Re Dayang Construction and Engineering Pte Ltd
[2002] SGHC 123

Case Number : CWU 600086/2002

Decision Date : 08 June 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : Tan Chee Meng and Florence Chew (Ruth Chia & Co) for the petitioning creditors; Zaheer K Merchant and Sadique Marican (Madhavan Partnership) for Dayang Construction and Engineering Pte Ltd; Tito Isaac (Tito Isaac & Co) for the opposing creditors; Rajendran Kumaresan (WT Woon & Co) for the supporting creditors; Karen Loh for the Official Receiver

Parties : —

Companies – Winding up – Statutory demand – Validity – Demand letter not giving company three weeks to pay and not warning it of consequences of failure to comply – Whether demand letter defective – Whether demand letter complies with statutory requirements – s 254(2)(a) Companies Act (Cap 50, 1994 Ed)

Companies – Winding up – Company unable to pay debts – Statutory demand under s 254(2)(a) of Companies Act (Cap 50, 1994 Ed) – Whether company insolvent and unable to pay its debts – Whether to maintain order for winding up – s 254(1)(e) Companies Act (Cap 50, 1994 Ed)

A judgment creditor petitioned on 11 March 2002 for Dayang Construction & Engineering Pte Ltd ('Dayang') to be wound up under s 254(1)(e) of the Companies Act (Cap 50) (the 'Act') on the ground that Dayang is unable to pay its debts. The petitioner relied on the provisions of s 254(2)(a) of the Act as proof of insolvency. The petitioner stated in the Amended Petition that judgment in the sum of $200.090.30 together with pre-judgment interest and costs of $1,216.99 and $1,800 respectively were entered on 29 November 2001 against Dayang. On 5 December 2001, the solicitors for the petitioner served on Dayang a letter demanding payment of the judgment sum, interest and costs. At the adjourned hearing of the Amended Petition on 12 April 2002, counsel for Dayang sought an adjournment of four weeks as the company wished to apply for Judicial Management. Goh Eng Soo ('Goh'), a director of Dayang, filed an affidavit to oppose the winding up, stating that legal proceedings against Dayang's two trade debtors, namely Tong Hup Seng Construction Co Pte Ltd ('Tong Hup Seng') and Guobena Sdn Bhd ('Guobena') were intended, that the company needed time to file for Judicial Mangement or apply for a Scheme of Arrangement and that several creditors supported the adjournment. The petitioner and other creditors who supported the winding-up opposed the adjournment.

After hearing arguments and on the evidence, the application for an adjournment was refused and an order was made for Dayang to be wound up. On 18 April 2002, counsel for Dayang requested further arguments. The judge permitted the company and those creditors opposing the Amended Petition another opportunity to be heard. At the hearing, counsel for Dayang contended that the 5 December letter was not a statutory demand within s 254(2)(a) of the Act, as it was defective in two respects: firstly, it did not refer to a period of three weeks for payment but had demanded repayment within five days; secondly, it contained no warning that the company would be wound up if the company did not meet the demand. Consequently, the Amended Petition must fail.

Held

, maintaining the winding-up order:

(1) Having regard to the scheme, structure and language of s 254(2)(a), there is clearly no merit

whatsoever in either of the alleged defects raised by counsel for Dayang. The letter of 5 December 2001 was an effective demand for the purposes of s 254(2)(a) (see 19).

(2) The three-week period is not a statutory requirement of the notice of demand itself. It is relevant only in the context of a company failing or neglecting to pay a debt within that period: *Re Simpson Devp Investment (HK) Co Ltd* [1999] 1 HKLRD 202 followed. It is also not a legal imposition of s 254(2)(a), express or implied, that the creditor must indicate on the face of the demand the implications to the company and the detriment it may suffer if it fails to comply, or the other two alternatives available to it, namely securing or compounding. Ultimately, it is for the court to decide whether a company should be wound up in the exercise of its discretion. The form in which a statutory demand is expressed ought to be approached with the general discretion of the court in mind and in this case, it was not suggested that Dayang was in fact misled by the demand: *Helicarr Consolidated Ltd v Royal Insurance Fire & General (NZ) Ltd* [1993] 2 NZLR 46 followed (see 20 – 33).

(3) It was clear from the Amended Petition that the petitioner had an undisputed judgment debt, it was due and Dayang had neglected to pay it. The court was entitled to accept that as prima facie proof, and inference could be drawn, that the company was unable to pay its debts within the meaning of s 254(2)(e): *Cornhill Insurance Plc v Improvement Services Ltd And Others* [1986] 1 WLR 114 and *Taylors Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216 followed (see 35 and 36).

(4) The company was commercially insolvent. It had no available cash to settle the judgment debt. There were no on-going projects in hand and no future contracts in the pipeline. There was no reason to keep the company alive just to pursue a claim against the two trade debtors when that could be left to liquidators who had consented to act in the winding up of the company. In the hands of those liquidators, any possible potential conflict of interest would be avoided, given that Goh's brother and father are directors of Tong Hup Seng (see 39 – 42).

(5) The initiatives to stop the winding-up for the reasons given were viewed with some reservations. Dayang had made loans to its directors and directors' fees were due from the company. With liquidators in place, the directors would face the possibility of having to repay these loans and stand in the queue like the rest of the unsecured creditors to recover any sum due to them from the company as directors (see 44).

(6) The proposed Scheme of Arrangement exhibited in Goh's second affidavit was skimpy and unconvincing. It glaringly omitted to take into account the substantial borrowings of the directors and solely focused on the trade debts of Tong Hup Seng and Guobena. Creditors were left to wonder when the proposal would take effect and the length of time they would have to wait for payment. The proposal was also dependent on the company succeeding in any litigation against Tong Hup Seng and Guobena (see 47).

(7) None of the creditors who opposed the grant of a winding-up order filed affidavits stating reasons for their opposition. From what was said in court or seen in letters exhibited by Dayang, they were all mere expressions of willingness to give the company time to recover money from Tong Hup Seng and Guobena. That alone was not good enough a reason for opposing the winding-up, even if it represented the wishes of the majority (see 49).

(8) Accordingly, the order made on 12 April 2002 to wind up Dayang is to stand.

Cases referred to

Bateman Television Ltd And Another v Coleridge Finance Co Ltd

[1969] NZLR 794 (refd)

Cornhill Insurance Plc v Improvement Services Ltd And Others

[1986] 1 WLR 114 (folld)

Helicarr Consolidated Ltd v Royal Insurance Fire & General (NZ) Ltd

[1993] 2 NZLR 46 (folld)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd

[1980] 2 MLJ 53 (refd)

Pac Asian Services Pte Ltd v European Asian Bank AG

[1989] 3 MLJ 385 (refd)

Re Simpson Devp Investment (HK) Co Ltd

[1999] 1 HKLRD 202 (folld)

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd

[1992] 1 MLJ 313 (refd)

Taylors Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd

[1990] BCLC 216 (folld)

United Malayan Banking Corp Bhd v Richland Trade & Developmetn Sdn Bhd

[2000] 4 MLJ 670 (refd)

Wei Giap Construction Co (Pte) Ltd v Intraco Ltd

[1979] 2 MLJ 4 (refd)

Legislation referred to

Companies Act (Cap 50) ss 254(1)(e), 254(2)(a)

Insolvency Act 1986 [UK] s 123(1)(a)

Judgment

GROUNDS OF DECISION

1. Eastern Steel Services Pte Ltd, a judgment creditor, petitioned on 11 March 2002 for Dayang Construction & Engineering Pte Ltd ("Dayang") to be wound up under s 254(1)(e) of the Companies Act (Cap. 50) on the ground that Dayang is unable to pay its debts. As proof of insolvency, the petitioner relied on the provisions of s 254(2)(a) of the Act under which a company shall be deemed to be unable to pay its debts if:

"(a). a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;"

2. The petitioner stated in the Amended Petition that judgment in the sum of $200,090.30 together with pre-judgment interest and costs of $1,216.99 and $1,800 respectively were entered on 29 November 2001 against Dayang. On 5 December 2001, solicitors for the petitioner served on Dayang a letter demanding payment of the judgment sum, interest and costs. This demand letter, which was relied on for the purposes of s 254(2)(a) states:

"

YOUR REF:

OUR REF: FC/ES/2687/01/lit/ac

5 December 2001

M/s Dayang Construction & Engineering Pte Ltd

19 Kim Keat Road

#04-00 Fu Tsu Building

Singapore 328804

Dear Sirs,

D.C. SUIT NO. 4185 OF 2001/V

CLAIM BY EASTERN STEEL SERVICES PTE LTD

We refer to the above matter.

By way of service, we forward herewith a L.S. copy of the Judgment dated 29th November 2001 obtained against you.

TAKE NOTICE that unless the outstanding Judgment sum of S$200,090.30, interest thereon at the rate of 6% per annum calculated from the date of the Writ 23rd October 2001 till the date of Judgment 29th November 2001 and S$1,800.00 costs are paid to our clients or to us as our clients' solicitors within five (5) days from the date hereof, our clients will be proceeding as they deem fit for the recovery thereof.

Yours faithfully

Signed

Encl.

cc: clients

"

3. At the adjourned hearing of the Amended Petition on 12 April 2002, Counsel for Dayang sought an adjournment of four weeks as the company wished to apply for Judicial Management.

4. Goh Eng Soo ("Goh"), a director of Dayang, filed an affidavit on 4 April 2002 to oppose the winding-up. He admitted that the company's unsecured creditors were owed approximately $1.5 million. But the company's inability to pay its creditors was largely due to the company being owed substantial sums of money by two main trade debtors, Tong Hup Seng Construction Co Pte Ltd ("Tong Hup Seng") and Guobena Sdn Bhd ("Guobena"). Legal proceedings against both trade debtors were intended. Moreover, the company needed time to complete and finalise the accounts and file for Judicial Management or apply for a Scheme of Arrangement. Several creditors supported the adjournment. Goh claimed that creditors representing 70% of the total value of the debts owed by the company opposed the winding-up.

5. The petitioner and other creditors who supported the winding-up, opposed the adjournment. Ee Teck Siew ("Ee"), the petitioner's Finance Manager, in 5 and 11 of his affidavit filed on 11 April 2002 deposed that the petitioner had not received any payment or any concrete payment proposal from Dayang; the petition was based on Dayang's failure to pay on the judgment. From notices received by the petitioner, creditors who supported the winding-up amounted to $444,569.10 out of $771,342.63 of the updated list of parties wishing to attend the hearing of the Amended Petition. This represented more than 50% in value of those creditors wishing to attend.

6. After hearing arguments and on the evidence before me (and detailed below), the application for an adjournment was refused; an order was made for Dayang to be wound up.

7. On 18 April 2002, M/s Madhavan Partnership acting in place of M/s Anthony Wee Jin requested further arguments. At that stage, the winding-up order had not yet been perfected. I permitted the company and those creditors opposing the Amended Petition, another opportunity to be heard. After hearing full arguments, I maintained the winding-up order. I now publish the reasons for my decision.

8. At the hearing on 30 April 2002, Counsel for Dayang contended that there was no affidavit verifying the Amended Petition at the time the order to wind-up the company was made. The Official Receiver, as it transpired, had declined to act as liquidator and consent of private liquidators had to be sought. The Petition was amended to cater to the Official Receiver's decision. The other amendment to the Petition was to correct an error in the registered address of Dayang. In my view, a further affidavit was not required as there were no substantial changes to the original Petition. The amendments were obvious and largely consequential.

9. Counsel for Dayang also contended that the 5 December letter was not a statutory demand within s 254(2)(a) of the Act. The demand letter was defective in two respects. Firstly, it did not refer to a period of three weeks for payment. The notice period was five days. Secondly, it contained no warning that the company would be wound up if the company did not meet the demand. Consequently, the Amended Petition must fail.

10. The objection raised questions concerning the interpretation and operation of the Act relating to proof of the insolvency of the debtor company in winding-up proceedings.

11. There was no dispute that the letter dated 5 December 2001 demanding payment of a judgment debt was properly served on Dayang at its registered office. The judgment, which was undisputed and was admittedly due, remained unsatisfied.

12. It was common ground that there is no form of notice prescribed in the Companies Act or Companies Winding Up Rules.

13. S 254(1) of the Companies Act (Cap.50) sets out the various grounds under which a company may be wound up. In this case, the petitioner relied on subsection (e), namely, a company may be wound up if it is unable to pay its debts. The insolvency of a company may be established in different ways. A petitioning creditor may or may not avail itself of the provisions of s 254(2) to prove the insolvency of a company. S 254(2)(a) affords creditors who are owed more than $10,000 a simple and convenient means of establishing ground (e).

14. On a plain and ordinary reading of s 254(2)(a), two separate sets of statutory requirements are discernible; one for the creditor and

the other is for the debtor company to comply.

15. The statutory requirements of sub-section (a) that pertains to the creditor are:

> (a) the debt must be in excess of $10,000;
>
> (b) the written demand to pay the sum due must be under the hand of the creditor or his authorised agent;
>
> (c) the demand has to be served on the debtor company by leaving it at its registered address.

16. Unless the creditor has fully complied with the requirements imposed by sub-section (a), the statutory demand would be defective. The Court of Appeal in ***Pac Asian Services Pte Ltd v European Asian Bank AG*** [1989] 3 MLJ 385 held that in order to raise the presumption of insolvency, there must be strict compliance with the statutory requirements. In that case, the statutory demand was not served on the company's registered address and that was found to be fatal.

17. As for the debtor company, it has to be mindful of the following statutory provisions under sub-section (a):

> (a) for three weeks after date of service of the demand letter, the debtor company fails to pay the sum due or to secure or compound it to the reasonable satisfaction of the creditor.

18. So, after service of the demand, the debtor company has three weeks to pay or secure or compound the debt to the reasonable satisfaction of the creditor. If the debtor company neglects to take any of those three specified options, after expiry of that period of three weeks, a petition to wind up the company may then be presented in reliance of the presumption of insolvency, which has arisen.

19. Having regard to the scheme, structure and language of sub-section (a), there is clearly no merit whatsoever in either of the alleged defects raised by Counsel for Dayang. In my view, the letter dated 5 December 2001 was an effective demand for the purposes of s 254(2)(a).

20. The three-week period is not a statutory requirement of the notice of demand itself. I agree with Le Pichon J who held in ***Re Simpson Devp Investment (HK) Co Ltd*** [1999] 1HKLRD 202 at p 202 that:

> "There was nothing in s.178(a) that required there to be any reference to three weeks in the demand. The three-week period in s.178 (1)(a) was relevant only in the context of a company failing or neglecting to pay a debt that was not disputed on bona fide grounds within that period."

21. In ***Re Simpson Devp Investment (HK) Co Ltd***, the demand letter in question did not refer to the period of three weeks for payment. The letter demanded payment within six days of all sums advanced by way of general banking facilities. It went on to further state that failing repayment, proceedings would be issued against the company for recovery of all sums outstanding, interest and legal costs as well as possession of the properties mortgaged as security for the advances. The amount outstanding and due to the petitioner, the Hongkong and Shanghai Banking Corporation was in excess of HK$52 million.

22. Like Dayang, the Hong Kong company opposed the petition on the ground that there was no statutory demand within s178(1)(a) of the Companies Ordinance (Cap. 32). Counsel submitted that the letter was "just a simple demand letter". He argued that for the presumption of insolvency to arise under s178(1)(a), there had to be a reference to a period of 21 days for payment. Le Pichon J rejected his submissions.

23. In ***Sri Hartamas Development Sdn Bhd v MBF Finance Bhd*** [1992] 1 MLJ 313, a decision of the Malaysian Supreme Court, MBF Finance Bhd as judgment creditor petitioned on 17 January 1988 to wind up the judgment debtor, Sri Hartamas Development, on the back of a statutory demand served on the latter on 27 December 1988. It was argued that the statutory demand was bad as the company was not given the statutory three weeks notice but instead a shorter time to comply with the demand. Consequently, the presumption of insolvency

did not arise.

24. The Supreme Court held that the demand letter with a shorter notice period than 21 days was not bad or invalid. At p 313 of the report:

> " (4) Although the respondent has stated incorrectly in the notice of demand that the debt must be paid within 21 days from the date of the notice, that does not affect the validity of the demand to pay the sum due. The three weeks in the section refer to the neglect to pay before the presumption of inability to pay debts arises under the section and is not a requirement relating to the notice of demand itself."

25. It is also not a statutory requirement of sub-section (a) to spell out or indicate to the recipient in the demand letter the two other specified options, other than payment: ***Helicarr Consolidated Ltd v Royal Insurance Fire & General (NZ) Ltd*** [1993] 2NZLR 46. To that extent, the sub-section does not require any explicit reference in the demand to the consequence the sub-section imposes or to warn the company of the creditor's intention of instituting winding-up proceedings if satisfaction was not given.

26. If there is some other unexpressed requirement with which a demand must comply in order to fall within the subsection, it can only arise by implication as a matter of statutory construction. Having regard to accepted guides to legislative intention, no proper implication within the express words of subsection (a) can arise to introduce in the demand letter a warning of winding–up proceedings.

27. Counsel for Dayang relied on ***Sri Hartamas Development Sdn Bhd v MBF Finance Bhd*** [1992]. At p 313 of report, the Supreme Court held:

> " (1) Although the demand in writing need not be in any special form, it must strictly comply with the requirements of s 218(2)(a) of the Companies Act 1965. The whole purpose of the demand is to warn the debtor of an impending petition."

That decision was also cited by the authors of ***The Singapore Companies Act - An Annotation Vol. 2*** by Walter Woon and Andrew Hicks at paras. [465]-[467].

28. I declined to follow ***Sri Hartamas*** on this point. With respect, there is no legal basis for that view. It is not a legal imposition of s 254(2)(a), express or implied, that the creditor must indicate on the face of the demand the implications to the company and the detriment it may suffer if it fails to comply.

29. ***Sri Hartamas*** and the later decision of ***United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd*** [2000] 4 MLJ 670 both referred to ***Bateman Television Ltd And Another v Coleridge Finance Co Ltd*** [1969] NZLR 794. North P recounted and accepted counsel's reasoning there that since the object of the demand was to warn the debtor that a winding–up petition may be presented, it did not matter whether or not the demand was signed by or on behalf of the creditor. The decision in ***Bateman Television*** was read as suggesting that the statutory demand must warn the debtor company that a failure may lead to winding-up proceedings.

30. That suggestion was commented upon and, rightly so, not adopted by the Wellington Court of Appeal in ***Helicarr Consolidated Ltd v Royal Insurance Fire & General (NZ) Ltd*** [1993] 2NZLR 46. It is plain from the observations of the Wellington Court of Appeal, that there is no legal requirement that a statutory demand must contain a warning.

31. The Wellington Court of Appeal held at p 46:

> " 1. Section 218(a) of the Companies Act 1955, sets out one of three circumstances in which a company is deemed to be unable to pay its debts. A notice must be served on the company requiring it to pay the sum due and then the company must have neglected for three weeks after service to pay the sum or to secure or

compound it to the reasonable satisfaction of the creditor. The section does not require that the notice should do more than demand payment and there is no implied requirement that the notice inform the company of the other two alternatives available to it, namely securing or compounding. …"

32. McKay J at p 49 observed:

> "The section was considered by this Court in *Bateman Television Ltd And Another v Colderidge Finance Co Ltd*, where the issue was whether a demand under the section in its then form could be signed by an agent. In his judgment North P said at p 803:
>
> > 'As Mr. Fox pointed out, there is no prescribed form of notice and the whole object of the demand was to warn the debtor of an impending petition and accordingly whether the notice be signed by the creditor personally or by another on his behalf adds nothing to the value of the notice.'
>
> This statement might suggest that before a demand could be relied on for the purposes of the section, it must warn the debtor that failure to comply may lead to a petition for winding up. **The section does not in terms so require, but whether or not such a requirement is to be implied, it would seem to be both desirable and prudent, in view of the fact that the Court has a discretion whether or not to make an order for winding up.**"

[emphasis added]

33. I am in complete agreement with McKay J's observations. The form in which a statutory demand is expressed ought to be approached with the general discretion of the Court in mind. Ultimately, it is for the Court to determine whether a company should be wound up in the exercise of its discretion. In this case, it was not suggested at all that Dayang was in fact misled by the December demand.

34. I hasten to add that unlike in Singapore, a form of statutory notice is prescribed by English legislation. The corresponding provision to s 254(2)(a) is s 123(1)(a) of the Insolvency Act 1986. The sub-section expressly states that the written demand is to be in a form prescribed. The form prescribed in the Insolvency Rules draws the debtor's attention to 21 days to deal with the demand or a winding-up order could be made in respect of the company. That is also the case in Australia. Since 23 June 1993, the statutory notice is in a form prescribed.

35. I would add that in the particular circumstances of this case, from the matters set out in the Amended Petition and the two affidavits that were filed before the hearing on 12 April 2002, I was satisfied that the company was unable to pay its debts.

36. It was clear from the Amended Petition that the petitioner had an undisputed judgment debt, it was due and Dayang had neglected to pay it. I am entitled to accept that as prima facie proof, and inference could be drawn, that the company was unable to pay its debts within s 254(1)(e): ***Cornhill Insurance Plc v Improvement Services Ltd And Others*** [1986] 1WLR 114; ***Taylors Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd*** [1990] BCLC 216.

37. Le Pichon J in ***Re Simpson Devp Investment (HK) Co Ltd*** at p 204 of the report said:

> "Proof by a creditor that the debt has not been paid within a reasonable time is prima facie evidence that the company is insolvent where the company has no bona fide basis on which to dispute the debt in question. See Re Globe New Pattern Iron

> and Steel Co (1875) LR 20 Eq 337. Therefore irrespective of whether the letter constitutes a statutory demand, it is open to the court to infer that the company is unable to pay its debts with s. 177(1)(d) where it was under an undisputed obligation to pay a specific sum and failed to do so. See Re United Strength Ltd [1992] 1 HKC 386 and Halsbury's Laws of Hong Kong Vol6, para. 95.0978…"]

38. The explanation offered for Dayang's failure to pay on the judgment was cash flow constraints. The reason given by the Company to stave off the winding -up was for more time to pursue two trade debtors, Tong Hup Seng and Guobena who each owed the company $1,616,947.58 and $267,441.28 respectively. If Dayang was given this opportunity, the unsecured creditors stood a chance of full recovery of all debts owed to them by the company.

39. There were no on-going projects in hand and no future contracts in the pipeline. In a letter dated 19 January 2002 to a prospective client, Goh admitted the company had no working capital and therefore, it could not tender for new projects. In other words, the company was unable to sustain business activity in its situation.

40. The company was commercially insolvent. It had no available cash to settle the judgment debt. The Privy Council in ***Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd*** [1980] 2MLJ 53 at 54 approved a passage in Buckley on Companies Act dealing with commercial insolvency, that is, of the company being unable to meet current demands upon it. The passage reads:

> "In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: This is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it has not assets available to meet its current liabilities it is commercially insolvent and may be wound up."

41. Ee, in his affidavit filed on 11 April 2002, explained that the petitioner took out garnishee proceedings in December 2001 to enforce the judgment but was not successful. It was advised by M/s Rajah & Tann representing the garnishee, Tong Hup Seng, that there was no money due to Dayang.

42. Goh explained that Dayang had not sued Tong Hup Seng as the company's cause of action had only arisen of late. Be that as it may, I saw no reason to keep the company alive just to pursue a claim against Guobena and Tong Hup Seng when that could be left to liquidators who had consented to act in the winding-up of the company. In the hands of those liquidators, any possible potential conflict of interest would be avoided. Dayang's Counsel had earlier informed the Court that Goh's brother is a director of Tong Hup Seng. Counsel during further arguments confirmed once again on 28 May 2002 that Goh's brother and father are directors of Tong Hup Seng.

43. From the audited accounts for the financial year ended 31 December 1999, amounts owing by directors stood at $332,185. Loans to directors increased significantly in the following financial year to $962,186. The unaudited balance sheet for the financial year ended 31 December 2001, exhibited in Goh's first affidavit, showed the directors' borrowings reduced to $320,728.67. That appeared to contradict the management accounts for the same period exhibited in Goh's second affidavit. The management accounts for the financial year ending 31 December 2001 revealed that the directors of the company owed $846,585.33 to the company whilst directors' fees due from the company were $400,000.

44. In year 2001, when the company was experiencing serious cash flow difficulties, directors' borrowings were as high as $846,585.33. I viewed the initiatives to stop the winding-up for the reasons given with some reservations. With liquidators in place, the directors would face the possibility of having to repay these loans and stand in the queue like the rest of the unsecured creditors to recover any sum due to them from the company as directors.

45. Goh in 9 of his second affidavit deposed:

> " It is respectfully stated that the fact that the Company and its directors are prepared to go to every length to save itself demonstrates the genuine manner in

which the Company will strive to maintain and achieve its obligations."

46. I was not persuaded by that declaration when the obvious thing for the directors to do, if they sincerely and genuinely wanted to ensure the company's survival, is repay their own substantial borrowings to the company. There was never any hint of an offer or pledge to repay the loans.

47. The proposed Scheme of Arrangement exhibited in Goh's second affidavit was skimpy and unconvincing. It glaringly omitted to take into account the substantial borrowings of the directors and solely focused on the trade debts of Tong Hup and Seng Guobena. Creditors were left to wonder when the proposal would take effect and the length of time they would have to wait for payment. The proposal was dependent on the company succeeding in any litigation against Tong Hup Seng and Guobena.

48. D'Cotta J in ***Wei Giap Construction Co (Pte) Ltd v Intraco Ltd*** [1979] 2MLJ 4 held that:

> "(2) in exercising its discretion, the court will have regard for the wishes of the majority of the creditors if they have good reason for opposing the petition.
>
> (3) in the exercise of its discretion it is the duty of the court to weigh all the relevant matters and decide whether the *prima facie* right of the petitioning creditors to an order should give way to the wishes of some creditors who assign no reason for their opposition or who merely state that in their view the appellants might be in a position to pay their debts if allowed to continue to operate."

49. None of the creditors who opposed the grant of a winding-up order filed affidavits stating reasons for their opposition. From what was said in Court or seen in letters exhibited by Dayang, they were all mere expressions of willingness (stemmed probably from a promise of full satisfaction of their debts or claims) to give the company time to recover money from Tong Hup Seng and Guobena. That alone, in my view, was not good enough a reason for opposing the winding-up, even if it represented the wishes of the majority.

50. Obviously, the directors recognised and acknowledged the company's insolvency. That is to be inferred from their desire to place the company under Judicial Management or to apply for a Scheme of Arrangement.

51. After seeing the second affidavit of Goh and hearing further arguments, I was more convinced than ever that the company was commercially insolvent and unable to pay its debts.

52. Accordingly, I ruled that the order made on 12 April 2002 to wind-up Dayang is to stand. I also awarded the petitioner costs (to be treated as winding-up costs) fixed at $4,500.

Sgd:

BELINDA ANG SAW EAN

JUDICIAL COMMISSIONER

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