IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 171

Companies Winding Up No 111 of 2016

In the matter of Section 254(1)(e) of the Companies Act (Cap 50)

And

In the matter of Two Oceans Film Company Pte Ltd

Between

Koh Say Chong

… Plaintiff

And

Two Oceans Film Company Pte Ltd

… Defendant

JUDGMENT

[Insolvency Law] — [Winding Up]

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Koh Say Chong
v
Two Oceans Film Company Pte Ltd

[2016] SGHC 171

High Court — HC/Companies Winding Up No 111 of 2016
Choo Han Teck J
8, 29 July 2016

29 August 2016 Judgment reserved.

Choo Han Teck J:

1 The question before me is whether a creditor, who is also a controlling shareholder and director of a company may wind up the company under s 254(1)(e) and s 254(2)(a) of the Companies Act (Cap 50, 2006 Rev Ed) in the face of objection from other creditors.

2 Koh Say Chong ("the plaintiff") applied to wind up Two Oceans Film Company Pte Ltd ("the Company") on the ground of insolvency stated in s 254(1)(e) of the Companies Act. The Company is a private limited company incorporated on 28 August 1998 in Singapore that deals in the business of advertising and video production. The plaintiff is a director, shareholder and creditor of the Company.

3 The two shareholders of the Company are the plaintiff and his wife, Geraldine Ng Mui Ling ("Geraldine Ng") who each own 50% of the shares in the Company. The plaintiff and Geraldine Ng are also the two directors of the Company. The plaintiff and Geraldine Ng are also the sole directors and shareholders of another company, Salt Films Pte Ltd ("Salt Films"), which is one of the creditors of the Company.

4 The plaintiff claims that he and Salt Films advanced loans to the Company. The plaintiff also claims that he had not drawn his full salary, remuneration and expenses from the Company since late 2015 to help the Company tide over its financial difficulties. On 5 May 2016, the plaintiff issued and served a statutory demand on the Company for payment of the sums of:

(a) Unpaid salary, remuneration and expenses of $85,049.64 as at 31 March 2016; and

(b) Loans in the amount of $186,360.32.

5 The amount of unpaid salary, remuneration and expenses that the plaintiff raised in his submissions ($69,549.64) differs from what he raised in the statutory demand ($85,049.64). I take $69,549.64 to be the correct amount given that this is the sum that the plaintiff exhibited in his 2nd affidavit dated 5 July 2016. The plaintiff exhibited an extract from the Company's accounts, which shows that the plaintiff had received payment of $15,500, which was the difference between $69,549.64 and $85,049.64, as payment for his salary for November 2015 and partial payment for his salary for December 2015.

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Nothing turns on this inconsistency because on either amount, the debt exceeds the statutory minimum of $10,000 under s 254(2)(a) of the Companies Act. The statutory demand also contains the notice that in the event of the Company's refusal and/or failure and/or neglect to make payment of the sums within three weeks from the date of service of the demand, the Company would be deemed to be unable to pay its debts and winding up proceedings may be commenced against it.

6 The Company did not pay the Debt, or offer to secure or compound the debt after the three week period prescribed under the statutory demand. The plaintiff then filed the present application to wind up the Company on the ground that the Company is deemed to be unable to pay its debt and was insolvent by operation of s 254(1)(e) read with s 254(2)(a) of the Companies Act.

7 The schedule tendered by the plaintiff to the Court shows that the Company has 36 creditors including the plaintiff. The schedule is reproduced below:

No	Name	Creditors' Claim	Correct Amount (as in the records of the Company)
1	Yap Ming Yang	$210.00	$495.00
2	Li Jia Ling	$356.20	$356.20
3	Sng Ye Xiang	$485.00	$485.00
4	Jessleen Loy	$700.00	$250.00

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5	Yuka Kamamoto	$930.00	$930.00
6	Choong Mun Lok	$1,001.50	$3,426.50
7	Soh Zhi Min Pamela	$1,031.20	$993.75
8	Wong Wan Yu	$1,081.25	$1,081.25
9	Tan Ji Sheng Dylan	$1,531.25	$168.75
10	Tan Jie Kai Leslie	$1,531.25	$1,531.25
11	Shawn Kelvin Fonseka	$2,002.89	$2,002.89
12	Sin Kam Heng	$2,353.75	$2,353.75
13	Lee Zhi Han Joanna	$2,750.00	$2,750.00
14	Tan Lip Hwee Jason	$3,000.00	$3,000.00
15	Chu Kok Yong	$3,180.00	$3,260.00
16	Chia Wing Keong	$3,828.75	$7,752.51
17	Andrew Poh Joon Di	$4,327.15	$4,717.80
18	Lee Wei Wen	$5,000.00	$5,000.00
19	Sabrina Simone Tan Siok Min	$5,000.00	$5,000.00
20	Siau Xindi	$8,200.00	$7,200.00
21	Grace Song Jia En	$9,100.00	$1,800.00
22	Ngoh Siew Hoong	$9,100.00	$8,700.00
23	Abdul Wahid Bin Subarmah	$11,648.00	$8,449.00
24	Diva Models (S) Pte Ltd	$11,550.00	$11,550.00

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25	Lee Wei Hao Ernest	$11,648.00	$563.00
26	Tan Zuo Quan	$19,450.00	$7,950.00
27	Fanny Seah Gek Swee	$29,650.00	$29,650.00
28	Yap Kok Jiunn	$33,000.00	$33,000.00
29	Song Zu Singapore	$123,333.40	$127,345.90
30	Iceberg Design Pte Ltd	$128,677.50	$128,677.50
31	Bert Lighting House Pte Ltd	$170,490.29	$165,416.79
32	Tribeca Management Pte Ltd	$2,600.00	$2,600.00
33	Christian Eber	$3,500.00	$3,500.00
34	Salt Films Pte Ltd	$1,194,018.27	$1,194,018.27
35	Papillon Designers' Gallery Pte Ltd	$19,367.00	$19,367.00
36	[The plaintiff]	$255,909.96	$255,909.96

8 In total, the company owes $2,081,542.61 to its creditors based on the claims made by its creditors. At the winding up proceedings, 32 creditors of the Company, representing $608,747.38 of the Company's debt raised objections ("the opposing creditors") over the plaintiff's application to wind up the Company and asked that the plaintiff's application be dismissed or stayed. three creditors of the Company, representing $1,216,885.17 of the Company's debt supported the plaintiff's application to wind up the Company.

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9 30 opposing creditors consisting of the 1st to the 30th creditor listed in the table above at [7] are represented by Mr Aditya Naidu ("Mr Aditya"). The 31st opposing creditor, Bert Lighting House Pte Ltd ("Bert Lighting") is represented by Mr Nicolas Tang ("Mr Tang"). The 32nd opposing creditor, Tribeca Management Pte Ltd ("Tribeca") is represented by Ms Annsley Wong ("Ms Wong").

10 The arguments raised by Mr Aditya, Mr Tang and Ms Wong in their submissions can be summed as follows. First, the opposing creditors argue that the winding up application was an abuse of process. Their case is that the plaintiff orchestrated the situation of indebtedness that led to the present winding up application, and that it was thus disingenuous for the plaintiff to allege that the Company failed to reply his statutory demand or dispute the debt because the plaintiff himself is one of the two directors who has control the Company. The opposing creditors also aver that the plaintiff, as a shareholder, did not show an interest sufficient to induce the court to wind up the Company. They rely on *Re Ah Yee Contractors (Pte) Ltd* [1987] SLR(R) 396 in support of their claim that the plaintiff, as a shareholder, has to show the Court that there is a surplus divisible among the shareholders, post winding up, before the Court will assist him in his winding up application. Further, the creditors claim that the plaintiff's resort to a winding up application was improper as he had alternative options such as commencing legal action to enforce his debt.

11 The second ground which the opposing creditors rely on is the plaintiff's failure to discharge his burden to prove that the Company is unable

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to pay its debts and is insolvent. They argue that there is no proof that the Company was indebted to the plaintiff and that the amounts listed in the statutory demand were questionable, being claims without any supporting evidence. Further, the opposing creditors argue that a mere omission by the Company respond to a statutory demand or to pay its debts is not conclusive of the Company being insolvent especially since it was the plaintiff himself who had caused the Company's failure to respond to the statutory demand.

12 With regard to Salt Films, the opposing creditors challenge the debt owed to Salt Films. They say that the statement of accounts attached to the affidavit of Geraldine Ng in support of the winding up filed on behalf of Salt Films lacks details of when the loans were made, for what purpose they were made, and when repayments were made. The opposing creditors also make the point that the plaintiff might have diverted contracts from the Company to Salt Films.

13 Another complaint raised by Ms Wong for the 32nd creditor was that the plaintiff had, in the time leading up to this application, reduced the Company's assets, against the interest of the creditors. To demonstrate this, she points to the fact that the plaintiff had during the period between 27 October 2015 to 31 March 2016 continued to pay himself a monthly salary, claim for his own personal hospitalisation and insurance endowment plans, book hotels, rent vehicles and service his personal car even though the Company was insolvent at the time.

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14 In response, the plaintiff's counsel, Mr Cheo, argued that as a creditor, the plaintiff is entitled to rely on s 254(1)(e) read with s 254(2)(a) of the Companies Act to wind up the Company after the statutory demand is served and not responded to. He further contends that the plaintiff is not required to show that there will be a surplus, divisible amongst the shareholders, after the winding up. With regard to the opposing creditors' allegations, the plaintiff denies the allegations and submits that they are without any credible basis and are not supported by any evidence. Finally, he claims that there is no obligation to explore alternative measures such as suing the Company for the debt before resorting to a winding up application.

15 A company is deemed to be unable to pay its debts and presumed to be insolvent under s 254(2)(a) of the Companies Act if it neglects to pay the debt in a statutory demand, or to secure or compound for it within three weeks after service of the statutory demand. While a mere omission to pay a debt may not amount to a neglect to pay, this should only be the case when there is valid excuse for not paying the debt such as a *bona fide* dispute against the debt or the existence of a *bona fide* counterclaim (see *Re Mechanised Construction Pte Ltd* [1989] 1 SLR(R) 500 and *Ng Tai Tuan and another v Chng Gim Huat Pte Ltd* [1990] 2 SLR(R) 231). Nonetheless, even if the statutory ground is established, the Court may, after considering all the relevant factors, such as the utility, propriety and effect of a winding up order as well as the overall fairness and justice of the case, exercise its discretion not to wind up a company (see *Lai Shit Har and another v Lau Yu Man* [2008] 4 SLR(R) 348 at [33]).

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16 Given that the statutory requirements under s 254(2)(a) in the present application have been fulfilled and there are no disputes over the debt or counterclaims raised by the Company, the issue before me is whether the opposing creditors have raised sufficient grounds to invoke the Court's exercise of its residual discretion to dismiss the plaintiff's winding up application. I find that the creditors have not done so.

17 The allegations raised by the opposing creditors' in objection to the winding up application are not substantiated by evidence other than the bare assertions that:

(a) There was bad faith in the plaintiff orchestrating the winding up application on the basis of his relationship with the Company as its creditor, director and shareholder; and

(b) There were questionable transactions arising from the debts claimed by Salt Films and himself.

18 Although the plaintiff, Salt Films and the Company are related entities, this cannot, on its own, be sufficient to justify denying the plaintiff's application. Otherwise, that would amount to establishing a rule preventing associated entities such as directors or related companies that are simultaneously creditors from availing to the grounds of winding up under s 254(1)(e) read with s 254(2)(a) that is available to creditors under the Companies Act. Even if there is merit in the opposing creditors' bare assertions that there are questionable transactions arising from the debt claimed by the plaintiff and Salt Films, the liquidator, appointed upon a

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winding up order will be obliged to look into the proof of the debts and make the appropriate assessment of the amounts the Company is liable for. The liquidator is also empowered to commence investigations and take legal action against the appropriate entities, if required, for improprieties such as breaches of fiduciary duties, undervalued transactions or unfair preference should they arise.

19 Secondly, the plaintiff does not need to show that there would be sufficient surplus to be distributed to the shareholders after all debts are paid. This is because the plaintiff is applying to wind up the Company as a creditor on the basis of the Company's insolvency. His interest in the winding up of the Company is simply the recovery of the debt that the Company owes to him. The present application is different from *Re Ah Yee Contractors (Pte) Ltd* [1987] SLR(R) 396 that the opposing creditors rely on. In that case, the applicant of the winding up was a shareholder attempting to wind up the company on just and equitable grounds. It was reasonable for the court in that case to require the applicant, who was a fully paid shareholder (but not a creditor), to show an interest in the winding up of the company by showing a surplus, divisible amongst the shareholders, after the winding up to induce the court to interfere on his behalf. This is not required when the applicant is applying to wind up the Company as a creditor in his own right as is the case here.

20 Thirdly, the opposing creditors have also not provided any viable alternative to winding up the Company. Their suggestion that the plaintiff commence a suit against the Company for the recovery of the debt is not

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practical. It is very likely that the Company will not dispute the debt just as it has done in this winding up application. That will result in a default judgment entered against the Company that will be used to support yet another winding up application. Hence, to ask that the plaintiff to commence a suit against the Company would be a waste of time and costs.

21 Lastly, also from a practical standpoint, I find that granting the winding up order is the most appropriate measure, on the available facts, and it will not prejudice any party. The two sole directors and shareholders of the company, *ie*, the plaintiff and Geraldine Ng, are in favour of the winding up. The obvious inference is that neither of them believes the Company to be a going concern moving forward. On that basis, it is highly unlikely that refusing the winding up application would result in any positive benefit or outcome to the Company or its creditors. In fact, prolonging the Company's life may cause further depletion of the Company's assets through its continued operations. Further, the majority of the creditors in value support the application and it is only a minority that is opposed to it. All things considered, it is more sensible to realise and distribute the assets of the Company as soon as possible to the creditors and thereafter its shareholders and a winding up order is the appropriate way to see this through.

22 I therefore find that the statutory ground of winding up under s 254(1)(e) read with s 254(2)(a) has been established and that the opposing creditors have failed to provide sufficient reason to invoke the Court's discretion to interfere with this winding up application. There is also no evidence of an abuse of process.

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23 For these reasons and because the papers are in order, I grant the winding up application in its terms sought.

- Sgd -
Choo Han Teck
Judge

Cheo Chai Beng Johnny (Cheo Yeoh & Associates LLC) for the plaintiff;
Defendant unrepresented;
Trish Xavier (Insolvency and Public Trustee's Office) for the Official Receiver;
Ron Alvin Soh and Aditya Naidu (Samuel Seow Law Corporation) for a group of 30 opposing creditors;
Nicolas Tang (Farallon Law Corporation) for the 31st opposing creditor;
Annsley Wong (Clifford Law LLP) for the 32nd opposing creditor.

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