Interocean Holdings Group (BVI) Ltd
v
Zi-Techasia (Singapore) Pte Ltd (in liquidation)

[2014] SGHC 09

High Court — Originating Summons No 981 of 2013
Edmund Leow JC
15 November; 30 December 2013

Companies — Winding up

13 January 2014

Edmund Leow JC:

1 This was an application made by the plaintiff for an order under s 279(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") that the members' voluntary liquidation of the defendant company be stayed altogether and that the officers of the defendant be permitted to resume management of the company. The plaintiff first appeared before me on 15 November 2013; the defendant was not represented but I was shown a letter dated 21 October 2013 wherein the liquidator said for the defendant that it had no objection to this application.[1]

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[1] Affidavit of Yek Jia Min (Ye Jiamin, Jasmin) dated 7 November 2013 at p 19.

2 After hearing oral submissions I was satisfied that I had the power under s 279(1) of the Act to grant the stay but I adjourned the matter to consider first, whether I should grant a stay; and second, whether it would have the effect which the plaintiff said it did and therefore whether I ought to grant the second prayer.

3 On the first point, I directed the plaintiff to provide satisfactory answers on why it required the resurrection of the defendant when it would be easier and cheaper simply to incorporate a new company. When the matter was heard again on 30 December 2013, I was informed that there were financial and tax incentives in reinstating the defendant company; the defendant company was part of a larger group of companies, the Zuellig Industrial Group, and such incentives would have to be captured before the close of the Zuellig Industrial Group's financial year. I was satisfied with this reason.

4 In the meantime I had also considered the issue of whether the plaintiff's second prayer had the effect in law claimed by the plaintiff and after reviewing the authorities I came to the conclusion that it did.

5 As both my concerns were allayed, at the hearing on 30 December 2013 I granted the plaintiff's order in terms. But as the matter appeared to deal with an issue of law on which there is no Singapore authority, I thought it appropriate to issue grounds for my decision.

6 The background facts were these. The plaintiff was a holding company beneficially entitled to all the issued shares of the defendant. The defendant was a Singapore company incorporated on 2 September 2004. On 12 April 2013, the members of the defendant resolved at an extraordinary general

meeting to put the company into voluntary winding up on the basis that it had no business transaction for over 12 months. Liquidators from Baker Tilly TFW LLP were appointed.

7 Subsequently, the plaintiff changed its mind. It now wanted the business of the defendant to continue so that the defendant could "be profitable from new potential business".[2] I was told that there was also considerable goodwill in the defendant's corporate name and that there were, as I have said, financial and tax incentives for reinstating the defendant. On 4 September 2013, an extraordinary general meeting of the company was held wherein it was resolved by way of special resolution that the company would withdraw its winding up petition and then do one of three things: void the dissolution, stay the winding up proceedings altogether, or revoke them entirely. On 30 September 2013, the liquidators wrote[3] to say they had no objections to the cessation or stay of the members' voluntary winding up. The liquidators said that as at 11 April 2013, the defendant had cash at the bank in the sum of $94,715.99 and no liabilities and that, as at 30 September 2013, it had $92,881.63 to its credit at the bank representing the sum of the defendant's surplus assets. There were prior liabilities which by that date had been discharged. The defendant owed the plaintiff $709,095 of which $699,998 was capitalised to equity and the remaining sum of $9,097 was paid in full. It owed $133,176 to Argus Industrial Group Holdings Ltd ("AIGHL") which were also paid in full. Accrued expenses of $5,293 up to 31 January 2013 were also paid in full. Thus, as at 30 September 2013, the liquidators

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[2] Affidavit of Daniel Christian Zuellig dated 16 October 2013 at p 5

[3] Affidavit of Daniel Christian Zuellig dated 16 October 2013 at p 37

were able to say that there were no outstanding liabilities; that they had been paid their fees out of the defendant's assets prior to liquidation; and that they were not aware of any misfeasance proceedings against the officers of the defendant or of any other way in which the conduct of the defendant was against commercial morality or the public interest.

8 I turn now to the law. Section 279(1) of the Act reads as follows:

> **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.

9 This is a provision dealing with general powers of a court on winding up; and notwithstanding the words on its face it would also apply in a voluntary winding up due to the effect of s 310 of the Act which reads:

> **310**.—(1) The liquidator or any contributory or creditor may apply to the Court —
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> (*a*) to determine any question arising in the winding up of a company; or
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> (*b*) to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court.
>
> (2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

10 I was therefore satisfied that I had the power to order a stay of winding up proceedings altogether and further that the exercise of this power was entirely discretionary.

11 As to the exercise of discretion, the plaintiff cited the cases of *Chimbusco International Petroleum (Singapore) Pte Ltd v Jalalludin bin Abdullah and other matters* [2013] 2 SLR 801 and *In re Calgary & Edmonton Land Co Ltd (In Liquidation)* [1975] 1 WLR 355 ("*Re Calgary*") as authorities for the proposition that stays have been granted where all the creditors have been paid or provided for, or where a scheme of arrangement has been agreed to by the creditors.

12 *Re Calgary* is a case which had to do with s 256(1) of the UK Companies Act 1948 (c 38) (UK), which is *in pari materia* with s 279(1) of the Act. Megarry J considered "that the application for a stay must make out a case that carries conviction", at 358–359; and then went on to discuss in some detail the persons whose interests had to be considered by the court when deciding whether or not to exercise its discretion, at 360:

> That brings me to the third point, that of the persons whose interests have to be considered on an application for a stay. These must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors. Their rights are finite, in that they cannot claim more than 100p in the pound. I cannot see that in normal circumstances any objection to a stay could be made on behalf of the creditors if for each of them it is established either that he has been paid in full, or that satisfactory provision for him to be paid in full has been or will be made, or else that he consents to the stay or is otherwise bound not to object to it. Second, there is the liquidator. By section 309 [of the Companies Act 1948], all costs, charges and expenses properly incurred in the winding up, including the liquidator's remuneration, are made payable out of the assets of the company in priority to all other claims. Where a liquidator has accepted office on this footing, I cannot see that in normal circumstances it would be right to stay the winding up unless his special position had been fully safeguarded, either by paying him the proper amount for his expenses or by sufficiently securing payment.

> A liquidator who loses control of the assets by reason of a stay ought normally to be properly safeguarded in relation to his expenses. Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected against the destruction of that right without good cause.

13 I was satisfied that these statements represent the correct principles in relation to the interests that should be considered by the court in deciding whether or not to grant a stay. If the interested parties so identified have consented to a stay the court should seldom and only with good reason stand in their way. I would add that this should be contingent on the party seeking a stay being able to demonstrate in full and forthright detail the reasons for which a stay is sought. I was not sure whether the court should also consider separately whether a stay would be "conducive or detrimental to commercial morality and to the interests of the public at large": per Buckley J in *In re Telescriptor Syndicate, Limited* [1903] 2 Ch 174 at 180; but even if I did consider this I was of the view that in the present case the business carried on was above board and there was nothing that I could see that would offend any notion of commercial morality.

14 In the present case, all the relevant parties have been notified of this application. The creditors have been paid off in full and no longer have any interest in the matter. The plaintiff was the main creditor and has affirmed that it has been satisfied in full. I was shown a letter from AIGHL confirming that it no longer had any interest in the application and therefore consented to the

application. The liquidators and the defendant had no objection. The plaintiff as I have said was able to satisfy me as to its reasons for reinstating the defendant.

15 I now deal with the issue of the effect of a stay altogether. Upon reviewing the authorities, I was satisfied for the following reasons that the effect of a "stay altogether" of winding up proceedings would be to put the officers of the company back into management.

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. The weight of foreign jurisprudence construing the older English and Australian legislation that is *in pari materia* with our Act is that the only remedy is to stay the winding up. In *Re Intermain Properties Limited* (1985) 1 BCC 99555 ("*Re Intermain*") Hoffmann J held that a winding up order has much wider consequences than the usual judgment *inter partes* because its statutory effect was wide ranging and such an order could therefore not be rescinded notwithstanding bad service. In Australia and the United Kingdom the position has changed following legislative amendments permitting rescission or termination of winding up orders, an innovation which Singapore has not so far followed. Neither has Malaysia; in *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651, a decision of the Court of Appeal in Putrajaya, Abu Samah Nordin JCA surveyed the older authorities from England, Australia and New Zealand and concluded that the weight of opinion was that a winding up order could not be rescinded where there was no statutory provision permitting this, save for those circumstances where the court may exercise its inherent jurisdiction. I

am not sure whether this last exception is good law in Singapore but I do not need to express any decided opinion on it.

17 While these authorities were cases in which the company had been ordered into winding up, in my view the position would be the same in a voluntary winding up, *viz*, that once commenced (see s 291(6) of the Act) the voluntary winding up cannot be revoked or rescinded. The following passage from Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2nd Ed, 2009) at para 17.006 sets out the applicable principles which should also apply where winding up is commenced voluntarily as well as by way of court order:

> A company that is put into liquidation undergoes a change of status involving certain legal consequences … Although its corporate status and powers are not as such affected by the liquidation, the company exists thereafter only for the purpose of being wound up, the directors' powers pass to the liquidator, and there are restrictions on the alienation of its property and on the right to take proceedings and levy execution against it. Because these changes are the result of statutory enactment, they cannot be displaced by any act whereby the company of its own motion reverts to its former state. This can only be achieved by obtaining an order of the court staying proceedings in the winding up.

18 In my view, as the state of the law stands at present, the only way a company being wound up can be put back into its former state is by way of a court order staying the winding up proceedings and this is so whether the company has been put voluntarily into winding up or is in such a state by way of court order. In *Krextile Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Limited* [1974] VR 689 ("*Krextile Holdings*"), Gillard J discussed the effect of a perpetual stay granted under s 243 of the Companies Act 1961 (No 6839 of 1961) (Victoria), which is *in pari materia* with s 279 of the Act, in the following terms, at 693:

> 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 a 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 above which are comprehended within the expression "all proceedings in relation to the winding 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.

19 In the present case there was no prior order of court and hence there was nothing to be revoked or to be rendered a "dead letter", but I agreed with the other observations in this passage.

20 In *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd* (1990) 2 ACSR 766 ("*Austral Brick*"), Young J had to decide the same issue before me which is whether, upon the staying of a winding up, the powers of the directors re-vest in them. After citing the above passage from *Krextile Holdings*, Young J made the following observations, at 769:

> This appears to be the clue to the solution to the problem that arises in this case. Although the word "stay" normally denotes the freezing of an existing situation so that no fresh step may be taken, with a winding up order it appears that a stay means that the cloud over the company's normal activities is temporarily or indefinitely removed. As the directors remain in office and their powers are merely removed, the imposition of a stay permits the directors once again to implement their powers: see *Collins v G Collins & Sons Pty Ltd* [(1984) 9 ACLR 58].

21 I think this is correct. In the scheme of the Act, once winding up has been stayed altogether, this means that the process of liquidation set out in the Act leading ineluctably to the dissolution of the company is stayed. All proceedings in relation to winding up become stayed including all the statutory duties and activities of the liquidator. Under s 294(2), on the appointment of a liquidator, all the powers of the directors cease except in so far as the liquidator or the company in general meeting with the consent of the liquidator approves the continuance thereof. The powers merely cease; the office is not extinguished; and so if the statutory process of liquidation is stayed, it must follow that the powers of the directors which were in abeyance while the company was in winding up now continue. Therefore the effect would be to put the officers of the company back into control.

22 I was further of the view that 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 or (as here) the date that voluntary winding up commences. The winding up is stayed, not set aside, rescinded or discharged. Therefore a stay does not undo the actions of the liquidator but operates only to halt the proceedings and thenceforth to permit the officers of the company to continue in control. In *American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 MLJ 369 the issue was whether a stay order could validate dealings entered into by the company from the date of the winding up to the date of the stay order. The Court of Appeal (Putrajaya) in construing the effect of a stay order obtained under s 243(1) of the Companies Act 1965 (Act 125) (Malaysia) (*in pari materia* to s 279(1) of the Act) held it could not. Ramly Ali JCA said, at [23]:

> There are strings of authorities to show that a stay order takes effect from the date of pronouncement of the order and not backdated to the date of the winding up order. A stay order does not wipe the winding up order out of existence but would only be operative from the date of the granting of the stay order. Therefore the question of validating all dealings and agreements entered into after the date of the winding up until the date of the stay order (as being done be the learned judge in the present case and described by Abdoolcader J as against the principles of commercial morality) does not arise at all (see *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors*; *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action* [1996] 1 MLJ 872; *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd*; *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors; McAusland v Deputy Commissioner of Taxation* (1993) 118 ALR 577).

23 I think this is correct but the question fortunately does not arise for decision in the present case.

24 For the reasons above I could see no reason in the circumstances to refuse the application and therefore gave order in terms. I made no order as to costs.

25 By way of postscript I would add that there remain some questions in the present stay regime that I think may require legislative intervention to resolve. The first is the proper procedure if the defendant company were to be wound up in future. It might be thought that as the winding up is only stayed, it would be open to any interested party to apply to court to have the stay order set aside or varied so that winding up could, in a sense, continue. However the present winding up proceedings were commenced on the footing of a members' voluntary winding up and it is uncertain whether, in future, should the company become insolvent, a creditor could apply afresh under s 254 for the company to be wound up by the court. In *Re Intermain*, Hoffmann J was of the opinion that an existing petition should be regarded as exhausted by a perfected winding up order which being stayed would make it necessary for a fresh winding up petition to be presented. But nothing was said whether this principle would apply also to cases of voluntary winding up.

26 The second point is that with regard to powers of directors, there is an issue that were the directors to quit office whether through the efflux of time or by the effect of provisions in the articles of association there could be nobody to take up the reins of the company in the case that winding up was stayed altogether. This was the concern raised by Young J in *Austral Brick* at 769. In such a case the court may need to make further orders to appoint new directors, but we currently have no statutory provisions dealing with that. By way of comparison, s 482(3) of the Australian Corporations Act 2001 states that where a court has made an order terminating a winding up, it may also

give directions for the resumption of the management and control of the company by its officers, including directions for the convening of a general meeting of members of the company to elect directors of the company to take office upon the termination of the winding up. Also, I do not doubt that there may be other conceptual conundrums thrown up because a permanent stay of winding up is, in the words of Tipping J in *Re Kim Maxwell Ltd* [1992] 1 NZLR 69, a contradiction in terms. The insolvency regime may benefit from legislative clarity on the issue.

Edmund Leow
Judicial Commissioner

Gerald Yee and Jasmin Yek (Colin Ng & Partners LLP) for the plaintiff.