjournment of two weeks. On 20 June 2003, the applicants wrote again to the liquidators and *inter alia* queried the liquidators about certain perceived conflicts of interest.

12 On 23 June 2003, the shareholders' meeting was held and the company's sole shareholder, DI, resolved for the company to be wound up, nominating the liquidators for the position of liquidators.

13 The liquidators also proceeded to convene the creditors' meeting on 23 June 2003, despite the applicants' earlier objection that this was not convenient to them. At the meeting, the chairman of the meeting, a representative of the applicants, declared that this meeting would lapse as it was not convened at a time and place convenient to the majority in value of the creditors, as required by s 296(8) of the Act. No resolutions were voted on during this "lapsed meeting". Significantly, during this meeting an important difference in views was aired in relation to voting rights and the voting mechanism at a creditors' meeting. The applicants took the position that the appointment of the chairman of any such meeting would be determined by the majority in value of the creditors. The company expressed the view that the chairman should be appointed by a majority of creditors in value *and* number. The liquidators' position appears to be identical to that of the company. The applicants became concerned. They viewed the position taken by the company, the liquidators and their advisors as an attempt to dilute and undermine their rights in a voluntary creditors' liquidation.

14 In response to the earlier queries from the applicants dated 20 June 2003, the liquidators in a letter dated 3 July 2003 stated that PWC had in fact earlier undertaken work for the company. The letter furnished some additional facts on the PWC and Samil relationship. PWC operated independently of Samil and was a separate legal entity. Both PWC (the Singapore entity) and Samil were individual member firms of the worldwide PWC organisation. The liquidators also asserted:

(a) Samil, the PWC network firm in Korea, was currently the auditor of DI (the sole shareholder of the company).

(b) Samil had been appointed to act in various advisory capacities:

(i) to carry out a due diligence review and workout plan for DWC, Daewoo Telecom, Daewoo Car Sales, Daewoo Capital, Diners Club and more than 30 foreign subsidiaries;

(ii) to advise on the sale of Daewoo Motor to Ford Motors;

(iii) to act as a lead financial advisor for the sale of the Information and Communication Division of Daewoo Telecom, Automobile Parts Division and certain divisions of Daewoo

Electronics;

(iv) to assist DWC with regard to its split into three companies, DI, Daewoo Engineering and Construction company Ltd and DWC (which occurred in 1999/2000);

(v) to review the business plan of Daewoo America Inc, which is the US subsidiary of DI; and

(vi) to act as sellside advisor for various non-performing loan ("NPL") auction projects such as KAMCO NPL auction, Korea Exchange Bank NPL auction, KDIC NPL deal manager and development of NPL valuation model for KAMCO.

(c) PWC Singapore had previously undertaken the following works with the company:

(i) providing advice on a possible scheme of arrangement (January 2000); and

(ii) performing a limited financial due diligence of the company in November 1999 for the responsibility of Samil in connection with Samil's due diligence review of DWC.

15 At this juncture, I should mention that the applicants had already separately engaged in May/June 2003, Anjin, a Korean based accounting firm, to conduct a due diligence exercise on the company. The Anjin report was finalised only in July 2003, shortly after the directors of the company had resolved to place it under a creditors' voluntary liquidation.

16 The Anjin report stated that the company had written off or intended to write off as bad debts the sum of $420,931,000 which comprised (a) trade receivables of $208,899,000 due from related companies and (b) loans of $212,032,000 made to related companies. The company's insolvency appeared, to Anjin, to be inextricably linked to its relationship to related entities.

17 The Anjin report examined in detail these related company debts exceeding $400m and concluded that they had been incurred in dubious circumstances that not only hinted at mismanagement, but suggested fraud on the part of the directors and officers of the company and/or its shareholders.

18 On 4 August 2003, the solicitors for the company, M/s Allen & Gledhill ("A&G"), wrote to the then solicitors for the applicants, M/s Andre Yeap & Co ("AYC"), to allege*, inter alia*, that the applicants' position in relation to the first creditors' meeting had "obstructed the efficient discharge" of PWC's duties as "liquidators". This was apparently a veiled reference to the applicants' unwillingness to confirm the appointment of the liquidators. The liquidators also wrote to the applicants, once again, on 4 August 2003 reiterating their independence from other PWC partnerships globally. They maintained that they were not in a position of conflict. They stressed that their solicitors had been trying to liaise with the applicants' solicitors to hold the creditors' meeting, but to no avail.

19 On 7 August 2003, the solicitors for the applicants refuted this in a brief response.

20 On 21 August 2003, the solicitors for the company, in a letter to the applicants' solicitors, reiterated that the liquidators viewed themselves as the liquidators of the company and would seek the court's directions in respect of the discharge of their duties.

21 Immediately thereafter, on 22 August 2003, the liquidators made an *ex parte* application,

through the company's solicitors, to the court for orders that:

(a) a creditors' meeting be held on 12 September 2003; and

(b) PWC be permitted to exercise all powers as liquidators of the company.

It is pertinent to point out that s 296(8) of the Act states that the further meeting shall be summoned by *the company* and not the liquidator.

22 That application was filed and argued by the company's solicitors. It appears from the correspondence exhibited in these proceedings that both the company and the liquidators had at all material times used the same solicitors.

23 Having obtained an *ex parte* order of court on 27 August 2003, the liquidators issued a second notice of meeting to creditors on 3 September 2003 giving notice that the creditors' meeting would be "reconvened" on 12 September 2003 ("the second creditors' meeting"). However, neither the applicants nor any of the other creditors were alerted to the fact that an *ex parte* order of court conferring powers on the liquidators had been obtained.

24 At the second creditors' meeting, the chairman of the meeting, once again a representative of the applicants, declared that the meeting had not been convened at a date and time convenient to the applicants. The creditors' meeting again lapsed pursuant to s 296(8) of the Act. This was, as explained by the applicants, partly due to the fact that the period from 10 to 12 September 2003 was a public holiday in Korea, as a result of which the applicants did not have sufficient time to make a decision. The applicants' representative also informed those present that the applicants felt it would be more appropriate for the company to be wound up by the court, and that the applicants would shortly initiate steps to commence the compulsory winding up process. The following reasons were *inter alia* given:

(a) the applicants had carried out a due diligence exercise on the company, the results of which had revealed that the company had written off, or was intending to write off more than $400m in debts from various related companies within the Daewoo Group;

(b) the liquidators of the company would have to look closely at the merits of writing off or of seeking to write off such large related company debts, the actual recoverability of such debts, and the role of the directors and officers of the company and or other entities within the Daewoo Group in relation to the incurring of these debts. In this respect, the applicants strongly felt that a court appointed liquidator as an officer of the court owing duties to the court, would benefit the creditors as a whole;

(c) Samil, the PWC network firm in Korea, which forms part of the PWC organisation, had done substantial work for the Daewoo Group since 1999, including a major restructuring of DWC. The applicants felt that appointing PWC partners to investigate the large related company debts run up by other companies within the Daewoo Group would in the circumstances be unseemly, if not inappropriate.

25 At the second creditors' meeting, the liquidators reiterated and further amplified their earlier responses pertaining to the relationship between PWC and Samil. They emphasised again that there was no profit-sharing between PWC Singapore and any other PWC organisation, and that Samil was not a fully integrated member of the PWC organisation. They were merely affiliates of an umbrella global organisation.

26 The applicants' solicitors wrote to the company's solicitors on 23 September 2003 reiterating that the applicants, as the majority in value of the creditors, had an interest in all applications made by the liquidators to court. The applicants stressed to the company's solicitors that they should be served with a copy of any application made to court. Only when the applicants' solicitors received the reply from the company's solicitors dated 13 October 2003 were the applicants actually provided with a copy of the *ex parte* order of court obtained by PWC on 27 August 2003. The applicants maintain they were kept in the dark about that application and are aggrieved that they were not informed about it earlier. This has further undermined their confidence in the liquidators.

27 On 16 October 2003, the solicitors for the applicants wrote to the solicitors for the company reserving their clients' rights to take issue with the events that had transpired.

28 Soon after this, on 14 November 2003, the applicants initiated an application for leave under s 299(2) of the Act to file and proceed with a petition to wind up the company. The applicants have also deposed that "a court winding up is necessary to ensure that there will be a liquidation process untramelled by any doubts, so that the independent creditors of the company would not be left with a legitimate sense of grievance".

29 The liquidators in a response affidavit stated that there was "no reason to disrupt the Creditors' Voluntary Liquidation"; that they were fully independent and had been performing their duties in an impartial manner. In their view there were "many reasons why the company *should not be placed* in Compulsory Liquidation with the appointment of new liquidators" [emphasis added]. They insisted that Samil had absolutely no control or influence over the manner in which they as liquidators would approach the liquidation; they maintained that although Samil and PWC Singapore were individual member firms of the worldwide PWC organisation, they were both independently run. They referred to certain discrepancies as highlighted in the Anjin Report and stressed that they were prepared to take action against any party involved in company wrongdoings. Placing the company in compulsory liquidation would, in the liquidators' view, be highly disruptive. Time would be lost and costs wasted. They had now acquired a unique knowledge of the company and its workings. The applicants could also arrange for the appointment of a committee of inspection to oversee the liquidation process or nominate a liquidator of their choice at a future meeting of creditors. The liquidators emphatically and repeatedly asserted that the appointment of new liquidators at this juncture would be disruptive and strenuously opposed the granting of leave to commence compulsory winding up proceedings. They also reserved the right to raise these points again and to expand upon them in the event that a winding up petition "comes to be heard".

30 The liquidators' affidavit was filed by the company's solicitors, who, as noted earlier, have also rather anomalously been engaged to represent the liquidators. At the hearing of this particular application, however, the solicitors stated they were appearing solely for the company.

31 Having set out the facts, I will now examine the statutory matrix.

Statutory matrix

32 Section 299(2) of the Act stipulates:

> After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by *leave of the Court* and subject to such terms as the Court imposes. [emphasis added]

33 Section 262(3) of the Act, which applies to compulsory winding up, is *in pari materia* with

s 299(2). It reads:

> When a winding up order has been made or provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except —
>
> (a) by *leave of the Court*; and
>
> (b) in accordance with such terms as the Court imposes.
>
> [emphasis added]

34 The statutory scheme for judicial management has a similar statutory impediment which takes effect upon the presentation of a petition for a judicial management and ceases upon the making of such an order or the dismissal of the petition, as the case may be. Section 227C(c) of the Act which is the relevant provision mandates:

> [N]o other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with *leave of the Court* and subject to such terms as the Court may impose. [emphasis added]

35 It is germane to observe that the bankruptcy regime also creates similar fetters restraining any steps from being taken in any action or proceedings once bankruptcy has commenced. This mandatory requirement for leave is a consistent and integral feature of our insolvency scheme upon the initiation of any insolvency process, and must be both understood and observed, when applicable.

36 The rationale for these provisions is axiomatic: it is to prevent the company from being further burdened by expenses incurred in defending unnecessary litigation. The main focus of a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximised; the process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. Unnecessary costs should not be incurred; liquidators should act in the collective interests of all legitimate stakeholders and not with a view to enhancing their own self-interests or fees.

37 This statutory ring-fencing of the company also acts as a strong disincentive to creditors inclined to scramble to the judgment finishing line, in the often mistaken belief that their priority will be enhanced. In examining the purport of similar provisions in the Bankruptcy Act (Cap 20, 2000 Rev Ed), the Court of Appeal in *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd (in liquidation)* [2002] 3 SLR 241 at [51], succinctly stated:

> This court had in *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393 stated that the purpose of s 76(1)(c)(ii) was to prevent the [liquidators'] or administrator's task from being made more difficult due to a scramble among creditors in taking action or obtaining decrees against the debtor or his assets. The requirement to obtain leave is to ensure that the court could guard against any inequity on account of such a scramble.

38 Reference should also be made to s 253(2)(d) of the Act:

> [T]he Court shall not, where a company is being wound up voluntarily, make a winding up order unless it is satisfied that the voluntary winding up cannot be continued with *due regard* to the interests of the creditors or contributories. [emphasis added]

39 This provision is also cast in broad and generous terms. "Due regard" for the creditors and contributories confers on the court a broad discretion to consider what will best serve those having a genuine vested interest in the winding up of the company. The contributories' interests will obviously be of little consequence if the creditors' prior claims cannot be fully satisfied. The reference to creditors *or* contributories is in the disjunctive. It is however plausible that in some unusual cases, regard should be given to both their interests, particularly if there is a likelihood of a potential surplus of assets. The views of the majority creditors will be a very significant factor, though not invariably conclusive. In the final analysis, it cannot be gainsaid that the creditors are effectively funding the liquidation process. In instances where the majority creditors, whether in value or in number, are related to the company, the courts will however be vigilant to ensure that the views and rights of independent minority creditors are neither ignored nor trampled upon. The minority creditors may in such cases insist that transactions between related entities be closely scrutinised to ensure that liabilities are properly visited upon those responsible and that no rights are "inadvertently" missed. This approach is aptly summarised by Templeman LJ in *In re Southard & Co Ltd* [1979] 1 WLR 1198 at 1211:

> [W]here the choice before the court is between a compulsory winding up and a voluntary winding up, the judge, after hearing the reasons of the majority and the reasons advanced by the minority, must decide whether the interests of the unsecured creditors, and in particular the interests of the independent opposing creditors, and thus the interests of the public, are likely to be better served by making a compulsory winding up order or not.

40 The law is also plainly settled (*per* Vinelott J in *Re MCH Services Ltd* [1987] BCLC 535 at 538) that:

> [I]t would be wrong to refuse a compulsory order [to wind up a company] if the refusal would leave a majority of trade creditors with a justified feeling of grievance, a feeling that is that they have been unfairly deprived of the opportunity of ensuring that an independent liquidator, *that is a liquidator not chosen by the directors*, is given the charge of the winding up. [emphasis added]

41 I have referred to s 253(2)(d) at this juncture, because a court should not grant leave to commence proceedings against a company in liquidation if the process will ultimately prove to be futile when the matter is heard; in other words, barren litigation should not be given a kiss of life. Some authorities seem to indicate that the litmus test at the leave stage is whether there is a serious or substantial issue to be tried; or whether there is, as it is sometimes characterised, "a *prima facie* case". To my mind, it is consistent with the general taxonomy of the Act and "leave" principles that all the applicant has to do at this stage is to satisfy the court that the application is brought *bona fide*, underpinned by credible facts and is, even without a serious investigation of the factual matrix, capable of succeeding if and when heard. Though this is not a high hurdle to surmount, the evaluation should in any event be made in the context of certain broad principles, which I shall deal with shortly. It is vital to the integrity of insolvency proceedings that genuine independent creditors can avail themselves of the court's assistance when they do indeed have legitimate grievances.

Applicable principles

42 What procedure ought a claimant against a company already in liquidation follow? In the normal course of events, a proof of debt ought to be submitted. Should the liquidator decide not to admit the proof, the claimant is entitled to appeal to the court under the winding up rules. This procedure however can be dispensed with if and when there is a good reason to do so, the burden being on the applicant to justify the departure from the scheme. If for instance the liquidator has shown a pre-disposition not to accept the proof, or an indication that he will act in a manner that

may be either inimical to or inconsistent with the views of creditors, or if he does not command the confidence of independent creditors, it makes good sense to obviate the proof stage and let the court assume conduct of the matter at an early stage. While convenience and the saving of costs are factors that will be taken into consideration, fair play and commercial morality are of paramount importance.

43 The words "action or proceeding" in s 299(2) and its sister provisions are not defined in the Act. There is however a body of English and Australian case law that appears to suggest the words ought to be broadly interpreted to embrace all manner of civil proceedings, including the prosecution of a counterclaim or the execution of a judgment. This is consistent, in my view, with the *raison d'etre* of the provisions. The words "action or proceeding" may also extend to cover criminal or other punitive proceedings. The English courts have taken the wider view that criminal prosecutions are embraced by the moratoriums: *In re J Burrows (Leeds) Ltd (in liquidation)* [1992] 1 WLR 1177 and *R v Dickson* (1992) 94 Cr App R 7. The Australian courts in earlier decisions had decided otherwise: *Re Timberland Ltd* [1976] VR 790 and *R A Ringwood Pty Ltd v Lower* [1968] SASR 454.

44 Although it is undisputed between the parties in this application that leave was required to initiate the compulsory winding up process pursuant to s 299(2), the company took the position at the hearing that the actual granting of leave was not warranted on the existing facts. The liquidators, though they did not appear through counsel at the hearing, had taken an identical position in their affidavit, as indicated earlier.

45 Section 299(2) does not lay down any guidelines as to when leave to proceed may be given. The courts have often referred to this general discretion as an absolute discretion (see *In re Aro Co Ltd* [1980] Ch 196). That said, the discretion has to be exercised rationally in the context of the insolvency scheme. There has been no attempt to broadly catalogue the relevant discretionary factors. *McPherson, The Law of Company Liquidation* (4th Ed, 1999) states at 252:

> Unfortunately, there has not been, relatively speaking, much examination as to when leave will be granted.

46 In my view, certain broad guidelines can nonetheless be distilled from the decided cases, and more importantly from the statutory scheme for liquidation. It must be emphasised that while this broad categorisation of discretionary factors covers a wide spectrum of situations, none of these factors should be viewed alone as being decisive; nor should these guidelines be construed as fetters on the absolute discretion conferred by the statutory provision. I shall now outline these guidelines.

Timing

47 The timing as to when the application for leave is made could be a relevant consideration. An application made late in the day when the liquidator has completed a substantial amount of his work or when a creditor has acquiesced in the liquidator's discharge of his duties for a substantial period is less likely to be persuasive. On the other hand, an early application is by itself not decisive. The court may, in appropriate cases, be inclined to allow the liquidators an opportunity to consider the matter and evaluate the position the company should adopt *vis-à-vis* the application.

Nature of the claim

48 The court will carefully scrutinise every application to ensure that a party is not seeking, through the application, to avail itself of a benefit that would *not* otherwise be available to it through the conventional winding up procedure *ie* filing of proof of debts. Another consideration would be

whether the claim, if prosecuted successfully, would prejudice the claims of other legitimate creditors in a manner that could be viewed as negating the statutory scheme of *pari passu* treatment for all unsecured creditors. Further, where there is no likelihood of the claim being satisfied in any way, leave ought not to be given. The court will be loath to lend its imprimatur to sterile litigation.

49 If an applicant is merely attempting to claim from the company, property which *prima facie* belongs to the applicant, then it stands to reason that leave to proceed should be readily given (*In re David Lloyd & Co* (1877) 6 Ch D 339). This is recognition by the law that the rights of a secured creditor or *in rem* rights should not be fettered as a matter of course by the initiation of insolvency proceedings. A further example when leave will usually be readily given relates to rights accrued through subrogation or statutorily conferred rights on third parties. The Third Parties (Rights Against Insurers) Act (Cap 395, 1994 Rev Ed) recognises that if third party rights against a company have crystallised before winding up commences, then the company's rights against the insurers will be vested in the third party.

Existing remedies

50 If the claim or right that an applicant is pursuing can be adequately or conveniently dealt with within the insolvency regime, such as through the filing of a proof of debt, the court will not be inclined to grant leave to proceed. The incurring of significant costs by the company, the dissipation of its assets in attending to the claim and the reasons for wanting to proceed outside the insolvency scheme are other factors that the court will consider. The decision in *Meehan v Stockmans Australian Cafe (Holdings) Pty Ltd* (1996) 22 ACSR 123, correctly lends support to the proposition that a good reason for refusing leave would exist in cases where the company's resources are threadbare and considerable costs would be incurred if leave were granted. On the other hand, when the liability of the creditor needs to be a liquidated amount before it is admitted to proof, leave will usually be readily granted (*Re Berkeley Securities (Property) Ltd* [1980] 3 All ER 513; *cf: Re Islington Metal and Plating Works Ltd* [1983] 3 All ER 218).

Matrix factors

Views of the majority creditors

51 In *Re Zirceram Ltd (in liquidation)* [2000] 1 BCLC 751 at [25], Lawrence Collins QC, sitting as a deputy judge of the High Court, opined:

> (1) One of the reasons, if not the principal reason, for giving weight to the views of the majority of creditors who wish the voluntary liquidation to continue is that they have the largest stake in the assets of the company and their motives (especially if they are connected with the company) for resisting compulsory liquidation may be questionable if there are nor assets or no realistic prospects of recovery for the unsecured creditors.
>
> (2) The court may have regard to the general principles of fairness and commercial morality, and the exercise of discretion should not leave substantial independent creditors with a strong legitimate sense of grievance. *Fairness and commercial morality may require that an independent creditor should be able to insist on the company's affairs being scrutinised by the process which follows a compulsory order*.
>
> (3) Inter-group transactions may require special scrutiny if they operate to the prejudice of creditors and the court may take account of the fact that an opposing creditor is not an independent creditor, but an associated company.

[emphasis added]

52 I agree with this summary of the law pertaining to the consideration and weight that should to be accorded to the views of creditors. The linchpin here is fairness and "commercial morality". I want to emphasise that while the views of the majority creditors are important and should generally be accommodated, the position is quite different where the majority creditors are related entities. If there appears to be some basis for an independent minority creditor to suggest that it is or might be marginalised or disregarded in a liquidation process besieged by the majority creditors, most of whom are related entities, the court ought to carefully assess how it can grant a platform to that creditor to vindicate its rights. At times, this remedy could take the form of an order to replace liquidators within the voluntary liquidation scheme with an objective third party who has no apparent relationship with the company's management, shareholders or the related major creditor(s). There is however an unresolved issue in respect of the exact nature and scope of the obligations of a "voluntary" liquidator that may make this an unattractive proposition, should an investigation of the company's affairs be called for. This will be addressed later in [56].

Need for an independent inquiry

53 In *Re Zirceram Ltd* it was also observed at [25]:

> A compulsory liquidation may be ordered so that there can be an investigation which is not only independent, but seen to be independent. *Even if there is no criticism of the liquidator appointed in the voluntary winding up (a) the fact that associated supporting creditors have gone to great lengths to install, and maintain, him in office, may disqualify him in the eyes of the creditors; (b) the petitioning creditors may view with cynicism any investigation undertaken by a liquidator chosen by the very persons whose conduct is under investigation*. [emphasis added]

54 This is, in my view, a critical consideration, particularly in instances where one senses that impropriety in one form or another has occurred in the company concerned. The role of the liquidator in such cases takes on an added dimension: he wears the hat of investigator and sometimes that of "prosecutor". He is not a mere collector of assets performing an administrative function. It stands to reason that the liquidator should not be perceived, in such cases, as having had any relationship with the company's officers or shareholders. In my view, there is often a public interest element in such cases that may sometimes tip the scales in favour of allowing a compulsory winding up. The court will be vigilant not to allow the smokescreen of costs raised by interested parties, who might well be the subject of enquiry, to deter it from granting appropriate relief to legitimate creditors.

Choice of liquidator

55 It has been tentatively suggested that the recourse, where the identity of the liquidator is an issue, is to apply for a change of the liquidator under s 302 of the Act: *Re Inside Sport Ltd (in liquidation*) [2000] 1 BCLC 302. In *Re Zirceram Ltd* the court took the view (at [25]) that:

> A liquidator appointed in the voluntary winding up must be seen not to be taking sides, but even if there is no attack on the probity or competence of the liquidator, or any other criticism, it may nevertheless be right to protect the creditors by a full investigation into the affairs of the company by a fully independent liquidator appointed in the context of a compulsory winding up.

56 The option of changing the liquidators in a voluntary liquidation appears, at first blush, to be a more expeditious and less costly course of action than a compulsory winding up. While this point

was not argued before me, I should at least advert to it. The court in *Re Pinkroccade Educational Services Pte Ltd* [2002] 4 SLR 867 appeared to accept that liquidators in voluntary liquidation have less exacting obligations than court liquidators appointed pursuant to a compulsory winding up. While I have reservations about the merits of this view, it would be inappropriate for me, given that this is not an argued point, to say more here. For now it can be persuasively said that creditors who desire a court supervised liquidation have another legitimate reason for seeking the compulsory winding up of a company. Indeed, if a significant objective of the independent creditors is an investigation into the company's affairs, the identity of the liquidator is crucial. It is, I dare say, imperative in such cases to appoint liquidators who have had no nexus to the company, if legitimate (not necessarily majority) creditors seek this. A court appointed liquidator in a compulsory liquidation, as an officer of the court, unlike a voluntary liquidator, may better serve the interests of the creditors in these circumstances.

57 I am conscious that some of the authorities I have referred to deal with the exercise of discretion at the hearing stage and not the requirements at the leave stage. These points are nonetheless relevant considerations; the court has to evaluate, even at the leave stage, the prospects of success at the hearing stage. As stated earlier, at this stage however, a final assessment of the merits need not be made.

Exercise of discretion in this application

58 The material considerations in this application unequivocally lean in favour of granting leave to the applicants to initiate compulsory winding up proceedings.

59 While some time has elapsed between the company's attempt to install the liquidators through the voluntary liquidation proceedings and the filing of this application, the applicants have consistently voiced their concerns over:

(a) the state of the company's affairs;

(b) the need for an enquiry into the reasons for the company's insolvency; as well as

(c) the apparent lack of independence on the part of the liquidators.

Neither the company nor the liquidators can assert that the applicants have been inconsistent or dilatory.

60 Given the tenor of the communications between the applicants on the one hand, and the company and its liquidators on the other hand, it is understandable why the applicants now seek the court's assistance to consider the demise of the company afresh. The fact that the applicants are the undisputed majority creditor with 71% of the admitted proofs to their credit is, in this case, a critical factor. Counsel for the company, when queried by me, *agreed* that this was a critical factor. In this respect, I find it rather odd that in order to justify resisting/opposing compulsory winding up proceedings, the company has sought through its solicitors to argue that additional costs will be unduly incurred in the process. How can they? *Huge* sums of money have already been lost by those previously responsible for the company. The shareholders have, on any account, no equity left in the company. The directors' rights have been displaced by the "provisional" liquidators. I did not question the company's solicitors, but the thought crossed my mind when this contention was raised: Who had instructed them to raise this untenable argument of "additional costs"? Who are they trying to save costs for? They were clearly not representing the liquidators at the hearing. In the circumstances, I attached no weight at all to this contention. This argument seems even more quixotic when one considers that the applicants themselves, as the majority creditor, will have to substantially shoulder,

directly or indirectly, these additional costs, if and when incurred. Interestingly, the company could not, when I queried its solicitors, point to any other independent creditor supporting or relying on this rather remarkable contention.

61 On this basis alone, there is sufficient reason to grant leave to proceed. There are however certain additional factors that weigh heavily in favour of granting leave in this case. The Anjin report, for instance, cries out for further enquiry into the circumstances that have led to the demise of the company. The liquidators in their tepid response affidavit have not adequately satisfied the applicants, nor this court, how layer upon layer of intricate transactions between the company and related entities as identified by the report can be satisfactorily peeled back and accounted for. Indeed, most unfortunately, the relationship between the applicants and the liquidators appears somewhat strained.

62 It is puzzling that even after opposing parties have voiced their views, *ex parte* applications are resorted to; thereby obviating notification to the parties most interested in such matters. This is surely a recipe for building a platform of mistrust and setting in motion a train of suspicion. I am confident in this case that this was not the intention of the liquidators who come from a reputable and respected firm. But this has now happened, and the applicants do not now appear to be comfortable with or confident in the liquidators' ability to discharge their duties even-handedly. The liquidators may not, if and when all the facts are laid bare, be in a position of actual conflict after all. Notwithstanding, there is clearly, in my considered view, a real basis for the applicants to perceive some apparent conflict.

63 Ordinarily, it would benefit all concerned to maintain the same liquidators. Having said that, in a case like this, where doubt has been cast on the conduct and accountability of the directors and officers of the company and its related companies it would be appropriate for the court to consider whether the existing liquidators are in the best position to discharge their duties as liquidators to the body of creditors. Liquidators in the exercise of their many obligations and duties exercise discretion. In some instances, subject to the supervision of the court, they act in a quasi-judicial capacity. They must not only be impartial but remain above the fray at all times. It has been said repeatedly that a liquidator should not only be independent, but indeed be seen to be so: *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81; *Re Pinstripe Farming Co Ltd* [1996] 2 BCLC 295. They must be perceived to be so, by all right-thinking independent creditors and observers. These principles are encapsulated in two important English decisions, *Re Palmer Marine Surveys Ltd* ([1] *supra*) and *Re Zirceram Ltd (in liquidation)* ([15] *supra*). It should be noted that it is not imperative to question or, for that matter, to address the competence of a voluntary liquidator in order to obtain such a compulsory winding up order.

64 One further point should be noted. The applicants have deposed:

> 24. During the lapsed Creditors' Meeting on 23 June 2003, critical differences in approaches had already surfaced. While the Applicants took the position that the appointment of the chairman of any such meeting would be determined by the majority in value of creditors, the Company expressed the view that the chairman should be appointed by a majority in value and number. Presumably, this difference will carry over to other issues, including whether the nomination of any liquidator at any Creditors' Meeting would require just the vote of the majority in value of the creditors, or the majority in value and number of the creditors.
>
> 25. The differences in approach over the voting mechanism at any Creditors' Meeting has been compounded by further disagreement between the Applicants and the Company in relation to whether the Company's nominees for the position of the liquidators have been appointed the

liquidators of the Company.

26. The Applicants' position is that as the creditors have even not decided upon the nomination of liquidators in a Creditors' Meeting, the Company's nominees have not been validly appointed to the position of liquidators, and remain only as the Companies' [*sic*] nominees. However, the Company's position is that their [*sic*] nominees have been validly appointed as the liquidators by its shareholders in the Shareholders' Meeting held on 23 June 2003.

…

30. As we see it, whether or not Messrs Timothy James Reid, Subramaniam Ramasamy Iyer and or Goh Thien Phong are liquidators or provisional liquidators of the company, there is simply no basis for them to allege that we have been obstructing the performance of any duties they may have.

31. As recognised by the Company and its nominees for the position of liquidators, the Creditors' Voluntary Winding Up cannot proceed without recourse to court proceedings. It is evident that for the Creditors' Voluntary Winding Up to continue, two key fundamental issues would have to be resolved in court with the participation of all the interested parties, including the Applicants:-

(1) whether the Company's nominees for the position of liquidators have been validly appointed as the liquidators of the Company; and

(2) whether resolutions at the Creditors' Meeting, including any resolution for the nomination or appointment of any liquidators, are to be carried by a majority in value of the creditors or a majority in value and number of the creditors.

32. In a Court Winding Up, as opposed to a Creditors' Voluntary Winding Up, the liquidator would be appointed by the court, after having had the opportunity to hear all interested parties. Clearly a Court Winding Up would be much more efficient and cost effective from that point of view.

65 An interesting issue arises from this. Apart from highlighting the lack of congruence between the applicants and the liquidators, as well as the company, the applicants have drawn attention to an anomaly in the procedure for voting in a voluntary liquidation at different stages of the procedure. Is the appointment of the chairman of a meeting of the creditors during a voluntary winding up as well as the appointment of the liquidators to be decided by a majority in value or a majority in value and number? *Butterworths' Annotated Statutes of Singapore* (Vol 1, 1997 issue) at 804 suggests:

> In the absence of any specific rules, it would seem therefore that at common law voting should be by simple majority on a show of hands. Though s 296(7) and (8) speak of the majority of creditors by value, it is not clear that they may vote by value.

66 No authority has been cited for this observation. It must also be pointed out that s 11(2)(b) of the Act states that a majority in number and value of the creditors may grant permission for the appointment of an officer of the company to be a liquidator. The Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed) ("the Rules") do not appear to directly address the position of how the votes of creditors are to be taken into account in a voluntary winding up. Rule 119 appears to be the only rule of any assistance. It refers to a resolution being passed when a majority in number *and* value of the creditors has voted in favour of the resolution. It must however be observed that this

rule comes under that part of the Rules (rr 106 to 130) which is captioned "General Meetings of Creditors and Contributories in Relation to *a Winding Up by the Court*" [emphasis added]. Further ambiguity has been caused by references in certain provisions of rr 106 to 130 to voluntary winding up proceedings. For instance, r 114(4) states that it does not apply to a meeting under s 296 of the Act. In a similar vein r 117(4) and r 118(3) state that they do not apply to s 296 meetings under the Act. A plausible view is that the reference to s 296 of the Act in these rules was inserted *ex abundanti cautela* by the draftsman. If this view is correct, and the subject rules do not apply, is the common law position then applicable, as suggested by *Butterworth's Annotated Statutes of Singapore* ([65] *supra*)? Having reviewed the position, I can understand why the parties in this case can *prima facie* take different positions which obviously serve their very different objectives.

67 This point could be critical where the views of the majority in number and those of the majority in value do not coincide. Having pointed out these difficulties, I do not think I should express any considered views on this save to add that the recourse of an aggrieved majority creditor may be to rely on s 325 of the Act. Sections 325(1) and (2) of the Act are of general application to all liquidations. Section 325(1) states that where the court thinks fit, it can direct a meeting of the creditors to ascertain their views. Section 325(2) directs the court, in no uncertain terms, to have regard to the value of each creditor's debt and not the number of creditors. If the interests of the qualitative and quantitative majorities of the creditors diverge, the courts can then redress the situation. For example, in the case of *In re The Seremban General Agency, Ltd* (1922) 3 FMSLR 3, a resolution for winding up was purportedly passed by the creditors having the majority in number but not value. The court ordered the compulsory winding up of the company, taking into account the wishes of the creditor having the majority in value of claims. The appropriate judicial philosophy appears to be correctly encapsulated in that case, even though the statutory provisions are not *in pari materia* with the Act.

68 It stands to reason that those who have the greatest financial interest in the assets of the company should usually be allowed the biggest say. Corporate democracy is seldom a quantitative exercise. This common sense approach using value as the touchstone also resonates in the UK Cork Report 1982 (*Report of the Review Committee on Insolvency Law and Practice* (*Comnd* 8558) para 922) which takes the view that the power of a creditor's vote should be intertwined with the value of the claim. In England, the Insolvency Act 1986 states that voting at the creditors' meeting is now decided by a majority in value of the creditors. This is at variance with the previous procedure where the majority both in number *and* value was decisive. The Insolvency Rules in England have detailed proceedings on how voting is to be carried out. The position in Singapore cries out for legislative intervention; in situations which cannot be sensibly resolved, the ambiguity may lead to unnecessary litigation.

69 I have had to refer to the background facts at some length in this matter. Given the obvious and stark difference in views on the issues, the applicants, despite their status as majority creditor, have regarded the voluntary process as one fraught with uncertainty. If the company and the liquidators are right in their views on the voting issue identified, the applicants, though a majority creditor, could well find themselves sidelined. This cannot be right in the circumstances. The applicants therefore prefer the certainty of a compulsory winding up and the appointment of a court appointed liquidator. Failing to see how either the company or the liquidators could legitimately oppose this application in these circumstances, I accordingly readily allowed it and granted leave for the initiation of compulsory winding up proceedings.

Role of liquidators

70 I am constrained by the circumstances to conclude by briefly alluding once again to the role

of liquidators in both voluntary and compulsory liquidation. I have not concluded that the liquidators in this instance behaved, or will behave, inappropriately. I do not need to do so at this stage. Liquidators should always view matters through objective lenses. When concerns are raised and liquidators are challenged on an issue involving an existing or potential conflict, they should pause and carefully review their position dispassionately. They should seek, if necessary, advice from wholly independent counsel or their peers in the same profession. They must be seen to be properly wearing the mantle of objective neutrality untarnished by any special interests, including their own fee considerations. This is especially crucial when a significant creditor takes issue with the appointment of liquidators initiated by company directors who have hardly distinguished themselves in the run-up to insolvency. I was surprised that the liquidators filed an affidavit strenuously opposing the granting of leave to proceed with the compulsory winding up of the company. It is hornbook law that liquidators should not descend into the battle arena. In *Souster v Carman Construction Co Ltd* [2000] BPIR 371, the role of a voluntary liquidator in relation to a petition for the compulsory winding up of a company was addressed (at 372):

> It is well understood that the role of the voluntary liquidator in a petition like this is that of neutrality to assist the court. He should not be partisan and should not become involved in arguing the merits for or against the making of a winding-up order. The authorities for that proposition are to be found in *Re Medisco Equipment Ltd* [1983] BCLC 305, and *Re Arthur Rathbone Kitchens Ltd* [1997] 2 BCLC 280.

71 In an earlier judgment (*Re Roselmar Properties Ltd (No 2)* (1986) 2 BCC 99,157 at 99,158), Harman J had ruled in a similar vein:

> [T]he voluntary liquidator has a duty to stand neutral between all creditors and to exercise a detached judgment in an almost quasi-judicial manner, particularly when for example dealing with proofs of debt and such like matters. He is not to appear and take sides and to fight battles. More especially is he not to give any appearance of taking sides and fighting battles, let alone in substance to so do, on behalf of directors and shareholders who claim also to be creditors of the company.

72 It is trite law that a liquidator in winding up proceedings has no *locus standi* to oppose or support the making of an order. The role of the liquidator, voluntary or otherwise at the leave stage, ought to be no different. The liquidators in this case ought not to have contentiously opposed in their affidavit the granting of leave to the applicants to commence proceedings that might possibly displace them. This is jarringly at odds with what is expected of them in such an application. It is incumbent on them in the circumstances to merely recite the relevant facts and to leave it to the court to decide the matter on its merits. The role of a liquidator in legal proceedings must be one of pure and utter impartiality. It strikes me also as somewhat incongruous that in a situation like this when their role was challenged and allegations were made about their relationship with the company, the liquidators should be represented, at any juncture, by the same firm of solicitors as the company. A whole spectrum of circumstances has surfaced as a result, casting doubt on the liquidators' objectivity. This is most unfortunate, as I am fairly certain that the liquidators may not have intended this to happen.

A footnote

73 Prior to hearing the application, I had asked both counsel if they had any objections about having this matter heard before me. Mr Yeap had joined the applicants' present solicitors only after I had departed from the firm. The matter was also transferred to the applicants' present solicitors subsequent to my departure. Mr Yeap had had continuous conduct of this matter in his previous firm.

If the parties harboured any concerns, I would not have heard the matter. Both counsel assured me they had no misgivings about my hearing the case and requested that I proceed. The facts were completely new to me.

Application allowed.