IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 118

Originating Application No 164 of 2024

In the matter of Section 186 of the
Insolvency, Restructuring and Dissolution
Act 2018

And

In the matter of HC/CWU 138/2023 and
Viva Capital (SG) Pte Ltd

Between

Ascentury International Company Limited

… *Claimant*

And

Viva Capital (SG) Pte Ltd

… *Defendant*

EX TEMPORE JUDGMENT

[Insolvency Law — Winding up — Unable to pay debts]

TABLE OF CONTENTS

Ascentury International Co Ltd
v
Viva Capital (SG) Pte Ltd

[2024] SGHC 118

General Division of the High Court — Originating Application No 164 of 2024
Goh Yihan J
6 May 2024

7 May 2024

Goh Yihan J:

1 This is the claimant's application to set aside the Winding Up Order (dated 31 October 2023) that was made in HC/CWU 138/2023 ("CWU 138") against the defendant, Viva Capital (SG) Pte Ltd. The defendant consents to this application. For better consistency with the relevant statutory provisions, I prefer to refer to the claimant's application as being to "terminate" the defendant's winding up arising from CWU 138.

2 While the defendant's joint liquidators (the "Liquidators") do not object to this application, they seek certain directions in relation to their liquidation remuneration and disbursements (the "Liquidation Remuneration and Disbursements"). More specifically, the Liquidators seek confirmation that the Liquidation Remuneration and Disbursements, for the period from 31 October

2023 to the determination of this application, should be paid out of the defendant's assets, the quantum of which to be agreed if not taxed.

3 In response to the Liquidators' position, the claimant submits that the Liquidation Remuneration and Disbursements ought to be a matter between the Liquidators and the party which had engaged them, *ie*, 61 Robinson Pte Ltd ("61R"), who was the petitioning creditor in CWU 138. More specifically, the claimant submits that the directions which the Liquidators seek ought to be dealt with separately from the termination of the defendant's winding up. This is because those directions concern a contractual issue that the Liquidators should raise against 61R and do not give rise to a legitimate basis to object to this application.

4 In my judgment, the Liquidators are correct to seek the directions in relation to the Liquidation Remuneration and Disbursements in this application. I therefore terminate the defendant's winding up, effective upon the satisfaction of the directions sought by the Liquidators. Since this application raises a seldom discussed point in Singapore about how a court should consider the interests of the liquidator in deciding to terminate a winding up, I set out the brief reasons for my decision below.

Background facts

5 I turn now to the background facts.

6 I begin with the defendant's winding up in CWU 138. The defendant is part of the Viva Land Group, which is a group of companies that is primarily in the business of regional real estate. On 25 July 2023, 61R filed an application to wind up the defendant on the basis that the defendant was unable to pay its

debts. On 31 October 2023, the defendant was wound up pursuant to the Winding Up Order (see the High Court decision of *61 Robinson Pte Ltd v Viva Capital (SG) Pte Ltd* [2023] SGHC 315).

7 Subsequently, the claimant in this application entered into an agreement with 61R. By a Deed of Sale and Assignment of Rights dated 26 December 2023 between it and 61R (the "Deed"), the claimant agreed to buy all of its rights, title, interest, and benefits in (a) the debts that 61R is owed by the defendant, and (b) CWU 138 from 61R. There is nothing in the Deed that requires the claimant or the defendant to bear the Liquidation Remuneration and Disbursements. Indeed, the claimant's position is that, in consideration of the payment of $1,500,000 made to 61R under the Deed, which is an amount substantially larger than the debt of $467,289.72 claimed by 61R, the Liquidation Remuneration and Disbursements would not be borne by the claimant or the defendant.

8 Following the execution of the Deed, the claimant and the defendant agreed that the defendant should continue its operations. The claimant also agreed to apply to terminate the defendant's winding up. On being notified on this application, the Liquidators came forward to state that the Liquidation Remuneration and Disbursements should be paid from the defendant's assets. However, the claimant points out that the Liquidators have not filed an application for the directions they seek, and that it is unclear why the Liquidators raise the Liquidation Remuneration and Disbursements as a basis to object to this application.

The applicable law on terminating a winding up

9 With the above background facts in mind, I turn to the applicable law.

The court has a statutory power to terminate a winding up

10 I begin with a preliminary point raised by the claimant's submissions. The claimant submitted that the appropriate order in this application is that of a "setting aside" as opposed to a permanent stay of CWU 138. The claimant's submission appears to be based on its belief that the court has no statutory power to terminate the defendant's winding up. If so, then I should explain that the court now has the statutory power to terminate a winding up pursuant to s 186(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), even though it did not have such a power under the predecessor legislation.

11 Pursuant to s 186(1) of the IRDA, the court may, on the application of any creditor, make an order to, *inter alia*, terminate a winding up on a specific day. For completeness, s 186(1) provides as follows:

> **Power to stay or terminate winding up**
>
> **186.**—(1) At any time during the winding up of a company, 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 or terminated, make an order —
>
> > (*a*) staying the proceedings either altogether or for a limited time, on such terms and conditions as the Court thinks fit; or
> >
> > (*b*) terminating the winding up on a day specified in the order.

12 While the claimant refers to the High Court decision of *Standard Chartered Bank (Singapore) Ltd v Construction Professional Resources Pte Ltd* [2019] 5 SLR 709 ("*Standard Chartered Bank*") to persuade me that the appropriate order in this application should be a "setting aside" as opposed to a permanent stay of CWU 138, I find that the claimant need not have done so.

This is because Choo Han Teck J in *Standard Chartered Bank* was dealing with an application pursuant to s 279(1) of the Companies Act (Cap 50, 2006 Rev Ed) to have the winding up order there "stayed *sine die* on the grounds that the debt had since been paid" (at [2]). Section 279(1) provided 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.

13 It was in that context that Choo J decided that, since a permanent or indefinite stay order is not an order that should be made when there are good reasons to set aside the original winding up order, the court has an inherent power to set aside that winding up order. In coming to this conclusion, Choo J pointed out (at [5]) that some countries have legislation for a creditor to "apply to the court for an order terminating the winding up of the company". In the learned judge's view, the presence of such legislation "makes matters simpler" (at [5]). In particular, he pointed to s 493 of the Malaysian Companies Act 2016 (No 777 of 2016), which provides that:

> **Power of Court to terminate winding up**
>
> **493.** (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 of the company ought to be terminated, make an order terminating the winding up of the company as the Court thinks fit.

14 Unlike s 279(1) of the Companies Act, s 186(1) of the IRDA now provides for a court's power to terminate a winding up. While not framed

identically as s 493(1) of the Malaysian Companies Act 2016, the purport of s 186(1) is clear. This is that the court now has a statutory power to terminate a winding up.

15 To be clear, there are some differences between s 493(1) of the Malaysian Companies Act 2016 and s 186(1) of the IRDA. One, whereas s 493(1) provides that it applies "any time *after* an order for winding up has been made" [emphasis added], s 186(1) provides that it applies "at any time *during* the winding up of a company" [emphasis added]. While this may suggest that s 186(1) applies in a different time period from s 493(1), I think that this is a drafting distinction with no substantive difference. After all, the winding up process continues even after an order for winding up has been made. This is because the liquidator would then carry out the actual winding up of the company. Two, whereas s 493(1) allows the order terminating the winding up to be made "as the Court thinks fit", s 186(1)(*b*) only provides for "terminating the winding up on a day specified in the order". While this may suggest that a court is powerless to attach terms to the termination of the winding up pursuant to s 186(1)(*b*), I do not think that this was the legislative intent. After all, specifying a day on which the termination takes effect is to stipulate terms. Further, there is no good reason why a court can attach terms to the staying of a winding up but not to the termination of a winding up. Moreover, s 186(3) provides that the court can, in fact, give certain directions relating to the "resumption of the management and control of the company" by its officers.

16 In fact, s 186(1) of the IRDA is framed similarly to s 482(1) of the Australian Corporation Act 2001 (Cth), which provides that:

> **482 Power to stay or terminate winding up**
>
> (1) At any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order.

The Australian courts have routinely applied s 482 to terminate a winding up in the sense of setting aside an order for winding up. As such, I am satisfied that s 186(1) of the IRDA gives the court the statutory power to do the same. There is therefore no need for the court to exercise any inherent power to do so, as was the case previously under s 279(1) of the Companies Act. To be fair, Ms Jasmin Kang, who appeared for the claimant, readily accepted this position when I posed the question to her during the hearing before me.

The relevant factors in deciding whether to terminate a winding up

17 I now consider the relevant factors that a court should take into account when deciding whether to terminate a winding up. In the High Court decision of *Phang Choo Ong v Gilcom Investment Pte Ltd (LRG Investments Pte Ltd and another, non-parties)* [2016] 3 SLR 1156 ("*Phang Choo Ong*"), Chua Lee Ming JC (as he then was) explained (at [17]) that three broad principles can be extracted from the cases in relation to the court's exercise of discretion under s 279(1) of the Companies Act to stay a winding up. Summarised, these principles are:

(a) First, the state of affairs that required the company to be wound up no longer exists (see *Phang Choo Ong* at [18]).

(b) Second, the granting of a stay would not be detrimental to commercial morality and the interests of the public at large (see *Phang Choo Ong* at [19]).

(c) Third, the interests of the creditors, the members, and the liquidator must be protected (see *Phang Choo Ong* at [20]).

18 In my view, these principles apply equally to s 186(1) of the IRDA, with suitable modifications made to cater for the court's power to terminate a winding up under that section. Indeed, these three principles broadly mirror those that the Australian courts consider when applying s 482 of the Corporation Act 2001 (Cth), which is framed similarly with s 186(1). In this regard, The New South Wales Supreme Court in *In the matter of Glass Recycling Pty Ltd* [2014] NSWSC 439 summarised the considerations that inform the court's discretion to terminate a winding up pursuant to s 482 in the following terms (at [15]; see also the Supreme Court of Queensland decision in *Re Warbler Pty Ltd* (1982) 6 ACLR 526 at 533):

> The attitude and interests of the creditors, including future creditors whose interests might be prejudiced if the company were released from winding up;
>
> The interests of the liquidator, particularly with regard to remuneration;
>
> The interests of contributories, so that a stay or termination will not generally be granted unless each member either consents to it or is bound not to object to it, or his or her rights are properly secured;
>
> The public interest, including matters of commercial morality, and whether all the company's debts have been discharged;
>
> The company's trading position and general solvency; and
>
> Any explanation for any non-compliance with statutory duties and of the circumstances leading to the winding up.

The relevance of the liquidator's interests in the termination of a winding up

19 It will be seen that one of the considerations above concerns the interests of the liquidator, particularly with regard to remuneration. This is consistent

with the third of Chua JC's three broad principles in *Phang Choo Ong* in relation to when a court should stay a winding up.

20 The relevance of the liquidators' interests in the termination of a winding up is also consistent with Australian decisions on the termination of a winding up. As Mr Joshua Chin ("Mr Chin"), who appeared for the Liquidators, rightly submitted before me, those decisions make it clear that a court would only terminate a winding up if it is satisfied that there are safeguards to the liquidator's fees and expenses. For example, the Victoria Supreme Court in *Re J & G Flooring Pty Ltd* [2024] VSC 103 dismissed an application to terminate the winding up despite the applicant's confirmation that he had accepted the liquidator's costs and that "the entire amount is able to be paid from the funds in the [c]ompany's liquidation account" (at [63]). This was because "[t]here was no evidence that the [a]pplicant had reached an agreement with the [l]iquidator for the payment of the [l]iquidator's remuneration and disbursements" (at [72]). Similarly, the New South Wales Supreme Court in *Isacson v Riad Tayeh & David Solomons as Liquidators of Isacson Pty Ltd* [2015] NSWSC 1394 considered if the liquidators' "legitimate interests [had] been accommodated" (at [58]). On the facts, the court found that "a proper arrangement [would] be made for meeting the various costs and fees to which the [l]iquidators [were] entitled" (at [32]).

21 The relevance of the liquidators' interests in the termination of a winding up is, above all, consistent with the Court of Appeal's reasoning in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2022] 1 SLR 771 ("*AnAn*"). In that case, VTB was the alleged creditor of AnAn. While VTB succeeded at first instance in obtaining a winding up order against AnAn, the Court of Appeal allowed the appeal and reversed the winding up. After the

winding up was reversed, AnAn applied in the High Court for VTB to bear the remuneration and expenses of its former liquidators and liquidators' solicitors. The High Court dismissed AnAn's application and AnAn appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and, in the course of doing so, explained its power to order a petitioning creditor like VTB to bear the liquidator's remuneration and expenses. In sum, the court held that it had the inherent power to order a petitioner creditor to bear the liquidator's remuneration and expenses.

22 However, this power would only be exercised where it would be unjust for the company to bear the bulk of such remuneration and expenses. Indeed, the mere fact that the winding up order was reversed does not mean that the petitioning creditor should bear such remuneration and expenses. This is because, among other reasons, the statutory provisions, governing the liquidator's claim for remuneration and expenses out of the company's assets, must be satisfied. This is in turn grounded on the sound policy that, as officers appointed by the court, liquidators should expect the court to provide security for their remuneration by ensuring that they are paid out of the company's assets. For completeness, I set out the court's reasoning (at [100]–[102]):

> 100 Any order made by the court against a petitioner ought to assume the form of an order for the petitioner to *indemnify* the company for the remuneration paid to the liquidator. As a starting point, the liquidator must still be paid from the company's assets pursuant to s 311 of the Companies Act or s 183 of the IRDA, which state that a liquidator's remuneration and expenses "are payable out of the assets of the company". This is a crucial point that must be observed in order not to subvert the statutory insolvency regime.
>
> 101 This would safeguard the liquidator's entitlement for his remuneration. It should not be overlooked that while a liquidator is appointed pursuant to an application by a petitioning creditor, the appointment is made by the court (see

> [92] above) – hence the need to provide security for his remuneration.
>
> 102 With the aforementioned safeguards, any litigation over liability for a liquidator's fees can be effectively confined between the petitioner and the company. …
>
> [emphasis in original]

23 While *AnAn* concerned the reversal of a winding up order on appeal, I agree with Mr Chin that these principles concerning a liquidator's remuneration and expenses apply equally to the situation where a court is terminating a winding up order. Indeed, were it otherwise, liquidators would not have sufficient comfort as to their remuneration and expenses. They may then become reluctant to perform their duties until there is a final and unappealable decision on a winding up. The starting position therefore remains that a liquidator's remuneration and expenses ought to be paid out of the company's assets. The practical import of this starting position is that a court, in deciding whether to terminate a winding up pursuant to s 186(1) of the IRDA, must consider whether the liquidator's interests, especially with regard to remuneration and expenses, have been adequately protected. If not, the court may either not grant the application to terminate the winding up or allow the application but on such terms as would protect the liquidator's interests.

My decision: the Winding Up Order should be terminated with directions on the Liquidation Remuneration and Disbursements

There are good reasons to terminate the winding up

24 Turning now to the present case, I am satisfied that, subject to the adequate protection of the Liquidators' interests, especially in relation to the Liquidation Remuneration and Disbursements, that there are good reasons to terminate the defendant's winding up.

25 First, the state of affairs that required the defendant to be wound up no longer exists. In this regard, the winding up was premised on an alleged debt owed by the defendant to 61R in the sum of $467,289.72. However, following the assignment of the said debt from 61R to the claimant, the claimant and the defendant have since agreed that the claimant will not enforce the payment of the debt and is agreeable to the termination of the winding up.

26 Second, the termination of the defendant's winding up would not be detrimental to commercial morality and/or the interests of the public at large. In this regard, it is significant that the winding up was premised on a simple debt and did not involve any alleged impropriety on the defendant's part. Apart from the non-payment of the said debt, the defendant had at all material times remained solvent.

27 Third, the interests of the defendant's creditors and members will not be prejudiced by the termination of the defendant's winding up. This is because the creditors, apart from Canon Singapore Pte Ltd ("Canon") and Singapore Telecommunications Limited ("Singtel"), have no objections to the termination of the defendant's winding up. As for Canon and Singtel, the amounts owing to them are $2,961.96 and $1,140.73, respectively. These are relatively small sums which the defendant has undertaken to pay.

28 However, I am not satisfied that the interests of the Liquidators have been adequately protected. I turn now to address this point.

It is necessary for directions to be made in relation to the Liquidators' Remuneration and Disbursements

29 In my view, the claimant is not correct in submitting that the payment of the Liquidation Remuneration and Disbursements is a matter between 61R and them. This is because, pursuant to *AnAn* and s 183 of the IRDA, the Liquidation Remuneration and Disbursements should be paid out of the defendant's assets. It does not matter that this amount was not part of the terms of the Deed. This is because the Deed was between the claimant and 61R. It is therefore unclear how the Deed can affect the Liquidators, either positively or negatively. Further, the claimant is also not correct in submitting that the Liquidation Remuneration and Disbursements is a matter to be dealt with separately from the termination of the defendant's winding up. This is because, as the cases clearly show, the court has to bear in mind the liquidators' interests in deciding whether to terminate a winding up. Finally, it is no objection that the Liquidators have not filed a formal application for the directions they seek. This is because the court needs to consider their interests in deciding whether to terminate the defendant's winding up and may order such termination on terms which, for example, mirror the directions sought in this application.

30 Accordingly, I can only terminate the defendant's winding up if I am satisfied that the Liquidators' interests, specifically in relation to the Liquidation Remuneration and Disbursements, are adequately protected. The Liquidators have indicated that they would not object to the claimant's present application if the directions in relation to the Liquidation Remuneration and Disbursements are given. In my view, the practical solution is for me to terminate the defendant's winding up effective upon the satisfaction of the directions sought, *ie*, the amount of the Liquidation Remuneration and Disbursements being agreed or taxed, which is to be paid out of the defendant's assets. If the claimant

takes the view that this upsets the bargain that it struck with 61R in the Deed and/or with the defendant, then it need not act on the directions, which would not trigger the termination of the defendant's winding up. These directions are as follows:

(a) Confirmation that the remuneration incurred by the Liquidators for the period from 31 October 2023 to the determination of this application be paid out of the assets of the defendant, such Liquidation Remuneration to be agreed if not taxed; and

(b) Confirmation that the disbursements incurred by the Liquidators for the period from 31 October 2023 to the determination of this application be paid out of the assets of the defendant, such Liquidation Disbursements to be agreed if not taxed.

For clarity, the date of the "determination of this application" referred to above shall be 6 May 2024.

Conclusion

31 For all the reasons above, I terminate the defendant's winding up arising from CWU 138, to be effective upon the amount of the Liquidation Remuneration and Disbursements being agreed or taxed, which is to be paid out of the defendant's assets. For clarity, the termination of the defendant's winding up takes effect once there is agreement or fixing of the Liquidation Remuneration and Disbursements and is not dependent on the actual repayment of such amount, which can take place later.

32 Finally, while the Liquidators sought costs for their attendance at the hearing before me, I made no order as to costs because, while I disagree with

the claimant, I do not think that it refused to agree with the Liquidators out of bad faith or unreasonably.

Goh Yihan
Judge of the High Court

Kang Hui Lin Jasmin (Kelvin Chia Partnership);
Lim Tat, Subir Singh Grewal and Glenda Lim Jia Qian
(Aequitas Law LLP);
Hing Shan Shan Blossom, Chin Tian Hui Joshua and
Clarie Ong Bee Sim (Drew & Napier LLC) for the non-parties.