IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 13

Civil Appeal No 56 of 2021 (Summons No 89 of 2021)

Between

1 An Guang Shipping Pte Ltd (judicial managers appointed)
2 An He Shipping Pte Ltd (receivers appointed)
3 An Hua Shipping Pte Ltd (receivers appointed)
4 An Kang Shipping Pte Ltd (receivers appointed)
5 An Sheng Shipping Pte Ltd (receivers appointed)
6 An Xing Shipping Pte Ltd
7 Da An Shipping (Pte) Ltd (in members' voluntary liquidation)
8 Da Guang Tankers (Pte) Ltd (judicial managers appointed)
9 Da Xin Tankers (Pte) Ltd (judicial managers appointed)
10 Da Zhong Tankers (Pte) Ltd (judicial managers appointed)
11 Dafa Shipping (Pte) Ltd (judicial managers appointed)
12 Dong Fang Shipping & Trading (Pte) Ltd (in creditors' voluntary liquidation)
13 Dong Jiang Tankers (Pte) Ltd (judicial managers appointed)
14 Dong Nan Tankers (Pte) Ltd (in creditors' voluntary liquidation)
15 Dong Sheng Tankers (Pte) Ltd (judicial managers appointed)

16 Dong Ya Tankers (Pte) Ltd (judicial managers appointed)
17 Hua An Shipping Pte Ltd (in creditors' voluntary liquidation)
18 Hua Guang Shipping Pte Ltd (in creditors' voluntary liquidation)
19 Hua Kang Shipping Pte Ltd (in creditors' voluntary liquidation)
20 Hua Sheng Shipping Pte Ltd (judicial managers appointed)
21 Hua Xin Shipping Pte Ltd (in creditors' voluntary liquidation)
22 Hua Zhong Shipping Pte Ltd (judicial managers appointed)
23 Nan Chiau Maritime (Pte) Ltd (judicial managers appointed)
24 Nan Chuan Maritime (Pte) Ltd (judicial managers appointed)
25 Nan Hai Maritime (Pte) Ltd (in creditors' voluntary liquidation)
26 Nan King Maritime (Pte) Ltd (in creditors' voluntary liquidation)
27 Nan Sia Maritime (Pte) Ltd (in creditors' voluntary liquidation)
28 Nan Ya Maritime (Pte) Ltd (in members' voluntary liquidation)
29 Nan Yi Maritime (Pte) Ltd (in creditors' voluntary liquidation)
30 Nan Zhou Maritime (Pte) Ltd (judicial managers appointed)
31 Xin An Shipping (Pte) Ltd (judicial managers appointed)

32 Xin Bo Shipping (Pte) Ltd
(judicial managers appointed)
33 Xin Chun Shipping (Pte) Ltd
(judicial managers appointed)
34 Xin Dun Shipping (Pte) Ltd
(judicial managers appointed)
35 Xin Guang Shipping (Pte) Ltd
36 Xin Hui Shipping (Pte) Ltd
(judicial managers appointed)
37 Xin Kang Shipping (Pte) Ltd
(judicial managers appointed)
38 Xin Sheng Shipping (Pte) Ltd
(judicial managers appointed)
39 Xin Ya Shipping & Trading
(Pte) Ltd (in creditors'
voluntary liquidation)
40 Xin Ying Shipping (Pte) Ltd
(judicial managers appointed)

… *Appellants*

And

Ocean Tankers (Pte) Ltd
(in liquidation)

… *Respondent*

In the matter of Originating Summons No 452 of 2020
(Summons No 2085 of 2021)

In the matter of Companies Act (Cap. 50)

And

In the matter of Ocean Tankers (Pte) Ltd

Ocean Tankers (Pte) Ltd
(in liquidation)

… *Applicant*

JUDGMENT

[Civil Procedure — Striking out]
[Civil Procedure — Appeals — leave]

An Guang Shipping Pte Ltd (judicial managers appointed) and others
v
Ocean Tankers (Pte) Ltd (in liquidation)

[2022] SGCA 13

Court of Appeal — Civil Appeal No 56 of 2021 (Summons No 89 of 2021)
Andrew Phang Boon Leong JCA and Judith Prakash JCA
24 November 2021

21 February 2022

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 This judgment deals with an application by Ocean Tankers (Pte) Ltd, whom we shall refer to as OTPL, to strike out a notice of appeal filed by 40 associated companies in CA/CA 56/2021 ("CA 56"). We shall refer to the appellants collectively as the "XH Companies".

2 It should be noted that our decision herein is being made without an oral hearing of the application, pursuant to the powers accorded to the Court of Appeal by s 55(1)(*a*) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed).

3 In May 2020, OTPL applied in HC/OS 452/2020 ("OS 452") to be placed under judicial management pursuant to s 227B of the Companies Act

(Cap 50, 2006 Rev Ed) (the "Act"). Consequently, on 7 August 2020, judicial managers were appointed for OTPL. At the time, OTPL was the charterer of over one hundred vessels belonging to the XH Companies and a substantial amount of charterhire was outstanding. At some point thereafter the XH Companies were also placed in judicial management.

4 Disputes arose between the judicial managers of OTPL and those of the XH Companies. The main dispute concerned the view of the XH Companies that after OTPL went into judicial management, it had retained the XH Companies' vessels for the benefit of OTPL's judicial management. The charterhire arising out of the bareboat charters for the period of retention should thus be payable as expenses of OTPL's judicial management. As such, these sums were to be treated as priority judicial management expenses, to be paid ahead of unsecured creditors. The OTPL judicial managers were prepared to admit the charterhire claims as ordinary unsecured debts of OTPL but were not prepared to pay these in priority. The amounts of charterhire claimed (the charterhire debts") are huge and treating them as preferred debts would result in applying all of OTPL's assets towards them leaving nothing for the unsecured creditors.

5 To resolve matters, the OTPL judicial managers took out HC/SUM 2085/2021 in OS 452 on 1 May 2021 ("SUM 2085"), seeking directions from the court on how the charterhire debts were to be treated.

6 It should be noted that OTPL went into liquidation before SUM 2085 was heard and determined. The OTPL judicial managers (who were then

appointed as liquidators), however, sought and were granted orders that allowed them to continue with SUM 2085. This order was phrased as follows:

> That the Liquidators be at liberty to continue with the pending applications in HC/OS 452/2020 [the main case under which SUM 2085 was filed], as well as any appeals that may arise from those pending applications.

7 The High Court Judge heard SUM 2085 and delivered oral judgment on 20 September 2021. The Judge held that while priority could be accorded to a small part of the XH Companies' claims, the balance would have to be classified as ordinary unsecured debt. That would mean no priority and that these amounts would be settled on a pro-rata basis with the debts of other unsecured creditors. Dissatisfied with the outcome, the XH Companies filed the notice of appeal in CA 56.

The Issue and Discussion

8 The basis upon which OTPL seeks to strike out the notice of appeal is that the XH Companies did not obtain leave of court before filing CA 56. Such leave they say is necessary because OTPL is presently a company in liquidation and that status invokes the operation of s 133(1) of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"). The section provides as follows:

> **Effect of winding up order**
>
> **133.**—(1) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or commenced against the company except —
>
> (*a*) by the leave of the Court; and

> (*b*) in accordance with such terms as the Court may impose.
>
> (2) Subject to section 198, an order for winding up a company operates in favour of all the creditors and contributories of the company as if made on the joint application of a creditor and of a contributory.

9 The XH Companies do not dispute that no leave of court was applied for or granted pursuant to s 133(1) IRDA. Accordingly, the issue we have to determine is whether in the present case that section applies so as to require the striking out of the notice of appeal.

10 The XH Companies point out that the reason for the provision is to give effect to a moratorium during company liquidations so that the assets of the company are not dissipated in defending lawsuits unnecessarily. This point was well explained by V K Rajah JC (as he then was) in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset*") as follows:

> 36 The rationale for these provisions is axiomatic: it is to prevent the company from being further burdened by expenses incurred in defending unnecessary litigation. The main focus of a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximised; the process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. Unnecessary costs should not be incurred; liquidators should act in the collective interests of all legitimate stakeholders and not with a view to enhancing their own self-interests or fees.
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> 37 This statutory ring-fencing of the company also acts as a strong disincentive to creditors inclined to scramble to the judgment finishing line, in the often mistaken belief that their priority will be enhanced. …

Although these observations were made in relation to s 262(3) of the Companies Act (Cap 50, 1994 Rev Ed), the wording in that provision is similar to that found in s 133 IRDA, and we adopt the same in our approach to s 133(1).

11 The XH Companies argue that there was no need for them to seek the leave of court. They put forward two alternative bases for this contention. The first is that they had taken a purely defensive step against the adverse ruling that OTPL had secured in SUM 2085. The second is that the proceedings commenced by SUM 2085 and the consequent appeal do not fall within s 133(1) of the IRDA.

12 The argument based on a purely defensive step is, in Singapore, taken from the decision of *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265 ("*Hyflux*"). In *Hyflux*, the plaintiff company was in the midst of a restructuring effort and was protected by a moratorium. It sued the defendant and in response the defendant brought a counterclaim. The plaintiff sought to strike out the counterclaim, arguing that it was in breach of the moratorium and that the defendant had failed to obtain leave of court to commence or continue its counterclaim: *Hyflux* at [7]. Aedit Abdullah J held that the counterclaim should be allowed, observing as follows:

> 17 The rationale for allowing certain counterclaims to proceed even in the face of moratoria is clear. It would be inimical to allow a claim to proceed but not a counterclaim in respect of the same factual grounds: the defendant would be deprived of either a defence or a reduction of the claim based on the very same facts. Disregarding the counterclaim would tilt the balance too far in favour of the applicant company. This, I believe, is the basis of the various cases cited.
>
> …

> 21 What can be gleaned from these cases is that where a statutory moratorium is imposed in respect of the commencement of proceedings against a company, it would ordinarily not cover situations where the company itself commences proceedings and the defendant seeks, through a counterclaim, to reduce or extinguish any liability owed to the plaintiff.
>
> 22 While there does not appear to be any mention of an exception for counterclaims in any of the parliamentary debates relating to the enactment of s 211B of the CA, I do not find that the intention was manifested to require leave to be obtained for counterclaims. Clearer language would have been expected to be used had that been the intention. The position at common law in relation to the interpretation of similar statutes would have been well understood: see [18]–[20] above. In the absence of express language to the contrary, the expectation is that Parliament intended to leave existing case law unaffected.
>
> 23 It follows that a counterclaim made in respect of a claim brought by a company undergoing s 211B restructuring would not require leave of court, but only in so far as it operates to extinguish or negate the claim, without affecting the position of the other creditors. Thus, any part of a counterclaim that goes beyond operating as a defence, such as a claim for damages or property, would require the leave of court.

13 While *Hyflux* related to a counterclaim based on facts similar to the company's claim, the XH Companies argue that the case should not be confined to those facts. They contend that the decision was based on the longstanding principle that defensive actions, taken in response to claims brought by a company in liquidation, are not prohibited by virtue of a moratorium. The main question, therefore, is whether filing of the notice of appeal can be classified as a defensive step taken by the XH Companies.

14 OTPL responds that the filing of an appeal has been recognised as a proceeding "against the company" and in this case that filing was not of a defensive nature. It asserts that the XH Companies are seeking to fasten liability

on OTPL; they are claimants who are seeking to be priority claimants. Most importantly, they seek to make inroads into OTPL's assets at great expense to its unsecured creditors. While the XH Companies have asserted that CA 56 is a defensive measure to overturn "the adverse ruling" (adverse to them that is) obtained by OTPL, OTPL submits that this is a mischaracterisation of the nature of the Judge's decision in SUM 2085. CA 56 they say is an action that the XH Companies have taken out to increase their chances of recovery from OTPL over and above other unsecured creditors.

15 It does appear to us to be difficult at a general level to describe an appeal as "a defensive step". The purpose of an appeal is for the appellant to challenge a court ruling in favour of the respondent which the appellant does not agree with and replace that ruling with one in favour of the appellant. Described that way, an appeal seems to be offensive rather than defensive. It is not, however, necessary for us to come to a conclusion on this point. There is a more fundamental objection to the striking out application. This brings us to the second basis on which the XH Companies resist the application.

16 The XH Companies submit that on a fundamental level, CA 56 is not caught by the statutory moratorium imposed by s 133(1) IRDA as it is not a proceeding *against* OTPL. They rely on the case of *Thomas Evan v Mortgage Debenture Limited* [2016] EWCA Civ 103. In that case, the English Court of Appeal held that if the original application was not a proceeding against a company, an appeal against the dismissal of such application could not be regarded as such a proceeding. Counsel for the respondent company (in administration) had argued that the proceeding was an appeal to which the company was the respondent and was therefore a proceeding against the

company for the purposes of the moratorium. Richards LJ expressly rejected this submission, stating at [26]:

> … in my view, this question is to be judged by reference to the nature of the original application. If the application was a legal proceeding against the company, within the terms of the moratorium, then an appeal against the dismissal of the application would also be a proceeding for which permission was required. Its purpose would remain to obtain relief against the company. If, however, the original application was not a proceeding against the company, an appeal against the dismissal of the application cannot sensibly be regarded as such a proceeding.

17 In our view, the observation of Richards LJ that whether leave is required or not "is to be judged by reference to the nature of the original application" is an apt one. It is the original application that will determine whether a proceeding in court is one that can be classified as "against the company" or not. In the present case, the facts before us plainly establish that SUM 2085 was not a proceeding taken against OTPL.

18 It bears noting that there is no dispute, at least at this point, about the quantum of the charterhire debts owing to the XH Companies in OTPL's liquidation. These claims were submitted to the judicial managers, subsequently liquidators, of OTPL and neither the quantum nor the basis for them was challenged. The judicial managers of OTPL were aware from the time that they took over management of the company that OTPL had chartered vessels from the XH Companies and that charterhire was accruing. Indeed, the judicial managers spent some time on trying to end these charters as unprofitable contracts and that end was eventually achieved with the aid of the court.

19 Thereafter, the only issue between OTPL and the XH Companies was regarding the priority of the charterhire debts owed to the XH Companies. This was an intractable issue, however, in view of the huge amount of the charterhire debts and the relatively small amount available for distribution to creditors. Accordingly, the judicial managers commenced (and the liquidators continued) SUM 2085 to obtain directions from the court as to whether the charterhire debts enjoyed priority over the unsecured debts or were to be treated as part of the unsecured debts. SUM 2085 was not seeking a ruling on the liability of OTPL to pay the XH Companies the charterhire debts but simply directions as to whether these should be paid before or with the unsecured debts. The whole point of the summons was to determine the legal status of the charterhire debts: this was a question of law which the liquidators of OTPL required to be determined in order for them to properly carry out their duties in the liquidation of OTPL.

20 In our judgment, SUM 2085 which concerned the administration of the liquidation and not a claim against OTPL cannot be considered to be a "proceeding … against the company" within the meaning of that phrase in s 133(1) IRDA. No doubt, the XH Companies appeared at the hearing of SUM 2085 to put in their submissions on what the correct legal position was. That was a completely proper step for them to take as parties with a vested interest in the determination of the issue. The mere fact that they contested the position that the liquidators of OTPL were asking the court to adopt could not, however, turn SUM 2085 into a proceeding against OTPL.

21 Accordingly, CA 56 which is an appeal against the decision in SUM 2085 similarly cannot be considered a "proceeding … against the company".

Conclusion

22 For the reasons given above, we dismiss this application. OTPL shall pay the costs of the XH Companies fixed at $10,000 inclusive of disbursements. The usual consequential orders will apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Thio Shen Yi SC (TSMP Law Corporation) (instructed), Leo Zhen Wei Lionel, Chong Yi-Hao Clayton and Kwong Kai Sheng (WongPartnership LLP) for the appellants;
Narayanan Sreenivasan SC, Rajaram Muralli Raja, Jonathan Lim Jien Ming, Tan Kai Ning Claire and Eva Teh Jing Hui (K&L Gates Straits Law LLC) for the respondent.