IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 27

Companies Winding Up No 105 of 1994

Between

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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In the Matter of the Companies Act Chapter 50 And In the Matter of Thye Nam Loong (Singapore) Pte Ltd (RC no.196500242G)

[1998] SGHC 27

Companies Winding Up No 105 of 1994
Lai Siu Chiu J
26 January 1998

Judgment:

GROUNDS OF DECISION

The background

1. Thye Nam Loong (Singapore) Pte Ltd (the company) was compulsorily wound up by order of court on 5 May 1995 on a petition presented by Bangkok Bank Public Company Limited. By the same order of court, Messrs Michael Ng and Bobby Chin (the liquidators) from an accounting firm were appointed the liquidators of the company and were given wide ranging powers including those set out under s 272 of the Companies Act Cap 50 (the Act). Prior to the Winding Up order, one of the directors of the company was Teh Wee Khiang (TWK) who resided/still resides at #06-38 Goldhill Towers, Goldhill Avenue, Singapore; Teh Liang Teik (the applicant) is TWK's father.

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2. Pursuant to an (exparte) application made by the liquidators (summons in chambers no 1703/97) under s 285 of the Act supported by an affidavit filed by Michael Ng, an order of court was granted on 2 April 1997 (the order of court) requiring the applicant and his son TWK to attend court on 20 May 1997 for the purpose, inter alia, of being examined on the affairs of and to produce the books of, the company.

3. The liquidators had difficulty serving the order of court on the applicant so they applied to court again (the second application) for leave to effect service on him at his Kuala Lumpur office or elsewhere in Malaysia. The second application was granted on 28 April 1997 (the second order of court) by the learned assistant registrar who ordered service to be effected in accordance with O 11 rr 3(8) and or 4(2) to 4(5) of the Rules of the Supreme Court (RSC).

4. According to the applicant, service was purportedly effected on him by Messrs Shearn Delamore, a firm of Kuala Lumpur solicitors, on 9 May 1997.

5. The applicant then filed summons in chambers no 3695/97 to, inter alia, set aside the order of court as well as the second order of court. His application came up for hearing before me whereupon I dismissed it with costs; I ordered the liquidators to reimburse the applicant his airfare and expenses in coming from Kuala Lumpur to attend court in Singapore to comply with the order of court; the applicant has appealed against my decision (Civil Appeal No 203 of 1997).

The arguments

6. In support of his client’s application, counsel for the applicant submitted as follows:

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a. Michael Ng's affidavit did not assert that the applicant was at any time a director of the company or that the applicant resided in Singapore. On the contrary, an instant search conducted in the records of the Registry of Companies (exhibited in counsel's affidavit) showed the applicant to have a Kuala Lumpur address;

b. the initial and only meeting between the liquidators and TWK held on 17 August 1995 was not attended by the applicant;

c. the only allegation in Michael Ng's affidavit which concerned the applicant was, that he (as a shareholder) had received dividends which "the directors of the company had waived in his favour", all other matters upon which examination is sought under s 285 of the Act concerned TWK and not the applicant;

d. s 285 of the Act is for a private examination and is limited territorially, which presumption is reinforced by subsection (5) thereof. It is in pari materia with s 236(2) of the English Insolvency Act 1986 (the Insolvency Act) which has been construed to be limited territorially. The applicant does not fall within the ambit of s 285 which covers any officer of the company, any person suspected to have in his possession any property of, and any person supposed to be indebted to, the company;

e. leave to serve process and orders on persons out of the jurisdiction is not a matter within the inherent powers of the court; there must be express power to do so either by statute or rules having statutory force (see *In re Anglo-African Steamship Co* (1886) 32 Ch D 348). There is no provision in the Act or in the

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Companies (Winding Up) Rules which confer jurisdiction for service out of Singapore of an order made pursuant to s 285 of the Act;

f. the second order of court should be set aside as s 285 of the Act is not an originating process; O 11 rr 3 and 4 apply to originating processes (*In re Seagull Manufacturing Co Ltd (in liquidation*) [1993] Ch 345). The RSC do not apply to proceedings relating to the winding-up of companies and it is to be noted that under O 38 r 18 a writ of subpoena cannot be served on any person outside the jurisdiction;

g. s 285 of the Act differs from s 83 of the Bankruptcy Act which provides for a public examination of the debtor; s 83(15) of the Bankruptcy Act which provides for examination of the debtor in Singapore and elsewhere is conspicuously absent from s 285 which section is also to be contrasted with s 286 which empowers the court to order a public examination of any officer or former officer of a company.

7. Counsel for the liquidators cited *Re Bank of Credit and Commerce International SA* (No 7) [1994] 1 BCLC 455 to support his argument that it was perfectly in order for the assistant registrar to have made the second order of court. In that case, an English court made an order under s 236 of the Insolvency Act requiring a national and resident of, Saudi Arabia to attend a United Kingdom court to be examined.

8. Further, the justice of this case required the making of the second order of court. Banks in Singapore were owed about $50m by the company and there were oddities in its affairs which only former directors could have knowledge of. The applicant was the patriarch and founder of the company and was its

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managing director for a long time until October 1993. The company suffered a huge loss of $9m in 1992 and yet in November of that year, the company declared a large dividend ($2m) which was waived by all the other shareholders in the applicant's favour (*B & C Holdings Plc v Spicer & Oppenheim* [1993] BCLC 168)

9. Counsel submitted that the effectiveness of s 285 of the Act would be undermined if a court order requiring attendance of a person for cross-examination cannot be served because the person is out of Singapore. The court has seen it fit to grant an order requiring the applicant to attend before liquidators to be examined on important issues touching the company; it should also balance the inconvenience to the applicant against the importance of the information and help he can give to the liquidators.

10. Counsel pointed out that in *Re Seagull Manufacturing Co Ltd* the court held that on a true construction of s 133 of the Insolvency Act, the provision applied to directors and others who were within the class of persons specified in subsection (1) whether or not they were British subjects and whether or not they were within the jurisdiction of the English court at the relevant time. Section 133 of the Insolvency Act is in pari materia with s 286, not s 285, of the Act.

11. Counsel submitted that *Re Tucker* [1990] 1 Ch 148 cited in support of the applicant's case was not relevant; it concerned an application under s 25 of the Bankruptcy Act 1914 by the trustee of a bankrupt debtor, requiring K the brother of the bankrupt, who resided in Belgium, to attend court in England to answer questions relating to the debtor's affairs. The Court of Appeal held that s 25(1) did not assert a jurisdiction over British subjects resident abroad. Accordingly, rule 86 of the Bankruptcy Rules 1952 did not provide a procedural power to

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permit service out of the jurisdiction of summonses issued under s 25(1) of that Act and the orders for service on K in Belgium could not stand. Although the words may be similar, s 285 of the Act and s 25 of the Bankruptcy Act 1914 are not in pari materia. Even if the rule of construction in *Re Tucker* is applicable to Singapore statutes, Lord Wilberforce in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 (at p 152B) said:

The respondent company contends, and the Court of Appeal has held, that the provisions regarding collection of tax by deduction from wages can never have been intended to apply to a foreign company, non-resident in the United Kingdom, which makes payments outside the United Kingdom.

In my opinion this contention is erroneous because it is based upon a mistaken application or understanding of the "territorial principle". That principle, which is really a rule of construction of statutes expressed in general terms, and which as James LJ said a "broad principle", requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating.

Accordingly the approach to s 285 of the Act cannot merely be as to territory or location. The "person" with respect to whom Parliament is presumed, in the particular case of s 285 to be legislating, must also be considered. Parliament cannot have intended, in the case of a director (of a company in liquidation) that he cannot be brought before a court to be examined regardless of the knowledge he may have with regards to the affairs of the company, merely because he happened to be out of Singapore and cannot accept service. There would be far reaching consequences if the interpretation of the English courts in *Re Tucker* was to be adopted in Singapore.

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The decision

12. I ruled in favour of the liquidators on the applicant's summons in chambers and rejected the request for further arguments from his counsel for reasons which I shall now set out.

13. I shall start by setting out the law relevant to the two orders of court impugned by the applicant. Firstly, I set out s 285 of the Act:

(1) The court may summon before it any officer of the company or any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court considers capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company.

(2) The court may examine him on oath concerning the matters mentioned in subsection (1) either by word of mouth or on written interrogatories and may reduce his answers to writing and require him to sign them, and any writing so signed may be used in evidence in any legal proceedings against him.

(5) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful excuse, made known to the Court at the time of its sitting and allowed by it, the Court may cause him to be apprehended and brought before the Court for examination.

Section 285 is in pari materia with s 236(2) of the Insolvency Act and is very similar in wording to s 268 of the English Companies Act 1948. Contrary to the applicant's contentions, there are no words in s 285 to limit the court's powers

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to summon for examination only persons who are/were officers of the company; the words "*any person"* are wide enough to extend to the applicant. My view is reinforced by the House of Lords' decision in *B & C Holdings Plc v Spicer & Oppenheim* which I shall refer to later.

14. I turn next to the question of service under the RSC. Counsel for the applicant had referred to Order 1 therein as the starting point for his arguments. It is clear from O 1 r 2(4) that the rules do not apply to proceedings relating to the winding up of companies. Consequently, O 11 relating to service of originating process would not apply; I accept the submissions of the applicant on both these counts.

15. It follows from the above comments that one needs to look at the Winding Up Rules for the correct procedure, and in particular rule 17 which reads:

(1) Subject to any order to the contrary, every petition, notice of motion and summons shall be served upon every person against whom any order or other relief is sought *but the Court may at any time direct that service be effected or notice of proceedings be given to any person who may be affected by the order or other relief sought and may at any time direct the manner in which such service is to be effected or such notice given*; and any person so served or notified shall be entitled to be heard.

It is therefore incorrect to say, as counsel for the applicant contended, that the assistant registrar was wrong to have granted the second order of court. The italicised words in rule 17 above clearly stipulated that the court has the discretion to direct how service should be effected and that was precisely what

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the assistant registrar did when he ordered service on the applicant to be in accordance with O 11 rr 3(8) or 4 thereof.

16. The English provision which is relevant is s 133(1) of the Insolvency Act which states:

Where a company is being wound up by the court, the official receiver or, in Scotland, the liquidator may at any time before the dissolution of the company apply to the court for the public examination of any person who --

(a) is or has been an officer of the company; or

(b) has acted as liquidator or administrator of the company or as receiver or manager or, in Scotland, receiver of its property; or

(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company.

That section is somewhat similar but not in pari materia (as counsel for the liquidators said), with s 286 of the Act.

17. I now turn to the cases cited by counsel; I start with *In Re Seagull* and the judgment of Mummery J ([1992] Ch D 128) which headnote reads:

A British subject living in the Channel Islands was a director of a company in compulsory liquidation. In July 1990, on the application of the official receiver, the registrar made two orders, one requiring the director to attend for public examination in London, pursuant to s 133 of the Insolvency Act 1986, the other

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giving the official receiver liberty to serve sealed copies of both orders on him in the Channel Islands, pursuant to rule 12.12 of the Insolvency Rules 1986. In September 1990, on the application of the director, both orders were set aside on the ground that they were made without jurisdiction since at all relevant times the director was resident abroad.

On appeal by the official receiver:-

Held, allowing the appeal and restoring the orders, that on its true construction section 133 of the Act of 1986, in contrast with the territorially qualified private examination provisions, applied to directors and others who were within the class of persons specified in subsection (1) whether or not they were British subjects and whether or not they were within the jurisdiction of the English court at the relevant time; and that accordingly, the registrar had the power to make the orders and had properly exercised his discretion under rule 12.12 by giving the official receiver liberty to serve them out of jurisdiction.

The director appealed against Mummery J's decision but his appeal was dismissed (see [1993] Ch D 345).

18. *In Re Seagull* is of persuasive authority since the wording of s 133(1) of the Insolvency Act (see para 15 above) is somewhat similar to our section in question. Counsel for the applicant had drawn a distinction between s 133(1) and s 285 of the Act in that the former provides for a public against a private, examination in the latter provision. With respect, I do not think that is a significant distinction.

19. I turn next to *Re BCCI (No 7)* [supra] cited on behalf of the liquidators; the headnotes read:

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A and his wife held 5 accounts with BCCI forming part of a composite account known as MLA 1044. They lodged with the liquidators of BCCI proofs of debt in respect of the sums standing to the credit of those accounts in the total sum of US$230m. Subsequently M lodged a proof of debt in the sum of $125m claiming that he was the beneficial owner of the money in MLA 1044. M had been a director of BCCI and the liquidators had commenced proceedings against him for fraudulent and wrongful trading and misfeasance. Criminal proceedings were pending against him in the United States. The liquidators rejected M's proof and M issued an application appealing against that decision. In support of that application A made an affirmation in which he stated that the money in MLA 1044 was held by him and his wife on behalf of M. Directions were given, inter alia, that A should attend and be cross-examined on his affirmation and that if he did not do so his evidence should not be read without the leave of the judge. In August 1993 the liquidators of BCCI applied ex-parte to Knox J for: (1) an order under s 236 of the Insolvency Act 1986 requiring A, who was a Saudi Arabian citizen living and working in that country, to attend to be cross-examined respecting the affairs of BCCI and to produce all documents relating to the affairs of the bank, in particular to the accounts comprised in MLA 1044; and (2) a further order restraining A (who had made a brief visit in England) from leaving England until after the conclusion of the examination. The judge made the order sought. Lindsay LJ subsequently varied the order to permit A to leave the country on lodging security of 500,000. A applied to set aside the order on the ground that the examination was directed exclusively at issues already before the court on M's proof of debt application. Only after counsel for A had addressed the court on this basis, did counsel for the liquidators make it clear that they did not seek information under s 236 examination for that purpose but rather to discover the source of the deposits of $230m and in particular whether the money represented any part of the $1.5 billion which the liquidators alleged

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M had looted from BCCI. Counsel for A objected that this amounted to a new case unsupported by any affidavit or statement complying with r 9.2 of the Insolvency Rules 1986 and was an unfair way of proceeding but he did not seek an adjournment of the application.

Held --

(1) When exercising its power under s 236 of the 1986 Act the court had to balance the reasonable requirements of a liquidator for the information and documents sought, against the consequences which the order would have for the respondent. The court would only make an order if justice and fairness required it.

(2) An examination order under s 236 of the 1986 Act would not have been justified if the only object had been to obtain information for the purpose of assisting the liquidators on M's proof of debt application. Such an order was not needed for that purpose. At the hearing of M's proof of debt application, the liquidators would have an opportunity to cross-examine A on his affirmation; and if A did not tender himself for that purpose, his evidence could not be read without the leave of the judge and there was every prospect that M's application would fail.

(3) Although there had been no clear statement by the liquidators until counsel for the liquidators presented his clients' case, that the information was sought for a wider and different purpose than M's proof of debt application, this had not prejudiced A's presentation of his case. In the circumstances there was no procedural unfairness in permitting the liquidators to shift the emphasis of their case.

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(4) A had information which might assist the liquidators in trying to find what had happened to BCCI's missing millions and which was reasonably required by the liquidators. On the facts, the prejudice to A was far outweighed by the advantages which the examination sought to achieve for the conduct of the winding-up. It was just and fair to make the order and accordingly it should not be set aside.

20. Holding No 4 above was made by Sir Donald Nicholls in reliance on *B & C Holdings v Spicer & Oppenheim* (supra). In that case the House of Lords heard an appeal by the auditors of Atlantic Computers Plc (Atlantic) against an order, which the auditors contended was oppressive, made under s 236(2)(c) of the Insolvency Act requiring them to produce to the joint administrators of a failed public company B & C Holdings all books, papers and other records in their possession, custody or control relating to or having connection with the 1987 and 1988 year-end audit of Atlantic which had been acquired by B & C Holdings at 420m in addition to which the company invested another 117m into Atlantic. Atlantic had a deficiency in assets which was not reflected in the audit done by the appellants. In dismissing the appeal, Lord Slynn said (at p 176):

In my opinion, although there may be some difference in the wording of these sections, the position under s 236 of the Insolvency Act 1986 is broadly the same as that under s 268 of the Companies Act 1948....

Lord Slynn added (at pp 177-78):

The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents (reconstituting the company's state of knowledge) but in the fact that the applicant must satisfy the court that, after

balancing all the relevant factors, there is a proper case for such an order to be made....An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him to a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others.

Finally (at p 179) his lordship said:

...That papers may be produced which could possibly lay the auditors open to further claims (as to which I know nothing) is a factor to take into account but it is only one factor to be balanced against the administrators' reasonable requirements. The fact that the company never had and was never entitled to have some of the documents and that certain of them could only be obtained by litigation with the auditors, in so far as they were relevant to issues in that litigation, are factors to take into account in the balancing exercise to be set against the purposes of the administration set out in s 8 of the 1986 Act.

This may well be an exceptional order. The size of the financial crash however, gives rise to an exceptional case. Creditors and investors stood to lose vast sums. It was the administrators' task to investigate 'what was the true financial position of Atlantic at the time of its acquisition and, if it was different from the way it was represented, how and why the truth was concealed' (see [1992] BCLC 314 at 317 per Hoffmann J)...

21. Whilst I do not agree with the submission of counsel for the liquidators that this case warrants an exceptional order, bearing in mind that the losses of the

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company are nowhere near those of B & C Holdings, I am persuaded by the principles enunciated in the case that it was appropriate for the courts below to have made the two (2) orders which they did.

22. There only leaves the case of *Re Tucker* cited for the applicant to be considered. That case revolved on the interpretation of s 25 of the English Bankruptcy Act 1914 which states:

(1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

The wording of this section while similar to s 285 of the Act, is not in pari materia. I am therefore not prepared to follow the ruling laid down by the Court of Appeal that the provision is limited territorially to England and adopt that ruling for s 285 of the Act to say the section is limited territorially to Singapore.

23. It is noteworthy that the applicant, in his affidavit, did not refute the allegations made in Michael Ng's affidavit in particular relating to the dividends of $2m paid to him and waived by all the other directors, at the time that the company suffered substantial losses of $9m; the applicant merely attempted to raise technical objections to the two (2) orders of court obtained by the liquidators. I could not see how the order of court could be prejudicial to the

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applicant especially as I had ordered the liquidators to make adequate provision for his travelling and other expenses. On the other hand, denying the liquidators the right to question him would greatly hamper them in their duties to recover the debts owed to and other assets of, the company.

24. Accordingly, I dismissed the applicant's summons in chambers no 3695/97.

Lai Siu Chiu

Judge

Lai Siu Chiu J

Leslie Chew and Ng Yeow Khoon (Khattar Wong & Partners) for the liquidators of Thye Nam Loong (Singapore) Pte Ltd
Jason Lim (Winston Chen & Partners) for the applicant Teh Liang Teik

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