# *Re* Win-Win Aluminium Systems Pte Ltd
# [2010] SGHC 297

**Case Number** : Originating Summons No 803 of 2010

**Decision Date** : 08 October 2010

**Tribunal/Court** : High Court

**Coram** : Tay Yong Kwang J

**Counsel Name(s)** : Edwin Lee (Eldan Law LLP) for the applicant; Marina Chin Li Yuen and Jean Tan (M/s Tan Kok Quan Partnership) for Tavica Design Pte Ltd.

**Parties** : Re Win-Win Aluminium Systems Pte Ltd

*Companies*

8 October 2010

**Tay Yong Kwang J:**

**Introduction**

1 This is an application by Win-Win Aluminium Systems Pte Ltd ("the company") pursuant to section 210 of the Companies Act (Cap 50, 2006 Rev Ed) for an order that the company be at liberty to convene a meeting of creditors, as defined in a proposed scheme of arrangement, for the purposes of considering and of approving, with or without modification, the said scheme of arrangement. One of the consequential orders sought in the application is that "all present, pending or contingent actions or proceedings as at the date of the order made herein, including but not limited to winding up proceedings, judicial management proceedings, arbitration, the appointment of a receiver and manager, the enforcement of any security or (by way of execution or otherwise) the enforcement against or recovery of any assets of the company be restrained or stayed except with the leave of court".

2 The affidavit in support of the application, affirmed by a director of the company, sets out the following facts. The company was incorporated on 14 February 1996 as an exempt private company limited by shares, with its registered office at 21 Tuas West Avenue, Singapore. Its authorised and paid up capital is $1.1 million. Three shareholders, including the abovesaid director, hold 25%, 36.4% and 38.6% of the shares respectively. The company is principally in the business of fabrication and installation of aluminium windows and cladding for buildings.

3 The company was the subcontractor for aluminium cladding works in respect of Excalibur Centre, a building owned by Excalibur Land (S) Pte Ltd ("Excalibur"). The main contractor for the project was Excalibur's closely related company, Tavica Design Pte Ltd ("Tavica"). The letter of award was finalised and signed on 19 March 1999 for the said subcontract works.

4 The company claims that throughout the course of the project, its claims were underpaid and there were numerous delays from extensive variation works. The company commenced arbitration proceedings against Tavica on 12 February 2001 to recover some $1.813 million owed to it together with loss and damage for the delays. The limited resources of the company were thus channelled towards the arbitration, thereby preventing it from taking on any substantial projects.

5 After the Excalibur project in 2000, the company remained a live but not very active company. Its accounts from 2002 to 2008 showed accumulated losses of some $1.92 million. Its accounts before 2002 are not available.

6 The company wishes to continue with the arbitration proceedings as it believes that its claim therein is a meritorious one. It acknowledges that an interim award on some issues of fact was previously made in favour of Tavica in the arbitration. This award was accepted by the High Court in Suit No. 538 of 2001 (an action by Excalibur against the company and Leck Kim Koon ("Leck")) and judgment for $151,041.01 was given against the company. The company paid up this judgment amount but has appealed against the High Court judgment by way of CA No. 57 of 2010 filed on 13 April 2010. It believes it has good grounds for the appeal. The appeal is not ready for hearing before the Court of Appeal.

7 "In consideration of the far-reaching effects of the abovementioned long-drawn arbitration proceedings", the company believes that it will be in the best interests of its creditors to effect a scheme of arrangement. The proposed scheme of arrangement essentially envisages the company's partial repayment of debts from its recovery of outstanding debts through pending court actions or arbitration proceedings. Leck, a former director of the company, has agreed in principle, subject to the scheme of arrangement being approved, to lend the company up to $115,000 to pay for the costs of litigation/arbitration. The company will, one month after receiving payment of its claims in litigation/arbitration, make *pari passu* repayment of its unsecured debts after deducting legal expenses, repayment of the loan to Leck and the scheme manager's fees. All monies received or paid out by the company during the period of the scheme of arrangement will be placed in an escrow account under the control of the scheme manager. The company owes its creditors more than $4m and hopes to recover some $1.9 million from Tavica in the arbitration.

8 The company emphasized that during the existence of the scheme of arrangement, all participating creditors bound by the scheme will not be at liberty to commence legal proceedings or execution against the company or its guarantors for any debts owed by the company. However, the company reserves its rights to commence or continue legal proceedings for the recovery of outstanding debts owed to it.

9 The directors of the company believe that carrying out the scheme of arrangement is a more viable alternative for its creditors in comparison to a compulsory liquidation scenario where the creditors are likely to receive no returns instead of the partial repayment of unsecured debts owed to them.

10 Despite this application being an *ex parte* one, solicitors for Tavica turned up at the hearing to oppose it. Tavica claims in the arbitration with the company an amount in excess of $1.8 million and asserts that it owes nothing to the company. On 7 April 2010, Tavica issued a statutory demand for $240,650.95, the amount of costs awarded in its favour against the company in respect of the interim award in the arbitration proceedings. When this amount was not paid, Tavica commenced winding up proceedings against the company in CWU No. 94 of 2010 ("CWU 94") on 4 June 2010. Leck was one of two of the company's creditors who turned up at the hearing of CWU 94 to oppose the winding up of the company. In his affidavit there, he claimed to have advanced money to the company over the last few years and alleged that he is a creditor for the amount of $1,058,061.34 (however, in the proposed scheme of arrangement, the company listed Leck as a significant creditor for $1,263,131.47). At the said hearing on 25 June 2010, as the application for winding up was opposed, directions were given for the filing of affidavits by the respective parties. Pre-trial conferences were thereafter conducted by a registrar of the Supreme Court, with the next one scheduled for 25 November 2010.

11 The company argued that it has already provided security for costs of $100,000 in the arbitration. Leck was willing to inject $115,000 into the company to enable it to continue with the arbitration proceedings which have been ongoing for almost 10 years. This is the last chance for the company to recover what was due to it. The company's creditors who have held back from enforcement action are owed about 90% in value of all the company's debts with the alleged amount due to Tavica forming only some 5% or so. The company was therefore confident of achieving the requisite number and value of positive votes for the scheme of arrangement.

12 Tavica disputes the company's computation of its debts. It maintains that the company owes it more than $1.8 million but it does not owe anything to the company. However, the company in its proposed scheme of arrangement has listed Tavica as a creditor for only $240,650.95, the amount of costs awarded in the arbitration. Tavica was not even listed as a contingent creditor for its substantive claim in the arbitration. The significant creditors listed by the company are related to the company and have not responded to queries as to how their alleged debts arose. If Tavica's substantive claim was included as a contingent debt, the company would not even achieve the three-fourths in value of creditors voting in favour of the scheme of arrangement, as required by section 210(3). The company was accused of seeking to obtain by the back door what it could not do in CWU 94. Tavica submitted that if the company wanted to continue with the arbitration, then it should pay what has been ordered against it in the same arbitration. Tavica agreed to stay the arbitration pending its application to wind up the company but was not told of any intended section 210 application by the company. If it had known that the company was "going to jam the CWU", it would have gone on with the arbitration, which had already stalled in the years 2002 to 2007.

13 The company argued that Tavica would be the only creditor to benefit from CWU 94 because winding up the company would halt the arbitration proceedings. It disputes Tavica's claim of $1.8 million and argued that creditors being related to the company did not mean that they are not separate legal entities. The company's proposed scheme of arrangement does not include contingent creditors. Further, it has provided security for costs in the amount of $100,000 for the arbitration. Tavica's response was that the security amount would not be sufficient as the arbitration will take another two or three weeks to conclude. Further, Tavica argued, the company has been dormant for almost a decade already and there was hardly any goodwill to preserve.

14 After hearing the parties, I directed this Originating Summons to be heard with CWU 94 and imposed the condition that the Originating Summons' prayers will not be granted unless the company provides some security to the satisfaction of Tavica or pays Tavica the amount in issue in CWU 94. The question of costs was reserved. The company has appealed against the said condition.

15 It seems eminently fair that if the company intends to pursue the arbitration proceedings with Tavica, it should pay up whatever costs have been ordered in those proceedings. No stay has been granted on the payment of those costs. If this application under section 210 is granted without the condition imposed, the company would have effectively obtained a stay of the costs order as all proceedings against the company, including CWU 94, would be stayed unless leave of court is obtained to proceed. Since Leck has advanced more than $1 million to the company over the years and is willing to inject another $115,000 to fund the arbitration, it should not be an insurmountable problem for the company to comply with the condition imposed.

16 In any event, the section 210 application is going to be fraught with difficulty since the company does not wish to include contingent creditors in its list of creditors. Problems will definitely arise where the value of the votes is concerned and that issue is going to be pivotal because if Tavica's full claim is taken into account, it is not likely that the votes in favour of the proposed scheme of arrangement would reach the three-fourths in value necessary for it to become binding on

the creditors. The issue whether Tavica should be recognised as a contingent creditor would also be highly contentious in view of the clear stand taken by each side. It would require some consideration of the respective merits of their dispute but that is precisely the matter under arbitration. The issue is likely to become the subject of an application to court and the result will be that the dispute in the arbitration is transferred indirectly to the court for adjudication. That, in my view, would be quite unacceptable.