

CASE UPDATE

LATEST PRONOUNCEMENT ON WINDING UP APPLICATIONS

BNP Paribas v Jurong Shipyard Pte Ltd [2009] SGCA 11

The Court of Appeal has ruled that it may be an abuse of the court's process for a creditor to threaten winding up proceedings against a debtor company which has offered to place the disputed sum in an escrow account. The court also signalled that a statutory demand issued under section 254(2)(a) of the Companies Act should inform the debtor company that it can either pay the debt or secure or compound for it to the creditor's satisfaction.

Drew & Napier LLC successfully represented Jurong Shipyard Pte Ltd (the "**Respondent**") in the appeal.

Background

BNP Paribas (the "**Appellant**") served a statutory demand on the Respondent for payment of approximately US\$50m (the "**Alleged Debt**"). The Appellant threatened winding up proceedings against the Respondent, despite the Respondent having offered to place in escrow sufficient funds to cover the Alleged Debt to meet any judgment on the Appellant's claim.

The Respondent obtained from the High Court an injunction restraining the Appellant from commencing winding up proceedings. The Appellant appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court dismissed the appeal and held that any filing of a winding up petition on the facts of this case would have constituted an abuse of the winding up process.

Section 254 of the Companies Act

Section 254(1)(e) of the Companies Act permits the court to order the winding up of a company if it is unable to pay its debts.

The Appellant relied on section 254(2)(a) of the Companies Act in justifying its intention to present a winding up petition. This sub-section provides that a company shall be deemed to be unable to pay its debts if a creditor has served the company with a statutory demand requiring the company to pay the sum so due, and "*the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor*".

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The court held that the fact that the Respondent had offered to provide security showed that it was not insolvent. The filing of a winding up petition would therefore amount to an abuse of the court's winding up jurisdiction. There was no legal basis for the Appellant to threaten to file a petition against the Respondent. The Appellant should have, instead, commenced court proceedings to recover the Alleged Debt.

Statutory Demand

The Appellant had issued a statutory demand in these terms:

“TAKE FURTHER NOTICE that this is a statutory letter of demand for payment, made for and on behalf of our clients and in this regard, unless the said sum of USD50,723,070 is paid to our clients or to us as their solicitors within **twenty-one (21)** days from the date of this letter, you are deemed unable to pay your debts pursuant to Section 254(2)(a) of the Companies Act (Cap. 50) and our clients shall forthwith be entitled to present a winding-up petition in the High Court for a winding-up order to be made against you.”

The court noted that the terms of the statutory demand were misleading in stating that the Respondent would be deemed to be unable to pay its debts if it did not pay the Alleged Debt within 21 days. Drawing on the approach of the UK and Australian positions, the court also signalled that a statutory demand issued under section 254(2)(a) of the Companies Act should inform the debtor company that it can either pay the debt or secure or compound for it to the creditor's satisfaction.

Court's Discretion to Order Winding Up

The court frowns upon attempts by creditors to threaten companies with winding up petitions where the debts are not admitted or where there are *bona fide* cross-claims equal to or exceeding the creditors' claims. This is because the presentation of a winding up petition may trigger cross-default clauses and merely compound the company's problems.

Where the company is a member of a group enterprise (as was the case here), a winding up petition could trigger a series of cross-defaults under financial arrangements which that company and other group companies are party to. As a result, an entire business group would be put at risk of being pushed into a state of insolvency.

Where a petition to wind up a temporarily insolvent but commercially viable company is filed, economic and social interests such as those of its employees, the non-petitioning creditors, as well as the company's suppliers, customers and shareholders, may be affected. These are interests that a court may legitimately take into account in deciding whether or not to wind up the company.

Section 257(1) of the Companies Act empowers the court to adjourn the hearing of a winding up application so as to allow a company time to resolve the issues at hand or to seek alternative measures. An injunction of limited duration to restrain a winding up petition from being presented may also be justified if irreparable harm could flow from its presentation.

Comment

Given the current economic climate, this is a timely reiteration by the Singapore courts that the presentation of a winding up petition can have a devastating impact on a company's business and the goodwill of its customers. As such, the court strongly discourages any attempt by creditors to threaten winding up to put pressure on an alleged debtor to pay up.

Equally welcome is the court's position that, in deciding whether to wind up a temporarily insolvent but commercially viable company, the court will consider many other economic and social interests, such as those of affected employees, suppliers, customers and shareholders. In short, the court will consider both the interests of the creditors, as well as the larger public interest.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the Litigation and Dispute Resolution lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our [website](#)), or:

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