IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 177

Companies Winding Up No 285 of 2019 and Summons No 563 of 2020

Between

Ang Chek Chin

… *Plaintiff*

And

ANS Import & Export Pte Ltd (formerly known as Ang Ngee Seng Import & Export Pte. Ltd.)

… *Defendant*

GROUNDS OF DECISION

[Companies] — [Winding up] — [Intention to appear and be heard] — [Locus standi]
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v
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[2020] SGHC 177

High Court — Companies Winding Up No 285 of 2019 and Summons No 563 of 2020
Audrey Lim J
6, 13 July 2020

21 August 2020

Audrey Lim J:

Introduction

1 ANS Import & Export Pte Ltd ("the Company") is owned equally by two brothers ("the brothers"), Ang Chek Chin ("Raymond") and Ang Chek Poh ("Roland"), who are also the two directors of the Company. Raymond commenced winding up proceedings against the Company on the basis that Roland had acted in the Company's affairs in his own interest and in a manner which appeared to be unfair or unjust to Raymond, and that it would be just and equitable to wind up the Company, pursuant to s 254(1)(*f*) and (*i*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA") (based on the provision as it stood at the material time).

2 Roland filed a notice of intention to appear to oppose the winding up and applied by Summons No 563 of 2020 ("SUM 563") for the court to summon various persons (including Raymond) to be examined and to produce documents, relying on s 285 of the CA. Additionally, two employees and an ex-employee of the Company filed notices of intention to appear and filed affidavits. At the hearing before me, Roland agreed to buy out Raymond's shares in the Company and thus the winding up application was resolved. This decision deals with two matters in the course of the proceedings, namely whether and when a non-party, particularly one who is not a creditor or contributory of the company, is allowed to appear and intervene in winding up proceedings, and when s 285 of the CA can be invoked.

Background

3 The business was initially set up by Raymond's and Roland's father as a sole proprietorship and subsequently incorporated as the Company with the father and sons holding one share each. It was in the business of importing and exporting household products, with its principal business in wholesale trade and the manufacture of chemical products. The father then left his share equally to Raymond and Roland when he passed away.

4 Raymond's case is as follows. As the father grew older, Roland and Raymond were tasked to grow the business. Although the brothers had their disputes even in 2004, they nevertheless continued to manage the Company together and it became more of a quasi-partnership. Despite their differences, there was a relationship of mutual trust and confidence, with the division of responsibilities between the brothers in the Company. Subsequently, matters took a turn for the worse which led to the breakdown of the relationship and conflict within the Company. This included Roland's deliberate exclusion or

obstruction of Raymond from participating in human resource matters in the Company, Roland's abuse of his access rights to the computer system to monitor Raymond's emails, and Roland's conduct *vis-à-vis* third parties which affected the Company's reputation. The Company is dysfunctional and the brothers no longer communicate with each other and can no longer make decisions for the Company. Essentially there is a deadlock and a loss of substratum in the Company which had been formed as a family business and quasi-partnership. Raymond attempted to utilise the buy-out mechanism in the Company's Constitution, but Roland was not agreeable to any offer that he made.

5 Roland resisted the winding up. He asserted that the Company was never started as a quasi-partnership nor ever ran as such, and that it was not founded on mutual trust or confidence between the brothers. The brothers regarded each other strictly as business colleagues. They had many disagreements over the years and did not see eye to eye on many issues. However, Roland disputed Raymond's allegations of what Roland had allegedly done to cause the breakdown in trust and confidence between them. In any event, the Company's Constitution provided for a share buy-out mechanism. The winding up procedure was an abuse of process and Raymond was using it for a collateral purpose to pressure Roland into agreeing to his unreasonable buy-out terms. A winding up was also not appropriate as the Company is a going concern and a viable business.

6 I set out briefly some of the broader areas of dispute, as they formed the backdrop to the applications made in these proceedings.

7 The first concerned the supply of gloves. According to Roland, Raymond had caused the Company to enter into a glove-supply contract with White Glove Co Ltd ("White Glove") on unconscionable terms and caused the

Company to terminate the previous contract with Dupallo Industries Sdn Bhd ("Dupallo"). The gloves supplied by White Glove were consigned to a Singapore company, Motusgen Pte Ltd ("Motusgen"), which belonged to Raymond's son, Kenneth. The Company was also issued payment invoices from another entity, Century Plastic Manufacturing Company (Private) Limited ("Century Plastic"), for the shipment of the products. Raymond's friend, one "Kang", is the owner of Century Plastic. Roland found these arrangements problematic as White Glove only charged about $0.54 per glove, whereas Century Plastic sold the gloves to the Company at $1.07 per glove. Roland hence began investigations into these transactions.

8 The second dispute involved Raymond's decision to hire one Michael Tan ("Michael") as the General Manager of the Company, which Roland did not agree with. The third dispute involved NTUC Fairprice Co-operative Ltd's ("NTUC Fairprice") decision not to renew a particular contract with the Company, which Roland claimed was Raymond's fault. He claimed that Raymond had delayed in raising the necessary purchase orders to be issued by the Company to ANS Orient (Malaysia) Sdn Bhd for the latter to supply the product to meet NTUC Fairprice's requirements.

9 Roland thus filed SUM 563 and applied to examine Raymond, Kenneth, Kang and Michael. He also sought an order that Raymond produce all documents pertaining to: (a) the supply contracts between the Company and NTUC Fairprice; (b) the supply of gloves by Dupallo to the Company; (c) the supply of gloves from White Glove to the Company through Century Plastic; and (d) the appointment or involvement of Motusgen as consignee in respect of the gloves supplied. Further, Roland sought orders that: (a) Kenneth produce all documents pertaining to Motusgen's involvement in the supply of the gloves; and (b) Kang produce all documents pertaining to Century Plastic's

involvement in the supply of the gloves. Roland premised his application on s 285 of the CA read with r 49 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) ("CWU Rules") and ss 257(2)(*c*) and/or 257(2)(*f*) of the CA (based on the provisions as they stood at the material time).

10 Additionally the following persons ("Non-Parties") filed notices of intention to appear in the proceedings and filed affidavits, namely: (a) Ang Chek Joo ("Chek Joo"), the sister of Raymond and Roland, who has been employed at the Company for over 30 years and is the present admin manager of the Company; (b) Yuen Chin Ching ("Yuen"), who has been employed at the Company for 20 years and is the present Senior Admin Executive of the Company; and (c) Liew Kit Yee ("Liew"), a former employee of the Company.

Right to appear and be heard at a winding up application

Non-Parties' and Raymond's submissions

11 The Non-Parties submitted that they had the right to be heard and relied on *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR(R) 382 ("*Four Pillars*"). They had served the requisite notice of intention to appear under r 28 of the CWU Rules, and by r 30, were entitled to file an affidavit to oppose the winding up. Further, a non-party is not precluded from intervening merely because is he not a creditor or shareholder of the company. In this regard, the Non-Parties referred to *Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd* [2016] 11 MLJ 590 ("*Ambank*") in relation to rr 28, 29 and 30 of the Companies (Winding-Up) Rules 1972 (M'sia) ("Malaysian CWU Rules 1972") (which are *in pari materia* to rr 28, 29 and 30 of the CWU Rules).

12 The Non-Parties argued that it was in the interests of justice for them to be heard. They claimed that they did not side with either Raymond or Roland, but sought only to "factually comment" or "clarify" certain aspects of the Company's operations. Their evidence was highly probative and would assist the court to make a fair and just decision. There were many inconsistencies between Raymond's factual claims and the Non-Parties' evidence, and if their evidence was not admitted, Raymond's evidence could not be sufficiently scrutinised. Chek Joo and Yuen also attested that if the court were to wind up the Company, it would jeopardise the livelihood of its employees, many of whom have been with the Company for years.

13 Raymond argued that the Non-Parties had no *locus standi* to participate as they were neither contributories nor creditors of the Company. The purpose of the winding up process and provisions of the CA indicate that persons other than creditors and contributories should have limited involvement. Rule 27 of the CWU Rules allows only a creditor or contributory of the company to be furnished with the winding up application and supporting affidavit, and Form 8 of the First Schedule to the CWU Rules ("Form 8") suggests that the right to appear and to oppose a winding up is meant to apply only to creditors or contributories of the company. The court in *Four Pillars* also stated that the party who serves the notice of intention to appear is normally a creditor or contributory.

My decision

14 Rule 28 of the CWU Rules provides that a person who intends to appear at the hearing of a winding up application must serve a notice of intention to appear, which may be in accordance with Form 8. The Court of Appeal in *Four Pillars* held (at [13]) that the purpose of the rule is to give the person, "normally

a creditor or contributory", a right to be heard before the court decides whether to make a winding up order. The court further held that by serving the notice, that person becomes a party to the proceedings and acquires the rights to: (a) appear before the court and be heard; (b) file an affidavit in opposition to the winding up application; (c) receive affidavits in reply to his affidavit; (d) apply to the court for orders and directions enumerated in s 257(2) of the CA; and (e) appeal against the winding up order. In *Four Pillars*, the person who had served a notice of intention to appear was a shareholder of the company that was the subject of the winding up. The court did not have to consider the issue in respect of a person who was not a creditor or contributory of the company.

15 The question before me is whether a person who is not of an accepted class, *ie*, the company, a creditor, a contributory, the official receiver or the liquidator of the company ("the class of persons"), has a right to appear and be heard on an application for the winding up of the company. The CA is silent on this. Generally, a person who is not of the class of persons should not be allowed to appear to be heard on the application to wind up the company. However, this is not an immutable rule, as will be seen later.

16 The overall framework of the CA clearly gives rights to creditors and contributories to appear and be heard in relation to a company's winding up, as they are directly affected by the winding up. As for the notice of intention to appear in r 28 of the CWU Rules, Form 8 provides the option to a creditor or contributory, and requires the person filling the form to state either the amount owing by the company (if he is a creditor) or the number of shares in the company (if he is a contributory). It should be noted, however, that r 28(2) of the CWU Rules states that the notice "may" be in Form 8 and "with such variations as circumstances may require". Whilst this suggests that a person other than a creditor or contributory may file a modified Form 8 to include his

status as neither a creditor nor a contributory and thereby participate in an application to wind up a company, generally a person who is not of the class of persons should not be allowed to appear and participate. Otherwise, *any* person could, by merely serving a notice of intention to appear in compliance with r 28 of the CWU Rules, become a party to a winding up application, have a right to apply for orders and directions under s 257(2) of the CA, and even appeal against the winding up order.

17 In *In re Bradford Navigation Company* (1870) LR 5 Ch App 600, the English Court of Appeal held that no person has a right to be heard in a petition for winding up of a company except for creditors and contributories. The court explained (at 602) that, historically, contributories were the only ones who could be heard in a winding up, but as the operation of winding up a company interfered with creditors, Parliament (by legislation) made winding up a matter for both creditors and contributories. Hence, while creditors and contributories could be heard in a winding up application, it was something entirely different to say that "any person who has an interest in, or a right to or in respect of, some of the property of the company, large or small, has a right to appear as a litigant". Similarly, in *In re SBA Properties Ltd* [1967] 1 WLR 799 at 802C–D, the court accepted that the only persons entitled to appear at a hearing of a winding up application are the company, its creditors and its contributories. This position was also accepted in *Re Mid East Trading Ltd* [1997] 3 All ER 481, where the court included an Official Receiver and any liquidator as persons with standing.

18 I turn to the case of *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] 1 WLR 4482 ("*PWC v Saad*"). There, the company was wound up in the Cayman Islands. The respondent liquidators then applied to wind up the company in Bermuda for the sole purpose of enabling them to invoke the Bermudian Companies Act ("Bermuda CA") to order the appellant auditor

("PWC"), who was registered in Bermuda, to produce documents and information relating to the company. The Bermudian court granted the winding up and the order for production. PWC, who was neither a contributory nor creditor of the company, appealed to set aside that decision, raising the issue of whether it had standing to challenge or appeal the Bermudian court's decision. The Privy Council held that the Bermudian court had no jurisdiction to wind up the company. The court recognised (at [30] and [36]) the general proposition that a person who is not the company, official receiver, liquidator, contributory or creditor cannot be heard on a winding up petition and does not have *locus* to challenge the making or continuation of the winding up order. However, there was no reason why, in appropriate circumstances, a person who would be directly affected by a winding up order should not have the right to be added as a party to the proceedings. The circumstances where such a course would be appropriate would be "exceptional" and "the mere fact that a person rightly anticipates that his or her rights will be detrimentally affected as a result of the winding up order would normally be quite insufficient to justify that person being added as a party". There, the Privy Council allowed PWC to be added as a party to the winding up petition based on the "very unusual facts of [the] case". The challenge to the winding up order was based on a fundamental issue of whether the Bermudian court had jurisdiction to grant a winding up order which the Privy Council felt had to be seriously addressed, and the fact that the sole ground for making the winding up order was to obtain relief against PWC. Hence, it would have been a denial of justice if PWC could not challenge the making of the order.

19 I was of the view that *PWC v Saad* does not detract from the general principle that, in a winding up application, only the class of persons has a right to be heard. *PWC v Saad* can be distinguished as the respondent had applied for a winding up order in Bermuda for the sole purpose of obtaining a relief against

PWC via the Bermuda CA. The Privy Council had found that PWC was the "sole direct targets" of the winding up application in Bermuda. In such a case, where a relief sought is directed at a specific person, he should be given an opportunity to be heard on the matter, as any order granted may affect that person. This is consistent with the general principle that a person who is a subject of an application should be given notice of the application and an opportunity to be heard or to respond. This is also embodied in r 7 of the CWU Rules, which provides that (subject to any express exceptions) a winding up application must be served on the party affected, and an interlocutory application must be served on every person against whom an order is sought.

20 In the present case, the Non-Parties had no standing to be heard at the application for the winding up, as they did not fall within the class of persons or a person expressly provided for in the CA. Even the very limited exception in *PWC v Saad* did not apply to them, as they were not the targets of the winding up application. The Non-Parties attested that they merely wished to set some facts straight and claimed to be "neutral" in the proceedings[1]. However, at the same time, Chek Joo and Yuen attempted to argue that if the court were to wind up the Company, this would jeopardise the livelihood of its employees. In my view, it was not appropriate to give any regard to their evidence (see also *In re Craven Insurance Co Ltd* [1968] 1 WLR 675). By their own evidence, they were not seeking to oppose or challenge the winding up – hence they could not rely on r 30 of the CWU Rules to adduce affidavit evidence since r 30 provides for affidavits to be filed "in opposition" to a winding up application. As for Liew, his position was even more tenuous, given that he was a *former* employee of the Company and not a person who would have been affected by the Company's

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1 Minute sheet dated 6 July 2020 at p 2.

winding up[2]. As such, I did not allow the Non-Parties the right to be heard on the winding up application.

21 The Non-Parties' reliance on *Ambank* ([11] *supra*) was misconceived. The Malaysian High Court in *Ambank* held (at [13] and [16]) that nothing in the plain reading of the Malaysian CWU Rules 1972 prohibits a non-creditor/contributory from applying to be heard, and that since there was a lacuna in that regard, O 15 r 6(2)(*b*) of the Rules of Court 2012 (M'sia) (concerning the rule on joinder of parties) could apply to allow such a person to apply to be heard. However, O 1 r 2(2) of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") (based on the provision as it stood at the material time) expressly provides that the Rules of Court do not apply to winding up proceedings (save for certain provisions that are irrelevant for the present purposes).

Section 285 of the CA

Roland's and Raymond's submissions

22 Next, Roland in SUM 563 applied for Raymond, Kenneth, Kang and Michael ("the Witnesses") to be orally examined, and for Raymond, Kenneth and Kang to produce documents. His supporting affidavits and written submissions premised his application on s 285 of the CA[3], although the summons also sought to invoke s 257(2) of the CA.

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2 Minute sheet dated 6 July 2020 at p 2.

3 Roland's 4th affidavit dated 6 February 2020 at [4]; Roland's 5th affidavit dated 5 March 2020 at [3]; Roland's Written Submissions for SUM 563 dated 29 June 2020 at [27].

23 Roland, relying on *Liquidator of W&P Piling Pte Ltd v Chew Yin What and others* [2004] 3 SLR(R) 164, submitted that s 285 of the CA gives the court a wide discretion to call before it any person it finds relevant to the disposal of the case. In particular, the Witnesses would be relevant to determine, *inter alia*, whether the factual assertions have been made out for a winding up on just and equitable grounds, whether it was Raymond who had breached his duties to the Company, and whether the winding up application was commenced for a collateral purpose and hence constituted an abuse of the court process. Roland submitted that these were fact-sensitive issues.

24 Raymond opposed the application, on the basis that the documents or information were not reasonably required. SUM 563 was taken out for a collateral purpose and was not intended to facilitate a liquidator in discharging his statutory function. Rather, Roland's motivation was to determine whether Raymond had caused the deadlock in the Company in order to force Roland's hand to buy him out on unfair terms, and the application was motivated by a personal vendetta against Raymond. There was no benefit to an application under s 285 of the CA as: (a) the issues that Roland sought to cross-examine the Witnesses on were matters already addressed in affidavits filed in the winding up application; (b) Roland had access to the documents he was seeking; and (c) Raymond had provided a detailed explanation on the circumstances relating to the transactions or events that Roland was seeking information and documents on.

My decision

25 I dismissed SUM 563. As Roland and Raymond had subsequently agreed that the former would buy out the latter's shares in the Company, I no

longer had to determine whether the Company should be wound up. The focus here is on when s 285 of the CA can be invoked and by whom.

26 Whilst it is not entirely clear from the statute itself, s 285 of the CA can be invoked by a liquidator (see *Pricewaterhouse Coopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 ("*Celestial Nutrifoods*") at [34]) and, as can be gleaned from r 49 of the CWU Rules, by a contributory or a creditor. However, the court's power under s 285 to summon a person to be examined on oath, to record his answers or to produce documents can be invoked only *after* the court has ordered a winding up or appointed a provisional liquidator.

27 The legislative history of s 285 of the CA was set out in *Celestial Nutrifoods* at [38]–[39] and *Re China Underwriters Life and General Insurance Co Ltd* [1988] 1 SLR(R) 40 ("*Re China Underwriters*") at [41]–[42]. In gist, s 285 of the CA has its origins in s 117 of the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict c 106) (UK), which was later adopted into s 115 of the Companies Act 1862 (25 & 26 Vict c 89) (UK) ("1862 UK Act"), then s 174 of the Companies (Consolidation) Act 1908 (c 69) (UK), s 214 of the Companies Act 1929 (c 23) (UK) ("1929 UK Act"), and s 268 of the Companies Act 1948 (c 38) (UK) ("1948 UK Act"). This was then enacted in Singapore as s 211 of the Companies Ordinance (Cap 174, 1955 Rev Ed) ("Companies Ordinance"). Section 115 of the 1862 UK Act initially only allowed the court to invoke the power to summon a person after a winding-up order had been made, but this was expanded in the 1929 UK Act to also allow the power to be invoked after the appointment of a provisional liquidator (*Re China Underwriters* at [42]). It was this expanded version which was enacted in Singapore, and s 211(1) of the Companies Ordinance provided that the court's power to summon a person to be examined and to produce documents *etc*, may be made "at any time after the

appointment of a provisional liquidator or the making of a winding-up order" ("the Phrase"). Hence, this made clear when the power could be invoked.

28 However, the Phrase in s 211(1) of the Companies Ordinance was removed when s 211 was re-enacted as s 249 of the Companies Act (Act 42 of 1967) ("Companies Act 1967"). Instead, s 249 of the Companies Act 1967 was remodelled to be identical to s 249 of the Companies Act 1961 (Aus), which had likewise been derived from s 268 of the 1948 UK Act. Section 249(1) of the Companies Act 1967 read:

> The Court may summon before it any officer of the company or 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 deems capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company.

29 Whilst the removal of the Phrase may suggest that the powers under s 249 were no longer restricted to situations of winding up or where a provisional liquidator had been appointed, legislative material suggests that there was no intent to make such a substantive change. The Explanatory Statement to the Companies Bill (Bill No 58/1966) stated that the clauses in Part X of the Companies Bill (which included what was eventually s 249 of the Companies Act 1967) "more or less reproduce[d] the provisions of the existing [Companies] Ordinance". A similar point was made in *Re China Underwriters* (albeit in the context of whether the court could exercise its jurisdiction in relation to a foreign company not wound up in Singapore) where the court noted (at [42]) that the removal of the Phrase was probably because it was thought to be superfluous.

30 As such, the omission of the Phrase from s 249 of the Companies Act 1967 (and maintained as such in s 285 of the CA) did not change the original

intent that the powers under that section could only be invoked where a winding up order has been made or a provisional liquidator had been appointed.

31 This is further supported by r 49 of the CWU Rules, which provides that if a s 285 application is made by a creditor or contributory, the summons and affidavit in support of the application shall be served on the liquidator – this requirement can only be fulfilled if the company has been wound up or a liquidator appointed. The above interpretation also accords with the purpose of s 285, which is to assist a liquidator in the accumulation of information that would enable or facilitate in the discharge of his duties (*Celestial Nutrifoods* at [34] and [41]). The procedure in s 285 to summon a person is not meant for the purpose of determining whether a winding up should be granted – in such a case, the proper procedure lies in s 257(2) of the CA, which allows the court on a winding up application to do certain things including directing a trial and directing that oral evidence be taken.

32 As such, where Roland invoked s 285 of the CA, I dismissed his application. Even on the basis of s 257 of the CA, I did not consider it necessary to order the Witnesses to be orally examined or for Raymond, Kenneth and Kang to produce documents. Raymond and Roland had filed numerous affidavits and exhibited documents to support their respective applications in favour of, or in opposition to, the winding up. It was not disputed that their relationship had broken down and that there is a deadlock in the Company. However, the Company's Constitution provided for a share buy-out mechanism, and thus it was not a case in which there was no ability for a shareholder to exit the Company (see *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 at [51]). The main issue would have turned on whether the buy-out provision in the Constitution had been properly invoked and utilised, and this would turn on the wording of the

Constitution and whether the brothers had applied the share buy-out mechanism in accordance with the Constitution. There was no need for witnesses to be orally examined on this issue or on the other allegations in dispute (at [7]–[8] above). As for the production of documents, any relevant documents would be in the possession of the Company, of which Roland was a director. He was thus in a position to obtain access to them.

Conclusion

33 To conclude, the Non-Parties had no standing to appear and to be heard in the winding up application. I also dismissed SUM 563. As Roland and Raymond eventually agreed that the former would buy out the latter's shares in the Company, the question of whether the Company should be wound up was no longer in issue, and I need say no more on this.

Audrey Lim
Judge

Koh Choon Guan Daniel and Ng Wei Ying (Eldan Law LLP) for the plaintiff;
The defendant unrepresented;
Ling Daw Hoang Philip and Chua Cheng Yew (Wong Tan & Molly Lim LLC) for Ang Chek Poh;
Wong Liang Kok and Linus Lin Zhiyi (Tan Peng Chin LLC) for the non-parties.