Re CEP Instruments Pte Ltd (in liquidation)
[2004] SGHC 206

Case Number : OS 1130/2003, SIC 2678/2004

Decision Date : 14 September 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Kenneth Tan SC (Kenneth Tan Partnership) and Eric Low (Unilegal LLC) for petitioning creditor; Gerald Tham (Yeo Wee Kiong Law Corporation) for liquidators; Lee Eng Beng and Chua Beng Chye (Rajah and Tann) for contributories

Parties : —

Civil Procedure – Judgments and orders – Unless order – Failure to comply with unless order – Judgment given in default – Whether failure to obey unless order intentional and contumelious – Whether prejudice caused to the other party – Whether there was cause to go behind the default judgment obtained.

Civil Procedure – Summary judgment – Determination of questions of mixed fact and law to be tried as preliminary issues – Whether default judgment obtained should be set aside – Whether proof of debt based on default judgment should be rejected or admitted – Whether application for summary judgment appropriate – Order 14 r 12 Rules of Court (Cap 332, R5, 1997 Rev Ed).

14 September 2004

Lai Siu Chiu J:

The background

1 L & M Geotechnic Pte Ltd ("L & M") was the petitioner in Companies Winding Up No 112 of 2002 ("the Winding Up Proceedings") against CEP Instruments Pte Ltd ("the Company") for an unsatisfied judgment debt obtained on 22 July 2002 in Suit No 1564 of 2001 ("the Suit") in the principal sum of $975,016.75 (excluding interest, statutory interest and costs). On 11 October 2002, the court granted a winding up order against the Company and Mr Lim Lee Meng and Mr Chee Yoh Chuang (collectively referred to as "the Liquidators") were appointed the liquidators.

2 Following the Winding Up Proceedings, L & M filed a proof of debt ("the Proof of Debt") on 11 November 2002 in the aggregate sum of $1,032,557.27 (calculated as at the date of the winding up order) for the judgment debt.

3 On 6 August 2003, the Liquidators filed this originating summons ("the OS") wherein they prayed for the following orders:

(a) that the Liquidators be at liberty to admit in full, without further proof, the Proof of Debt lodged with the Liquidators by L & M;

(b) that the Liquidators be at liberty to declare and pay dividends to L & M out of the assets of the Company in the hands of the Liquidators, on the basis that the Proof of Debt is admitted in full;

(c) that the Liquidators' costs of and occasioned by this application be paid out of the assets of the Company in the hands of the Liquidators.

The application was supported by an affidavit ("the first affidavit") filed by one of the Liquidators, *viz* Chee Yoh Chuang ("Chee").

4 On 28 November 2003 an order was granted by Judith Prakash J on the OS, by consent of the Liquidators, L & M and the contributories of the Company. L & M and the contributories agreed to file their affidavits and present their witnesses for cross-examination for purposes of the adjudication of the Proof of Debt. The contributories agreed to bear, jointly and severally, all costs that might be awarded against the Company and all costs and expenses reasonably incurred by the Company and/or the Liquidators in the proceedings. The contributories further agreed to indemnify the Company and the Liquidators for all costs, expenses and liabilities (including any act or omission) that might be incurred by the contributories in the name of the Company and/or the Liquidators in connection with the adjudication of the Proof of Debt.

5 On 17 May 2004, L & M applied to court under Summons in Chambers No 2678 of 2004 ("the Application") for these orders:

(a) the following issues of mixed fact and law be tried as preliminary issues as regards the admission or rejection of L & M's Proof of Debt lodged on 11 November 2002 in Companies Winding Up No 112 of 2002;

(i) whether the default judgment obtained in the Suit should be set aside and if so on what terms;

(ii) in any event, whether L & M's Proof of Debt based on the judgment should be rejected or admitted;

(b) until the determination of the preliminary issues, the exchange of affidavits of evidence-in-chief of the witnesses be deferred to 28 June 2004 or such other date as the court should determine;

(c) the costs of the Application be costs in the cause.

L & M relied on the first affidavit filed by Chee to support the Application.

6 I heard the Application on 27 May 2004 and made the following orders:

(a) the judgment dated 22 July 2002 obtained by L & M in the Suit was to stand;

(b) the Liquidators were to accept the Proof of Debt filed by L & M on 11 November 2002;

(c) costs of the Application to L & M and the Liquidators were to be taxed unless otherwise agreed;

(d) the hearing dates of 2 to 6 August 2004 were to be vacated.

7 The shareholders/contributories of the Company, *viz* CEP Holdings Pte Ltd, Teo Koon Eng, Teo Li Lin, Annie Koh Wee Meng, Goh Hung Huat, Peter Chee Yam Sin, Chwee Lin Hoo and Poh Cher Kin have now appealed against my decision in Civil Appeal No 39 of 2004.

The Application

8 In the first affidavit filed in support of the OS and relied on by L & M for the Application,

Chee set out the history of the Suit which culminated in the Winding Up Proceedings. He deposed to the following facts:

(a) On 21 September 2001 the Company commenced Magistrate's Court Suit No 28487 of 2001 ("the MC Suit") against L & M claiming $21,135.29, interest and costs;

(b) On 18 October 2001, L & M filed a defence and counterclaimed the sum of $975,016.75 as well as damages, interest and costs against the Company in the MC Suit;

(c) On 2 November 2001, L & M applied to the High Court in Originating Summons No 601642 of 2001 ("the transfer application") to transfer the MC Suit to the High Court because the amount of its counterclaim exceeded the jurisdiction of the subordinate courts. The transfer application was granted on 16 November 2001. The proceedings in the MC Suit were transferred to the High Court and renumbered as the Suit;

(d) On 21 November 2001, the Company applied to court to strike out L & M's defence and counterclaim and for summary judgment on its claim;

(e) On 7 January 2002, the striking-out application was dismissed with costs and L & M was granted unconditional leave to defend the Company's claim with costs in the cause;

(f) On 10 January 2002, the Company filed its reply and defence to L & M's counterclaim;

(g) On 4 February 2002, the court made the following directions:

(i) the parties were to file their respective lists of documents by 11 March 2002;

(ii) the Company was to file a summons for directions by 18 March to be heard on 22 March 2002;

(h) L & M filed its list of documents on 11 March 2002 but the Company only did so on 14 March 2002;

(i) On 18 March 2002 the Company filed the summons for directions. The application was heard on 22 March 2002 and it was ordered that:

(i) the affidavits of evidence-in-chief ("the AEICs") were to be filed and exchanged by 28 June 2002;

(ii) the Company was to set down the Suit for trial by 10 July 2002;

(iii) hearing of the Suit was fixed from 12 to 16 August 2002;

(j) The Company did not file or exchange AEICs by 28 June 2002 nor did it set down the Suit for trial by 10 July 2002;

(k) At a pre-trial conference held on 17 July 2002:

(i) counsel for the Company informed the Registrar that he had told his clients of the court's directions but he had not received instructions to prepare the AEICs or to set the Suit down for trial;

(ii) counsel for L & M informed the Registrar that his client was ready with its AEICs and that it was agreeable to an "unless order" being given for the exchange of AEICs by 19 July 2002;

(iii) the court then made an "unless order" granting leave to the Company to exchange AEICs by 19 July 2002 and to set down the Suit for trial by 26 July failing which the Suit would be dismissed with costs and judgment would be entered for L & M on the counterclaim;

(l) On 19 July 2002, the Company's solicitors wrote to L & M's solicitors to say that as they had received no instructions from the Company, they were unable to exchange AEICs that day;

(m) Accordingly, pursuant to the "unless order", L & M entered judgment on 22 July 2002 against the Company on its counterclaim and the Company's claim was dismissed with costs.

9 From his investigations, Chee discovered that exactly two weeks after L & M filed its counterclaim, *viz* on 31 October 2001, the Company purported to sell to its parent company, CEP Holdings Pte Ltd ("CEP Holdings"), its following assets:

(a) at $1,800, office computers with a book value of $13,479.53;

(b) at $48,000, three motor vehicles with an aggregate book value of $60,603.58;

(c) at $8,000, instruments with an aggregate book value of $17,185.42;

(d) at $20,000, plant and machinery with an aggregate book value of $32,513.71.

10 Chee noted that on 8 November 2001, two days after the Company was served with L & M's transfer application, the directors (Lew Chin Ying, Teo Li Lin, Annie Koh Wee Meng, Tjhung Praewpan) of the Company declared what purported to be interim dividends of 500% for the year ending 31 December 2001, amounting to $600,000 before, and $453,000 after, tax. The net dividends were paid out on 22 November 2001. Further, on 7 January 2002, the directors of the Company purported to declare interim dividends again of 500% for the year ending 31 December 2002 amounting to $600,000 before, and $453,000 after, tax. The net dividends were distributed immediately that same day.

11 On 18 January 2002, a company called CEP Services Pte Ltd ("CEP Services") was incorporated, which registered address at 30B Hillview Terrace was also the registered address of the Company as well as CEP Holdings. The directors and shareholders of CEP Services were/are Teo Koon Eng and Darrell Teo Ter-Nern. Teo Koon Eng was also a shareholder of the Company while Darrell Teo is also a shareholder of CEP Holdings. The other shareholders of CEP Holdings are Teo Koon Geok Tom, Lew Chin Ying, Teo Li-Jien Regina and Teo Ter-Yi Terence all of whom (together with Darrell Teo) reside at 115 Duchess Avenue, Singapore 269153. All six shareholders hold equal shares in CEP Holdings.

12 Chee deposed that on 1 February 2002, the Company purported to sell its stock (with a book value of $256,693) to CEP Services for $219,352.30. On 8 February 2002, the directors of the Company purported to declare interim dividends of 500% for the year ending 31 December 2002 amounting to $600,000 or $453,000 after tax.

13 On 1 March 2002, the Company sold its furniture, fittings, office equipment, instruments, storage racks and air-conditioners to CEP Holdings for $26,400 against a book value of $27,611.80.

Fifteen days later (on 15 March 2002), when the Company was already insolvent by reason of the events set out in earlier paragraphs, the Company purported to declare and pay out interim dividends of 191.66667% amounting to $230,000 before tax and $173,650 after tax, for the year ending 31 December 2002.

14 On 15 July 2002 (after it had failed to comply with the deadline to file and exchange AEICs by 28 June and to set down the Suit for trial on 10 July), the Company purported to sell its renovations, tiling and painting to CEP Holdings for $3,000. This was followed on 22 July 2002 by L & M obtaining judgment against the Company for its default of the "unless order". L & M then made a demand on 24 July 2002 for its judgment sum within seven days. This was followed by a statutory notice under s 254(2)(a) of the Companies Act (Cap 50, 1994 Rev Ed). Neither the Company nor its solicitors responded to L & M's demands.

15 On 8 August 2002, the Company requested Singapore Network Information Centre to transfer the Company's domain name "cep.com.sg" to CEP Services without any consideration.

16. The Company did not oppose the winding up proceedings of L & M and, as at 11 October 2002, the date of the winding up order, the Company had the following assets left:

(a)	Trade debtors	$20,063.75
(b)	Cash at bank	$ 397.88
(c)	Goods and services tax claimable	$ 92.21
(d)	Prepayments	$ 3,992.44
Total		$24,546.28

17 Chee's investigation revealed that prior to the declaration of 500% dividend on 8 November 2001, the Company declared a dividend of 20.8333% amounting to $18,500 for the financial year ending 31 December 1998, despite having retained profits amounting to $1,300,094 available for distribution that year. In fact, the Company had equally substantial retained profits for the years 1997, 1999 and 2000 despite which, no dividends were declared for those years. The retained profits of $1,455,560 from earlier years were carried forward to 2001 and, together with the profits of $30,962 made that year, the total profits retained were $1,486,522. After payment of the net dividend amounting to $453,000 in November 2001, the retained profits carried forward to 2002 were $1,033,522 ($1,486,522 – $453,000).

18 Chee noted that the Company made no profits for the period 1 January to 11 October 2002 notwithstanding which the Company paid out the entire (balance) retained profits of $1,033,522 as dividends in three tranches, *viz* on 7 January, 8 February and 15 March 2002.

19 Based on his investigations, Chee deposed that he arrived at the following conclusions:

(a) The Company's directors and contributories systematically stripped the Company of its assets and transferred them to related parties of the Company and/or those of its directors and/or contributories, leaving the Company an empty shell;

(b) The deliberate steps in sub-para (a) above were taken two weeks after L & M filed its counterclaim;

(c) The actions of the Company's directors and contributories were done with the intention:

(i) of eventually abandoning the Company's defence to L & M's counterclaim;

(ii) of frustrating any judgment which L & M might obtain on its counterclaim;

(d) The directors and contributories wilfully abandoned the Company's defence to L & M's counterclaim by withholding instructions to the Company's solicitors on preparation of the AEICs and setting the Suit down for trial. Indeed, no reasons were given for their inaction;

(e) The directors and contributories were prepared to allow L & M to enter judgment for the reason that the Company's assets had, by then, been dissipated and transferred out. L & M would thus recover nothing on its judgment.

20 Chee also relied on the following facts for his conclusions:

(a) The Company did not appeal against the court's "unless order";

(b) After L & M had entered judgment, the Company did not challenge or attempt to set aside the judgment;

(c) The Company failed to respond to L & M's demands for payment of the judgment debt;

(d) The Company failed to challenge the judgment after L & M served on it the statutory notice under s 254(2)(a) of the Companies Act and even after the Winding Up Proceedings were instituted;

(e) Neither the Company nor its contributories opposed the winding up order; no one even appeared at the hearing;

(f) The Company's failure to comply with the "unless order" was intentional and contumelious.

21 Given the facts set out in the first affidavit and his conclusions thereon, Chee submitted that the Proof of Debt filed by L & M on 11 November 2002 on the basis of the judgment should be admitted in full without further proof. There was no reason for the Liquidators to "go behind" the judgment which was properly and fairly obtained. There was no question of fraud or collusion between the Company and L & M.

22 Chee pointed out that apart from L & M, only one other creditor (BSL Corporate Services Pte Ltd) of the Company, had filed a proof of debt. Another creditor, according to the Company's Statement of Affairs, was a director Lew Chin Ying who was owed $2,698.59. However, she had not filed a proof of debt for her claim, nor was her debt reflected in the Company's unaudited balance sheet as at 11 October 2002 which showed the following liabilities:

(a)	Trade creditors	$ 5.25
(b)	Goods and services tax payable	$ 8.91
(c)	Provision for taxation	$ 0.24
(d)	Deferred taxation	$2,302.00

Total $2,316.40

All taxes had since been fully paid.

23 I note from a letter from the contributories' solicitors dated 9 April 2003 to the Liquidators' solicitors (exhibited in one of the affidavits filed in the OS), that the Liquidators had clawed back a sum of $1,043,661.65 from the contributories. At the date of hearing of the OS and the Application, that sum had been reduced to about $900,000 as the Liquidators had disbursed some moneys therefrom in payment of legal fees and part of their own costs.

24 I should mention that L & M had separately applied for security for costs (of $60,000) in the OS from the contributories by way of Summons in Chambers No 1941 of 2004 on 8 April 2004. The contributories opposed this application in which regard Teo Khoon Geok ("Teo") filed an affidavit on behalf of CEP Holdings and on behalf of the seven other contributories.

25 As Teo's affidavit (filed on 5 May 2004) also touched on L & M's judgment, it was necessary to look at it in considering the Application. In his affidavit, Teo justified the Company's inaction following its unsuccessful attempt to strike out L & M's defence and counterclaim, in the following paragraphs:

> 10 As the Company's claim against L & M was only for the sum of S$21,135.29, the Company had to weigh the cost of pursuing the action to trial against the amount recoverable should the Company succeed in its claim. What the Company had initially thought was a simple claim in the Subordinate Court for the small sum of S$21,135.29 had escalated into a full 5-day High Court trial.
>
> 11 Contrary to L & M's assertions in their 2nd Affidavit, the Company did not simply ignore the timelines [for exchange of AEICs and setting down the Suit for trial]. The Company was actively seeking legal advice from its solicitors and assessing its legal position. L & M is not in any position to assume and allege that the Company made no efforts at all. L & M possesses no personal knowledge of the Company's affairs. L & M came about its conclusion by reading more into the Company's solicitors' letters than what was stated and by drawing its own inferences.
>
> 12 The fact was that the Company assessed the situation and made the decision to cease to take further steps in the litigation. The Company eventually did not meet the deadline for the exchange of affidavits and L & M proceeded to enter default judgment on 22 July 2002.
>
> 13 Unfortunately, this was a wrong decision. As mentioned in my earlier Affidavit filed on 30 October 2003 in Companies Winding Up No 112 of 2002/H, the Contributories acknowledge that this was a mistake and a poor judgment call on the part of the directors.
>
> 14 The Contributories would highlight, however, that this mistake was made in good faith and without dishonesty. Further, the Contributories are now disputing the Default Judgement and the admission of L & M's Proof of Debt purely as a point of principle, so that there is no miscarriage of justice and L & M would not get an unwarranted and unjustified windfall. The Contributories are disclaiming the surplus funds which have been returned to the Company and have given an irrevocable undertaking to the Court to donate the net proceeds of any distribution from the Company to the Straits Times Pocket Money Fund.

26 I should point out at this juncture that in the Winding Up Proceedings, Teo had filed an

affidavit on 30 October 2003 to support the contributories' application by way of Summons in Chambers No 6769 0f 2003 ("Teo's application") to, *inter alia*, remove the Liquidators, appoint new liquidators and that the contributories be authorised to take steps in the Company's name to contest the Proof of Debt and/or to set aside the default judgment of L & M. Teo's application was withdrawn with leave of court on 28 November 2003.

27 Teo had referred to the Suit and L & M's judgment in the affidavit he filed on 30 October 2003. He deposed that L & M's counterclaim came as a complete surprise to the Company as L & M had not complained of the supposedly defective instruments supplied by the Company nor sought compensation for the same. He opined that L & M's inexplicable delay in asserting its claim cast substantial doubts on the *bona fides* of its counterclaim, the basis of which was wholly misconceived and unsupported by facts or evidence. He added that the Company viewed the counterclaim as frivolous and filed as a ruse to delay prosecution of the Company's claim. Consequently, the Company proceeded to apply for summary judgment and to strike out L & M's counterclaim. He said the Company was disheartened by the dismissal of its striking-out application. In his affidavit at para 138, Teo deposed:

> … In so far as the Company was concerned, L & M's suit was a baseless claim. The Company was under the mistaken impression that, if the company did not proceed with its claim against L & M, L & M would similarly not proceed with its counterclaim. The directors were of the view that that there was no point in wasting money to defend L & M's frivolous claim. The Company's claim was only for an amount slightly in excess of $20,000, and the Company was advised that legal fees for defending L & M's counterclaim in a trial would be around $250,000. Even if the Company succeeded, it was doubtful if any part of the fees could be recovered against L & M in view of their doubtful financial position. These factors resulted in the Company making the mistake of not taking any further steps in the action.

28 Given Teo's own strong belief that L & M's counterclaim was unmeritorious, his and the other contributories' failure to instruct the Company's solicitors to defend the claim vigorously instead of allowing L & M to enter default judgment thereon is all the more suspicious. His excuse as to the Company's mistaken belief rings hollow because at all times the Company had legal advisers for the Suit.

The submissions

29 Counsel for L & M pointed out that the dispute in the Suit related to a sub-contract between the parties going back to 1999. I noted from his affidavit filed in support of Teo's application, that Kumagai-Sembcorp Joint Venture ("the main contractor") was awarded the main contract for the Changi Airport Mass Rapid Transit line by the Land Transport Authority some time in 1998–1999. The main contractor retained L & M as a specialist sub-contractor for the supply, installation and monitoring of the instrumentation works in the project. In turn, after inviting the Company on 22 January 1999 to quote, L & M on 24 March 1999 awarded to the Company the sub-contract for the supply of instruments for the project. The court was informed that if the Company's claim and L & M's counterclaim were re-litigated, it meant that representatives from the main contractor would have to be called as witnesses (confirmed by counsel for the contributories). This factor was one of the reasons put forward by counsel to oppose the contributories' attempt to re-open the Suit. L & M would suffer irreparable prejudice if witnesses from the main contractor were no longer available in the event that its default judgment was set aside and the Suit went for trial.

30 Counsel for the contributories argued that his clients' altruistic intentions (in wanting to donate the Company's moneys to the Straits Times Pocket Money Fund instead of unjustly enriching

L & M) showed they had no ulterior motives for their actions other than wanting to see justice done.

The decision

31 I viewed the statements in Teo's affidavit set out in [25] above with considerable scepticism. I was equally unconvinced of the supposedly altruistic intentions expressed in Teo's affidavit, which in any case is not a relevant consideration for the purposes of the Application. What Teo alleged in his affidavit was also effectively rebutted by an affidavit filed on L & M's behalf by Koh Chee Yong ("Koh") on 29 April 2004, which I shall turn to later.

32 It bears remembering what Chee had deposed to in his affidavit on how L & M came to obtain default judgment against the Company on its counterclaim. Chee ([8(k)] *supra*) had exhibited to his affidavit[1] the exchange of letters between solicitors for L & M and for the Company on 19 July 2002. L & M's solicitors' letter stated:

> We refer to the Order of Court made at the pre-trial conference on 17 July 2002.
>
> Please be advised that we are able and ready to exchange Affidavits of Evidence-in-Chief with you today, in compliance with the aforesaid Order of Court.
>
> Please confirm whether you are able to effect the aforesaid exchange of Affidavits of Evidence in Chief with us at 4.00 pm today.

It drew the following reply from the Company's solicitors:

> We refer to your letter of even date
>
> We have no instructions from our clients and our clients are therefore unable to exchange the Affidavits of Evidence-in-Chief today.

33 In his affidavit, Koh pointed out that Teo's allegation (in para 9 of his affidavit) that the Company was unable to comply with the limited timelines ordered was false. It suggested, which was not the case, that the Company defaulted only because it had attempted unsuccessfully to meet the deadlines imposed by the court. Nothing could be further from the truth. This was borne out by the fact that no attempts were made by the Company to obtain extensions of time to comply with the court's "unless order". There was no protest either to its solicitors or to L & M's solicitors on the default judgment; it was simply ignored. Koh deposed that the persons who controlled the Company, *viz* the contributories, deliberately chose *not* to give instructions to the Company's then solicitors, even though they had been told of the consequences of non-compliance by their solicitors' letter dated 17 July 2002 where it was said:

> The Registrar has accordingly ordered that parties exchange their respective witnesses' AEIC by close of business on Friday, 19 July 2002, failing which Judgment with costs will be entered against the defaulting party.

34 I share Koh's sentiments. What was stated in paras 11 and 12 ([25] *supra*) of Teo's affidavit was misleading and untrue. As Chee said in the first affidavit, the contributories made a conscious and deliberate decision on the Company's behalf not to contest L & M's counterclaim. Instead, they embarked on an asset stripping exercise of the Company.

35 What caused the contributories' subsequent *volte-face*? It was the Liquidators' recovery from

them of the Company's moneys which they had paid themselves by way of dividends. This is obvious from the chronology of events set out in [8] to [15] above, coupled with the fact that the Liquidators recovered back $1,043,661.65 from the contributories on 10 April 2003. Thereafter the contributories were galvanised into action, first by Teo's application in the Winding Up Proceedings (albeit withdrawn subsequently) and then by their role in the OS as seen in the Order of Court dated 28 November 2003. Nothing else had changed. If the contributories were worried about recovering any costs from L & M in defending the counterclaim, that would still be a deterring concern as L & M's financial position had not improved since April 2003.

Conclusion

36 I took a dim view of the contributories' conduct in the events leading up to L & M's default judgment and the Winding Up Proceedings subsequent thereto. Their behaviour was reprehensible and I informed their counsel accordingly at the hearing. Teo's affidavits reviewed above contained either untruths or half truths. His explanation for his and the inaction of his fellow contributories in not defending L & M's counterclaim or pursuing the Company's claim was incredible; I rejected it totally.

37 From the time L & M obtained judgment (on 22 July 2002) until the filing of this OS (6 August 2003), more than a year had elapsed. The Company on its part commenced the MC Suit on 21 September 2001 while L & M's counterclaim was filed on 18 October 2001; these events took place almost three years ago. Counsel for L & M informed the court that his clients wanted closure, after all these many years. The delay by the contributories in re-opening the Suit had prejudiced L & M.

Order 14 r 12 of the Rules of Court

38 The Application had been made under O 14 r 12 of the Rules of Court (Cap 322, R 5 1997 Rev Ed), which states:

> (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter where it appears to the Court that —
>
> (a) such question is suitable for determination without a full trial of the action; and
>
> (b) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.
>
> (2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks fit.

39 As to when an application under O 14 r 12 is appropriate, I refer to *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 relied on by L & M. There, the appellate court held that questions of construction of documents are suitable for decision as preliminary points but they may not be so if there are also disputes as to the factual matters affecting the point of construction. On the particular facts of that case, the Court of Appeal felt that there would be no savings of time or costs in respect of the trial of the action (and the counterclaim) by deciding the preliminary issue of whether the claim was in fact time barred.

40 In our case, the contributories did not and indeed could not, dispute the chronology of events in relation to the MC Suit and the Suit, leading up to the judgment of L & M as well as the Winding Up Proceedings and winding up order. There were no factual disputes that needed to go to

trial in relation to the chronology of events.

41 Chee had described the Company's failure to comply with the "unless order" as intentional and contumelious. L & M referred to the Court of Appeal's decision in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750 for the factors to determine when the conduct of a party who failed to comply with an "unless order" would be considered to be intentional and contumelious. The following determinants were some of the holdings in the case:

(a) The onus was on the defaulting party to show why his failure to obey the order did not warrant the striking-out of the claim. The defaulter must establish that there was no intention to ignore the peremptory order and that failure to obey was due to extraneous circumstances;

(b) The party seeking to escape the consequences of his default must show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances;

(c) A crucial factor was whether or not there had been prejudice to the other party. The nature of the relief sought by the party in default and whether or not the penalty imposed was proportionate to the default in question were also relevant. In short, all the circumstances of the case must be taken into account.

42 Applying the above tests to our case, the contributories failed miserably on every count. There was no merit in their arguments for going behind the default judgment obtained by L & M (see *Re Menastar Finance Ltd* [2003] 1 BCLC 338). Consequently, I granted the Application.

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[1]In CYC-3.