Eversendai Engineering Pte Ltd v Synergy Construction Pte Ltd (Ministry of Education, Third Party)
[2004] SGHC 129

Case Number : Suit 358/2004, SIC 2843/2004

Decision Date : 11 June 2004

Tribunal/Court : High Court

Coram : Vincent Leow AR

Counsel Name(s) : Brandon Choa (Acies Law Corporation) for judgment creditor; Mentioning for the attachee (Attorney-General's Chambers); Ray Shankar (Tan Kok Quan Partnership) for judgment debtor

Parties : Eversendai Engineering Pte Ltd — Synergy Construction Pte Ltd — Ministry of Education

11 June 2004

Assistant Registrar Vincent Leow

Introduction

1 The instant application raised an interesting issue on the statutory protection accorded a company in voluntary winding-up after provisional liquidators have been appointed. This issue arose against the backdrop of a spate of garnishee and attachment proceedings against Synergy Construction Pte Ltd by a number of its sub-contractors who may have been spurred on by a misguided notion that they would in this manner be able to lawfully overcome the pari passu doctrine. This is not to cast any aspersion on those involved. One who has the misfortune to extend credit to a company which has run into financial difficulty has every right to seek to secure himself. The question is merely whether this is permissible under the statutory regime.

Background

2 The facts are simple. On 13 May 2004, Eversendai Engineering Pte Ltd ("Eversendai"), a sub-contractor, obtained judgment of about $350,000 against Synergy Construction Pte Ltd ("Synergy"), their main contractor. Pursuant to that judgment, on 24 May 2004, they applied to attach all monies due from the Ministry of Education ("attachees") to Eversendai. This formed the instant application which came before me on 1 June 2004.

3 Prior to these events, the directors of Synergy had, on 4 May 2004, resolved that Synergy was by reason of its liabilities unable to continue its business. A declaration to this effect was filed with the Accounting and Corporate Regulatory Authority and with the Official Receiver on the same day. It is important to note that the declaration of solvency was not made. Concurrently, they appointed provisional liquidators. The shareholders' meeting and creditors' meeting were then called pursuant to s 291(b) of the Companies Act ("CA") and both were fixed for 3 June 2004.

4 At the hearing, it was not disputed that the monies were due and owing. Instead, the question that arose for determination was whether the attachment order nisi should be made absolute given that the shareholders' meeting had not taken place yet. The answer would depend on the protection that Synergy was entitled to – which, in turn, hinges on whether winding-up had commenced.

Has winding-up commenced?

5 The statutory protection imposed by the CA ring fences up the company once winding-up has commenced. It is thus pertinent to determine whether winding-up has commenced. In obtaining this answer, the starting point must be to look to the statutory framework as winding-up is solely a creature of statute. The relevant provisions on this entire area can be found in Division 3 of Part X of the CA.

6 The genesis of voluntary winding-up is s 290 CA which stipulates that:

> (1) A company may be wound up voluntarily —
>
> …
>
> (b) if the company so resolves by special resolution.

7 This is followed by s 291 CA which reads:

> (1) Where the directors of a company have made a statutory declaration in the prescribed form which has been lodged with the Official Receiver and have lodged a declaration in the prescribed form with the Registrar —
>
> (a) that the company cannot by reason of its liabilities continue its business; and
>
> (b) that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration,
>
> the directors shall forthwith appoint an approved liquidator to be the provisional liquidator.
>
> …
>
> (6) A voluntary winding-up shall commence —
>
> (a) where a provisional liquidator has been appointed before the resolution for voluntary winding-up was passed, at the time when the declaration referred to in subsection (1) was lodged with the Registrar; and
>
> (b) in any other case, at the time of the passing of the resolution for voluntary winding-up.
>
> [Underlining mine]

8 It was not in dispute that this was a voluntary winding-up. Further, it was clear that the declaration referred to in s 291(1) CA was lodged and that a provisional liquidator appointed. Thus, on a prima facie reading, it would appear that the voluntary winding-up had commenced on 4 May 2004, that being the date that the declaration under s 291(1) CA was filed with the Registrar of Companies and Businesses (or the Accounting and Corporate Regulatory Authority as it is now known).

9 The problem with this conclusion was that at the time of this application, the shareholders' meeting had not been held yet. As such, it was still possible that the pre-condition to a voluntary winding-up of a special resolution as required by s 290(1)(b) CA may not be met (either because the

meeting is never held or because of lack of sufficient support by the members). This becomes a concern because the wording of s 291(6) CA reads 'before the resolution for voluntary winding-up **was passed**' which being phrased in the past tense appears to require the resolution to have been passed. Given this possible conflict in the reading of the provision, the issue is thus whether the winding-up provisions only take effect after the resolution for voluntary winding-up has been passed, with its effect backdated to the date that the declaration was filed or whether the provisions take effect immediately upon the declaration being filed and provisional liquidator appointed.

10 No authorities directly on point were brought to my attention. However, some guidance may be gleaned from an examination of the statutory provisions dealing with the compulsory winding-up regime. Under that regime, s 255 CA deals with the commencement of winding up and it reads:

> (1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding-up shall be deemed to have been validly taken.
>
> (2) In any other case the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up.
>
> [Underlining mine]

11 A similar issue arises as to whether winding-up has commenced in the window period between the presentation of the petition and the court hearing. I am not aware of any local decisions dealing with this, but this point has arisen for determination in other jurisdictions.

12 I turn first to the Malaysian case of *Kredin Sdn Bhd v Development & Commercial Bank* [1995] 3 MLJ 304 where Siti Norma Yaakob JCA in delivering the judgment of the Malaysian Court of Appeal stated in relation to their equivalent provisions that

> [s 255] was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding-up up to the date when the order for winding-up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors. [Section 259] preserves the assets and effects of the company and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding-up order is made, it relates back to the date of the presentation of the winding-up, ie the date when the winding-up is deemed to have commenced… The fact that no winding-up order will ultimately be made makes no difference to this finding, as [s 255] is not concerned whether a winding-up order will ultimately be ordered or not, but that in mandatory tones it provides protection to unsecured creditors once a winding-up is deemed to have commenced that is upon the presentation of the petition. Thus, to say that protection is only present as and when the winding-up order is eventually made is to go against the very intention of what Parliament has enacted. That protection arises once a winding-up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding-up.
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> [Underlining mine]

13 This approach must be contrasted to the position taken in by the Supreme Court of New South Wales in *Fleet Motor & General Insurance Co. (Aust.) Pty. Ltd. v Tickle* [1984] 2 ACLC 282. There, McLelland J held that

> Unless and until a winding-up order is made by the Court, there is no winding-up and a fortiori there is no commencement of any winding-up. In the period between commencement of proceedings for a winding-up order and the final disposition of those proceedings, all that can relevantly be said is that if a winding-up order is made in the proceedings, the winding-up pursuant to that order shall… be deemed to have commenced at the time of the filing of the application for the winding-up…
>
> A compulsory winding-up does not in fact commence until the winding-up order is made by the court. Once the order is made, the winding-up is to be 'deemed to have commenced' at the earlier date. In this context the word 'deemed' is used to create a statutory fiction...
>
> [Underlining mine]

14 Similarly, the English Courts in *Re Miles Aircraft Ltd* [1948] 1 All ER 225 has adopted a similar view. Vaisey J stated:

> The difficulty in saying that there is a winding-up now in progress seems to me to be that, if the petition is ultimately dismissed or withdrawn, there never will have been a winding-up by the Court. All that we have now is a contingent future possible winding-up…

15 I am swayed to prefer the New Zealand and English position of requiring the winding-up order to be given first before the winding-up provisions bite. In my opinion, this position is preferred for two reasons: first a winding-up petition can be presented all too easily and to allow a resultant blanket rule against the disposition of property or attachments upon the mere presentation of a winding up petition would be too onerous on creditors and a company's business operations.

16 Second, in cases where the company is actually unduly prejudiced by the lack of an automatic stay, relief can be found under s 258 CA which provides:

> At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

This must be contrasted to s 262(3) CA which provides:

> (3) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except —
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

17 Section 258 CA when contrasted to s 262(3) CA clearly implies that the drafters had envisioned that there was a difference in the protection to be accorded a company after a winding-up petition was filed and after a winding-up order was made.

18 Having considered the position with respect to a compulsory winding-up, I turned back to consider the voluntary winding up regime. I do not think that the same principles are applicable here as I am of the opinion that the position in the voluntary winding-up regime differs from the compulsory winding-up regime in that the voluntary winding-up commences once s 291(6)(a) CA is complied with and it does not require the resolution to be passed first.

19 My basis for this conclusion is the literal wording of s 291(6)(a) CA itself, which is the first and foremost factor: see *Comptroller of Income Tax v GE Pacific* [1994] 2 SLR 690. The provision here states that 'voluntary winding-up **shall** commence'. These imperative words must be contrasted to the wording of s 255 which states "winding-up of the company **shall be deemed to have** commenced". It is axiomatic that where Parliament has chosen two different phrases to express themselves in the same Act, that they would prima facie have intended two different meanings to be attributed to those phrases.

20 The words 'shall be deemed to commence' creates a statutory fiction. These words indicate the intention of legislature as being that although the winding-up does not commence at the time of the presentation of the petition, it nevertheless should be taken to commence from that stage after the winding up order is given. This must be so because the word 'deemed' suggests that something is being assumed as being so for certain purposes although it is really not so: see *AR Goel v First National Bank* AIR 1960 Pun 476. In contrast, the wording of s 291(6) CA just uses the words 'shall commence'. This is not without significance. These words provide in unequivocal language that winding-up commences at the time of the filing of the declaration. Thus, there appears no reason on the face of the statute to suggest that the provisions operates in a similar manner to s 255 CA – i.e. retrospective backdating, and I would not impute the contrary meaning solely because of the words 'the resolution for voluntary winding-up **was** passed'. I would highlight the words of Lord Tindal CJ in the *Sussex Peerage* (1844) 8 ER 1034 at 1057 that:

> [T]he only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. <u>If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense</u>. The words themselves alone do, in such case, best declare the intention of the lawgiver.
>
> [Underlining mine]

21 Furthermore, I would note that the voluntary winding-up regime lacks the equivalent of s 258 CA. Yet, it cannot be said that there is any less of a need for the protection afforded by s 258 CA to a company prior to the shareholders' meeting. The logical reason then for the absence of an equivalent s 258 CA in the voluntary winding-up regime must simply be due to the fact that there is no need for such a provision as the voluntary winding-up has already commenced upon s 291(6) CA being met as opposed to after the resolution being passed (and subsequently backdated).

22 I also accept that s 291 CA deals with the appointment of a provisional liquidator and such an appointment is only interlocutory in nature and designed to preserve the assets of the company: see *Re Rothwells Ltd* [1990] 2 Qd.R 181. This does not mean that the voluntary winding-up cannot commence at this time. The language used in the statute is clear, precise and unambiguous and it firmly states the time for commencement as such. I see no reason to read into the language restrictions that are not there.

23 Having examined the wording of the statutory framework, I turn to consider the purpose and object underlying the words of the statutes: as provided under s 9A(1) Interpretation Act. I am of

the view that the approach articulated above can be supported on policy grounds. First, in a compulsory winding-up situation, there is little certainty that the winding-up order will be made. The decision is always dependent on the Court who has a wide discretion in the hearing of the petition. After all, winding-up is a drastic remedy and the Court would hesitate before imposing the draconian measure of winding-up the company unless this is the fairest course of action after taking into account the interests of all parties including the creditors, contributories, suppliers, employees, customers and shareholders.

24 In contrast, a voluntary winding up is a matter strictly between the shareholders of the company and no external agency plays a role. Further, it must be noted that the directors of the company would in this scenario already have made a statutory declaration to the effect that the company is unable by reason of its liabilities to carry on its business. It would take a brave shareholder to resist in the face of surrender by the company's management - who would presumably be more aware of the company's financial state. Further, company directors are normally appointed by the majority shareholders and corporate democracy is generally a quantitative exercise where the majority wins. Although, for the avoidance of doubt, I am not saying that it is an impossibility that the shareholders will never block the special resolution, but this is in my view slim (assuming of course that the directors are acting bona fide in the best interests of the company).

25 Second, the interests to be considered in a voluntary winding-up differs from that in a compulsory winding-up. In a compulsory winding-up, it must be recognised that if winding-up immediately commences upon the presentation of a winding-up petition, then however groundless or unjustified that petition is, it would ipso facto paralyse the trade of the company and great injury, without any corresponding advantage, would be done not only to the company but also to those interested in the assets of the company: see *Ex parte Pearson* [1868] LR 3 Ch App 443.

26 In contrast, the triggering point for the commencement of a voluntary winding-up are acts entirely and solely within the control of the directors of the company. As such, there is little fear that similar injury would be caused to the company (assuming of course that the directors are acting bona fide – but if so, the remedy would be against the offending directors or an application to convert the voluntary winding up to a compulsory winding up or judicial management: on the latter point see *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR 671 which deals with the possibility of a voluntary winding up being commenced for less than legitimate reasons). Instead, the only injury here is to legitimate creditors who may be deprived of an opportunity to pursue their remedy. I would point out that this is merely the loss of an opportunity for one month as the shareholders' meeting must be called within one month as provided under s 291(1)(b) CA. This injury must be juxtaposed to the harm that the winding-up provisions were designed to eradicate: i.e. preventing the company from being burdened by expenses incurred in defending unnecessary litigation from creditors grasping at straws in the hopes of usurping the operation of the pari passu doctrine and thereby ensure that the liquidator focuses on protecting the interests of the creditors as a class by preventing the fragmentation of its assets. Indeed, these interests are paramount given that the directors have already made a statutory declaration that the company is unable to carry on its business by reasons of its liabilities. Further, as the necessary special resolution can only be given at the shareholders' meeting, there would be a hiatus between the statutory declaration and the actual shareholders' meeting. With such a red flag flapping, there is a strong need to preserve the status quo and prevent any creditor from gaining priority, thereby preserving the assets of the company for the benefit of those who may ultimately be found to be entitled to the benefit of them: see *Re Dry Docks Corporation of London* [1888] 39 Ch D 306. As such, I am of the firm opinion that voluntary winding up commences immediately upon the appointment of the provisional liquidator and the filing of the declaration.

27 I would also add three things. First, such a winding up is merely provisional in nature. Its impact relates solely to the question of whether winding up has commenced. It does not mean that the company has been wound up. Thus, only provisions that refer to the commencement of winding up would bite at this time such as s 299 CA, while the other provisions would not. - for example, it does not prohibit the Court from making a judicial management order under s 227B(7)(a). Second, at the time of writing of these grounds, I am given to understand that the resolution for the voluntary winding-up was ultimately not passed. This does not mean that the voluntary winding-up never commenced. It merely means that the voluntary winding-up terminated as of the moment that the shareholders chose not to pass the resolution and it goes without saying that the protection accorded the company by the CA must end. The position would be the same if any other event takes place that is inconsistent with a voluntary winding up (such as if a winding up petition is filed with leave of Court). Third, at the time of the application, the creditors' meeting has also not been held, but since the consent of the creditors to the voluntary winding-up is not necessary, their refusal to consent or appoint a liquidator will not invalidate the voluntary winding-up.

28 I now turn to the applicable provisions regulating the protection that Synergy is entitled to. Counsel for Eversendai, Mr Choa, contended that this was a members' voluntary winding-up, while counsel for Synergy, Mr Shankar, contended that it was a creditors' voluntary winding-up. For reasons that I will come to, this dispute is irrelevant. Nonetheless, I will deal with it by referring to s 293 CA which reads:

> (1) Where it is proposed to wind up a company voluntarily, the directors of the company, or in the case of a company having more than two directors, the majority of the directors shall, in the case of a members' voluntary winding-up before the date on which the notices of the meeting at which the resolution for the winding-up of the company is to be proposed are sent out, make a declaration to the effect that they have made an inquiry into the affairs of the company, and that, at a meeting of directors, have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding-up.
>
> [Underlining mine]

29 The rationale for the declaration of solvency is simple. In the case of a members' voluntary winding-up, the creditors play no part. As such, it must be shown that no creditor will be prejudiced by the winding-up of the company. This can only be shown if the company can pay back all its debts in full by the filing of the declaration of solvency.

30 In this case, the directors of Synergy had not made the declaration of solvency, thus the voluntary winding-up must proceed as a creditors' voluntary winding-up. This point was similarly made in *Walter Woon,* Company Law, 2nd Edition at p 696 that "if the declaration of solvency is not made, the winding-up proceeds as a creditors' voluntary winding-up."

31 Mr Choa however sought to rely on s 295 CA which reads:

> (1) If the liquidator is at any time of the opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration made under section 293, he shall forthwith summon a meeting of the creditors and lay before the meeting a statement of the assets and liabilities of the company and the notice summoning the meeting shall draw the attention of the creditors to the right conferred upon them by subsection (2).
>
> (2) The creditors may, at the meeting summoned under subsection (1), appoint some other person to be the liquidator for the purpose of winding-up the affairs and distributing the assets of

the company instead of the liquidator appointed by the company.

If the creditors appoint some other person under subsection (2), the winding-up shall thereafter proceed as if the winding-up were a creditors' voluntary winding-up.

…

(5) Where the liquidator has convened a meeting under subsection (1) and the creditors do not appoint a liquidator instead of the liquidator appointed by the company, the winding-up shall thereafter proceed as if the winding-up were a creditors' voluntary winding-up; but the liquidator shall not be required to summon an annual meeting of creditors at the end of the first year from the commencement of the winding-up if the meeting held under subsection (1) was held less than 3 months before the end of that year.

[underlining mine]

32 He contended that this provision indicated that a creditors' voluntary winding-up only commenced after the creditors appoint a liquidator (or retain the existing liquidator) at the creditors' meeting. I could not agree. This provision only applies where a liquidator has already been appointed pursuant to a members' voluntary winding-up (where a declaration of solvency had been filed under s 293 CA) and the liquidator subsequently forms the opinion that the company would not be able to pay its debts in full within the period stated in the declaration. The liquidator must then call for a creditors' meeting and draw their attention to their right to appoint another person as the liquidator. It is in this light that the provision must be read as providing the time frame for facilitating the transformation of a members' voluntary winding-up into a creditors' voluntary winding-up because the company is no longer solvent as initially envisioned. As such, Synergy is clearly being wound up under a creditors' voluntary winding-up.

33 Given this, s 299 CA would apply (as it applies only to creditors' voluntary winding-up). That section reads:

(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding-up shall be void.

(2) After the commencement of the winding-up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

34 The clear words of this section make it clear that this application must fail. First, it was commenced without leave of Court per s 299(2) CA and second, it would be void per s 299(1) CA. As such, I would on this basis dismiss this attachment application.

35 In addition, I would add that even if this was a members' voluntary winding-up, the application must fail as s 334(1) CA would apply (as it applies to all voluntary winding-up). The provision reads:

Where a creditor has issued execution against the goods or land of a company or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding-up,

but

> (a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding-up is to be proposed, the date on which the creditor so had notice shall for the purposes of this section be substituted for the date of the commencement of the winding-up;
>
> (b) a person who purchases in good faith under a sale by the bailiff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and
>
> (c) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

[Underlining mine]

36 It was clearly impossible for the attachment to be completed before the commencement of winding-up. As such, any benefit obtained could not be retained against the liquidator. Further, there were cogent reasons for the Court not to set aside this right conferred on the liquidator, for to do so would first only encourage unsecured creditors to make a rush for the Company's assets, and undermine the principle underlying the winding-up regime which is the equitable distribution of assets. Given this, I saw no reason to allow the attachment order especially since the provisional liquidators objected to this application.

Discretion

37 I would further add that in the event that I am wrong and voluntary winding-up has not commenced, I would still have discharged the attachment order nisi. The decision to make absolute the attachment order nisi is clearly something within the discretion of the Court. This was clearly stated by Goh Phai Cheng JC in *Commercial Bank of Kuwait SAK v Nair (Chase Manhattan Bank NA, garnishees)* [1994] 1 SLR 197 in relation to garnishee orders that:

> It should be noted that this rule provides that the court 'may' make a garnishee order. The court's power to make a garnishee order, whether it is an order nisi or an order absolute, is discretionary. A garnishee order is basically an equitable remedy, and it may be refused where the attachment of the debt would be inequitable or unfair.
>
> [Underlining mine]

38 Further, an attachment order is an equitable remedy. It should not be granted if its effect is to prefer one creditor over another when the debtor is insolvent: see *George Lee & Sons (Builders) Ltd v Olink* [1972] 1 WLR 214 and *Prichard v Westminster Bank Ltd* [1969] 1 WLR 547. The Court's aim is to do justice not only between the parties, but also to any person who may be affected by the order: see *Rainbow Moorgate Properties Ltd.* [1975] 1 WLR 788.

39 As such, the pivotal consideration here is that the decision whether to wind up the company is imminent. In these circumstances, it would be at the very least unfair, if not pointless, to allow the creditor to gain an unfair advantage over other creditors. In recognising this, the Court is merely preventing a situation that is contrary to the statutory scheme for the orderly and fair distribution of an insolvent company's assets to its creditors: see *Credit Lyonnais v SK Global Hong Kong Ltd*

[2003] 4 HKC 104. Given this, I was of the opinion that the attachment order nisi should not be made absolute.

Conclusion

40 In closing, I would mention that at the start of the hearing, I felt that the best course forward would be for this hearing to be adjourned to a date after the shareholders' meeting. However, Mr Choa insisted that an adjournment would not be necessary and that I should proceed to hear this application forthwith. As such, I proceeded to hear the matter and ultimately declined to make absolute the attachment order nisi.