HCCW730/2000

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES WINDING-UP PROCEEDINGS NO.730 OF 2000

IN THE MATTER of the Companies Ordinance, Chapter 32

and

IN THE MATTER of Wellead Construction and Engineering Company Limited

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Before : Hon Chu J in Court

Date of Hearing : 27 November 2000

Date of Judgment : 27 November 2000

J U D G M E N T

In these proceedings, Eastern Technical Services Limited ("the petitioner") petitions for the winding-up of the company known as Wellead Construction and Engineering Company Limited ("the Company") on the ground that the Company is unable to pay its debt. At the adjourned hearing of the Petition, I refused the Company's application for a further adjournment and made a winding-up order. I now reduce my oral reasons into writing.

Background

The debt on which the Petition is based arises out of a judgment made against the Company on 24 February 2000 in HCA11383/1999 for the sum of $275,356 together with interest at judgment rate on seven outstanding invoices. The seven invoices were issued between 30 September 1998 and 31 March 1999 with payments due between 14 November 1998 and 15 May 1999. On 2 June 2000, the petitioner served a statutory demand for the principal judgment sum of $275,356 and accrued interest in the sum of $42,128.13. It is not in dispute that no payment has been made by the Company and the amounts stated in the statutory demand remain outstanding and unpaid.

Applications for dismissal of Petition and adjournments

The Petition came before the Companies Court on 30 October 2000 when the Company applied to dismiss the Petition on the ground that there has been no service of the statutory demand and the Petition. Alternatively, the Company applied for an adjournment of one month pending the outcome of arbitration proceedings between the Company and a third party.

The affirmations of service show that the statutory demand was served by leaving at the registered office of the Company as appearing on the records of the Company Registry at that time. As for the Petition, it was first served on 17 August 2000 by leaving at the same registered office, and again on 26 October 2000 by leaving at the Company’s latest registered office. The Company’s case is that it had moved its registered office on or about 30 May 2000 and notification of change of registered office was filed on 14 June 2000 with the Companies Registry. The Company said that it had never received the statutory demand and the Petition, and that it was only alerted to these proceedings by the Official Receiver.

I refused the Company's application to dismiss the Petition as I considered that there was no basis for the application. In the case of the statutory demand, it was served on the address which, according to the records of the Company Registry, was the registered office. Although the Company had already moved but notice of the new address was only effected after the statutory demand was served. The petitioner was entitled to rely on the public record in effecting service of the statutory demand, and it would not be a proper exercise of the court's discretion to dismiss the Petition on such ground. As for the service of the Petition, I accept that the petitioner ought to have made an updated search of the record at the Company Registry since there was a lapse of two months between the service of the statutory demand and the service of the Petition. The first service on the old address of the Company is therefore a bad one when it did not bring the Petition to the attention of the Company. The second service is, however, a valid one and it has duly reached the Company. The Company's complaint is that it is unrealistic to expect the Company to come up with any payment or proposal for payment when it was only served five days before the Petition was listed for hearing before the Company Court. The Company said that the prejudice is such that the Petition ought to be dismissed. Rule 25 of the Companies (Winding-up) Rules, Cap.32, does not stipulate a time limit for effecting service of the Petition. While accepting that late service of the Petition may cause difficulties to the Company, the Company had failed to identify any prejudice that cannot be overcome by an adjournment. The late service of the Petition cannot, in the proper exercise of the court's discretion, be a ground for dismissing the Petition. The Company had also referred to non-compliance with rule 29 of the Companies (Winding-up) Rules as a further ground for dismissing the Petition. The Company was clearly misconceived in that the Registrar Certificate had been issued before the first hearing.

The Company's ground for the alternative application to adjourn is on the basis that it is involved in arbitration proceedings against a third party. In the arbitration proceedings, the Company is claiming for the fees of engineering works in the sum of approximately $163 million from its main contractor. The hearing of the proceedings had been concluded and the arbitrator's decision has been pending from at least July 2000. On 7 October 2000, the arbitrator wrote and indicated tentatively that the reasoned award would be ready in November 2000. The Company therefore suggested that it had good prospect to receive more than $150 million and sought an adjournment of the Petition. The adjournment was opposed by the petitioner. Although I indicated that the reference to the Company being able to pay off its debt by the end of November on the strength of the pending arbitration award is highly speculative, I was mindful of the fact that the Petition was served very close to the hearing of the Petition. As the amount of the judgment debt was not considerable, I considered that the Company ought to be afforded a short adjournment to enable it to meet the debt. The Petition was therefore adjourned for four weeks to 27 November 2000.

At the adjourned hearing, the Company sought a further adjournment to the end of December. The Company had filed a further affirmation exhibiting a further letter from the arbitrator indicating that because of the voluminous written submissions and large number of factual issues involved, he was not in a position to issue the "Interim Award on Liability and Quantum" before the adjourned hearing and he would try his best to issue the Interim Award by the end of December 2000. Counsel for the Company also referred in his submission to a letter from a Mr Abby Yu of CITIC Ka Wa Bank Limited, a major creditor of the Company, dated 22 November 2000 requesting the court to grant the adjournment so that the Company could recover the debt from the third party when the arbitration award is issued and in turn pay off its creditors, including the petitioner and the bank. The petitioner opposed the adjournment and moved for a winding-up order to be made.

Reasons for the winding-up order

On considering the second application for adjournment by the Company, I have taken into account the following factors. It is not in dispute that the judgment debt is valid and subsisting and remains outstanding at the adjourned hearing. The Company had by the second affirmation of Lee Ye Fun filed on 27 October 2000 accepted that it is indebted in the region of $17.5 million to creditors other than the petitioner. One ETS-Testconsult Limited has given notice that it supports the Petition. This supporting creditor is also represented by the petitioner's solicitors and its debt is in the sum of $22,650 together with interest based on a judgment. Clearly, the Company has for some time been insolvent and unable to pay its debt. The only hope for the Company is the pending arbitration award, which is surrounded by a number of uncertainties. There is firstly no guarantee that with the four weeks' adjournment, the arbitrator will be able to produce a decision and an award, given that there has been a history of delay from as early as July or August 2000. Secondly, it is not known whether the award will be in favour of the Company. Counsel for the Company accepted that the Company's claim in the arbitration proceedings is subject to a claim for set-off in the region of $9 million and a counterclaim of $2 million. Even if the award were issued in December 2000 and in favour of the Company, there is no certainty that the Company will be able to enforce the award and obtain payment forthwith. In short, there is simply no assurance that the Company will be able to meet its debt to the petitioner, whether partly or wholly, even with the four weeks' adjournment sought. The granting of an adjournment involves the exercise of the court's discretion. It has to be demonstrated that the adjournment will serve some useful purposes. An unpaid creditor is entitled as of right to a winding-up order. It is also to be noted that the debt due to the petitioner has become due since 1998. Although in a creditor's winding-up petition, the court should have regard to the wishes, not only of the petitioner, but also of other creditors, and that in the present case, the application for adjournment has the support of a major creditor, the fact is this major creditor has no intention to appear on the Petition, let alone to oppose the Petition. Further, the stated reason for the creditor's support for an adjournment is that it was given to understand that the Company would obtain an award of over $100 million, which should be adequate to clear all of its outstanding debts. As observed earlier, the material available does not give any assurance that the Company stands to receive payment of over $100 million in December 2000. With the undisputed fact that the Company has for some time been insolvent and unable to pay its debts, the court is in no position to place any or any great weight on the wishes of the major creditor.

Having regard to all the factors indicated above, the discretion must clearly be exercised in favour of refusing the adjournment. The second application for adjournment is therefore refused. As the conditions for the making of a winding-up order are met, there will also be the usual winding-up order with costs.

(C. Chu)
Judge of the Court of First Instance,
High Court

Mr Victor Dawes, instructed by Messrs Haldanes, for the Petitioner

Mr Jimmy Kwong, instructed by Messrs William Sin & So, for the Company

Miss D.I. Hardwick, for the Official Receiver