

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

[2023] SGHC 32

Companies Winding Up No 78 of 2022

In the matter of the Insolvency, Restructuring and Dissolution Act (Act 40 of
2018)

And

In the matter of Laguna National Golf and Country Club Ltd

Between

Lim How Teck

... Claimant

And

Laguna National Golf and
Country Club Ltd

... Defendant

Originating Application No 96 of 2022

Between

Laguna National Golf and
Country Club Ltd

... Claimant

And

Lim How Teck

... Defendant

JUDGMENT

[Insolvency Law — Winding up]

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Lim How Teck
v
Laguna National Golf and Country Club Ltd and another
matter

[2023] SGHC 32

General Division of the High Court — Companies Winding Up No 78 of 2022
and Originating Application No 96 of 2022

Chua Lee Ming J

12 September 2022, 6 February, 13 February 2023

13 February 2023

Judgment reserved.

Chua Lee Ming J:

Introduction

1 Laguna National Golf and Country Club Ltd (the “Company”) was the owner of the Laguna National Golf & Country Club (now known as the Laguna National Golf Resort Club) (the “Club”) in the eastern part of Singapore. In HC/CWU 78 of 2022 (“CWU 78”), Mr Lim How Teck (“Lim”) seeks to wind up the Company on the ground that it is unable to pay its debts. Lim is the holder of an unsecured note issued by the Company, which the Company failed to redeem when the note fell due. The Company did not comply with a statutory demand issued by Lim’s lawyers.

2 The Company opposes Lim’s application on the ground that he does not have standing to make the application. A no-action clause in the trust deed

(which governs Lim’s unsecured note) permits only the bond trustee to take enforcement action against the Company unless it fails to comply with a direction to do so by noteholders holding not less than one-fifth in nominal amount of the unsecured notes outstanding (the “one-fifth nominal amount requirement”). It is undisputed that no such direction has been given to the trustee, although Lim has the support of a sufficient number of noteholders who satisfy the one-fifth nominal amount requirement.

3 In HC/OA 96 of 2022 (“OA 96”), Laguna (relying on the same no-action clause) seeks a permanent anti-suit injunction to restrain Lim from instituting and/or continuing with proceedings against Laguna in breach of the terms of the trust deed.

Background facts

4 In 1991, the Company issued 1,800 non-interest bearing unsecured notes of \$120,000 each, known as Laguna National Unsecured Notes 2021 Series A (the “Unsecured Notes”) to finance the development of the Club. It was a condition of membership in the Club that each member had to also purchase an Unsecured Note. The Unsecured Notes were to be redeemed by the Company on 11 June 2021 (the “Redemption Date”).

5 The Unsecured Notes were constituted by a trust deed dated 18 September 1991 (the “Trust Deed”)¹ between the Company and British and Malayan Trustees Limited (the “Trustee”).

6 In 2001, a company known as the Laguna Golf Resort Holding Pte Ltd (“LGRH”) acquired the Company. LGRH is owned by Group Eksklusiv Pte Ltd

¹ Kwee Seng Chio Peter’s 1st affidavit in CWU 78, at pp 17–54.

(“Group Exklusiv”),² which in turn is owned by Mr Kwee Seng Chio Peter (“Peter Kwee”), his wife and his son.³ Peter Kwee holds 60% of the shares in Group Exklusiv.

7 The lease for the land on which the golf club operates (the “Lease”), was originally due to expire in 2021. In 2012, the Lease was extended to 2040.

8 In April 2016, the Company sold the Lease to Laguna Hotel Holdings Pte Ltd (“LHH”) (the “Assignment”) for \$130,413,365.⁴ LHH is owned by LGRH.⁵ The Company obtained a licence from LHH to continue operating the golf course and facilities on the same plot of land until the Redemption Date (11 June 2021). The licence fee was \$600,000 per month from January to July 2017 and \$1.2m per month from August 2017 to 11 June 2021.⁶

9 On 17 November 2017, the Trustee met with Peter Kwee to discuss the Company’s audited financial statements for the financial year ended 31 December 2016 (“FY2016”). Among other things, Peter Kwee informed the Trustee that he was “aware of the due date for repayment [of the Unsecured Notes] and [was] considering various options such as membership conversion etc. which [had] been offered in the past and taken up by some noteholders”.⁷

10 On 10 June 2021, the Company informed the Trustee that, due to its current financial situation, it would not be able to redeem the Unsecured Notes

² Lim How Teck’s 1st affidavit in CWU 78, at p 177.

³ Lim How Teck’s 1st affidavit in CWU 78, at p 173.

⁴ Ngiam Hai Peng’s 1st affidavit in OA 96, at para 59.

⁵ Lim How Teck’s 1st affidavit in CWU 78, at p 181.

⁶ Ngiam Hai Peng’s 1st affidavit in OA 96, at para 60.

⁷ Ngiam Hai Peng’s 1st affidavit in OA 96, at p 654.

on the Redemption Date and it would cease its business with effect from 12 June 2021.⁸ Under cl 7.4 of the Trust Deed, cessation of business was an event of default. On 14 June 2021, the Trustee declared that there was an event of default and that the Unsecured Notes were immediately due and payable.⁹ The Company has in fact ceased business and LHH has taken over the Club.

11 On 13 July 2021, the Company objected to the Trustee’s declaration on the ground that the Trustee may exercise its discretion under cl 7 of the Trust Deed to make the declaration if and only if requested in writing to do so by noteholders who satisfy the one-fifth in nominal amount requirement or by Special Resolution (as defined in condition 19 of the Second Schedule to the Trust Deed).¹⁰

12 On 15 July 2021, the Trustee rejected the Company’s objection because cl 7 provided that the Trustee may act in its discretion but shall act if requested in writing by noteholders who satisfy the one-fifth nominal amount requirement or by Special Resolution.¹¹

13 On 10 September 2021, the Trustee issued a notice of a Noteholders’ meeting to be held on 7 October 2021.¹² The notice was issued pursuant to written requests made by noteholders representing more than one-tenth of the nominal amount of the Unsecured Notes outstanding (as required under the Trust Deed). The Company requested that it be allowed to independently verify

⁸ Ngiam Hai Peng’s 1st affidavit in OA 96, at p 100.

⁹ Ngiam Hai Peng’s 1st affidavit in OA 96, at p 102.

¹⁰ Ngiam Hai Peng’s 1st affidavit in OA 96, at p 107.

¹¹ Ngiam Hai Peng’s 1st affidavit in OA 96, at pp 108–109.

¹² Ngiam Hai Peng’s 1st affidavit in OA 96, at pp 119–120.

the signed forms submitted by the noteholders who had requested the meeting; the Trustee rejected the request.¹³

14 The meeting proceeded as scheduled on 7 October 2021 (the “7 October Meeting”). A Dispute Resolution Committee (“DRC”), chaired by Lim, was appointed. A number of Special Resolutions were tabled and passed, including a Special Resolution authorising the DRC to pursue recourse and/or recovery in relation to the non-redemption of the Unsecured Notes. Subsequently, the Trustee informed Lim that the Special Resolutions were not validly passed due to lack of the quorum required for the passing of Special Resolutions.¹⁴ Lim disagreed with the Trustee’s view.

15 On 4 April 2022, Lim filed CWU 78. On 28 April 2022, the Company filed OA 96.

The issues

16 The main issue in this case is whether cl 8.3 of the Trust Deed precludes Lim from pursuing CWU 78. A related issue is whether the Company is entitled to the injunction sought in OA 96.

Whether cl 8.3 of the Trust Deed precludes Lim from pursuing CWU 78

17 Clause 8 of the Trust Deed provides as follows:

8. ENFORCEMENT OF NOTE-HOLDERS’ RIGHTS

8.1 At any time after the Unsecured Notes shall have become immediately due and payable under the provisions of Clause 7 hereof, the Trustee may, subject to Clause 8.2, at its discretion and without further notice to the Company, institute

¹³ Ngiam Hai Peng’s 1st affidavit in OA 96, at paras 29–32.

¹⁴ Ngiam Hai Peng’s 1st affidavit in OA 96, at pp 178–180.

such proceedings as it may think fit against the Company to enforce such repayment. ...

8.2 The Trustee shall not be bound to take any step to enforce the performance of any of the provisions of these presents unless directed to do so (i) by a Special Resolution or (ii) in writing by Note-holders of not less than one-fifth in nominal amount of the Unsecured Notes outstanding, and in either case only if it shall be indemnified to its satisfaction against all actions, proceedings, claims and demands to which it may thereby render itself liable and all costs, charges, damages and expenses which it may incur by so doing.

8.3 Only the Trustee may pursue the rights and remedies available under the general law or under these presents to enforce the rights of the Note-holders against the Company and no Note-holder will be entitled to pursue such remedies against the Company unless the Trustee, having become bound to do so in accordance with the terms of these presents, fails to do so and such failure is continuing.

18 In the present case, Lim has confirmed that he has the support of noteholders who satisfy the one-fifth nominal amount requirement and can therefore direct the Trustee to take action to wind up the Company. However, no such direction in writing has been issued to the Trustee. Thus, the express exception in cl 8.3 (where the Trustee fails to act in accordance with such a direction) does not apply. Lim has explained that the Trustee's conduct had affected his faith in the Trustee's ability to act objectively.

19 Lim submits that, in addition to the express exception, cl 8.3 is also not applicable if the Trustee, by reason of conflict of interest or unjustifiable unwillingness, cannot properly pursue a remedy for holders of the Unsecured Notes ("Noteholders"): *Akanthos Capital Mgmt., LLC v CompuCredit Holdings Corp* 677 F.3d 1286 (2012) at 1294. Lim also relies on:

(a) *Feldbaum v McCrory Corp* 1992 WL 119095 ("*Feldbaum*") in which the court held at [*6] that a no-action clause applies if the trustee is capable of satisfying its obligations; and

(b) *Rabinowitz v Kaiser-Frazer Corp* 111 N.Y.S.2d 539 (1952) in which the court held at [*545] that a no-action clause does not apply if the trustee cannot faithfully and competently discharge its duty as a fiduciary.

20 As explained in *Feldbaum* at [*6]:

The primary purpose of a no-action clause is thus to protect issuers from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors. In protecting the issuer such clauses protect bondholders. They protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest. In addition to providing protection against improvident litigation decisions, a no-action clause also protects against the risk of strike suits. Obviously the class features of any such suits make that prospect somewhat more likely and somewhat more risky to the issuer than it would otherwise be.

No-action clauses address these twin problems by delegating the right to bring a suit enforcing rights of bondholders to the trustee, or to the holders of a substantial amount of bonds, and by delegating to the trustee the right to prosecute such a suit in the first instance. These clauses also ensure that the proceeds of any litigation actually prosecuted will be shared ratably by all bondholders.

21 The assumption, however, is that the trustee is capable of satisfying its obligations. I agree with Lim that a no-action clause cannot apply where the trustee would be placed in a position of conflict or if the trustee has shown unjustifiable unwillingness to act. The Company also does not dispute this principle.

22 In the present proceedings, Lim submits that cl 8.3 is not applicable because the Trustee (a) has demonstrated unjustifiable unwillingness to take

action against the Company and/or (b) would be placed in a position of conflict if it were to take action to wind up the Company.

23 Lim relies, in particular, on the following:

(a) Condition 3 of the Second Schedule to the Trust Deed provides that the quorum for the passing of a Special Resolution was at least two noteholders (or proxies) holding “in the aggregate a clear majority in the nominal amount of the Unsecured Notes for the time being outstanding”. The Trustee took the view that the nominal amount outstanding included the nominal amount of Unsecured Notes held by the Company. As a result, there was no quorum for the passing of Special Resolutions at the 7 October Meeting. Lim argues that the Trustee’s view (that the Company was a holder of its own Unsecured Notes) was unsustainable and showed that the Trustee was formulating technical arguments in favour of the Company.

(b) Condition 1 of the Second Schedule to the Trust Deed provides that the Trustee is entitled to “such indemnity as the Trustee may require against the cost of convening and holding” the 7 October Meeting. However, the Trustee had asked for a much wider indemnity against “all actions, proceedings, claims, demands, damage, loss and expenses including legal costs and all liabilities ...arising out of or in connection with” convening the holding the 7 October Meeting. Lim argues that this, combined with the Trustee’s position on the quorum for Special Resolutions, affected his faith in the Trustee’s ability to act objectively.

(c) The Company's Annual Report for financial year ("FY") 2016 showed the following:¹⁵

(i) The Company had a deficit in shareholders' fund but the financial statements were prepared on a going concern basis as a director of the Company who was also a substantial shareholder of the immediate and ultimate holding company, had undertaken to provide continuing financial support to enable the Company to continue operating as a going concern in the foreseeable future. The director referred to was Peter Kwee.

(ii) The Company had sold the Lease to a related corporation for \$130m. It appears that the proceeds of sale were used to offset against loans from related parties and to provide a loan to a related corporation.¹⁶ Before me, counsel for the Company explained that the latter was an advance payment of licence fees. It is not clear whether the advance payment was an obligation under the licence agreement. In any event, it is recorded in the accounts as a non-trade amount due to the Company and the licensor was a company controlled by Peter Kwee.

The Trustee had a meeting with a director of the Company, on 17 November 2017. Peter Kwee told the Trustee that the sale price of the Lease and the licence fee were based on independent valuation reports. Lim takes issue with the Trustee's reliance on Peter Kwee's undertaking to provide continuing financial support and the Trustee's failure to inquire into the circumstances behind the Assignment, especially since

¹⁵ Ngiam Hai Peng's 1st affidavit in OA 96, at pp 413, 414 and 425.

¹⁶ Ngiam Hai Peng's 1st affidavit in OA 96, at p 425.

the Trustee has acknowledged that the Lease was critical to the Company's operations.¹⁷ Lim questions how the Trustee could have satisfied itself, without more, that the Company would be able to redeem the Unsecured Notes. I also note that the Trustee has said that it became aware of the Assignment sometime in November 2017 after it reviewed the financial statements for FY2016.¹⁸ This is surprising because the financial statements for FY2015 (signed on 18 July 2016) noted that the Company had sold the Lease to a related corporation on 19 April 2016.¹⁹

(d) During the 17 November 2017 meeting, Peter Kwee also said that he was "aware of the due date for repayment [of the Unsecured Notes] and [was] considering various options such as membership conversion etc. which [had] been offered in the past and taken up by some noteholders".²⁰ Lim argues that this was arguably an event of default since Peter Kwee's statement indicated a material failure in respect of the Company's obligation to honour the Unsecured Notes. Lim takes issue with the Trustee's failure to act on Peter Kwee's statement. The evidence before me does not show whether the Trustee informed the noteholders of Peter Kwee's statement after the meeting on 17 November 2017.

¹⁷ Ngiam Hai Peng's 1st affidavit in OA 96, at para 54.

¹⁸ Ngiam Hai Peng's 1st affidavit in OA 96, at para 55.

¹⁹ Ngiam Hai Peng's 1st affidavit in OA 96, at p 401.

²⁰ Ngiam Hai Peng's 1st affidavit in OA 96, at p 654.

Unjustifiable unwillingness

24 Lim submits that the Trustee’s past conduct shows unjustifiable unwillingness to take action against the Company. In my view, this is a non-starter. The question is whether the Trustee has shown unjustifiable unwillingness to perform its duties under the Trust Deed. In this case, the Trustee has confirmed that it will act if so directed in writing by noteholders who satisfy the one-fifth nominal amount requirement, in accordance with cl 8.2. In my view, it cannot be said that the Trustee is unjustifiably unwilling to carry out its duty in accordance with cl 8.2. Lim has simply refused to invoke cl 8.2.

25 I note that under cl 8.2, the Trustee has some discretion in that it does not have to comply with any such direction unless it is indemnified “to its satisfaction” against all actions, proceedings, claims and demands to which it may thereby render itself liable and all costs, charges, damages and expenses which it may incur by so doing. However, this does not mean that the Trustee can refuse to accept any indemnity offered and thereby refuse to comply with a direction that has been given. If the Trustee refuses to accept an indemnity (the scope of which is consistent with the language used in cl 8.2) without good reason, the Trustee’s refusal would trigger cl 8.3 and the no-action clause would cease to apply.

26 For completeness, I should add the following:

- (a) The Trustee’s view that the nominal amount outstanding included the nominal amount of Unsecured Notes held by the Company and which had not been cancelled (see [23(a)] above) was not unreasonable. As the Trustee explained (through its lawyers’ letter dated

7 December 2021),²¹ the definition of “outstanding” in the Trust Deed excludes Unsecured Notes which have been purchased by the Company only if they have been cancelled. In my opinion, the Trustee’s view is not evidence of unjustifiable unwillingness to act. Neither can it be said to be evidence of partiality towards the Company. The Trustee had simply acted in accordance with the terms of the Trust Deed.

(b) Lim has also complained about the scope of the indemnity requested by the Trustee in relation to the 7 October Meeting (see [23(b)] above). The Trustee had in fact proceeded to convene the 7 October Meeting although it had not received the indemnity that it was entitled to. In my view, the fact that the Trustee’s subsequent request for an indemnity may have been wider than what it might have been entitled to does not show unjustifiable unwillingness on the Trustee’s part. The meeting had taken place and it was for Lim to object to the scope of the indemnity requested.

Conflict of interest

27 Lim submits that if the Trustee were the applicant in winding up proceedings against the Company, it would be placed in a position of conflict because it faces a potential claim by some noteholders for breach of its duties under the Trust Deed. In particular, Lim relies on the matters set out above in [23(c)] and [23(d)].

28 The mere fact that the Trustee faces a potential claim by some noteholders does not, in and of itself, necessarily mean that it would be in a

²¹ Ngiam Hai Peng’s 1st affidavit in OA 96, at pp 178–180.

position of conflict if it were the applicant in winding up proceedings against the Company. It is necessary to identify what the conflicting interests are. Lim has not shown how the Trustee's interest in protecting itself against potential claims by some noteholders would conflict with its interests as Trustee representing the noteholders in applying for and obtaining an order to wind up the Company.

29 However, once the winding up commences, I am of the view that the Trustee would be in a position of conflict. After the Company is ordered to be wound up, the liquidators will step in and take control of the Company and its property and things in action. One of the liquidators' responsibilities would be to investigate the Company's affairs and to seek recovery where warranted. The Trustee (as the applicant in the winding up proceedings) would need to continue to liaise with the liquidators and to provide the liquidators with all relevant information. In doing so, the Trustee has to consider the noteholders' interests.

30 As the Trustee is facing potential claims by some noteholders, its interest in protecting itself against such claims would conflict with its duty to protect the interests of the noteholders. For example, the liquidators may investigate the Assignment and the use of the proceeds from the Assignment. As Lim points out, the Trustee discussed the Assignment and redemption of the Unsecured Notes (among other things) with Peter Kwee. Lim (and the noteholders supporting him) have taken issue with the Trustee's responses to the Assignment and Peter Kwee's statement that he was considering other options such as conversion with respect to the redemption of the Unsecured Notes (see [9] above). The Trustee may have information that is relevant to the liquidators but which may be adverse to its own interests in any action brought by the noteholders against it.

31 I do not have to decide whether the Trustee did in fact breach its duties under the Trust Deed. It is sufficient for present purposes that the conflict of interest may potentially arise. The Trustee should not place itself in such a position. For this reason, I agree with Lim that cl 8.3 of the Trust Deed is not applicable in this case and therefore it does not preclude Lim from pursuing CWU 78.

32 Lim also submits that the Trustee has placed itself in a position of conflict by insisting that the Company is a holder of Unsecured Notes (see [23(a)] above). Lim argues that the interests of the Company would be diametrically opposed to the interests of the other noteholders. I disagree. The noteholders (excluding the Company) may not all agree that the Company should be wound up. The Trustee cannot be said to be in a position of conflict just because different noteholders have different views on the best course of action to take. The Trustee just has to act in accordance with the terms of the Trust Deed. The fact that the Company is treated as a noteholder does not change the analysis.

CWU 78

33 As cl 8.3 of the Trust Deed is not applicable, I find that Lim has the requisite standing to apply to wind up the Company in CWU 78. As there is no dispute that the Company is unable to pay its debts, I order that the Company be wound up. I also appoint Mr Cameron Lindsay Duncan and David Dong-Won Kim, care of KordaMentha Restructuring, 16 Collyer Quay, Singapore 049318, as joint and several liquidators of the Defendant. Finally, I order that costs of the proceedings be taxed, if not agreed or fixed, and be paid to Lim out of the assets of the Company.

OA 96

34 As stated earlier, in OA 96, the Company seeks a permanent anti-suit injunction to restrain Lim from instituting and/or continuing with proceedings against the Company in breach of the terms of the Trust Deed. This application is also based on cl 8.3 of the Trust Deed. As I have found that cl 8.3 is not applicable in this case, the Company's case for the permanent anti-suit injunction fails. Accordingly, I dismiss OA 96.

Conclusion

35 Lim's application in CWU 78 is granted and the Company's application in OA 96 is dismissed. The Company is to pay Lim costs in respect of OA 96 fixed at \$7,500 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge of the High Court

Tan Chee Meng, SC, Samuel Navindran and Paul Loy Chi Syann
(WongPartnership LLP) for the claimant in CWU 78 and the
defendant in OA 96;

Chong Kuan Keong, Tay Yan Xia, Gan Siu Min Cheryl and Lim
Lian Kee (Chong Chia & Lim LLC) for the defendant in CWU 78
and the claimant in OA 96;

Tan Tse Hsien, Bryan (Chen Shixian) and Joel Wang Pinwen (PK
Wong & Nair LLC) for the Trustee.