

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1978] SGHC 33

CWU 86/1977

Between

Wei Giap Construction Co
(Pte) Ltd

... Appellant

And

Intraco Ltd

... Respondent

GROUND OF DECISION

Insolvency Law — Winding up; Insolvency Law — Winding up

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Wei Giap Construction Co (Pte) Ltd v Intraco Ltd

[1978] SGHC 33

CWU 86/1977
D C D'Cotta J
22 June 1978

1 Cur Adv Vult

2 A winding up order was made against the appellants on the presentation of a petition pursuant to s 217(1)(b) of the Companies Act (Cap 185) by the respondents. The ground on which the petitioning creditors is relying for the proceedings herein is found in s 218(1)(e) of the said Act which empowers the court to order the winding-up of a company if the company in question is unable to pay its debts. In sub-s (2)(a) of the same section, it is provided that the company is deemed to be unable to pay its debts if a creditor has served on the company by leaving at its registered office a demand for payment exceeding the sum of \$500 and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the creditors' satisfaction.

3 It is not disputed that:

(a) the petitioners obtained judgment against the appellants on 20 April 1977 in Suit No 933 of 1977 for the sum of \$71,570.13 with interest thereon at the rate of 8% pa from the date of judgment until the date of payment;

(b) the petitioners by letter dated 22 April 1977 served the said judgment on the appellants together with a demand for payment of the judgment debt;

(c) the appellants have not to date paid the judgment debt or any part thereof;

(d) between 29 April 1977 and 30 May 1977 settlement of the judgment debt by instalments was negotiated and finalised but the appellants defaulted; consequently the petition herein was presented by the petitioners;

(e) the petitioners' papers are in order and were properly filed, advertised and served in compliance with the rules.

4 It is also not disputed that the appellants' total liabilities are in the region of about \$3m owing to about 150 creditors. There is an amount of about \$1,881,601.13 being owed to the company by about nine debtors. Of these nine debtors, there are three whose total debts amount to about \$1,300,000.00 which call for some comment. The first of the three, Wei Leong Construction Co are alleged to owe the appellants the sum of \$266,932.00. A receiving order has been made against this firm on 29 July 1977 in Bankruptcy Nos 869 and 882 of 1976. As regards the next debtor Teng Ta who is alleged to owe the sum of \$27,817.00 a winding-up order was made against this firm in winding up No 49 of 1977 on 27 May 1977; such being the position the likelihood of recoverability from these two firms is almost nil except for some dividends which the Official Assignee or Official Receiver might declare in the event of there being any funds. The third debtor is alleged to be the DBS Realty Pte Ltd whose indebtedness to the appellants is reputed to be in the region of \$1,087,083.00. However, in a joint affidavit made on 1 November 1977 by Bay Kwee Chai and Loh Chai Chon, two directors and shareholders of the appellants, a sum of \$28,000 only is certified as being due for payment by the DBS Realty Pte Ltd.

5 There is no evidence whether any payment has been received from the other debtors, or whether even a demand has been made for payment and apart

from the sum of \$28,000 allegedly owing by DBS Realty Pte Ltd the balance due to the appellants can be written off. While on the subject of creditors and debtors, it is also pertinent to note that a number of creditors whose debts total over \$850,000.00 are supporting the petition while some creditors with debts amounting to \$1m are opposing the petition. It is most difficult to ascertain the exact number of creditors and the amounts involved as many creditors are changing horses in mid-stream so frequently that to pin point with any degree of accuracy is out of the question. Some of the creditors opposing the petition have filed affidavits to the effect that if the appellants were allowed to continue to operate the chances of the creditors recovering what was due to them would be greater. There is also a third category of creditors who I shall quite appropriately designate as neutral in so far as they have not expressed an opinion either way.

6 There is a further allegation by the appellants that they have a `possible` claim for \$3,773,157.00 against the DBS Realty Pte Ltd for damages for breach of contract. A report in this connection was made for the appellants by Mr Eric Lim Ang Beng Hock, a Chartered Quantity Surveyor. It is not the function of the court to adjudicate upon the merits of this claim but the appellants although placing sole reliance on the claim against the DBS for funds to meet its debts do not appear to have done very much if anything at all towards achieving this objective. One would have thought that a claim so vital on which the continued existence of the appellants depend would have been pursued to the hilt: all that has been done to date is that notice of arbitration was given on 29 September 1977 but no arbitrator has yet been appointed.

7 Be that as it may, even assuming, that the appellants have a bona fide claim against the DBS, in my view taking into consideration the interests of the members of the company and the interest of the creditors the best person to

pursue such a claim on their behalf would be the Official Receiver who is in a position to do it not only expeditiously but with the minimum amount of expenditure.

8 The appellants are also possessed of immovable properties situate at Lorong H, Telok Kurau and Lorong Marzuki. The former comprises two flats which are about 90% completed; work on them commenced at the end of 1974 and stopped in March 1977. The appellants value this property at \$350,000.00. The premises are mortgaged to Nanyang Finance Co Ltd for \$150,000.00 with interest at the rate of \$2,500.00 per month. This property was put up for sale by auction and the highest bid received was \$154,000.00. Needless to add the property was not sold.

9 Property at Lorong Marzuki consisting of six Terrace Houses was valued in August 1976 at \$695,000.00. This property is mortgaged for \$450,000.00 with interest and like the Telok Kurau property is uncompleted. With the downward trend in the value of properties in Singapore generally, in my view the mortgagees of both properties who are secured creditors, should consider themselves most fortunate if they recovered their respective mortgage debt together with the interest thereon. These mortgaged properties cannot be regarded as assets of the company as the mortgagees are preferred creditors, the unsecured creditors being entitled only to the balance, if any, after payment of the mortgage debt and interest.

10 The appellants claimed to have pledged certain property comprising five Units Truck Mixer, a portable compressor, a commet pump valued at \$275,000.00 with the First Oversea Credit Ltd. Counsel for the petitioners has described this transaction as a sham Hire Purchase Agreement and an illegal transaction to which counsel for the appellants has conceded. To say the least,

this is a shady transaction and if a claim does exist once again I feel the proper person to pursue it would be the Official Receiver.

11 Finally in their latest affidavit dated 18 October 1977 the said Messrs Bay Kwee Chai and Loh Chai Chon state :

If the company is not wound up, it is our intention to reorganise the company and to seek fresh capital and to tender for fresh contracts. In this respect, we wish to inform the court that we need only one big contract to pull the company out of its financial difficulty provided financial aid is forthcoming. It is our intention to solicit the help of big hardware and building material suppliers to support us by giving us material on long term credit either on profit sharing basis or upon terms of payment of interest.

12 The petition herein was presented pursuant to s 217(1)(b) of the Companies Act which states that a company may be wound up under an order of court on the petition of any creditor. The ground on which the petitioning creditors is relying, is found in s 218(1)(e) of the said Act which empowers a court to order the winding-up of a company if the company in question is unable to pay its debts.

13 At the outset of his submission, counsel for the appellants admitted with absolute candour that the company (the appellants) was commercially insolvent. In this connection ***Buckley on the Companies Act*** (13th Ed) at p 460 has this to say:

In such a case it is useless to say that if its assets are realised there will be ample to pay 20 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 no assets available to meet its current liabilities it is commercially insolvent and may be wound up.

14 The aforesaid passage was quoted with approval by Plowman J in ***Re Tweeds Garages Ltd*** [1962] Ch 406 and also by Rajah J delivering the

judgment of the Court of Appeal in **Re Sunshine Securities Pte Ltd ; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd** [1978] 1 MLJ 57 .

15 Once it is established that the appellant company is insolvent, the law relating to its winding up is clearly stated in **Gore-Browne on Companies** (43rd Ed) at 3117 as follows:

If the petition for winding up is presented by a creditor whose debt exceeds £50, and is presently due, and it is shown that the company cannot pay its debts, it is almost a matter of course that the court will make the order desired, for this is his right unless other creditors oppose, when the court should have regard to the wishes of the majority.

16 The above view is supported by the case of **Bowes v Hope Life Insurance & Guarantee Co** (1865) 11 HLC 388 where Lord Cranworth in his judgment at p 402 had this to say:

It is not a discretionary matter with the court when a debt is established and not satisfied, to say whether the company shall be wound up or not, that is to say if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the court to direct the winding up.

17 It is conceded that the court has an overriding discretion as to whether a winding up order should be made but, as respectfully suggested by McPherson in **The Law of Company Liquidation** at p 59, the court's power to refuse an order is fairly strictly regulated and is exercised in accordance with principles which are relatively well-defined.

18 Now s 289 of the Companies Act provides that regarding matters pertaining to the winding-up of a company, the court may have regard to the wishes of the creditors and to the value of each of their debts for the purposes

of determining whether a winding-up order should be made. The position with regard to the creditors opposing the petition has also been expressed in **Palmer's Company Law** (20th Ed) at p 701 where after considering the petitioning creditors' right to a winding-up order the following view is expressed:

This right to a winding up order is, however, qualified by another rule, viz that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order.

19 From the above text, it does appear that 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.

20 On this question, I would like to refer to the case of **P & J Macrae Ltd** [1961] 1 WLR 229. In this case, the petitioners had obtained judgment for the sum of £685 which had not been paid; there were 11 supporting creditors to the extent of £2,136, six of whom were for under £100 and two for under £50; there were 42 opposing creditors to the extent of £19,000. The opposing creditors apart from expressing their desire to oppose the petition, did not assign any reason therefor. It was held by the Court of Appeal that the court had a complete and unfettered discretion in determining whether to make a winding-up order and that an appellate court would only interfere where the judge has exercised his discretion on the wrong principle; the bare fact of the opposing creditors being in a majority was not of itself sufficient, still less conclusive, to require a judge to exercise a discretion in their favour. In his judgment at p 236,

21 Willmer LJ has this to say:

In the present case the opposing creditors have not seen fit to explain the reason for their opposition. If they have good reasons

then the least they could do was to tell the court what those reasons are.

22 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.

23 In the instant case, the appellants are unable to pay the debts of the petitioning creditors, in addition to that their total liabilities amount to about \$3m. They made arrangements to liquidate their debts but despite time having been given them they failed to live up to their promises. It is not disputed that they have not carried on business since June 1977 and by the provisions of s 218(1)(c) the court has a discretion whether or not to make a winding-up order where a company has suspended business for a whole year.

24 In their affidavit of 18 October 1977 the said Messrs Bay Kwee Chai and Loh Chai Chon state:

It is our intention to solicit the help of big hardware and building material suppliers to support us by giving us material on long term credit either on profit sharing basis or upon terms of payment of interest.

25 The only inference that can be drawn is that the appellants have no assets whatever and no current source of income and in order to continue to operate they will have to raise funds and probably create further indebtedness. It is also quite obvious that any loans to the appellants in view of its financial position must surely be secured by its assets as one cannot envisage a lender granting an

unsecured loan in the circumstances: such a step would be to the detriment of the unsecured creditors.

26 In this case there is in my judgment abundant evidence that the company is insolvent and I so find. The opposing creditors have failed to show any good reason for their objection to the winding-up order being made. For the reasons above-mentioned, I ordered that the company be wound up.

27 ***Order accordingly.***

D C D'Cotta J

Anthony CS Yap (Shook Lin & Bok) for the appellants
Goh Aik-Chew (Goh Aik-Chew) for the respondents
