Deldar Tony Singh and another *v* Rajinder Singh and others
[2012] SGHCR 13

Case Number : Suit No 444 of 2012 (Summons No 3260 of 2012 & Summons No 3643 of 2012)

Decision Date : 28 August 2012

Tribunal/Court : High Court

Coram : Colin Seow AR

Counsel Name(s) : Walter Ferix Justine (Joseph Tan Jude Benny LLP) for the plaintiffs; Leng Siew Wei Aloysius and Ooi Jian Yuan (AbrahamLow LLC) for the second and third defendants.

Parties : Deldar Tony Singh and another — Rajinder Singh and others

Civil Procedure

Companies

28 August 2012 Judgment reserved.

Colin Seow AR:

Introduction

1 Before me are two summonses ("SUM 3260" and "SUM 3643") for the striking out of the Statement of Claim in Suit 444 of 2012 ("Suit 444") on the ground that the plaintiffs have failed to obtain leave of court as required under s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") before commencing Suit 444. The applicants in SUM 3260 and SUM 3643 are (respectively) the third and second defendants in Suit 444. The first defendant is not involved in these applications before me.

Background of the dispute

2 The plaintiffs and the first defendant were directors and are shareholders of the second defendant, a company currently in liquidation (hereafter referred to as "the Company"). The Company was incorporated by the first defendant on 12 June 2008. On 15 June 2011, the Company was placed under voluntary winding up pursuant to a special resolution passed at a general meeting which was convened on the same day. By way of an ordinary resolution passed in the same meeting, the third defendant (hereafter referred to as "the Liquidator") was appointed the liquidator of the Company.

3 On 30 May 2012, the plaintiffs commenced Suit 444 against the first defendant, joining the Company and the Liquidator as co-defendants. Suit 444 was commenced pursuant to a dispute which arose between the plaintiffs and the first defendant regarding their respective rightful shareholdings in the Company. In their Statement of Claim, the plaintiffs alleged, *inter alia*, that the first defendant had in or around June 2010 committed forgery of a Directors' Resolution in Writing ("the 78% DRIW") which resulted in the first defendant holding 78% of shares in the Company, leaving 11% shares each to the first and the second plaintiffs. This, the plaintiffs alleged, was contrary to the terms of a Directors' Resolution in Writing which the plaintiffs and the first defendant signed on 8 April 2010 ("the 45% DRIW"). According to the plaintiffs, the share distribution in the Company under the 45% DRIW would have been 45%, 35% and 20% between the first defendant, the first plaintiff and the second

plaintiff respectively. In the Statement of Claim, the section setting out the reliefs sought by the plaintiffs ("the section on reliefs") reads as follows:

AND the Plaintiffs claim:

1. against the [first defendant] and [the Company] as follows:

    a. a declaration that the 75% DRIW is null and void;

    b. a declaration that all resolutions passed by [the Company] from 8 April 2010 to 14 June 2011 are null and void;

    c. an order that the 152,000 ordinary shares in [the Company] currently held in the name of the [first defendant] pursuant to the 78% DRIW, be cancelled forthwith;

    d. an order that [the Company] forthwith issues fresh share certificates according to the following:

        (i) [the first plaintiff]: 55,000 shares;

        (ii) [the second plaintiff]: 16,000 shares; and

        (iii) [the first defendant]: 81,000 shares

        and lodges the changes in shareholding with [the Accounting and Corporate Regulatory Authority] within fourteen (14) days of the Order to be made herein, such that the rectified register of members and their respective shareholding and percentage are as follows:

        (i) [the first plaintiff]: 91,001 shares (35%);

        (ii) [the second plaintiff]: 52,001 shares (20%);

        (iii) [the first defendant]: 117,001 shares (45%);

    e. costs; and

    f. such further and/or other relief as the Court shall deem fit;

2. against [the first defendant, the Company and the Liquidator] as follows:

    a. a declaration that the following special and ordinary resolutions, purportedly passed at a general meeting of the members of [the Company] on 15 June 2011, are null and void:

        (i) the special resolution for [the Company] to be wound up voluntarily pursuant to Section 290(1)(b) of the Companies Act; and

        (ii) the ordinary resolution appointing [the Liquidator] as the liquidator of [the Company] for the purpose of the winding up;

    b. costs; and

c. any further relief as the Court may deem fit.

Parties' submissions

4 Counsel for the Company and the Liquidator, Mr Walter Ferix ("Mr Ferix"), submitted that the Statement of Claim should, insofar as the Company and the Liquidator are concerned, be struck out because the plaintiffs failed to obtain leave of court to commence Suit 444 against the Company and the Liquidator. In his written submissions, [note: 1] Mr Ferix cited ss 247, 248 and 299(2) of the Companies Act as the bases for his contention:

> 12. It is trite that a party is required to obtain Leave of Court before commencing proceedings against a company in the process of winding up.
>
> **See Section 247 read with Section 248 of the Companies Act (Cap. 50)**
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> **Modes of winding up**
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> **247.** The winding up of company may be either –
>
> (*a*) by the Court; or
>
> (*b*) voluntary.
>
> …
>
> **Application of this Division**
>
> **248.** Unless inconsistent with the context of subject-matter, the provisions of this Act with respect to winding up shall apply to the winding up of a company in either of those modes.
>
> ...
>
> **Alternatively see Section 299(2) of the Companies Act (Cap. 50)**
>
> **Property and proceedings**
>
> **299.** – (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.

[bold in original]

5 That Suit 444 was commenced against the Company and the Liquidator without leave of court was not disputed by the plaintiffs. However, counsel for the plaintiffs, Mr Aloysius Leng ("Mr Leng"), argues that no leave of court was required for the plaintiffs to commence Suit 444 against the Company and the Liquidator. The thrust of Mr Leng's argument is that leave is only required where (in the case of a company) a party seeks to commence legal proceedings as a *creditor* against the assets of the company in liquidation, or (in the case of a liquidator) a party seeks to take legal action against a liquidator in respect of matters related to the *liquidator's administration of company affairs* or otherwise related to the *liquidator's conduct as the company's liquidator*. Referring to the

Statement of Claim (in particular, the section on reliefs (see [3] above)), Mr Leng points out that none of these scenarios is present in Suit 444. Accordingly, Mr Leng argues that no leave was required in the present case.

6 For the record, Mr Leng also argues that the Company and the Liquidator were named as co-defendants in Suit 444 because they are necessary parties to the action, explaining that "[i]f the 2nd and 3rd Defendants were not parties to this Suit 444, they would not be bound by the Court's findings in this Suit against the 1st Defendant, which would be a breach of natural justice". [note: 2] However, this argument is of no relevance to the present proceeding because the issue before me is whether leave of court was required to be obtained before Suit 444 was commenced against the Company and the Liquidator, and not whether leave of court should be granted for Suit 444 to be commenced against the Company and the Liquidator.

The decision

The action against the Company

Materiality of whether the Company is under a creditors' or members' voluntary winding up

7 Before I embark on my analysis, I shall briefly state what are the key differences between a creditors' voluntary winding up and a members' voluntary winding up. As will be seen later, it is material for the purposes of the applications before me whether the Company is under a creditors' or a members' voluntary winding up.

8 Under s 4(1) of the Companies Act, creditors' voluntary winding up is defined as "a winding up under Division 3 of Part X [of the Companies Act], other than a members' voluntary winding up". Members' voluntary winding up is defined under the same provision as "a winding up under Division 3 of Part X [of the Companies Act], where a declaration has been made and lodged in pursuance of section 293". The said declaration refers to the declaration of solvency which is required to be made in a members' voluntary winding up under s 293 of the Companies Act:

> 293.–(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 2 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.
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> …

9 The upshot is that a voluntary winding up proceeds as a members' voluntary winding up only when a declaration of solvency has been made in accordance with s 293 of the Companies Act; otherwise the winding up would proceed as a creditors' voluntary winding up (see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 17.111).

10 As can be gleaned from the submissions, Mr Ferix's case for the striking out of the Statement of Claim lies in s 299(2) of the Companies Act (see [4] above). To recap, s 299(2) of the Companies Act provides:

> 299.– (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.

11 Section 299(2) falls under Division 3 of Part X in the Companies Act which deals with matters pertaining to voluntary winding up of companies. Division 3 is further divided into four subdivisions, each bearing its own heading. The heading for Subdivision 3 – the subdivision where s 299 of the Companies Act appears – reads, "*Subdivision (3) – Provisions applicable only to creditors' voluntary winding up* " (emphasis added in underline; italics in original).

12 It is therefore clear to me, on a plain reading of the Companies Act, that s 299(2) of the Companies Act applies only to a particular type of voluntary winding up, *viz*. a *creditors'* voluntary winding up, and I am not aware of any local case authority disagreeing with this position. In fact, I should mention that there was a decision rendered by an Assistant Registrar ("AR") which supports the conclusion I just made. In *Eversendai Engineering Pte Ltd v Synergy Construction Pte Ltd (Ministry of Education, Third Party)* [2004] SGHC 129 ("*Eversendai v Synergy*"), Eversendai Engineering Pte Ltd, the judgment creditor, applied for an attachment order *nisi* to be made absolute against the Ministry of Education from whom certain monies were due to the judgment debtor, Synergy Construction Pte Ltd ("Synergy"), a company placed under a voluntary winding up. Before the learned AR, an issue arose as to whether Synergy was under a members' or a creditors' voluntary winding up. In finding that Synergy was under a creditors' voluntary winding up, the learned AR made the following observation (see *Eversendai v Synergy* at [32]-[33]):

> 32 … Synergy is clearly being wound up under a creditors' voluntary winding-up.
>
> 33 Given this, s 299 [of the Companies Act] would apply (*as it applies only to creditors' voluntary winding-up*). …
>
> [emphasis added]

13 In the same regard, it is also helpful to refer to local commentary on s 299 of the Companies Act for guidance. In *Butterworths' Annotated Statutes of Singapore: Companies and Securities* vol 1 (Butterworths Asia, 1997) at p 807 ("*Butterworths'* vol 1"), Professor Walter Woon wrote:

> … Section 299(1) avoids enforcement after commencement of creditors' voluntary winding up in the same terms as s 260, which applies in winding up by the court. By s 258 in winding up by the court an application for stay of proceedings may be made in the period between presentation and the making of the winding-up order. By s 262(3) actions are stayed on commencement. With a creditors' voluntary winding up, after commencement there is, in similar terms, an automatic stay on proceedings unless the court gives leave: s 299. The purpose of these provisions is to ensure that no one creditor is able to gain an undue advantage by obtaining discharge of his debts in full. A primary principle of insolvency law is that ordinary creditors should be paid off out of the remaining assets equally in proportion to their debts. *Since in members' voluntary winding up, creditors should be paid off in full, the issue does not arise and so there is no statutory stay of proceedings or enforcement*. … [emphasis added]

14 At this juncture, I should mention that the position taken by the AR in *Eversendai v Synergy* and Professor Walter Woon in *Butterworths'* vol 1 is consistent with that adopted in Australia where its company law regime is in many ways similar to ours. In *Acton Engineering Pty Limited v Campbell and Others* (1991) 103 ALR 437, the Federal Court of Australia held at 450-1 (*per* Lockhart J):

> Although this case is concerned with a compulsory winding up, the Corporations Law provides, as

did its legislative predecessors, for creditors' and members' voluntary windings up. Section 500(2) of the Corporations Law [which was similarly worded as s 299(2) of the Companies Act in Singapore] provides that, after the commencement of a creditors' voluntary winding up of a company, no action or other civil proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court imposes. There is no comparable provision in the case of members' voluntary windings up, doubtless because they are presumed to be in respect of solvent companies and the winding up is under the control of its members and the liquidator whom they appoint. … [emphasis added]

15 Similarly, in an earlier case of *Ogilvie-Grant & Anor v East liquidator of Gordon Grant and Grant Pty Ltd* (1983) 7 ACLR 669 ("*Ogilvie-Grant v East*"), the Supreme Court of Queensland, while addressing s 230 of the Companies Act 1961 (Qld) (which applied to companies in insolvent winding up situations), made the following observation in respect of companies placed under members' voluntary winding up (at 672) (*per* McPherson J):

> … without the relevant restriction [*ie*, the prohibition under s 230 of the Companies Act 1961 (Qld) against the commencing of an action or other proceeding against a company once a winding up order is made], a company in liquidation would be subjected to a multiplicity of actions which would be both expensive and time-consuming, as well in some cases as unnecessary. This explanation has been accepted in a number of Canadian cases and appears also to have been adopted by Street J in *Re A J Benjamin Ltd* (1969) 90 WN (NSW) 107, 109. *It is consistent with this that there should be no automatic prohibition upon proceedings against a company in members' voluntary winding up, where the company is solvent and therefore less likely to be the target of numerous actions*. [emphasis added]

This particular holding in *Ogilvie-Grant v East* has been cited with approval in relatively more recent cases in Australia (see *eg*, *O D Transport (Australia) Pty Ltd (In Liquidation) and Others v O D Transport Pty Ltd and Others* (1997) 80 FCR 290 at 293).

16 I shall further add that the position taken in *Eversendai v Synergy* and *Butterworths'* vol 1 does not contradict the rationale behind s 299(2) of the Companies Act which has been explained in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset Management Corp*") at [36] (*per* V K Rajah JC (as he then was)) and which was recently reiterated in *LaserResearch (S) Pte Ltd (in liquidation) v Internech Systems Pte Ltd and another matter* [2011] 1 SLR 382 ("*LaserResearch (S) Pte Ltd*") at [11]-[12] (*per* Belinda Ang J):

> 11 … The rationale of s 299(2) and the statutory ring fencing regime that arises upon winding up (which also applies with equal force to a bankruptcy) has been considered in [*Korea Asset Management Corp* at [36]]:
>
> > … 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.
>
> 12 In other words (see *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 1994, Issue 34 (March 2010 release) at Ch O para 3753):

> The purpose of s 299(2) … is to preserve the limited assets of the company in the best way for distribution among all the persons who have claims upon them. As the fund is limited, it ought not to be diminished because of costs incurred due to actions against the company … The policy in winding up is that all claims should generally be disposed of by the cheap summary procedure of proving a debt in the winding up rather than by dissipating the assets in a multiplicity of suits.

17 The first and foremost reason is, as explained above at [11]-[15], s 299 of the Companies Act does not apply to a members' voluntary winding up. Furthermore, the High Court's observations in *Korea Asset Management Corp* and *LaserResearch (S) Pte Ltd* were made in the context where the companies in question were placed or purportedly placed under a *creditors'* voluntary winding up. In this regard, it is worth noting that in *LaserResearch (S) Pte Ltd*, the High Court expressly stated at [15] that "the purpose of s 299(2) is the preservation of an *insolvent* company's assets" (emphasis added). To take the analysis even further, given that a members' voluntary winding up must necessarily entail a declaration of solvency (see [8]-[9] above) – a declaration which, until the contrary is proven, establishes a presumption that all the company's debts would be paid in full – there is in principle no real concern regarding the distribution of company assets *pari passu* among the creditors of a company which has been placed under a members' voluntary winding up (see *Gerard v Worth of Paris, Ltd* [1936] 2 All ER 905 at 905 and 910). As such, the mischief at which s 299(2) of the Companies Act is targeted does not in principle even arise in a members' voluntary winding up.

18 Having regard to the analysis above, it is therefore clear that s 299(2) of the Companies Act applies only to a creditors' voluntary winding up. In other words, the requirement of leave of court under s 299(2) of the Companies Act does not apply to a members' voluntary winding up.

Is the Company under a creditors' or members' voluntary winding up?

19 The question that needs to be answered in the light of my analysis above is thus whether the Company in the present case is under a creditors' voluntary winding up or a members' voluntary winding up.

20 Having perused the affidavit evidence placed before me, I am satisfied that the Company was, at the time Suit 444 was commenced, under a creditors' voluntary winding up because no declaration of solvency under s 293 of the Companies Act was known to have been made in respect of the Company; none of the parties was able to produce any such declaration in the hearing before me. This by itself is sufficient to establish that the winding up of the Company at the material time was (and still continues to be so today) in the nature of a creditors' voluntary winding up (see [8]-[9] above).

21 Accordingly, I find that leave of court under s 299(2) of the Companies Act was required before Suit 444 could properly be commenced against the Company.

The action against the Liquidator

22 I now move on to deal with the action against the Liquidator. There is no statutory requirement for leave to be obtained before an action or legal proceeding may be commenced against a liquidator. However, it has been held in *Excalibur Group Pte Ltd v Goh Boon Kok* [2012] 2 SLR 999 ("*Excalibur Group Pte Ltd*") that such a requirement exists in common law. In *Excalibur Group Pte Ltd*, the High Court, after reviewing the laws of Australia, Canada, England and Malaysia, held at [28] (*per* Quentin Loh J):

> 28 … the Australian and Malaysian positions [that leave is required] should be followed in Singapore. A common law requirement for leave will promote the desirable objective of ensuring that the winding-up process is conducted efficiently and expeditiously in the interest of all stakeholders. The observations of V K Rajah JC, (as he then was), in [*Korea Asset Management Corp* at [36]] in the context of the strictures imposed upon the commencement of proceedings against a company once winding-up proceedings have been instituted are useful in this regard… This rationale applies equally to claims against a liquidator. A requirement for leave would ensure that frivolous claims are weeded out at the outset. This would avoid unnecessary and expensive legal proceedings.

On the facts of *Excalibur Group Pte Ltd*, the High Court found that leave was required for the action to be brought against the liquidator in that case. The High Court held (at [29]):

> 29 … the underlying reason for why liquidators are viewed as requiring the court's protection [*ie*, to require leave of court to be obtained before an action may be commenced against a liquidator] is that they play a central role in administering the winding-up process. They should be protected against unmeritorious, frivolous or vexatious legal proceedings which will cause delays and incur additional expense to the general body of creditors.

23 The liquidator involved in *Excalibur Group Pte Ltd* was a liquidator in a company which had been placed under a compulsory winding up. The question is therefore whether the holding in *Excalibur Group Pte Ltd* should similarly apply in cases like the present one which concerns a liquidator who has been appointed pursuant to a creditors' voluntary winding up. I am of the view that *Excalibur Group Pte Ltd* applies because, just as in a compulsory winding up situation, creditors' interest in the preservation and *pari passu* distribution of company assets is a live primary concern in a creditors' voluntary winding up. Moreover, it is not without significance for present purposes that the High Court had relied on the reasoning in *Korea Asset Management Corp* in arriving at its decision in *Excalibur Group Pte Ltd* (see *Excalibur Group Pte Ltd* at [28]). As mentioned earlier, *Korea Asset Management Corp* was a case involving creditors' voluntary winding up (see [17] above).

24 For completeness, I shall take this opportunity to further state the position which ought to taken in respect of actions or proceedings sought to be brought against liquidators in companies which have been placed under a *members'* voluntary winding up. In my opinion, the holding in *Excalibur Group Pte Ltd* is incapable of substantiating any notion that leave of court should be required before an action or proceeding may be commenced against such liquidators. As alluded to earlier, the decision in *Excalibur Group Pte Ltd* was borne out by considerations pertinent to creditors' interest in the preservation and *pari passu* distribution of company assets (see *Excalibur Group Pte Ltd* at [29], quoted in [22] above). Such considerations do not play a significant role in a members' voluntary winding up, if at all. This is because, unlike in a compulsory winding up (or for that matter, a creditors' voluntary winding up as well), in a members' voluntary winding up a declaration of solvency is made under s 293 of the Companies Act which establishes a presumption that all the company's debts would be paid in full (see [17] above; see also Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 7th Ed, 2011) at paras 11.05, 11.10 and 11.15).

2 5 *Apropos*, the Australian and Malaysian decisions which the High Court followed in *Excalibur Group Pte Ltd* (see [22] above) were also decisions borne out of factual matrices involving court-appointed liquidators in compulsory liquidations (see *eg*, *Armitage v Gainsborough Properties Pty Ltd & Anor* [2011] VSC 419 at [2]; *Baxter & Ors v Hamilton* [2005] TASSC 64 at [5]; *Mamone and 1 Ors v Pantzer* [2001] NSWSC 26 at [3]; *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547 at [2]; *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ

571 at [4]-[5]; *Chin Cheen Foh v Ong Tee Chew* [2003] 3 MLJ 57 at 57; *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 at 204-5). To my knowledge, there has been at least one instance in which the Australian court has considered and dismissed the argument that no proceeding may be commenced against a liquidator in a members' voluntary winding up without leave of court. In *Sullivan v Energy Services International Pty Ltd (in liq)* (2002) 171 FLR 106, for example, the Supreme Court of New South Wales held at [19] (*per* Young CJ in Equity):

> 19 [Counsel] submit that no proceedings can be brought against any liquidator, including a liquidator in a members' voluntary winding up, without leave of the Court which the Court has not yet given. They recognise that the authorities only go so far as to say that this applies to a court appointed liquidator, but cite A Keay, *McPherson on the Law of Company Liquidation*, 4thed (1999) at 287-288. *The submission is one which cannot be accepted*. The reason why one cannot sue a court appointed liquidator is as McLelland J pointed out in *Re Siromath Pty Ltd [No 3]* (1991) 25 NSWLR 25 at 28, based on the decision of Lord Brougham LC in *Aston v Heron* (1934) 2 MY & K 390 at 396-397; 39 ER 993 at 995, that the position of a court appointed liquidator is the position of the court and no-one can disturb it but through an application to the court. *Even if this point were of some merit, the Court would almost certainly grant leave to sue* … [emphasis added]

This lends further support to my view that leave of court is not required before an action or proceeding may properly be commenced against a liquidator in a *members'* voluntary winding up.

26 In summary, I hold that leave of court must be obtained if an action or proceeding is sought to be commenced against a liquidator in a creditors' voluntary winding up, but not a liquidator in a members' voluntary winding up. Given that the Liquidator in the present case is a liquidator in a creditors' voluntary winding up (see [20] above), I find that leave of court was required to be obtained by the plaintiffs before commencing Suit 444 against the Liquidator.

Conclusion

27 Given my analysis above, and given that the plaintiffs have failed to obtain leave of court before commencing Suit 444 against the second and the third defendants (*ie*, the Company and the Liquidator respectively), I find that the case for the striking out of the Statement of Claim in Suit 444 is made out. Accordingly, the applications in SUM 3260 and SUM 3643 are granted, and the Statement of Claim in Suit 444 is hereby ordered to be struck out in favour of the second and the third defendants. I will hear parties on costs.

[note: 1] 2nd Defendant's Skeletal Submissions (2 August 2012), p 4.

[note: 2] Plaintiffs' Written Submissions (1 August 2012), p 8.