BNP Paribas v Jurong Shipyard Pte Ltd
[2009] SGCA 11

Case Number : CA 91/2008

Decision Date : 09 March 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Sundaresh Menon SC, Aurill Kam, Disa Sim and Paul Tan (Rajah & Tann LLP) for the appellant; Davinder Singh SC, Blossom Hing, Lin Yan Yan and Joan Lim (Drew & Napier LLC) for the respondent

Parties : BNP Paribas — Jurong Shipyard Pte Ltd

Companies – Winding up – Alleged debtor offering to fully secure claim – Registration – Whether winding-up petition could be filed – Whether court should grant injunction to restrain filing of winding-up petition

Companies – Winding up – Whether statutory demand ought to spell out debtor could pay sum demanded or to secure or compound for it – Section 254(2)(a) Companies Act (Cap 50, 2006 Rev Ed)

9 March 2009

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the decision of Lee Seiu Kin J ("the Judge") in Originating Summons No 1727 of 2007, *viz*, *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR 33 ("the GD") granting Jurong Shipyard Pte Ltd ("JSPL") an injunction to restrain BNP Paribas ("BNP") from commencing winding-up proceedings against JSPL, which BNP had threatened to do after JSPL had failed to comply with BNP's statutory demand for payment of approximately US$50m allegedly due and payable by JSPL to BNP arising from certain foreign exchange contracts to which BNP was a counterparty.

2 At the conclusion of the hearing of this appeal, we dismissed it and gave the following brief grounds:

> 1 Jurong Shipyard Pte Ltd ("JSPL") entered into a number of FX contracts with one of its bankers, BNP Paribas ("BNP"), as counterparty. The instructions for the FX contracts were given by Mr Wee Sing Guan ("Wee"), who prior to October 2007 was a director of JSPL. Wee was also Group Finance Director of SembCorp Marine Ltd, JSPL's parent.
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> 2 JSPL's board of directors came to know of these contracts and repudiated them on various grounds: one of which was that BNP was aware or ought to have been aware that Wee had no authority to enter into the FX contracts; another was that Wee and BNP had colluded to cover up the losses by entering into a further unauthorized FX contracts to cover up the losses.
>
> 3 BNP rejected JSPL's allegations on the ground that JSPL directors have passed a resolution authorizing Wee to enter into FX contracts for the purpose of hedging or speculation.
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> 4 JSPL and BNP mutually agreed to close out the FX contracts in order to crystallize the

losses, with both parties reserving their respective rights and liabilities. After the close-out was completed under the terms of the Close-Out Agreement, the amount of the loss was crystallized at approximately US$50m.

5 BNP sent letters of demand to JSPL to pay the US$50m on the ground that there was an immediate payment obligation under the Close-Out Agreement, subject to a claw-back if JSPL could show that it was not bound by the FX contracts. BNP also claimed that JSPL was fully liable for the US$50m loss as it was their position that the FX contracts were authorized by JSPL.

6 On 20 November 2007, JSPL offered to place in escrow sufficient funds to cover the US$50m to meet any judgment obtained by BNP on its claim. This was made on the condition that BNP commence legal proceedings to recover the alleged debt. JSPL gave BNP up to 23 November 2007 to consider the offer. BNP rejected the escrow offer and served a statutory demand to JSPL for payment that same day.

7 On 23 November 2007, JSPL applied to the High Court for an injunction to restrain BNP from commencing winding-up proceedings on the ground that there were triable issues to BNP's claim and that BNP was not entitled to present a winding up petition.

8 BNP responded that JSPL had no triable issue as (a) there was an immediate obligation to pay, subject to a claw-back under the Close-Out Agreement; and (b) there was ultimately a debt (equal to the close-out amount) under the Master Agreement.

9 The application was heard by Lee Seiu Kin J who found that JSPL had raised triable issues to BNP's claim under the Close-Out Agreement and/or the Master Agreement.

10 BNP appealed to this court. We heard full arguments on the issues raised by BNP on appeal.

11 In our view, BNP should have accepted JSPL's offer to pay the amount of the crystallized loss into an escrow account and thereafter commenced an action against JSPL to recover the alleged debt. We hold that in a case where a solvent company does not admit the debt and is prepared to offer security to defend the claim, the court should not as a matter of principle, in the exercise of its discretion, allow a claimant to file a winding up petition against the solvent company, with all the potentially disastrous consequences that may result from the filing of the petition. It is inappropriate to use the threat of winding up to force a company to pay the unadmitted debt, in such circumstances.

12 Accordingly, we make the following orders:

(a) the appeal is dismissed with costs, with the usual consequential orders;

(b) the injunction is continued subject to JSPL providing security for the amount of BNP's claim (as per the statutory demand dated 20 November 2007) in a form to be agreed between the parties within 14 days from today, failing which we will make the requisite order; and

(c) if BNP fails to commence an action against JSPL within 12 weeks from the date hereof, the security shall be cancelled or returned to JSPL.

13 We express no views on the findings of Lee Seiu Kin J that JSPL has raised triable issues

to the claim of BNP.

3 We now elaborate on why it was wrong of BNP to have threatened to resort to winding-up proceedings against JSPL in order to recover a contested debt instead of accepting the security offered by JSPL pending the resolution of BNP's claim through court proceedings. In our brief grounds, we held that JSPL was entirely justified in applying for an injunction to restrain BNP from filing the petition. Although JSPL filed the petition on the ground that there were triable issues with respect to BNP's claim for the US$50m crystallised loss, it was also our view that the condition of triable issues was not even necessary to justify the injunction. We will now elaborate on our conclusions.

The court's power to wind up a company

4 We examine first the court's statutory power to wind up a company under the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). Section 253(1)(*b*) of the Act provides that "[a] company … *may* be wound up under an order of the Court on the application of any creditor, including a contingent or prospective creditor, of the company" [emphasis added]. Section 254(1)(*e*) provides that the court may order the winding up of a company if it is unable to pay its debts. A company is deemed to be unable to pay its debts in the circumstances prescribed by s 254(2) of the Act as follows:

> A company shall be deemed to be unable to pay its debts if —
>
> (*a*) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, *and the company has for 3 weeks thereafter neglected to pay the sum* ***or to secure*** *or compound for it to the reasonable satisfaction of the creditor*;
>
> (*b*) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (*c*) it is *proved* to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.
>
> [emphasis in italics and bold italics added]

5 In the context of this case, the following points may be noted with regard to the combined effect of ss 253(1)(*b*) and 254(2). First, the use of the word "may" instead of "shall" indicates a discretionary power in the court to order a winding up (see [15] below). Second, a creditor may be an actual, contingent or prospective creditor (see [6] below). Third, the court *may* wind up a company under s 254(1)(*e*) only if the latter is unable to pay its debts (see [7] below). Fourth, the creditor has to prove that the company is unable to pay its debts, and it can do so by adducing evidence of actual inability to pay its debts (s 254(2)(*c*)) or evidence of a deemed inability to pay its debts (s 254(2)(*a*)) (see [7] below). Fifth, to prove a deemed inability under s 254(2)(*a*) of the Act, it is necessary for the creditor to have a "due" debt, which the debtor has for three weeks neglected to pay *or to secure* or compound to the reasonable satisfaction of the creditor, after it has been served with a statutory notice to pay. If the creditor claims that the security is not satisfactory and is determined to issue winding-up proceedings, the debtor may then apply to court for a restraining order so as to enable the court to determine on an objective basis what the reasonable satisfaction of the creditor should be (see [9] below).

6 Taking the second point first, in the present case, BNP took the position that it was an existing, and not a contingent or prospective, creditor with respect to the US$50m crystallised loss on the ground that the terms of the close-out agreement mentioned at [4] of our brief grounds (see [2] above) were such that JSPL had agreed to make payment for the crystallised loss of US$50m. Given the points we have highlighted, it was clear why BNP had to rely on s 254(2)(*a*) of the Act rather than s 254(2)(*c*), given that JSPL had offered to place US$50m in escrow. This was a patent indication that JSPL was both able and willing to pay in the event that the court determined that it was liable to do so. In other words, JSPL was not an insolvent company.

7 This impediment, *viz*, the fact that JSPL was in reality not an insolvent company but yet refused to admit BNP's claim, led the latter to use a shortcut by the backdoor to try to enforce a contested claim by issuing a s 254(2)(*a*) statutory notice and threatening JSPL with winding up unless it made payment. In our view, had a winding-up petition been filed, it would have amounted to an abuse of the court's winding-up jurisdiction. First, winding-up proceedings are intended only for cases where the company is insolvent or deemed to be insolvent. In the present case, BNP could not have proved that JSPL was insolvent because the fact was that it was not insolvent, and this was easily confirmed by its offer to secure BNP's claim for the crystallised loss, even though it did not admit that it was liable for the loss. Second, BNP also could not prove a deemed inability to pay on the part of JSPL without first requiring the winding-up court to determine whether the latter was liable for the claim in the first place. In this regard, we note that the second statutory demand for payment (the first being withdrawn) was issued after the offer of security was made. In essence, BNP was seeking to invoke the court's winding-up jurisdiction to adjudicate on a disputed claim. Thus, it follows that there was no legal basis whatsoever for BNP to threaten to file a winding-up petition against JSPL. JSPL was not an insolvent company and BNP ought to have commenced court proceedings instead, as it is settled law that the court's winding-up jurisdiction is not for the purpose of deciding a disputed debt; see *Mann v Goldstein* [1968] 1 WLR 1091, where Ungoed-Thomas J said (at 1098–1099):

> For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, *that the winding-up jurisdiction is not for the purpose of deciding a disputed debt* (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court … [emphasis added]

Although this passage contains the qualification that the debt must be disputed on substantial grounds and not on insubstantial grounds (which is BNP's case *vis-à-vis* JSPL), it should be remembered that Ungoed-Thomas J's statement of principle was made in the context of a disputed debt *where the debtor did not make any offer to secure the disputed debt.* Where such an offer has been made, the issue of substantiality or insubstantiality falls by the wayside as it is no longer a relevant consideration given that the debtor is not unable to pay its debts. That is why, in our view, the issue of whether there were triable issues with respect to BNP's claim was not even relevant in the present case.

8 In *Re Yet Kai Construction Co Ltd* [2000] HKEC 186 (transcript available on Westlaw), Deputy Judge Woolley, in striking out a petition to wind up a company, based on a disputed debt, for abuse of process, made the following observations:

> However, before leaving the matter I am bound to comment on the course adopted by the petitioner here. Having what they believed was a good claim against the respondent, they had a choice of possible actions to take: they could bring an action in the Court of First Instance, with an application under Order 14 for judgment if they thought their claim was unanswerable; they

could, and under the provisions of the sub-contract, should, have referred their dispute to arbitration; or they could, as they have done here, serve a statutory demand followed by a petition to wind up the respondent. There is no evidence that they thought that the respondent was insolvent, or otherwise unable to pay, and the first two options, should their claim prove good, would have accordingly resulted in payment being made. The option chosen, however, if allowed to proceed to its logical conclusion, would probably result in the destruction of the respondent as a viable entity. The presentation of the petition alone can do, and no doubt has done here, considerable damage to the respondent's business and the goodwill of its customers. It is for this reason that the courts regard the use of such a procedure as a debt collecting operation, to put pressure on a company to pay, or to settle on terms which it might not otherwise have to, as something which should be discouraged in the strongest terms. There has been no explanation given to me why the petitioner chose this course, with its potentially devastating effect on the respondent, rather than another course which would have recovered a debt, if properly owed, without affecting the respondent's other business.

We agree.

9 Taking the fifth point next (see [5] above), even in the case of an admitted debt, the debtor company is not deemed to be unable to pay its debts if it has not neglected to secure the debt demanded under the statutory notice. In our view, the legal position must be *a fortiori* where the company does not admit the claim but offers to provide security. Although this situation is not expressly covered under s 254(2)(*a*), it was in our view a compelling reason for this court to restrain BNP from filing a winding-up petition against JSPL. A debtor which has offered security is not deemed to be unable to pay its debts, and there is no reason why an alleged debtor who has offered the same ought to be treated any differently. In the circumstances, even if BNP had filed such a petition, the fact that adequate security had been offered would have been a compelling reason to dismiss the petition.

10 In our view, we had no doubt that if BNP had filed a winding-up petition against JSPL in the circumstances of this case, the winding-up court would have dismissed the petition, in the exercise of its discretion, on the ground that it was an abuse of process as BNP would not have been able to prove that JSPL was unable or deemed to be unable to pay its debts.

The statutory demand

11 There is one issue in relation to the fifth point that was not argued before us. The point is whether the statutory demand requires the creditor to state that the debtor must be informed of the option of securing or compounding for the debt. It is a statutory requirement under the corresponding law in England, and also in Australia since June 1993. In both jurisdictions, the petitioner is required to inform the debtor company that he can either pay the debt or secure or compound for it to the creditor's satisfaction. There is, however, no such requirement under the Act or the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed).

12 However, in *Consolidated Press (Finance) Ltd v Australian Horticultural Finance Pty Ltd* (1992) 108 ALR 402, which was decided prior to the change in the law in Australia, Lockhart J of the Federal Court of Australia held (at 403) that even though:

> … the terms of s 460(2)(a) do not require the notice to specify that, if the company has for three weeks after service of the notice failed to pay the sum or to secure or to compound for it to the reasonable satisfaction of the creditor, winding up proceedings will be brought. Despite the lack of an express requirement to do so in my view, it is necessary to place in the notice the

alternatives of securing or compounding the debt. This view is premised on two bases. First, it certainly is the convention, and has been so for many years, that the statutory demand is drawn in such a form as to indicate all these matters to the recipient. Secondly, for the notice to comply with its fundamental purpose mentioned earlier, it must state each of the three options. Accordingly, each notice is bad.

13 In the present case, BNP sent a statutory demand in the following terms:

> **TAKE FURTHER NOTICE** that this is a statutory letter of demand for payment, made for and on behalf of our clients and in this regard, unless the said sum of **USD50,723,070** is paid to our clients or to us as their solicitors within **twenty-one (21) days** from the date of this letter, you are deemed unable to pay your debts pursuant to Section 254(2)(a) of the Companies Act (Cap. 50) and our clients shall forthwith be entitled to present a winding-up petition in the High Court for a winding-up order to be made against you.

14 It is clear that, whether or not there is a requirement to spell out all the three options, the terms of the demand were misleading in stating that JSPL would be deemed to be unable to pay its debts if it did not pay the sum demanded within 21 days. If the statutory demand did not comply with s 254(2)(*a*), and on the assumption that substantial injustice would be caused such that s 392 of the Act could not apply to remedy the non-compliance, it would follow that JSPL would not have been deemed to be unable to pay its debts pursuant to that subsection, and it would have been entitled to the injunction on the terms prayed for. However, since this point was not argued, we will leave it to be raised at another time in another case.

The court's discretion

15 This brings us to the first point concerning the discretionary power of the court not to wind up even a company which is proved or deemed to be unable to pay its debts. The general rule is that, where a company is unable or deemed to be unable to pay its debts, the creditor is *prima facie* entitled to a winding-up order *ex debito justitiae* (see *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR 268 ("*Metalform*") at [61]). This proposition can be traced to Lord Cranworth's statement in *Bowes v The Hope Life Insurance and Guarantee Company* (1865) 11 HLC 389; 11 ER 1383, where he said, at 402; 1389:

> [I]t 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. [emphasis added]

16 The first part of Lord Cranworth's statement is, however, qualified by the second part of the statement that there could be exceptional cases where the court would not grant a winding-up order. The relevant statutory provision under which the court was vested with the power to wind up insolvent companies in 1865 in England contained the same phrase "may order the company to be wound up" which has been enacted in s 254 of the Act. In construing a similar provision in the Companies Act 1948 (c 38) (UK), Buckley LJ (with whom the other two members, *viz*, Bridge and Templeman LLJ, agreed) stated, in *In re Southard & Co Ltd* [1979] 1 WLR 1198 at 1203–1204:

> Mr. Lindsay accepts that an unpaid petitioning creditor in respect of an undisputed debt is entitled to expect the court to exercise its discretion in his favour in the absence of special circumstances. Both section 222 of the Act of 1948, which is the section conferring the

jurisdiction to wind up a company compulsorily, and section 346 (1) are expressed in permissive language; in each case the verb used is "may". *In every case, Mr. Lindsay submits, the court has an unfettered discretion, and in my judgment that is the true view of the situation.*

This matter was discussed in *In re P. & J. Macrae Ltd*. [1961] 1 W.L.R. 229, … [where] all three members of the court regarded the question of jurisdiction in the same light. …

Upjohn L.J. put the matter thus: first of all he said, at p. 237:

> "That the court has a complete discretion was recognised as long ago as 1871 when Malins V.-C. in *In re Langley Mill Steel & Iron Works Co.* (1871) 12 Eq. 26, 29 put the matter in a nutshell in reference to the corresponding section 91 of the Companies Act, 1862: ..."

that, I may say, was the section which now is replaced by section 346. Then he cites from the judgment of the Vice-Chancellor in that case, in the course of which Malins V.-C. said, at p. 238:

> "'I am of opinion that the court has, under that section, complete discretion in all cases of winding up, and must exercise that discretion with reference to all the surrounding circumstances.'"

Then Upjohn L.J. goes on to draw attention to the fact that section 222 of the Act of 1948 itself confers by its language a discretionary jurisdiction, and he goes on to say at p. 238:

> "... although an undoubted creditor is as a general rule entitled to an order ex debito justitiae, there may be special cases where, apart altogether from the wishes of creditors generally, the court may not think fit to make an order: see for an example *In re Chapel House Colliery*."

[emphasis added]

17 In *Metalform*, this court made some observations on public policy considerations in relation to attempts by creditors to threaten companies with winding-up petitions where the claims or debts are not admitted or where there are *bona fide* cross-claims equal to or exceeding the creditors' claims. At [84], this court said:

> A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or financial standing with its other creditors or customers. In the contemporary business environment, practically all businesses are financed in varying degrees by debt. … Modern loan arrangements inevitably contain financial covenants which, if breached, might trigger other cross-default clauses. The presentation of a winding-up petition against the company is invariably such an event of default. In the present case, it would appear that [the debtor company in *Metalform*] would have 60 days to set aside a winding-up petition to avoid a default that would enable the bank to recall its loan. If other cross-default clauses are triggered, it would merely compound the company's problems. The prospect of the company's business being ruined in this way is very real.

18 Furthermore, where the company is a member of a group enterprise, as in the present case, the filing of a winding-up petition could immediately, or subsequently, if it is not set aside or withdrawn within a specified period of time, trigger a series of cross-defaults under financial arrangements entered into by that company or other companies within the group. It would therefore

not be an exaggeration to say that an entire business group could be put at risk of being pushed into a state of insolvency by the mere presentation of a winding-up petition.

19 Where a petition to wind up a temporarily insolvent but commercially viable company is filed, many other economic and social interests may be affected, such as those of its employees, the non-petitioning creditors, as well as the company's suppliers, customers and shareholders. These are interests that the court may legitimately take into account in deciding whether or not to wind up the company. In *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd* [1997] 1 MLJ 808, the High Court of Malaysia said, at 813 (in respect of a creditor's petition to wind up a company), that "*[n]ot only should the court consider the interest of the creditors, the court should also consider the interest of the public at large*" [emphasis added]. There, the petitioner had obtained judgment against the respondent company, which was in the business of developing residential property. In staying the petition for a period of one year, the court took into account the fact that the majority of the unsecured creditors were opposed to the winding up, and added (*ibid*) that:

> Recovering an abandoned housing project is akin to injecting life into the community in that area. Out of that one project much benefit could accrue to the community. Schools will emerge, public utilities will be provided and the general upliftment of life will no doubt bring harmony and contentment, thus nurturing a satisfied society. If another opportunity can be given to the [receivers and managers] to revive this abandoned project, so be it.

20 We agree with the above decision in so far as the public's interest could be taken into account in deciding whether to wind up a company. This is especially so if the company is a viable one. Under s 257(1) of the Act, the court may adjourn the hearing of a winding-up application conditionally or unconditionally or make any interim or other order that it thinks fit. In cases where a company is temporarily insolvent but the winding-up court would *ex hypothesi* grant an adjournment under s 257(1) of the Act to allow the company time to resolve the issues at hand or to seek alternative measures, an injunction of limited duration to restrain a winding-up petition from being presented may also be justified if irreparable harm could flow from its presentation.

Conclusion

21 In our brief grounds, we held that, as a matter of principle, the court should not, in the exercise of its discretion, allow a claimant to file a winding-up petition against a solvent company. In our more detailed examination of the law in these grounds of decision, we have gone further to find that BNP's statutory demand for payment and its subsequent resistance to JSPL's application herein was unjustified and that any filing of a petition to wind up JSPL would have been an abuse of the winding-up process. In view of the foregoing, we dismissed the appeal with costs.