
Dispute Resolution

Establishing and Disproving Insolvency – Golf Course Holding Company Avoids Winding Up Application

Introduction

Under the Insolvency, Restructuring and Dissolution Act 2018, the Court may order the winding up of a company on a number of grounds, including where the company is unable to pay its debts. In *Energy Resource Investment Pte Ltd v International Golf Resorts Pte Ltd* [2022] SGHC 134, the Singapore High Court was faced with such a winding up application, and set out the relevant considerations for establishing insolvency on this ground, as well as how such insolvency may be refuted.

In this case, a creditor sought to wind up the Defendant company on the ground that it could not repay certain loans owed to the creditor. The company here was the holding company for a luxury resort and golf course. The company disputed the debts as well as its alleged inability to pay such debts.

The Court held in favour of the company, declining to order its winding up. The Court found that the debts alleged to be owed were in fact disputed, as there was a triable issue in respect of two of the three loans from the creditor. The Court further found that, for the remaining loan, it had not been shown that the company could not repay the loan. The grounds for setting aside were thus not satisfied.

The company was successfully represented by Mr Vikram Nair, Mr Foo Xian Fong, Ms Glenna Liew, Ms Mazie Tan and Mr Ashwin Menon of Rajah & Tann Singapore LLP. The Plaintiff was represented by Mr Davinder Singh SC, Mr Jaspreet Singh, Mr Hanspreet Singh and Ms Waverly Song of Davinder Singh Chambers LLC.

Brief Facts

The Defendant company was the holding company of the Joondalup Resort, a luxury resort and golf course located in Perth, Australia. The Defendant had three shareholders, including one Mr Low. Mr Low also controlled the Plaintiff company.

The Plaintiff applied to the Singapore courts, seeking the winding up of the Defendant on the basis that the Defendant was unable to pay its debts arising out of three loans made to the Defendant. The loans were either made by the Plaintiff or by Mr Low and subsequently novated to the Plaintiff. The first and

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third loans were due and payable according to the Plaintiff, while the second loan was only payable in August 2022.

The Plaintiff submitted that grounds for winding up were made out as the loans were due and payable, and the Defendant was unable to pay. The Plaintiff also claimed the Defendant was insolvent and therefore unable to pay its second loan when it would become due. The Defendant disputed this, submitting that the first and third loans were capital contributions subject to an understanding amongst the shareholders that they would not be unilaterally called by any one shareholder. There was therefore a dispute giving rise to triable issues. The Defendant also argued it was not insolvent and would be able to pay the second loan when it fell due.

Holding of the High Court

The Court held in favour of the Defendant, declining to make a winding up order.

In reaching its decision, the Court considered the relevant approach to an application for winding up on the ground that the company is unable to repay its debts. The Court stated that it would consider:

- (a) Whether the debts are in fact owed, or whether they are disputed; and
- (b) Whether the company is in fact insolvent, being unable to pay its debts.

Whether the loans were disputed

The Court found that the first and third loans were disputed, and the Defendant had raised sufficient grounds to make out a triable issue.

The issue raised by the Defendant was that there was an agreement or representation binding the parties. Pursuant to this understanding, the parties would not seek repayment or have any repayment made unless all parties agreed to the repayment, and such repayment would be made on all similar loans at the same time. The Defendant had submitted that Mr Low had referred to or affirmed this understanding in earlier and separate proceedings.

The Court highlighted that the threshold for establishing a triable issue is not a high one. While a mere allegation is not enough, the Court will not be shy to find a triable issue if the evidence before it points in such direction. Here, the Court found that there was sufficient material to support the existence of an arguable case that should be permitted to proceed to trial, where there would be an assessment of all the evidence to determine whether the alleged understanding did in fact exist.

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Whether the company was insolvent

The Court found that the Defendant was not insolvent. This was relevant because the Defendant had acknowledged that the second loan was due in August 2022, but stated it would be able to pay this loan when it was due.

The Plaintiff had submitted an expert's assessment that the Defendant was unable to pay the consolidated liabilities. However, the Defendant pointed out that the expert's assessment took into account the first and third loans as current liabilities and also that the expert's report did not properly take into account additional cashflows and a loan facility that would be made available to the company.

The Court agreed with the Defendant that the first and third loans should have been excluded from the analysis as they were disputed. The Court was satisfied on the evidence that there were funds available, on a commercial assessment, that would meet the amount due on the second loan.

In reaching its decision, the Court set out the following approach for determining insolvency:

- (a) The Court would apply the cash flow test, which requires an assessment of whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due.
- (b) The ability to repay is measured against a timeframe allowing each debt to be paid as it comes payable, and whether any liquidity issue could be cured in a reasonable time. Debts not demanded or not due should also be considered.
- (c) The Court adopts a commercial rather than a technical view of insolvency, focusing on whether any liquidity problem is temporary and may be cured in the reasonably near future.

Concluding Words

The Court's decision highlights that winding up applications should only be brought where there are no triable issues in relation to the debt in question. Additionally, where a Plaintiff is trying to wind up a company on the basis that it would not be able to pay a prospective debt, the burden is on the Plaintiff to establish the company is unable to do so and therefore insolvent.

For further queries, please feel free to contact our team below.

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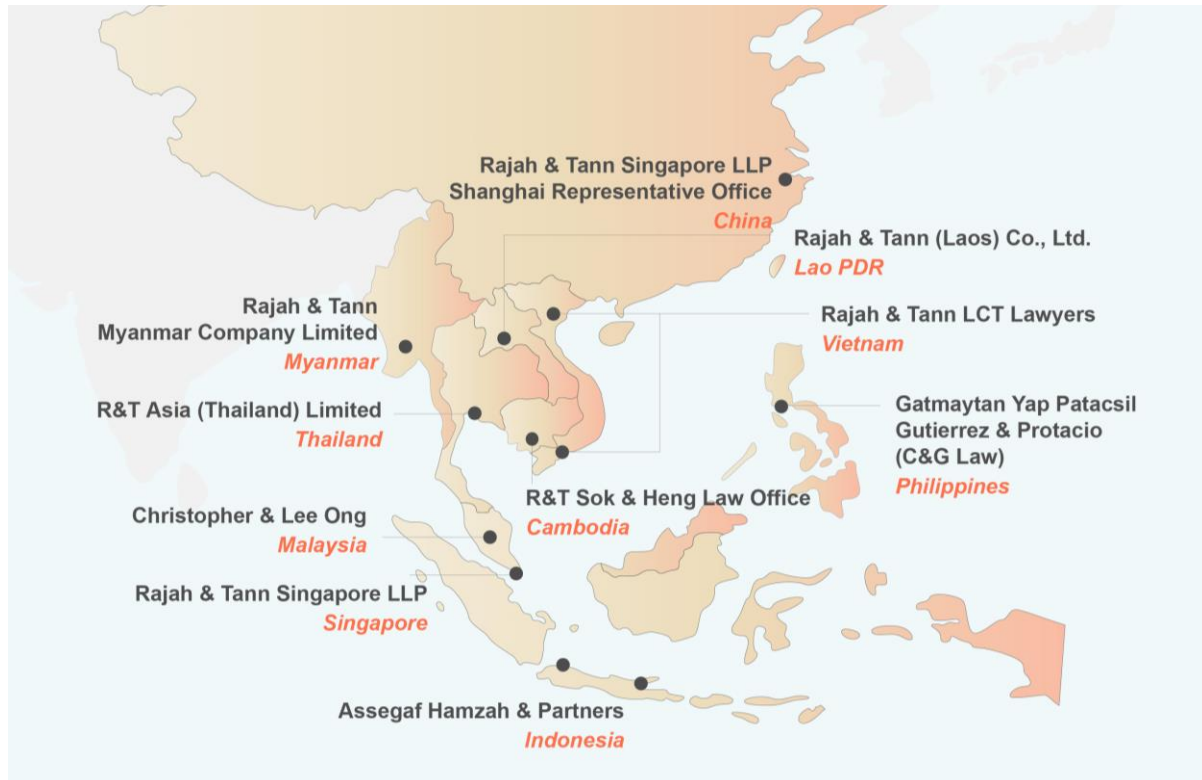
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