IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 51

Companies Winding Up No 265 of 2023

In the matter of section 125(1)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

And

In the matter of Fusionex Pte Ltd

And

Fusionex Pte Ltd

… *Claimant*

And

Resorts World at Sentosa Pte Ltd

… *Non-party*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Grounds for petition]

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Re Fusionex Pte Ltd (Resorts World at Sentosa Pte Ltd, non-party)

[2024] SGHC 51

General Division of the High Court — Companies Winding Up No 265 of 2023
Wong Li Kok, Alex JC
12, 19, 26 January 2024

27 February 2024

Wong Li Kok, Alex JC:

Introduction

1 HC/CWU 265/2023 was an application under s 125(1)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA") to wind up Fusionex Pte. Ltd. (the "Company"). This provision is rarely invoked as a ground for winding up, and there are no reported cases in Singapore of a winding up being allowed on this ground. The present application raised the issue as to the applicable principles governing the court's discretion under this ground. Taking guidance from persuasive foreign authorities, I decided to allow the application.

Background facts

2 The Company was a Singapore-incorporated company in the business of information technology consultancy and development of software and

applications.[1] It was wholly owned by a Malaysian-incorporated company, Fusionex Corp. Sdn. Bhd. (the "Sole Shareholder").[2] Both the Company and the Sole Shareholder were in turn indirect subsidiaries of FusioTech Holdings Sdn. Bhd. (the "Holding Company").[3] The Company, the Sole Shareholder and the Holding Company were all part of the Fusionex group of companies (the "Fusionex Group").[4]

3 The day-to-day operations of the Fusionex Group were managed by the management team of the Holding Company (the "Management").[5] The entire Management abruptly resigned between 4 December 2023 and 6 December 2023.[6] Following the resignation, Mr Hiroyuki Kumazaki ("Mr Kumazaki") was appointed as the Chief Executive Officer ("CEO") of the Fusionex Group on 6 December 2023 to look after the affairs of the group.[7]

4 Despite repeated requests by the current management of the Fusionex Group (including Mr Kumazaki), the Management refused to effect a proper handover. For instance:[8]

(a) The Management removed the financial records and management accounts of the Fusionex Group (save for a balance sheet

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1 1st affidavit of Hiroyuki Kumazaki dated 20 December 2023 ("1HK") at paras 4 and 5.

2 1HK at para 6.

3 2nd affidavit of Hiroyuki Kumazaki dated 24 January 2024 ("2HK") at para 8.

4 2HK at para 11.

5 2HK at paras 14 and 15.

6 2HK at paras 29 and 30.

7 2HK at para 32.

8 2HK at para 34.

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and consolidated statement of financial position as of 30 September 2023).

(b) There were no proper records of the Fusionex Group's contracts, customers, suppliers or management accounts.

(c) The Management refused to disclose the list of employees of the Fusionex Group.

(d) The Management refused to grant the current management access to the Company's IT server in the Holding Company's office premises.

5 The Company relied almost entirely on the Holding Company and other members of the Fusionex Group on finances, accounting and IT matters.[9] As such, any information relating to the Company remains sparse at best.[10] Counsel for the Company submitted that Ms Lee Shwu Fang ("Ms Lee"), currently listed as the sole director of the Company,[11] was not an executive director and also lacked knowledge on the Company's state of affairs.

6 In light of the above, on 20 December 2023, the Sole Shareholder passed a special resolution for the Company to be wound up by this court.[12]

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9 2HK at para 34(6).

10 2HK at para 34(6).

11 1HK at p 9.

12 1HK at para 7.

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Summary of the Company's case

7 Mr Kumazaki, on behalf of the Company, averred that the Sole Shareholder had the requisite standing under the IRDA to pass a valid special resolution to have the Company wound up by the court.[13] There was nothing impeding this court from making a winding-up order. In fact, because the mass resignation had "cripple[d] the entire Fusionex Group (including the Company)",[14] winding up was the most desirable option. Mr Kumazaki added that the Company was unable to pursue a members' voluntary winding up because there was insufficient information to make a declaration of solvency.[15] The Company was also unable to convene a creditors' meeting for the purposes of a creditors' voluntary winding up, as the current management had little or no information on the Company's list of creditors.[16] Hence, the Company had no choice but to seek the court's assistance to be wound up.

Decision

Mr Kumazaki was authorised to make the supporting affidavit

8 As a preliminary point, an affidavit supporting a winding-up application made by a corporation must be deposed to by "a director, secretary or other principal officer of the corporation" (r 67(2)(*a*) of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020). In ordinary circumstances, a director is the one who makes the supporting affidavit. However, as Ms Lee was a non-executive director without any knowledge of the Company's affairs, Mr Kumazaki was the most suitable

13 2HK at para 48.

14 2HK at para 39.

15 2HK at para 43.

16 2HK at para 43.

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personnel to make the affidavit. In that regard, there was a valid written resolution, dated 6 December 2023, through which the Holding Company's directors had appointed Mr Kumazaki as the CEO of the Holding Company and its subsidiaries (including the Company).[17] I was satisfied that Mr Kumazaki had the requisite authority to make an affidavit in support of this winding-up application.

The Sole Shareholder had locus standi to bring the winding-up application

9 Another preliminary issue was the *locus standi* of the Sole Shareholder to bring the winding-up application. Under s 124(1)(*d*) of the IRDA, a contributory has a standing to bring such an application. It was a non-issue that the Sole Shareholder was a contributory. However, s 124(2)(*b*) of the IRDA sets out further requirements where a contributory brings a winding-up application based on s 125(1)(*a*) of the IRDA (as in the present case):

> …
>
> (*b*) a person mentioned in subsection (1)(*d*) [*ie*, s 124(1)(*d*)] may not make a winding up application on any of the grounds specified in section 125(1)(*a*) … unless —
>
> …
>
> (ii) the shares in respect of which the contributory was a contributory, or some of those shares —
>
> (A) were originally allotted to the contributory;
>
> (B) have been held by the contributory and registered in the contributory's name for at least 6 months during the 18 months before the making of the winding up application; or
>
> (C) have devolved on the contributory through the death or bankruptcy of a former holder;
>
> …

[17] 2HK at p 217.

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10 At the hearing on 19 January 2024, the Accounting and Corporate Regulatory Authority ("ACRA") profile exhibited in Mr Kumazaki's first affidavit was insufficient to establish s 124(2)(*b*) of the IRDA. The ACRA profile did not show whether the Sole Shareholder was the original shareholder of the Company or held its shares for at least six of the last 18 months prior to the making of this application. Consequently, I directed the Company to file a further affidavit to demonstrate that s 124(2)(*b*) of the IRDA was fulfilled.

11 In Mr Kumazaki's second affidavit, the Company exhibited a copy of the Register of Members retrieved from ACRA. This showed that the Sole Shareholder had held all the shares in the Company since 3 February 2020.[18] Since the application was made on 20 December 2023, I was satisfied that the Company's shares "have been held by the [Sole Shareholder] … for at least 6 months during the 18 months before the making of the winding up application" (s 124(2)(*b*)(ii) IRDA).

The ground for winding up under s 125(1)(a) IRDA was satisfied

The legal principles

12 Under s 125(1)(*a*) of the IRDA, the court may order a company to be wound up if "the company has by special resolution resolved that it be wound up by the [High] Court". As noted in Walter Woon, *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2022) at para 557, it is "unusual" to invoke this ground, as a special resolution is usually the basis for a members' voluntary winding up. There is no reported local decision that sets out the legal principles governing the application of this provision.

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[18] 2HK at pp 315-320.

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13 In *Chong Kok Ming and another v Richinn Technology Pte Ltd and others* [2020] SGHC 224 ("*Richinn*"), a winding-up application was brought under s 254(1)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) which is the predecessor provision of s 125(1)(*a*) of the IRDA. However, the facts of *Richinn* did not require an in-depth analysis of this provision. The winding-up application was dismissed because, amongst others, what the company contemplated was a members' voluntary winding up – there was "no special resolution by the members that the company would be wound up *by the Court*" [emphasis in original] (*Richinn* at [75]).

14 Given the lack of local case law and commentary on this provision, I turn to Australian authorities for guidance. Section 461(1)(*a*) of Australia's Corporations Act 2001 (Cth) (the "Australian Corp Act") is *in pari materia* with s 125(1)(*a*) of the IRDA, with the latter adopting the same phrasing as the former. Like the present application, s 461(1)(*a*) of the Australian Corp Act was most frequently invoked by a sole shareholder. An example is *Hillig as Administrator of Darkinjung Local Aboriginal Land Council v Darkinjung Pty Ltd* [2006] NSWSC 1371 ("*Hillig*"), which is the leading authority on this provision. After perusing the cases under s 461(1)(*a*) of the Australian Corp Act and its foreign equivalents, Barrett J laid down the following principles (*Hillig* at [35]–[36]):

> [35] … First, the body of shareholders has a statutory right to decide that their company should be wound up by the court, being a right exercisable by whatever procedures are sufficient, in the particular circumstances, to cause a special resolution to be passed. Second, the court has discretion whether or not to make a winding up order (being the discretion created by the word "may" at the start of s 461(1)) but *the discretion should not be exercised against the making of the order unless the shareholders' decision, or some aspect of the surrounding circumstances, involves something unconscionable or inequitable (or some special consideration adversely affecting creditors indicates that there should be no winding up).* Third, the

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> availability to the shareholders of the alternative of initiating voluntary winding up by special resolution does not represent any reason for declining to make a winding up order. This last point is really no more than an aspect of statutory interpretation: if there had been some intention that the voluntary winding up mechanism should have primacy, s 461(1)(a) would not form part of the Act.
>
> [36] I am of the view that … [the sole member]'s reasons for preferring winding up by the court to voluntary winding up *do not appear to me to be something into which I need inquire*. …
>
> [emphasis added]

15 Applying these principles, Barrett J held that the sole member had the standing to apply for a winding-up order, and in the absence of any unconscionable or inequitable element, the ground for winding up was established (*Hillig* at [36]). Further, there was no indication that winding up would be inconsistent with the creditors' interests (*Hillig* at [37]). Following *Hillig*, Australian courts have generally ordered a winding up where the procedural requirements (*eg*, the validity of the special resolution) are met. For instance, a winding-up order was made in *MFS Alternative Assets (in liquidation) v Angstrom Assets Pty Ltd* [2012] NSWSC 447 ("*MFS*"), as the sole shareholder's winding-up application satisfied the formalities (at [5]), and there were no inequitable circumstances suggesting that an order should not be made (at [4] citing *Hillig*).

16 An example of unconscionable circumstances can be found in *Re Fernlake Pty Ltd* (1994) 13 ACSR 600 ("*Re Fernlake*") (cited in *Hillig*), where the court exercised its discretion to refuse a winding-up order. There, the shareholders contracted to sell some of their shares to another buyer, such that those shares were held on trust for the buyer. Subsequently, without the buyer's knowledge or consent, the shareholders proceeded to pass a special resolution for the company to be wound up by the court. The Supreme Court of Queensland noted that there were no technical irregularities surrounding the passing of the

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special resolution (*Re Fernlake* at 607). Nevertheless, it was "clearly inequitable … to give effect to a resolution passed wholly [and knowingly] in breach of the trusts by which each shareholder was bound" (*Re Fernlake* at 607).

17 Australian authorities have also identified factors in favour of the court making a winding-up order under s 461(1)(*a*) of the Australian Corp Act. One such factor is the lack of objection by the affected parties, such as the company itself and its creditors (see *MFS* at [4] and *Griffin Energy Group Pty Ltd v Griffin Windfarm Holdings Pty Ltd, Re Griffin Energy Group Pty Ltd (subject to Deed of Co Arrangement)* [2012] FCA 197 ("*Griffin*") at [18]).

18 Another relevant factor is the lack of a functional board. In *Griffin*, all the directors were purportedly removed, making it appropriate for the company's affairs to be placed in the hands of a provisional liquidator (at [20]). Of particular relevance to the present case is *Kala Capital Pty Limited* [2011] NSWSC 1253 ("*Kala*"). In making the winding-up order, Barrett J considered that the sole shareholder-director could not discharge her duties as a company's director satisfactorily, as the ex-director had refused to hand over any books or financial records in his possession or control (*Kala* at [12]–[13]). This rendered her unable to ascertain the company's condition, including its tax responsibilities and financial state (*Kala* at [12]). Barrett J also considered that the sole shareholder-director was predominantly based overseas, which ran afoul of the statutory requirement for a sole director to be ordinarily resident in Australia, further indicating instability in the company's administration (*Kala* at [14]). Finally, in *CIC Insurance Ltd v Hannan & Co Pty Ltd* (2001) 38 ACSR 245, the directors had resigned, and its sole shareholder was unable to find individuals willing to act as new directors (at [9]). As observed in *Hillig*, the absence of all internal machinery militated against the possibility of convening

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a creditors' meeting for voluntary winding up (at [33]). This made it necessary to rely on the court's power to wind up the company.

The case to allow the winding up has been made out

19 I agree with the principles set out in *Hillig*. There is a limited discretion to withhold winding up under s 125(1)(*a*) of the IRDA. Unlike in a members' voluntary winding up, other than as set out in this paragraph below, it is not for the court to question the shareholder(s)'s decision to pursue a compulsory winding up by the court over a voluntary winding up. If a special resolution has been validly passed, then the court should generally allow the winding-up application, subject to two considerations – the interests of the creditors and the presence of bad faith or other untoward circumstances (as per *Hillig*). With respect to creditors, relevant issues to consider would include any explicit objections from them, the list and scope of creditors (if available), and whether the winding up was aimed at undermining the creditors' rights and would put the creditors in a worse position than if the company continued as a going concern. With respect to untoward circumstances, a company seeking to be wound up should be transparent and explain the circumstances behind the winding-up application. This would allow the court to properly understand the basis on which it is asked to exercise its discretion. Whilst the lack of transparency on its own should not be fatal to any application, in most circumstances, a proper explanation will help to dispel any concerns of such untoward circumstances.

20 On the facts, there is no issue that a valid special resolution was passed by the Sole Shareholder for the Company to be wound up by this court. As to the creditors, I note that the Company was unable to list its creditors in Mr Kumazaki's affidavits because the current management had no access to any

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accounting and financial records. However, I considered that none of the creditors had raised any objections since the advertisement of the winding-up application on 2 January 2024.[19] The only party which attended the hearings (after having read the advertisement) was Resorts World at Sentosa Pte. Ltd., a contractual counterparty and potential claimant of the Company. It took no position on the winding up.

21 Further, nothing on the facts suggested any unconscionable or inequitable circumstances which justified withholding a winding-up order. During the hearing on 19 January 2024, I expressed my concern that Mr Kumazaki's first affidavit failed to disclose sufficient background information relating to the making of this winding-up application. The full and frank disclosure of the circumstances set out in Mr Kumazaki's second affidavit (see [3]–[6] above) armed me with sufficient information to grant the application.

22 In fact, I found that it was desirable to order a winding up. Similar to *Kala*, the mass resignation of the Company has made it difficult for the current management to conduct the Company's affairs properly. Considering the lack of information on the Company, I agreed with Mr Kumazaki that there was a risk of insolvent trading, which would not be in the creditors' best interests.[20] As in *Griffin*, the Company should be wound up, so that its affairs can be administered by the liquidators and under the court's supervision.

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19 2HK at para 47.

20 2HK at para 44.

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Conclusion

23 For the above reasons, I ordered the Company to be wound up by the court under s 125(1)(*a*) of the IRDA.

Wong Li Kok, Alex
Judicial Commissioner

Fong Shi-Ting Fay (Allen & Gledhill LLP) (instructed), Chia Chi Chong, Goh Qiqing (Mori Hamada & Matsumoto (Singapore) LLP) for the claimant;
Lim Min (K&L Gates Stratis Law) for the non-party (watching brief).

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