

W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd (in liquidation)
[2016] SGHC 80

Case Number : Suit No 112 of 2015 (Summons No 5277 of 2015)
Decision Date : 22 April 2016
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Ng Pei Yin and Jasmine Low (WongPartnership LLP) for the plaintiff; Gan Kam Yuin and Joey Quek (Bih Li & Lee LLP) for the defendant.
Parties : W Y Steel Construction Pte Ltd — Tycoon Construction Pte Ltd (in liquidation)

Insolvency Law – Winding Up

Building and Construction Law – Dispute Resolution

22 April 2016

Lee Seiu Kin J:

1 This was an application by the plaintiff for leave to proceed with suit no 112 of 2015 (“Suit 112”) against the defendant, which is in liquidation, pursuant to s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed). After hearing arguments, I dismissed the plaintiff’s application and awarded costs fixed at \$8,000 plus reasonable disbursements to the defendant. I now set out the grounds of my decision.

Background

2 The plaintiff was the main contractor for a Housing Development Board project in Hougang (“the Project”). The defendant was the sub-contractor engaged by the plaintiff to carry out the construction works under the Project.

3 On 9 October 2014, the defendant submitted Payment Claim No 28 (“the Payment Claim”) to the plaintiff for the sum of \$1,878,439.39 (exclusive of GST) for work done for the period ending 30 September 2014. The plaintiff’s position was that the Payment Claim was invalid as it was, amongst other grounds, served out of time. Nevertheless, on 29 October 2014, the plaintiff served Payment Response No 28 on the defendant, certifying a negative sum of \$666,382.89 (exclusive of GST).

4 On 30 October 2014, the defendant lodged adjudication application no SOP/AA 343 of 2014 (“AA 343”) in respect of the Payment Claim for the sum of \$1,878,439.39 (exclusive of GST). On 7 November 2014, the plaintiff filed its adjudication response wherein it objected to the validity of the Payment Claim and AA 343. The adjudication determination was rendered on 1 December 2014, and the plaintiff was held liable to pay the defendant the sum of \$1,135,987.04 (exclusive of GST).

5 On 10 December 2014, the plaintiff brought originating summons no 1160 of 2014 (“OS 1160”) against the defendant to set aside the adjudication determination. The plaintiff’s contention was that the adjudicator had erred in finding that the Payment Claim and AA 343 had been lodged within time. Pursuant to s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006

Rev Ed) ("the SOP Act"), the plaintiff paid into court as security the sum of \$1,135,987.04, representing the unpaid portion of the adjudicated amount which it was required to pay pending the final determination of OS 1160. On 24 December 2014, the defendant filed summons no 6372 of 2014 ("SUM 6372") in OS 1160 to enforce the adjudication determination in court. The matter was fixed for hearing on 10 February 2015.

6 On 3 February 2015, the plaintiff commenced Suit 112 against the defendant in respect of the latter's purported repudiation of the sub-contract shortly after AA 343 was brought. The plaintiff claimed the sum of \$18,588,051.25 (inclusive of GST) in damages. According to the plaintiff, the disputes in Suit 112 pertained to, amongst others, issues of back-charges and delays, which were the same issues dealt with in AA 343.

7 On 9 February 2015, the plaintiff filed summons no 634 of 2015 ("SUM 634") in OS 1160 for judgment in SUM 6372 to be stayed pending the disposal of Suit 112 in the event that a court order was granted to enforce the adjudication determination.

8 At the hearing of OS 1160 before me on 10 February 2015, the defendant's then solicitor, Mr Tan Tian Luh, reported that the defendant had been placed under creditors' voluntary liquidation that very morning and that he had no authority to act on the defendant's behalf. In the circumstances, I ordered for OS 1160 and SUM 6372 to be adjourned *sine die* with liberty to restore. Due to the commencement of the winding up of the defendant, both OS 1160 and Suit 112 were also stayed by operation of s 299(2) of the Companies Act. The plaintiff would require leave of court to proceed with either action.

9 In the meantime, the plaintiff also filed a proof of debt on 9 February 2015 for the \$18,588,051.25 sought in Suit 112 (although the defendant was only placed in liquidation the following day). This was superseded by another proof of debt filed on 8 May 2015 for \$9,081,020.16 ("the 8 May Proof of Debt"). According to the defendant, there remained a substantial overlap between the claims in the 8 May Proof of Debt and in Suit 112 even though the total sum claimed in the 8 May Proof of Debt was a smaller sum.

10 Subsequent attempts by the plaintiff and liquidators to reach settlement failed, and the plaintiff filed the present application for leave to proceed with Suit 112 pursuant to s 299(2) of the Companies Act.

The applicable law

11 Section 299(2) of the Companies Act prohibits, unless with leave of the court, commencement or continuation of legal proceedings against a company after winding up has commenced. The provision states as follows:

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.

12 The rationale behind the provision is well established. In *Korea Asset Management Corp v Daewoo Singapore Ptd Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset Management*"), VK Rajah JC set it out clearly as follows:

36 ... [the purpose of s 299(2)] 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.

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.* ...

[emphasis added]

13 More recently, in *LaserResearch (S) Pte Ltd (in liquidation) v Internech Systems Pte Ltd and another matter* [2011] 1 SLR 382 ("*LaserResearch*"), Belinda Ang J highlighted the purpose and function of s 299(2) of the Companies Act in quoting the following passage from *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 1994, Issue 34 (March 2010 release)) at [12]:

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.

Therefore, in the normal course of events, a claimant against a company already in liquidation ought to submit a proof of debt. The court may dispense with the procedure where there is good reason to do so and the burden lies on the applicant to justify departure from the scheme: see *Korea Asset Management* at [42].

14 The court's discretion under s 299(2) of the Companies Act is one that must be exercised rationally in the context of the insolvency scheme: see *Korea Asset Management* at [45]. The factors relevant to the exercise of discretion are set out in *Korea Asset Management* at [47]–[57], and may be summarised as follows:

(a) Timing of the application for leave: An early application may persuade the court to allow the liquidators an opportunity to consider the matter in appropriate cases.

(b) The nature of the claim: Whether the applicant is seeking to avail itself of a benefit that would not otherwise be available to it through the conventional winding up procedure; whether the successfully prosecuted claim would effectively negate the statutory scheme of *pari passu* treatment for all unsecured creditors; whether there is no likelihood of the claim being satisfied in any way; and whether the applicant is merely attempting to claim property which *prima facie* belongs to it.

(c) Existing remedies: Whether the claim can be adequately or conveniently dealt with within the insolvency regime; whether the company's assets will be dissipated by attending to the claim; and the reasons for wanting to proceed outside the insolvency scheme.

(d) Other factors such as the views of the majority creditors, the need for an independent inquiry and the choice of liquidator.

15 In the process, the court seeks to balance the collective interest of the general body of creditors against the relative hardship and injustice which may be experienced by the applicant. Ultimately, fair play and commercial morality are the most important considerations: see *Korea Asset Management* at [42].

The issue

16 For clarity, it is useful to summarise the state of proceedings between the plaintiff and the defendant as at the date of hearing.

17 There were two concurrent proceedings sharing common issues. The first set of proceedings, OS 1160, related to the dispute over the validity of the adjudication determination in AA 343. The plaintiff had applied to set aside the adjudication determination, while the defendant had applied to enforce it. Pending the determination of OS 1160, the plaintiff had paid into court the sum of \$1,135,987.04. The second set of proceedings, Suit 112, related to the defendant's purported repudiation of the sub-contract and included the issues contained in AA 343. Both OS 1160 and Suit 112 were stayed on account of the winding up action.

18 In addition to commencing OS 1160 and Suit 112, the plaintiff had also filed the 8 May Proof of Debt which substantially overlapped with its claims in Suit 112.

19 The sole issue before me was whether leave should be granted to the plaintiff to proceed with Suit 112. This required me to examine the inter-relationship between the two sets of proceedings, each of which had a direct bearing on the practical outcome of the other, and strike an appropriate balance among the competing interests at stake.

The inter-relationship between OS 1160 and Suit 112

20 The plaintiff's application was for leave to proceed with Suit 112 only. If leave were granted, it would mean that the plaintiff would be at liberty to proceed with its action against the defendant to recover damages of up to some \$18m. The action would at the same time determine the common issues contained in AA 343 and thus dispose of the matter in OS 1160. Given that OS 1160 would remain stayed by operation of s 299(2) of the Companies Act, this means the approximately \$1.1m paid into court by the plaintiff would have remained outside the hands of the liquidators. If the plaintiff succeeded in obtaining judgment in Suit 112 for a sum in excess of the amount paid into court, then it would be entitled to a refund of the \$1.1m in its entirety.

21 The plaintiff did not seek leave to proceed with OS 1160. Indeed it is probably not in the plaintiff's interest to do so. This is because, should OS 1160 be determined against the plaintiff, the \$1.1m paid into court would be released to the liquidators. Even if the plaintiff should succeed in the 8 May Proof of Debt, or in obtaining damages upon a determination of Suit 112, the plaintiff would not be able to recover the \$1.1m and would have to stand *pari passu* with all the other unsecured creditors for its share of the defendant's assets available for distribution. But if OS 1160 were determined in favour of the plaintiff, *ie* the adjudication determination is set aside by the court, the \$1.1m would be refunded back to it. The risk for the plaintiff is that it is often difficult to set aside an adjudication determination.

Relevant factors in this application

22 The core issues in dispute centred on the nature of the plaintiff's claim, the adequacy of existing remedies and the prejudicial effect this would have on the other unsecured creditors of the

defendant.

The plaintiff's submissions

23 The plaintiff argued that it had legitimate reasons for wanting to proceed with the claims in Suit 112 outside the insolvency scheme.

24 The plaintiff referred me to the case of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel Construction*"), in which the court recognised the need to protect the interests of an initially unsuccessful claimant who has paid monies into court pursuant to an adjudication determination in order to achieve effective justice. In circumstances where the initially successful party is in financial distress such that any monies paid to it is not likely to be recoverable by the time the parties' rights are finally determined, the court may be inclined to grant a stay of enforcement of the adjudication determination, taking into account relevant factors such as whether the failure to make payment had contributed to such distress and whether the claimant was already in distress when the parties entered into their contract: see *W Y Steel Construction* at [64] and [70].

25 In the present case, the plaintiff had filed SUM 634 in OS 1160 for the enforcement of the adjudication determination to be stayed in the event that it was granted. Its position, as I understood it, was that if the \$1.1m paid into court were released to the liquidator, there was the real risk that the sum cannot be recovered by the time the issues are substantively determined at trial and its interests would be prejudiced (see [21] above). Given the principle in *W Y Steel Construction* and the defendant's present state of insolvency, the plaintiff argued that it was likely for the court hearing OS 1160 to grant the stay. The result would be that the monies paid into court would remain locked in indefinitely until Suit 112 is heard and parties' rights are finally determined. The plaintiff would then find itself right back where it started — in order to access the monies paid into court, it would have to seek leave to proceed with Suit 112.

26 Further, the plaintiff claimed, though without further elaboration, that the issues raised in Suit 112 cannot be adequately or conveniently decided in the course of the defendant's liquidation. Parties' rights in relation to the monies paid into court would also be better determined at a more conclusive and deliberate forum of a trial.

27 Finally, the plaintiff argued that proceeding with Suit 112 would not prejudice the interests of the other unsecured creditors. Since the monies were merely paid into court as *security* pursuant to s 27(5) of the SOP Act, they technically do not fall within the defendant's pool of assets for the purposes of winding up proceedings. Therefore, should Suit 112 be decided in the plaintiff's favour and the monies be returned to the plaintiff (to whom they rightly belong), the unsecured creditors would suffer no prejudice.

The defendant's submissions

28 The defendant submitted that the situation was not as hamstrung as the plaintiff had made it out to be, to warrant the court's leave to proceed with Suit 112. Although it was open to the plaintiff to pursue what it felt was a more strategic course of action, there was no denying that proceeding with OS 1160 instead of Suit 112 at this juncture remained a viable option for the plaintiff. Another recourse would be to lodge a proof of debt for the claims in Suit 112. There was no basis for the plaintiff to argue that the issues cannot be adequately or conveniently dealt with in the ordinary course of liquidation. The defendant took pains to detail their liquidators' relevant expertise in addressing the plaintiff's claims and highlighted their capacity to seek appropriate advice if necessary. The defendant further argued that the plaintiff is in fact cognisant of this option, which is evident

from its lodging of the 8 May Proof of Debt that substantially repeats the issues raised in Suit 112. In any event, should the plaintiff disagree with the liquidator's adjudication on its proof of debt, it had the additional recourse of applying to court to reverse it at a later stage. Considering the alternative options available, the defendant saw the plaintiff's current application as merely an attempt to circumvent the conventional winding up procedure, which would have the effect of prejudicing the other unsecured creditors if granted.

29 Furthermore, the defendant emphasised that, as at 23 November 2015, the liquidator only had \$203,409.59 available to it. Liquidators' and solicitors' expenses had yet to be paid and the total value of the proofs of debt received had amounted to approximately \$24.6m. The detriment to the other unsecured creditors would be compounded by the further depletion of the defendant's limited resources in defending Suit 112.

30 Finally, considering its situation of financial distress, the defendant had little monies with which to satisfy any judgment rendered in favour of the plaintiff. Suit 112 was in effect sterile litigation, and leave to proceed with it should thus be refused.

My decision

31 I first deal with the plaintiff's submission that there was an interest in preserving the initially unsuccessful claimant's right to try to reverse the adjudication determination: see *W Y Steel Construction* at [64]. This was a valid point in the court's exercise of discretion in granting a stay on enforcement in OS 1160, but it was not in issue in the present application for leave to proceed with Suit 112. The argument was only relevant insofar as it supported the plaintiff's reasons for wanting to proceed outside the insolvency scheme and continue with Suit 112 (see [23]–[25] above), and in this respect I accepted that the plaintiff would face difficulties recovering the \$1.1m paid into court if it were not allowed to do so.

32 The most important consideration here, however, was the fact that the defendant's resources were already threadbare and considerable costs would be incurred if the company were required to defend the action. According to the plaintiff's statement of claim, Suit 112 concerned a construction sub-contract for nearly \$47m. The plaintiff's claim was in damages for breach of that sub-contract, essentially by the defendant's failure to complete the works on time. It also included damages for defective work and other ancillary claims. The total amount sought amounted to some \$18m. It was clear that if Suit 112 were to proceed, the defendant would incur considerable expense defending a suit which involved substantial disputes of fact. Moreover, as a company under liquidation, the defendant would face further difficulties producing the key personnel to give evidence on its behalf. The plaintiff's claim would, in all likelihood, exhaust the remaining funds of the company well before the action can be concluded. This would be a futile utilisation of the company's limited assets that would further the interest of one potential creditor to the detriment of the remaining creditors.

33 In addition, the plaintiff was not totally without recourse. It had already filed a proof of debt with the liquidators in relation to its claim which will be dealt with in the ordinary course of the liquidation.

34 All things considered, I was of the view that the detriment caused to the defendant's general body of creditors would far exceed any hardship to the plaintiff. There were no sufficiently compelling reasons to depart from the usual procedure in insolvency here. Accordingly, I refused the plaintiff leave to proceed with Suit 112.

Conclusion

35 In the result, I dismissed the plaintiff's application for leave under s 299(2) of the Companies Act. I also ordered the plaintiff to pay the defendant's costs of the application on an indemnity basis, which I fixed at \$8,000 plus reasonable disbursements.

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