

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 97

Originating Summons No 763 of 2015

In the matter of Section 279 of the Companies Act (Cap 50, 2006 Rev Ed)

And

In the matter of Gilcom Investment Pte Ltd (in liquidation)

Between

Phang Choo Ong

... Plaintiff

And

Gilcom Investment Pte Ltd

... Defendant

And

(1) LRG Investments Pte Ltd

(2) MC Marine Services

... Non-Parties

FOUNDATIONS OF DECISION

[Insolvency law] — [Winding up]

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Phang Choo Ong
v
Gilcom Investment Pte Ltd
(LRG Investments Pte Ltd and another, non-parties)

[2016] SGHC 97

High Court — Originating Summons No 763 of 2015
Chua Lee Ming JC
12 November 2015; 15 February 2016

17 May 2016

Chua Lee Ming JC:

Introduction

1 The defendant, Gilcom Investment Pte Ltd (“Gilcom”), was ordered to be wound up on the ground that it was deemed to be unable to pay its debts after it failed to comply with a statutory demand for payment of a debt under a default judgment against the defendant.

2 The plaintiff, Mr Phang Choo Ong (“Phang”), the sole director and shareholder of Gilcom,¹ applied for a stay of the winding up of Gilcom on the ground that Gilcom intended to apply to aside the default judgment. Phang alleged that the default judgment was irregular or, alternatively, that Gilcom had a defence on the merits. I dismissed the application on the ground that

regardless of whether Gilcom had grounds to set aside the default judgment, it was insolvent anyway. Phang has appealed against my decision.

The facts

3 Gilcom is an investment holding company registered in Singapore. LRG Investments Pte Ltd (“LRG”) is its creditor and a non-party to this action, together with another creditor, MC Marine Services (“MCM”). Gilcom was wound up on LRG’s application.

4 Gilcom, LRG, and another company, AAFH Singapore Pte Ltd (“AAFH”), were parties to a Memorandum of Agreement dated 13 August 2014² (“the MOA”) relating to a property development project in Australia (“the Project”). Gilcom and AAFH were to arrange for an investment of US\$100m (“the Investment Fund”) for LRG for the Project. Gilcom was the appointed agent and aggregator for an insurer, Allianz Insurance (“Allianz”), and AAFH was the financial representative and agent of LRG.

5 Under the MOA, LRG was to provide US\$10m as the insurance premium for the purchase of an insurance bond. Of this, US\$7m was to be paid by LRG and the remaining US\$3m was to be deducted from the Investment Fund. LRG was required to pay the US\$7m before disbursement of the Investment Fund. Pursuant to the terms of the MOA,

- (a) LRG was to pay the US\$7m to AAFH which would then issue a receipt to LRG;
- (b) Gilcom was to issue a receipt to AAFH and LRG upon receiving the US\$7m; and

(c) if the Investment Fund was not disbursed within the stipulated time frame of 70 to 90 banking days from AAFH’s receipt of the US\$7m, Gilcom was to “arrange a full refund of sums paid by [AAFH] to [Gilcom] under this MOA” and AAFH was to “arrange a full refund of sums paid by [LRG] to [AAFH]”.

6 According to LRG, the US\$7m was paid to Gilcom through AAFH in two tranches – on 10 July 2014 and 13 August 2014. It was not disputed that Gilcom received the US\$7m. Pursuant to the MOA, the Investment Fund was to be disbursed to LRG by 18 December 2014. As no such disbursement was made³, the US\$7m became refundable to LRG, but no refund was given.

7 On 5 February 2015, LRG commenced Suit 121 of 2015 (“S 121/2015”) against Gilcom for repayment of the US\$7m. The writ of summons was served on Gilcom at its registered address on 5 February 2015.⁴

8 LRG obtained judgment in default of Gilcom’s appearance on 2 March 2015.⁵ It applied to wind up Gilcom on 21 April 2015 and the winding up order was granted on 29 May 2015.⁶ No representative of Gilcom attended the hearing of the winding up petition.

9 Following the grant of the winding up order, MCM filed a proof of debt of S\$462,390 against Gilcom on 13 June 2015.⁷ Its claim was based on an investment agreement which was similar to the MOA except that there was no middle party involved. Under that investment agreement, Gilcom had agreed to arrange an investment fund of US\$5m for MCM and MCM paid US\$300,000 to Gilcom for the purchase of an insurance bond. The investment fund had not materialised and Gilcom had become liable to refund the

US\$300,000 to MCM.⁸ MCM's claim of S\$462,390 represented the sum of US\$300,000 and accrued interest at the time the proof of debt was filed.

10 On 6 June 2015, Gilcom applied to set aside the default judgment, not knowing that the winding up order had already been made. Gilcom withdrew the application after its solicitors were informed by LRG's solicitors on 8 June 2015 that the company had been wound up.⁹

11 Phang then filed the present application for a stay of the winding up order pursuant to s 279(1) of the Companies Act (Cap 50, 2006 Rev Ed). The avowed purpose of the application was to allow Gilcom to apply to court to set aside the default judgment in S 121/2015. LRG and MCM objected to the application and requested to be heard. Phang did not object to LRG and MCM being heard. The application for stay was contested only between Phang and LRG and MCM. Gilcom played no part in these proceedings. The liquidator indicated that he would abide by any order made by the court.¹⁰

12 Phang argued that Gilcom had good grounds to set aside the default judgment. First, he claimed that the default judgment was irregularly obtained because the writ had not been served at Gilcom's registered address. Second, he claimed that Gilcom had a good defence to LRG's claim because LRG had sued the wrong party. The gist of this defence was that Gilcom's liability under the MOA was to refund the US\$7m to AAFH – not LRG – and it was AAFH that was liable to refund the money to LRG.¹¹

The law

13 The court's power to stay winding up proceedings is found in s 279(1) of the Companies Act, which provides as follows:

Power to stay winding up

279.—(1) At any time after an order for winding up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

Section 4 of the Companies Act defines a “contributory” as including “a holder of fully paid shares in the company”. Phang, as Gilcom’s sole shareholder, therefore had the requisite standing to apply for the stay.

14 Once a company has been wound up, the only way it can be put back into its former state is by way of a stay of the winding up proceedings. A stay halts the winding up proceedings and permits the officers of the company to continue in control from the date of its pronouncement: *Interocean Holdings Group (BVI) Ltd v Zi-Techasia (Singapore) Pte Ltd* [2014] 2 SLR 485 (“*Interocean*”) at [18] and [22]. If a perpetual stay of the winding up is granted, the company can resume the conduct of its business and affairs, in accordance with its memorandum and articles of association, as if no winding up existed: *Krextil Holdings Pty Ltd v Widdows; Re Brush Fabrics Proprietary Limited* [1974] VR 689 at 694.

15 The onus is on the applicant to show why it is appropriate to stay the winding up rather than to let the insolvency proceedings run their normal course: *Chimbusco International Petroleum (Singapore) Pte Ltd v Jalalludin bin Abdullah and other matters* [2013] 2 SLR 801 at [96]. This onus is not easily discharged – the applicant must “make out a case that carries conviction”: *In re Calgary and Edmonton Land Co Ltd* [1975] 1 WLR 355 (“*Calgary*”) at 359.

16 Since the stay operates prospectively, and not retrospectively, the court is obliged to also consider events which occurred between the date the winding up petition was filed and the date the stay application is heard: *The Ayer Molek Rubber Co Bhd v Bintang-Bintang Sdn Bhd* [2013] 4 MLJ 401 at 417.¹²

17 As for the court's exercise of discretion under s 279(1) of the Companies Act, without trying to be exhaustive, three broad principles can be extracted from the cases.

18 The first principle is that an applicant for a stay has to show that the state of affairs that required the company to be wound up no longer exists. Where the winding up was on the ground of insolvency, the applicant has to show that the company is solvent: *In the matter of Glass Recycling Pty Ltd* [2014] NSWSC 439 ("*Glass Recycling*") at [18]; *Doolan, in the matter of MIH Company Pty Ltd (in liq) v MIH Company Pty Ltd (in liq)* [2015] FCA 1130 ("*Doolan*") at [10]. Credible evidence of solvency is required, not least because the court is putting the company back into operation. Mere assertions of solvency will not be sufficient. There must be proper verification of assets and liabilities; unaudited accounts and unverified claims of ownership or valuation will not ordinarily be probative of solvency: *Expile Pty Ltd v Jabb's Excavations Pty Ltd* (2003) 45 ACSR 711 at [16]. It also bears mentioning that the ability to repay debts, presently due, at a future time does not demonstrate solvency: *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 at [79].

19 The second principle is that a stay would be refused if granting a stay would be detrimental to commercial morality and the interests of the public at large. In this regard, it has been held that

(a) where the company is insolvent, carrying on business and obtaining credit would present a grave commercial risk to persons dealing with it, and such companies should remain wound up: *Re Mascot Home Furnishers Pty Ltd (in liquidation)* [1970] VR 593 at 596; *Ting Yuk Kiong v Mawar Biru Sdn Bhd* [1995] 2 MLJ 700 at 708;

(b) the court must be satisfied that it will be reasonable to entrust the affairs of the company to the directors under whose management the company had previously been subjected to an order for winding up. Therefore, a stay may be refused if there has been serious impropriety in the conduct of the company's affairs, or any other matter which poses a risk to future creditors: *Glass Recycling* at [19]; *Doolan* at [11]. I would add that in my view, the applicant's conduct in allowing the winding up order to be made or any unexplained delay in applying for a stay are also factors to be taken into consideration; and

(c) where the directors have failed to comply with their statutory duties to give information to the official receiver or to furnish a statement of affairs, the court may refuse a stay until it is satisfied that the trading operations of the company have been "fair and above board": *In re Telescriptor Syndicate, Limited* [1903] 2 Ch 174 at 182.

20 The third principle is that a stay would be refused if the interests of the creditors, the members and the liquidator are not protected: *Calgary* at 360; *Re Warbler Pty Ltd* (1982) 6 ACLR 526 ("*Warbler*") at 532, 533. The application for a stay must be served on all creditors and contributories: *Warbler* at 533. A stay is unlikely to be granted if arrangements are not made to pay the creditors: *Re Allebart Pte Ltd* [1971] 1 NSWLR 24 at 26. On the other hand, if the applicant has demonstrated that there are reasons for a stay and the

creditors, members and liquidator have consented to a stay, the court should seldom and only with good reason stand in their way: *Interocean* at [13].

21 I should add for completeness that the applicable statutory provisions in the cases referred to above are either substantially similar or identical (in the case of Malaysia) to s 279(1). In addition, although some of the cases involved voluntary winding up, the principles are equally relevant to cases involving compulsory winding up: see *Interocean* at [17].

Reasons for not granting the stay

22 Phang argued that a stay should be granted because (a) the winding up application had been based on non-payment of the judgment debt in S 121/2015, (b) there were good grounds to set aside the default judgment in S 121/2015, and (c) if the default judgment were set aside, then there would have been no reason for the winding up application.

23 In my view, it could not be said at this stage that an application to set aside the default judgment in S 121/2015 was bound to fail. However, whether or not Gilcom might succeed in setting aside the default judgment in S 121/2015 was irrelevant. LRG's application to wind up Gilcom may have been based on a statutory demand for payment of the judgment debt in S 121/2015 but ultimately the ground upon which the winding up order was given was that Gilcom was unable to pay its debts. To show that the state of affairs that required the company to be wound up no longer exists (see [18] above) Phang had to show that Gilcom was in fact able to pay its debts.

24 Considerations of commercial morality and interests of the public (see [19(a)] above) also dictated that a stay should be refused if Gilcom was insolvent.

25 Therefore, I agreed with LRG and MCM that it was incumbent on Phang to demonstrate Gilcom's solvency before a stay of the winding up would be considered. However, there was no evidence that Gilcom was solvent. Indeed, the evidence confirmed that Gilcom was insolvent.

26 First, by Phang's own admission, Gilcom did owe AAFH the US\$7m. It was clear that Gilcom would be unable to pay AAFH unless the US\$7m was first refunded by Allianz to Gilcom. During the hearing before me, Phang admitted as much when he submitted that Gilcom would be able to pay AAFH *if Allianz refunded the US\$7m to Gilcom*. Similarly, Gilcom's repayment of its debt to MCM depended on it receiving a refund from another company. Second, Gilcom's paid-up share capital was S\$100,000¹³ and, based on the affidavits filed, its only known assets as of 31 May 2015 were monies held in bank accounts amounting to S\$41,485 and US\$14,289.¹⁴ It was clear to me therefore that Gilcom was insolvent. It could not meet its liabilities to AAFH/LRG or MCM.

27 Further, there was no evidence that the interests of creditors and the liquidator would be taken care of if a stay were to be granted.

28 In my judgment, Phang had not made out a convincing case for a stay of the winding up proceedings.

Conclusion

29 For the reasons stated above, I dismissed the application for a stay of the winding up and awarded the costs of the application to LRG fixed at S\$8,000 inclusive of disbursements.

Chua Lee Ming
Judicial Commissioner

Sarbinder Singh (Kertar Law LLC) for the plaintiff;
David Chan, Tan Su Hui and Amelia Tan (Shook Lin & Bok LLP)
for the non-parties.

¹ Phang's 1st Affidavit dated 19 August 2015 at para 5

² Plaintiff's Bundle of Affidavits at p 69

³ Affidavit of Yu Yunhe dated 8 October 2015 at paras 2.2.1, 2.2.2 and 2.3.2

⁴ Affidavit of Eddie Osman dated 8 October 2015 at para 3

⁵ Plaintiff's submissions at para 14

⁶ CWU 79/2015

⁷ Affidavit of Michael Conrad Frank dated 29 October 2015 at para 2.4.2

⁸ Affidavit of Michael Conrad Frank dated 29 October 2015 at paras 2.1.1, 2.3.2

⁹ Plaintiff's submissions at para 23

¹⁰ Phang's 1st Affidavit dated 19 August 2015 at para 29 and p 66 (Exhibit PCO-1)

¹¹ Plaintiff's submissions at paras 43–45

¹² Creditors' further arguments at para 2.1.2

¹³ Phang's 1st Affidavit dated 19 August 2015 at p 21 (Exhibit PCO-1)

¹⁴ Phang's 3rd Affidavit dated 6 November 2015 at paras 22 and 24