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Who can decide to put a company into a creditors' voluntary liquidation: the members, the creditors and/or someone else? A case comment on *Superpark Oy v Super Park Asia Group Pte Ltd and ors* [2021] SGCA 8

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Introduction

The Court of Appeal (SGCA) had the opportunity to examine an insolvency mechanism that, while long-standing, has in recent years been seeing increased utilisation – creditors' voluntary winding up of companies, or CVLs as we in the insolvency space fondly call it. In doing so, the SGCA provided pertinent guidance on the law relating to the commencement of a CVL. We take a look at *Superpark Oy v Super Park Asia Pte Ltd and ors* [2021] SGCA 8 (Superpark).

Facts

The appellant, Superpark, was the 78.33% majority shareholder of the 1st respondent, Super Park Asia Group Pte Ltd (SPAG). SPAG was an investment holding company of various subsidiaries. The other shareholders of SPAG were one Treasure Step Global Limited (Treasure) and Vintex Oy (Vintex). One Kumarasinhe was the director and shareholder of Treasure. The directors of SPAG were one Juha (who was Superpark's CEO and nominated representative on the board of SPAG), one Goh Ke Ching (Goh), and Kumarasinhe.

The relationship between Superpark and Kumarasinhe deteriorated over various issues, including funding and allegations of non-compliance with audit and disclosure requirements. In light of the deteriorating relationship, Kumarasinhe tabled a board resolution over a Zoom meeting to put SPAG in provisional liquidation without notice. The resolution passed despite Superpark's objections.

The requisite statutory declaration under section 291 of the Companies Act was subsequently lodged, and the second and third respondents were appointed as provisional liquidators (the Provisional Liquidators). At the time of the appointment of the Provisional Liquidators, the Companies Act provisions applied, and not that under the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) which had not come into force then.

Superpark gave notice of an EGM on 2 July 2020, tabling resolutions to, among others, remove Kumarasinhe as a director and to terminate the voluntary liquidation (the EGM Resolutions). The EGM Resolutions were passed with Superpark's majority vote. The Provisional Liquidators did not consider the EGM Resolutions to be valid and binding on them, and proceeded to issue a Notice of Meeting of Creditors.

The Provisional Liquidators then commenced HC/OS 656/2020 (OS 656) for a declaration that the EGM on 2 July 2020 was invalid. It also filed HC/SUM 2700/2020 (SUM 2700) seeking for, among others, an injunction restraining Superpark from taking any action inconsistent with SPAG being in provisional liquidation. The judge at first instance granted various orders in SUM 2700.

The Provisional Liquidators subsequently took steps to sell all of SPAG subsidiaries on a condensed timeline, before

the creditors' meeting was held.

Superpark counter-commenced HC/OS 671/2020 (OS 671) for, among others, a declaration that the provisional liquidation and any voluntary winding up of SPAG be terminated at an EGM of SPAG. Superpark also filed (1) an injunction in HC/SUM 2791/2020 (SUM 2791) to restrain the Provisional Liquidators from taking any further steps in the provisional liquidation of SPAG; and (2) HC/SUM 2859/2020 (SUM 2859) for the injunction granted in SUM 2700 to be set aside.

In the meantime, an EGM and the creditors' meeting were held on 17 July 2020. Resolutions confirming, among others, the appointment of the second and third respondents as Provisional Liquidators failed at the EGM, but were passed in the creditors' meeting.

With respect to SUM 2859 and SUM 2791, the judge at first instance ordered that: (1) the Provisional Liquidators continue with their efforts to dispose of the assets of SPAG and those of the subsidiaries by way of private treaty; (2) Superpark to file judicial management proceedings by 5 August 2020, or find other means to restructure / rehabilitate SPAG; and (3) failing any concrete action by Superpark, the court would allow the liquidation process of SPAG to continue to its conclusion (the Court Order).

For completeness, Superpark commenced judicial management proceedings in HC/OS 761/2020 against SPAG. It also filed an interim judicial management application (IJM) in HC/SUM 3235/2020. The court granted the IJM application on 21 August 2020, holding that no shareholders' resolution was passed to wind up the company voluntarily. The judge also held the view that the Provisional Liquidators were no longer the liquidators of SPAG.

Holding

Superpark appealed the Court Order on 23 September 2020, after the IJM order was granted. Parties consented for the SGCA to decide on the following points of law:

1. In the event that a voluntary winding up was commenced pursuant to section 291(6)(a) of the Companies Act, when and how could it be terminated (Question 1);
2. Does section 291(6)(a) of the Companies Act mean that a voluntary winding up commenced upon the directors passing a resolution to appoint provisional liquidators under section 291(1) of the Companies Act, regardless of whether the members' resolution for voluntary winding up was passed pursuant to section 290 of the Companies Act (Question 2); and
3. Can the creditors of a company voluntarily wind-up a company (assuming the voluntary winding up has not already commenced pursuant to section 291(6)(a) of the Companies Act) and/or appoint liquidators in a voluntary winding-up, if the members have not passed any resolutions to that effect pursuant to section 290(b) of the Companies Act (Question 3).

The SGCA held that the key question was whether or not the creditors of a company even had the capacity to voluntarily wind up a company if no special resolutions to that effect were passed by the members (i.e. Question 3). Accordingly:

1. SGCA held that the creditors of a company **cannot** voluntarily wind-up a company, **if** the members have not passed any requisite resolutions to that effect:
   a. First, section 290(1) of the Companies Act is plain and unambiguous – a company may only be wound up voluntarily if (a) the constitution provides a certain timeframe to do so, or (b) there is a special resolution passed. There is no other way to wind up the company voluntarily. This is a crucial distinction from a court-ordered/compulsory winding up or CWU, the commonly used shorthand.

b. Second, allowing a company to be “voluntarily” wound by its creditors in the absence of a special resolution passed by members is at odds with the notion of voluntariness, which underpins the distinction between a CVL and a CWU. This is supported by authorities, applicable statues and academic works.

c. Third, to allow creditors to “voluntarily” wind up the company would render section 290(1)(b) of the Companies Act otiose. There would be no need for the passing of a special resolution by the company’s members if creditors had the power to wind up the company voluntarily.

2. Given the above holding in relation to Question 3, it followed that Question 2 was also answered in the negative, i.e. a voluntary winding up **cannot** be said to commence upon the directors passing a resolution appointing provisional liquidators **if** the members’ special resolution for winding up is not passed. SGCA further held that section 291(6)(a) of the Companies Act stipulates that a voluntary winding up may commence at the time the statutory declaration is lodged only in situations where (a) a provisional liquidator is appointed, and (b) after that appointment, the resolution for voluntary winding up was passed.

Given the SGCA’s findings, Question 1 was rendered irrelevant, and it left the issue of precisely when a voluntary winding up may be said to terminate to an appropriate juncture where such an issue arise on the facts.

The SGCA accordingly held that: (1) SPAG was never in liquidation; (2) the Provisional Liquidators should not be allowed to continue to dispose of SPAG’s assets. This was not an impediment to the IJM order, and the appointed IJMs were entitled to continue their work pending any further orders of the Court.

Case Comment

The SGCA made it crystal clear in *Superpark* that the only ways to voluntarily wind up a company are prescribed in section 290(1) of the Companies Act. Creditors have no means to voluntarily wind up a company without a special resolution from the company to that effect. The usual way is to file a CWU. *Superpark* is also likely to serve as authority in interpreting the in *pari materia* provisions of sections 160 and 161(6)(a) of the IRDA.

What was interesting in this case was that, as the SGCA observed, this was actually a conflict between the shareholders wrapped in an insolvency-linked dispute. Kumarasinhe, as controller of the minority shareholder, and together with the support of one other director (Goh), ostensibly took steps to bypass the requirements of the Companies Act and purportedly place SPAG under provisional liquidation. Indeed, the SCGA did not seem to look favourably at the actions of Kumarasinhe and the Provisional Liquidators – the latter was found to have been evasive on who was funding them (it was the former), and the evidence suggested that they were working closely with Kumarasinhe in accelerating the liquidation process and disposal of SPAG’s assets.

The SGCA also noted that the facts of *Superpark* potentially fell within one of the dangers highlighted in the Report of the Insolvency Law Review Committee 2013 (the Report), i.e. the “potential for abuse in instances where a provisional liquidator is appointed by the directors or a liquidator is appointed by the members, but these appointments have not yet been confirmed by a creditors’ meeting”, and where the company’s controllers then “effect swift liquidation under their own control, in which they themselves bought assets from the liquidator”.

To address this danger, the Report recommended introducing provisions to restrict the liquidators’ exercise of their powers prior to the meeting of the creditors. This has since been adopted by Singapore and can be found in section 171 of the IRDA. Section 171 of the IRDA provides for the following:

1. The powers conferred on a provisional liquidator by section 161 of the IRDA must not be exercised during the period before the holding of the meeting of the creditors under section 166 of the IRDA, except with sanction of the Court.

2. The above does not apply in relation to the provisional liquidator's powers to (a) take into his or her custody or under his or her control all the property to which the company is or appears to be entitled; (b) to dispose of perishable goods and other goods the value of which is likely to diminish if they are not immediately disposed of; and (c) to do all such other things as may be necessary for the protection of the company's assets.
3. The provisional liquidator must attend the creditors' meeting and report on any exercise of his or her powers.
4. Any provisional liquidator who, without reasonable excuse, fails to comply with the requirements of section 171 of the IRDA shall be guilty of an offence and be liable on conviction to a fine not exceeding $2,000 and also to a default penalty.

If the IRDA had been in effect at the material time, there may very well have been a different approach in the CVL, and/or the appointment and course of the Provisional Liquidators.

This case serves as a reminder to parties to be fully aware and advised of the requisite "dos and don'ts". Parties should also now take note of the new provisions and safeguards in the IRDA, and seek legal advice before proceeding with any action.

Please feel free to contact us if you have any queries.

Dentons Rodyk thanks and acknowledges Associate Elias Arun for his contributions to this article.

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