IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 168

Companies Winding Up No 307 of 2018
(Summons No 2586 of 2019)

In the matter of Section 279 of the Companies Act (Cap 50)

And

In the matter of Construction Professional Resources Pte Ltd

Between

Standard Chartered Bank (Singapore) Limited

… *Plaintiff*

And

Construction Professional Resources Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Companies] — [Winding up] — [Setting aside winding-up order]

Standard Chartered Bank (Singapore) Ltd
v
Construction Professional Resources Pte Ltd

[2019] SGHC 168

High Court — Companies Winding Up No 307 of 2018 (Summons No 2586 of 2019)
Choo Han Teck J
4, 16 July 2019

18 July 2019.

Choo Han Teck J:

1 The defendant, Construction Professional Resources Pte Ltd, was a company incorporated on 3 March 2010 and had carried on the business of building construction and consultancy services. It was indebted to the plaintiff, Standard Chartered Bank (Singapore) Limited, who obtained an order of court on 10 May 2019 winding up the defendant company on account of the unpaid debt, and liquidators were appointed accordingly to carry out the liquidation of the defendant.

2 On 4 July 2019, Mr Sankar, counsel for the defendant, applied to have the winding-up order stayed *sine die* on the grounds that the debt had since been paid and the plaintiff has no objection to the stay of the winding-up order.

3 Mr Sankar relies on the case of *Interocean Holdings Group (BVI) Ltd v*

Zi-Techasia (Singapore) Pte Ltd (in liquidation) [2014] 2 SLR 485 ("*Interocean*"), for the proposition that a company, once wound up, cannot have the winding-up order rescinded or set aside, and that the only recourse is to stay the order permanently. There, the court held at [16]:

> In Singapore, a winding-up order once perfected is one of those strange creatures that cannot be set aside or revoked. At least, there is no express provision in the Act permitting this.

4 The court in *Interocean* cited the judgment of Gillard J in *Krextile Holdings Pty Ltd v Widdows; Re Brush Fabrics Proprietary Limited* [1974] VR 689 ("*Krextile*") on s 243 of the Companies Act 1961 (No 6839 of 1961) (Victoria), which is *in pari materia* with s 279 of our Companies Act (Cap 50, 2006 Rev Ed). In particular, it cited the following passage explaining the solution preferred by that court and endorsed by the court in *Interocean*:

> Although the important and operative expression in s 243 contains a reference to 'proceedings', in my view, the word is not limited merely to applications to the Court, or to any proceedings that must be brought to the Court under the [Companies Act 1961 (Victoria)] in relation to a winding up. In my opinion, all the matters that flow directly from or are invoked by the making of an order as part of the process of winding up under the provisions of the [Companies Act 1961] (Victoria)] are 'proceedings in relation to the winding up'. It is the performance or observance of all the statutory powers and duties indicated about which are comprehended within the expression 'all proceedings in relation to the wining up'.
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> Accordingly, if an order were made under s 243 of the [Companies Act 1961 (Victoria)] it would be the process of winding up referred to in the various statutory consequences set out above and which directly flow from the making of the order that would be stayed. The Court, of course, is not empowered to revoke or recall its order once it is passed and entered. The effect of a perpetual stay of proceedings under s 243, however, must mean a virtual end to the winding-up process under that order. The statutory provisions that ordinarily would cause certain things to be done no longer apply to the company and the order for winding up becomes quite inoperative: see, per Molesworth J, in *Re Oriental Bank*

> *Corporation* [1884] Vic Law Rp 24; (1884) 10 VLR (E) 154, at p. 185; *Re Western of Canada Oil, Lands and Works Co.*, [1874] WN 148; *Re Stephen Walters and Sons Ltd* (1926) 70 Sol Jo 953; *Re South Barrule Slate Quarry Co.* (1869) LR 8 Eq 688; cf *Re Telescriptor Syndicate, Ltd.* [1903] 2 Ch 174.
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> Doubtless the Court would protect the interests of the liquidator and any person who could possibly be affected by its order by invoking the latter part of the section to grant the order for a stay only on terms, but once a perpetual stay was granted, the winding-up process comes to an end under the order and the company, still existing as a *persona juridica* may then carry on its business and affairs in accordance with its memorandum and articles of association, as if no winding-up order existed. To say the least, this conclusion may be regarded as somewhat paradoxical. The order to wind up made by a court of competent jurisdiction remains unrevoked, even though a stay be granted, but on granting the stay under s 234, the Court renders its own order a dead letter.

5 Some countries, such as Malaysia, have legislation for the liquidator or any creditor or contributory to apply to the court for an order terminating the winding up of the company: see Companies Act 2016 (No 777 of 2016) (M'sia) s 493. That makes matters simpler, but where there is no legislation on this point, there will be doubts as to whether the court can terminate a winding up after the order has been made.

6 As can be seen in the *Interocean* and *Krextile* cases, the courts there hesitated from venturing into the void. The very idea of setting aside or terminating a winding-up order, albeit by legislative enactment, supports the reasonable view that in some circumstances it would be just to do so, but to decline to make such an order just because there is no express legislative power may create greater legal problems than to have a court terminate the order on another basis.

7 As the court in *Interocean* noted at [22], "a stay takes effect only from the date of the pronouncement of the stay and is not backdated to the date of the

winding-up order". It goes on to hold that when a winding-up order is stayed, it is not "set aside, rescinded or discharged". A stay order, as the court in *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd* (1990) 2 ACSR 766 held, "means that the cloud over the company's normal activities is temporarily or indefinitely removed".

8 This then has the bizarre effect that a company that had been ordered "wound-up" regains all its powers in fact, but remains legally wound-up. What happens when it is unable to pay its debts to new creditors? The new creditors cannot wind up a company that had already been wound-up; and they are not parties who are entitled to rescind the stay order.

9 A permanent or indefinite stay order is not an order that should be made when there are good reasons to have the original order set aside. A permanent stay leaves the wound-up company in some astral void, legally dead but physically alive and trading – a zombie company. Furthermore, Mr Sankar is also applying to have the liquidators released. Once appointed, the liquidators should only be released only when the winding-up is fully completed, or when the winding-up order has been set aside, or when replacement liquidators have been appointed in their place.

10 The absence of legislation generally means that the court has to find a source of power elsewhere. The inherent power of the court under O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) is a wide but rarely used power. It is wide because it can be invoked in areas in which no statutory provision applies, and also where there are gaps in the common law. It is rarely used because it should not be the source of unrestrained judicial power. It can be used

in instances where it can express justice and ensure no prejudice to anyone in any way.

11 In the present case, the wound-up company had paid its debt to the plaintiff who wound it up. The plaintiff has no objections to the winding-up order being stayed permanently, so presumably it will not object to having the winding-up order set aside, but that must be done in the correct process. An application should be made by either the creditor or the liquidator under a fresh Originating Summons because the present Companies Winding Up proceeding is spent; and the company itself has no locus standi to apply.

12 For the reasons above, I adjourn this application to be heard together with any application for the winding-up order to be set aside. I will give such other directions as may be required at the hearing.

- Sgd -
Choo Han Teck
Judge

Timothy Ang Wei Kiat (Rajah & Tann Singapore LLP) for the plaintiff;
Sankar s/o Kailasa Thevar Saminathan (Sterling Law Corporation) for the defendant.