

Restructuring & Insolvency

Key Issues in Opposing a Winding Up Application: Standing of Shareholders and the Basis of Abuse of Process

Introduction

When a winding up application is made against a company, there are a number of potential hurdles before a winding up order is made. In *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd* [2023] SGHC 152, the Singapore High Court considered and clarified a number of key issues relating to winding up applications, including the relevant factors that the Court will consider in deciding whether shareholders of the company being wound up have standing to oppose the winding up application, and the Court's discretion to disallow a winding up application commenced as an abuse of process.

The decision involved a winding up application that had been filed by a purported creditor against a company owned by two individuals. One of the two shareholders opposed the application, while the other supported it. The Court had to determine whether the opposing shareholder had the necessary standing and whether to grant the winding up order.

The Court found that the opposing shareholder had standing to oppose the winding up application in her position as a shareholder (or contributory) of the company, even if the company was indisputably insolvent and there would be no returns to the shareholders after distribution to the creditors. The Court also found that the winding up application was commenced as part of a scheme to terminate the company and allow the supporting shareholder's new company to take over the company's business, and that the purported creditor's application was motivated by the collateral and improper purpose of advancing the scheme, and therefore the winding up application should be dismissed.

The decision demonstrates the relevant considerations in opposing a winding up application and highlights that the Court will not facilitate a winding up that is motivated by a collateral and improper purpose, as it amounts to an abuse of process.

Brief Facts

The Defendant in the winding up application was a company in the restaurant business and was owned by two sisters-in-law, Mdm Lakshmi and Mdm Rajeswary, who were equal shareholders and both directors of the Defendant. The parties ran into a number of disputes surrounding the running of the company, which later ran into financial distress.

Having failed in an attempt to remove Mdm Rajeswary as director, Mdm Lakshmi called for an Extraordinary General Meeting to issue new shares in the Defendant in exchange for financing from the



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Plaintiff. Although no resolution was passed due to opposition from Mdm Rajeswary, the Plaintiff nonetheless made payment of S\$20,000 as consideration for the issuance of shares in the Defendant.

The shares were never issued to the Plaintiff, who then issued a statutory demand to the Defendant for the S\$20,000. The statutory demand remained unfulfilled and formed the basis for the Plaintiff's application for the winding up of the Defendant. The winding up application was supported by Mdm Lakshmi.

Mdm Rajeswary opposed the Plaintiff's winding up application, arguing that there was no basis for the statutory demand as the S\$20,000 debt was disputed, and that the application was an abuse of process as it was motivated by the collateral and improper purpose of wresting control of the Defendant's business. The Plaintiff contended that Mdm Rajeswary, as a non-party, did not have standing to oppose the winding up application, as the Defendant was indisputably insolvent.

Holding of the High Court

The Court dismissed the Plaintiff's winding up application, finding it to be an abuse of process, and also that there was, in any event, a dispute as to the alleged S\$20,000 debt.

Standing to oppose a winding up application

The Court held that a shareholder (or contributory) has standing to oppose a winding up application, even if the company is insolvent and there would be no recovery to the shareholders after distribution to the creditors.

The Court rejected the Plaintiff's suggestion that Mdm Rajeswary required leave of court to oppose the winding up as there would otherwise be no guard against frivolous opposition by shareholders to winding up proceedings. The Court held that, rather than requiring leave of court, any unmeritorious opposition from shareholders can be guarded against through the attribution of the appropriate weight to such opposition, depending on the circumstances. This would be based on an assessment of the relevant factors, including the following:

- Whether the shareholder/contributory has a substantial interest in the winding up application;
- Whether the company is solvent;
- The *bona fides* of the shareholder/contributory opposing the application; and
- The countervailing interests of the company's creditors.

In the present case, the Court held that even if leave of court was required for a shareholder to oppose a winding up application, it would have granted leave to Mdm Rajeswary in any case, based on its assessment of the above factors.

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Dismissal of the winding up application

The Court first considered whether it had discretion to disallow a winding up application if the company was indisputably insolvent. The Court held that even if a company is proven or deemed insolvent, or if the other statutory bases for winding up are made out, it nonetheless retained a discretion and may decline to grant a winding up order, on the basis of the following:

- First, the Court may disallow a winding up application which amounts to an abuse of process, pursuant to its inherent jurisdiction to prevent an abuse of its processes.
- Second, the Court retains a general residual discretion to consider all other relevant factors when deciding whether a company should be wound up.

In exercise of its discretion, the Court disallowed the Plaintiff's winding up application. The Court found that there was in fact a scheme orchestrated chiefly by Mdm Lakshmi to wrest control of the Defendant's business from the Defendant and Mdm Rajeswary. The Court further found that the Plaintiff was a party to this scheme. The winding up application was not a genuine attempt to recover a genuine investment made for legitimate commercial reasons, and was instead an abuse of the processes of the court. As such, the overall fairness and justice of the case militated against making the winding up order.

Although the Court did not have to decide the issue, it stated that it would have also allowed the challenge to the winding up application on the ground that there was a substantial and *bona fide* dispute as to the debt allegedly owed to the Plaintiff. This finding would have served as an alternative basis upon which to dismiss the winding up application.

Concluding Words

The statutory winding up process involves the balancing of interests of various parties, including creditors, contributories and other stakeholders. In this regard, there are safeguards to guard against frivolous opposition by shareholders and other parties seeking to oppose a winding up application, and the Court may overall exercise its discretion to disallow winding up applications which are brought for collateral and improper motives.

Parties seeking to make a winding up application, or to oppose such applications, should thus ensure that they have fulfilled the relevant requirements and that they have genuine basis for their respective applications.

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

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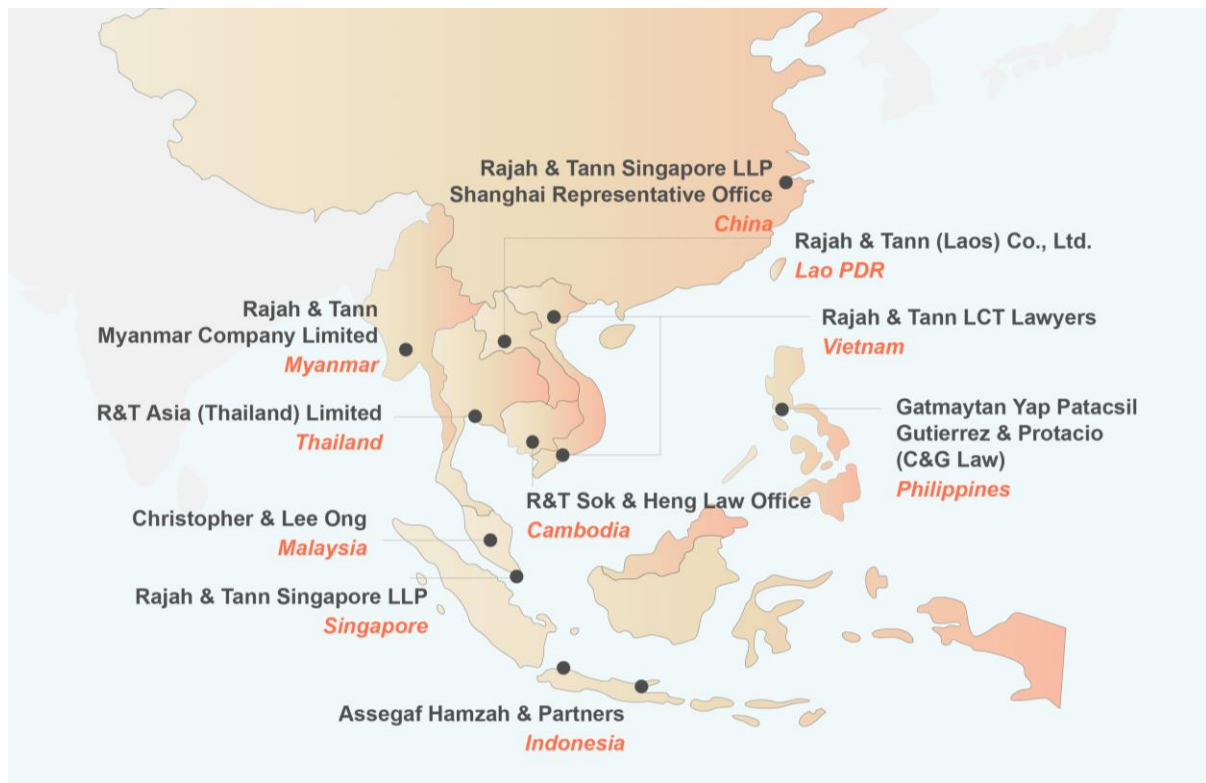
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