13,1980

No. 30 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

BETWEEN:

MALAYAN PLANT (PTE) LIMITED — Appellants (Respondents)

- and -

MOSCOW NARODNY BANK LIMITED — Respondents (Petitioners)

IN THE MATTER of Companies Winding Up No. 25 of 1977

IN THE MATTER of the Companies Act (Cap. 185)

- and -

IN THE MATTER of Malayan Plant (Pte) Limited

- and -

IN THE MATTER of Petition No. 25 of 1977 presented against the above-named Company on the 21st day of February 1977.

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from the judgment dated 14th day of April 1978 of the Court of Appeal of the Republic of Singapore (Chua, Choor Singh and Rajah, JJ) dismissing an appeal by the Appellants from the order of the Honourable Chief Justice Wee Chong Jin dated the 12th day of May 1977 winding up the Appellants upon the Respondents' Petition.

pp.92-100

pp.82-83

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QUESTIONS

2. The substantial questions raised by this appeal are:-

(a) whether, there having been concurrent exercise of a discretion in the courts below, the Judicial Committee of the Privy Council ought in this case to entertain an appeal on question of discretion; and, if so,

(b) whether the Appellants have shown that the concurrent exercise of discretion in ordering the winding up of the Appellants ought to be interfered with.

FACTS

p.2 3. The Appellants were a company incorporated on the 9th day of February 1972 under the Companies Act, Cap. 185. Their registered office is at No. 215 Upper Bukit Timah Road, 7½ m.s., Singapore 21. The paid up capital is $1,770,000-00. The principal business activity of the Appellants was the import and export of machineries, equipment, building materials and other goods.

p.5 4. The Respondents are a bank incorporated in the United Kingdom and have a place of business at MNB Building, 50 Robinson Road, Singapore.

5. The Appellants were the customers of the Respondents.

p.20 6. Although the Respondents up to the end of 1975 considered the Appellants "a well-respected business firm", the Respondents became increasingly concerned, not unnaturally, about the fate of the proceeds of the sale of goods held by the Appellants under a number of Trust Receipts p.17 whose dates of maturity had expired.

7. Yap Cheng Hai, the Chairman and Managing Director of the Appellants, was also not available to meet the Respondents to account to the Respondents as to the proceeds of certain goods held by the Appellants upon trusts for the Respondents. This unbusinesslike attitude prompted the Respondents to write to the Appellants on 7th December 1976 in the following terms:

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"Permit us to express our disappointment in not having the privilege of meeting your Mr. Peter Yap Cheng Hai, despite our numerous attempts to do so. A meeting would have inter alia cleared our doubts on where the proceeds received from your sales were channelled to, since it was not used to reduce any of your liabilities. Under such circumstances, we have no alternative, but to hand the matter to our solicitors, as we deem that you have been evading the issue. p.78

Please also be informed that the goods, presently stored in the godown at No. 15 Link Road, Singapore, are now to be considered under our full control and we demand the return of the other key to the said godown. In case our demand is not complied with, we will have to change the lock.

Further please inform us of the whereabouts of all the products held by you in trust for us under our Trust Receipts. p.79

Kindly note that any further delay in complying with our above requirements will not be tolerated and may force us reluctantly to take action on the guarantees executed."

8. The terms of every Trust Receipt executed by the Appellants in favour of the Respondents obliged the Appellants to keep the goods held thereunder, their cash proceeds and the Appellants' records thereof "separate and readily distinguishable from all other transactions." p.75

9. Two meetings were held between Yap Cheng Hai of the Appellants and officers of the Respondents on the 11th and 17th of December 1976. At the first meeting the Appellants were asked to explain why they had failed to honour their obligations to the Respondents, principally in respect of the various Trust Receipts concerned in these proceedings. Yap Cheng Hai expressed optimism that the Appellants' coal mine in Indonesia would yield profits soon and asked for time to pay. Yap Cheng Hai further promised to submit concrete proposals for repayment on a Schedule to be furnished to the Respondents later. At the end of the meeting the Respondents' Solicitors served the letter of demand dated 9th December 1976 on Yap p.62-63

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Cheng Hai who acknowledged receipt by endorsement on a copy thereof. It was made clear to Yap Cheng Hai that if the Appellants' proposals for repayment were subsequently submitted to the Respondents and were found satisfactory, the Respondents would withhold proceedings to wind up the Appellants.

pp.65-68

10. At the second meeting, the Appellants' Yap Cheng Hai failed to submit a Schedule of Repayment. He only made vague promises to repay.

p.63

11. On the 27th day of January 1977 the Respondents caused a notice of demand to be served by their solicitors, Messrs. Lee & Lee, at the Appellants' office, in the following terms:

pp.15-19

"

25th January 1977

TAKE NOTICE that we, Messrs. Lee & Lee of 18th Floor, UIC Building, Shenton Way, Singapore, Solicitors for the Moscow Narodny Bank Limited of Nos. 48/56 Robinson Road, Singapore, hereby require you to pay to our clients or to us the sum of Singapore Dollars Eight million ninety-two thousand and eighty-eight dollars and Cents Fifty-six (S$8,092,088.56) together with interest thereon until date of payment full particulars whereof are annexed hereto and short particulars whereof are as follows:

	Outstanding as at 4/12/76
Inward Bills Negotiated	402,243.45
Trust Receipts	6,322,122.57
Overdraft	1,367,722.54
	S$ 8,092,088.56

AND FURTHER TAKE NOTICE that in the event of your failure and/or refusal to make payment of the full amount now due from you to our client or to us within three weeks from the date of receipt hereof, we shall on behalf of our clients petition for you to be wound up by the Court upon the ground

provided for in Section 218(1)(e) read with Section 218(2)(a) of the Singapore Companies Act (Cap. 185), namely that you are unable to pay your debts.

Dated this 25th day of January 1977.

Sd. Lee & Lee

Solicitors for the Moscow Narodny Bank, Limited."

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The interest demand on the outstanding trust receipts was 14 per cent pursuant to the oral agreement between the Appellants and the Respondents and established in the course of dealings between them. p.62

12. On the 21st day of February 1977 the Respondents presented a petition (No. 25 of 1977) for the winding up of the Appellants. It was founded on Section 218(1)(e) read with Section 218(2)(a) of the Companies Act, Cap. 185. It was filed about four weeks after the date of the above-mentioned statutory notice. The notice was a demand for the sum of $8,092,088.56 far in excess of $500.00. The Petition alleged that over three weeks had expired since the Respondents had served the statutory demand, but the Appellants having neglected to pay or satisfy the sum demanded was insolvent and unable to pay their debts and that in the circumstances it was just and equitable that the Appellants should be wound up. pp.2-5

13. The Petition was verified by an affidavit swore on the 23rd day of February 1977 by Kong Yuk Min, the Deputy Manager of the Respondents in Singapore. He was at no material time a director or secretary of the Respondents. pp.5-6 p.7

14. On the 17th day of March 1977, Yap Cheng Hai swore an affidavit on behalf of the Appellants in opposition to the Petition. pp.8-14

15. On the 28th day of April 1977, Kong Yuk Min, the Deputy Manager of the Respondents' branch in Singapore, affirmed an affidavit in reply to the said affidavit of the said Yap Cheng Hai. pp.61-64

16. On the 21st day of April 1977, Wilson Sung an executive director of Deekes Wills (Pte) Ltd. swore an affidavit which contained nothing of pp.59-60

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substance save that the hope that if the Appellants were not wound up they would ultimately overcome what were described "(its) present difficulties". This is a significant admission in the Respondents' favour.

pp.80-81

17. On the 12th day of May 1977, the Honourable Chief Justice, Wee Chong Jin, heard arguments on the Respondents' Petition. Present at the hearing beside counsel for the Respondents and the Appellants were counsel representing a supporting creditor in the sum of $12,362.40, counsel for Deekes & Evans Limited, an English Company, an opposing creditor in the sum of $1,795,793.58, counsel for all contributories except for 1 share and the Official Receiver on whom the Petition had been served.

pp.82-83

18. On the 12th day of May 1977, the learned Chief Justice ordered that the Appellants be wound up, subject to the production of an affidavit by a director or secretary or principal officer of the Respondents in accordance with Rule 26 of The Companies (Winding-Up) Rules 1969, verifying the Petition. The learned Chief Justice also appointed the Official Receiver to be the Provisional Liquidator of the Appellants and allowed costs to be paid out of the proceeds received by the Official Receiver.

pp.84-85

19. On the 13th day of May 1977, Victor Vladimirovitch Gerashchenko, the Deputy Chairman, Director and Managing Director (Singapore Branch) of the Respondents affirmed the contents of the Respondents' said Petition and the affidavit of Kong Yuk Min filed on behalf of the Respondents.

pp.85-86

20. On the 19th day of May 1977, the Appellants gave notice of their intention to appeal to the Court of Appeal against the whole of the decision of the learned Chief Justice.

p.91

21. On the 22nd and 23rd day of March 1978 the Appellants' appeal was heard in the Court of Appeal of the Republic of Singapore before the Honourable F.A. Chua, the Honourable Choor Singh and the Honourable A.P. Rajah.

22. It was argued on behalf of the Appellants that -

(1) the Respondents had been the Appellants'

bankers from soon after the Appellants' incorporation; Record

(2) the Respondents had provided the Appellants with loans and credits and had obtained from them a mortgage, trust receipts and pledge;

(3) the Respondents were aware of the nature of the Appellants' business and as their bankers owed them a duty to warn them against incurring imprudent debts;

(4) the Respondents' financial support had enabled the Appellants to trade successfully, to have assets exceeding their liabilities and to have good prospects for the future;

(5) there was no possibility of the Appellants being able to replace the Respondents by an alternative source of finance at short notice;

(6) the Respondents' satisfaction with the Appellants was shown by their said letter to the Perusehaan Negara Perkebunan, V, dated the 17th December 1975; p.20

(7) the Respondents' sudden change of attitude and demand for repayment of all loans and advances in December, 1976, had put the Appellants in an impossible situation;

(8) on a winding up a liquidator was unlikely to be able to sell the Appellants' stock to best advantage and his prospects, unlike those of the Appellants, of getting in debts from Indonesian debtors were slight;

(9) the Appellants thought that the reason for the Respondents' sudden action might have been their refusal to buy Russian goods, but this was denied by the Respondents;

(10) the learned Chief Justice did not give any reasons for the orders which he made. Passages in Buckley on the Companies Act (13th Edition) p.460 and McPherson on The Law of Company Liquidation, pp.58-9 were cited to him. In the light of those passages he may have thought that, since the Appellants had failed to comply with a notice of demand, he had no alternative but to make a winding-up order.

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(11) even on a narrow view of a Court's discretion when dealing with an application for a winding-up, an order should have been refused in this case, because the Respondents could recover their money by enforcing the mortgage, pledge and trust receipts which they held and a winding-up was not in the interests of the creditors as a class;

(12) in the light of Re: LHF Wools Ltd. (1970) 1 Ch. 27 C.A. and other cases it is clear that a Court has wide discretion to decide whether or not a company should be wound up;

(13) in this case it was neither just nor equitable that a winding-up order should be made. A customer of a Bank is entitled to expect that it will not blow hot and cold with him. The effect of an order would be to bring to an end a profit-making business, result in loss of economic opportunities and because of probable losses by the Liquidator result in the contributories getting nothing.

23. Mr. John Newey, Q.C., counsel for the Appellants informed the Court of Appeal that he did not challenge the statutory notice of demand or any of the debts of which the demand has been made.

p.94 (ll. 1-5)

24. It was argued on behalf of the Respondents that -

(1) a prudent banker keeps close supervision over his customer. The Respondents were right to demand payment of sums outstanding in December 1976, and when the Appellants failed to make any response serve a notice of demand and bring proceedings for winding-up;

(2) since there was large undisputed debt due to the Respondents, they had a prima facie right to a winding-up order. A Court had a discretion to refuse such an order, but the discretion is closely regulated;

(3) in each of the reported cases in which a winding-up order had been refused there had been a special feature to justify refusal. There was no such feature in the present case;

(4) the learned Chief Justice was aware that he had a discretion whether or not to make a winding-up order. The Appellants had failed to show that he had exercised his discretion wrongly;

(5) a secured creditor might enforce his security or wind-up. The filing of a petition benefitted unsecured creditors. The Appellants were not commercially solvent as shown by their failure to meet a demand for payment. Future profitability should not be taken into account. There was no evidence that a Liquidator would not be able to get in assets.

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25. On the 14th day of April 1978, the Court of Appeal dismissed the Appellants' appeal. pp.91-92

26. The Judgment of the Court of Appeal was delivered by the Honourable Mr. Justice A.P. Rajah. As stated earlier, the learned judge stated that at the hearing of the appeal, Mr. John Newey, Q.C., appearing for the Appellants, informed the Court that he did not challenge the statutory notice of demand or any demand. This having been done the appeal proceeded on the issue whether the learned Chief Justice had exercised his discretion according to the Buckley concept or the modern concept as pronounced in the Court of Appeal in In Re: L.H.F. Wools Ltd. (1970) 1 Ch. p.27 ("the Wools Case"). p.94 (ll. 1-14)

27. The Court of Appeal held that the Wools Case did not apply in that that case there was a bona fide cross-claim overtopping the petitioning debt.

28. The Court of Appeal also referred to the decision in In Re: P. & J. Macrae Ltd. (1961) 1 W.L.R. 229. In that case the majority in number and value of creditors were opposed to the making of a winding-up order. Notwithstanding that situation, the learned County Court Judge, in the exercise of his discretion, made a winding-up order. By a majority, the English Court of Appeal allowed the winding-up order to stay and refused to interfere with that exercise of discretion.

29. The Court of Appeal held that where a debt was due and owing on which a winding-up petition could properly be founded the onus of persuading a pp.97-99

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judge not to make a winding-up order, in his discretion, was firmly on the debtor company. This was a matter entirely within the discretion of the judge, whose decision could not be interfered with on appeal unless he had erred in principle. The Court of Appeal concluded that they should not interfere with the exercise of his discretion by the learned Chief Justice and dismissed the appeal.

pp.101-102

30. On the 23rd day of May 1978, the Court of Appeal of The Republic of Singapore (Wee Chong Jin C.J., Chua and D'Cotta J.J.) made an order granting leave to the Appellants to appeal to the Judicial Committee of Her Britannic Majesty's Privy Council against the said decision of the Court of Appeal.

RESPONDENTS' SUBMISSIONS

31. The effect of Section 218(2)(a) read with Section 218(1)(e) is the Respondents respectfully submit as follows:-

(1) If the debtor fails to pay within 3 weeks of a valid notice the sum stated by the notice to be due that debtor is irrebutably presumed to be unable to pay its debt.

(2) If the company is unable to pay its debt - whether actually or as a result of the application of Section 218(2)(a) - the Court has the power to order the company to be wound up.

(3) The Court's power under Section 218(1) is discretionary having regard to the wishes of the creditors or having regard to any extenuating circumstances but, subject to that, the creditor who has made a demand is entitled to a winding-up order.

(4) If the demand under Section 218 (2) is for an amount in excess of that amount which is in fact due to the petitioner, the notice will still be effective in respect of the amount actually due provided that the debt exceeds $500.00: see Cardiff Preserved Coal & Coke Co. v Norton (1867) 2 Ch.App. 405 at 410; Re Tweeds Garages Ltd. (1962) Ch. 406 at pp.411-412 and Re Convere Pty Ltd. (1976) V.R. 345 at p. 350.

(5) If there is a genuine dispute as to the debt a winding-up order will not be made and this may well be the position, even where there is an undisputed debt of $500.00: see Re Tweeds Garages Ltd (1962) Ch. 406; Re Gold Hill Mines (1883) 23 Ch.D.210; In Re Brighton Club & Norfolk Hotel Co. Ltd. (1865) B.S. Beav. 204; In Re London and Paris Banking Corporation (1874) L.R. 19 Eq. 444.

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32. The principal contention of the Appellants is that the winding-up order should not have been made against the Appellants as they were solvent and trading profitably and able to pay their debts if given the opportunity. The Respondents respectfully submit that it is reasonably clear that where there is no substantial dispute as to the existence of the debt which is the subject of a notice under Section 218(2)(a) and the recipient of the notice fails to pay within the period of 3 weeks it is not thereafter open to the recipient of the notice to adduce evidence to establish that, although the company did not actually pay the debt, it could nevertheless have done so. That is the effect of the words "A company shall be deemed to be unable to pay its debts". It has been shown in the evidence and, as properly conceded by Mr. John Newey, Q.C. before the Court of Appeal, that the notice was valid and that there was no substantial dispute as to the existence of the debt referred to in the notice. Accordingly, the Appellants were irrebutably presumed to be insolvent.

33. There was on the evidence no substantial dispute as to the existence of the debt. Yap Cheng Hai in his affidavit merely says that trust receipts "are disputed". No grounds were given for disputing them except that contained in the following paragraph, namely that no agreement was made for interest rates as high as 14 per cent. This obviously suggests that there is no dispute as to the actual sum due or as to interest as low as 8¼ per cent. Kong Yuk Min in his affidavit of 28th April 1977 quite properly admitted that the sum of $113,362.42 was no longer due in respect of two trust receipts mentioned but this is only a small fraction of the total of $6,332,122.57 which is claimed in the Respondents' notice. Accordingly, the most that the Appellants can draw from this is that part of the capital and part of the interest due on the capital sum of the trust receipts were in dispute. There has been no suggestion of any

p.9 (ll. 5-6)

p.9 (ll. 7-12)

p.62 (ll. 17-29)

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dispute as to the amount due in respect of the Inward bills discounted or as to the overdraft. In the circumstances, the Respondents submit that, although there is a dispute as to the precise amount of the aggregate debt due, this dispute does not go to the existence or substance of most of the debt referred to in the said statutory notice. The Appellants therefore have failed to establish that the existence of the debt was disputed in the sense envisaged In Re Gold Hill Mines and the other authorities cited in sub-paragraph 31(5).

34. As to the wishes of the opposing creditor, namely Deekes Wills (Pte) Ltd, the affidavit of Wilson Sung contained nothing of substance save the hope that if the Appellants were not wound-up they would ultimately be able to overcome what they described as their "present difficulties". This is a significant admission in the Respondents' favour. The Respondents are the largest creditor as contrasted with the debt due to Deekes Wills (Pte) Ltd.

35. The Appellants have raised the technical objection that the Petition itself was ineffective because it was not supported by an affidavit sworn by a "director or secretary or other principal officer" of the Respondents, relying on Re Vic Groves and Co. Ltd (1964) 2 All E.R. 839. The Respondents submit that since the winding-up order was made conditional upon the filing of an affidavit by the right person, this technical objection has no merit.

36. There are no extenuating or exceptional circumstances in this case which would entitle the Court to stay or dismiss this winding-up petition.

R E A S O N S

37. The Respondents respectfully submit that the appeal should be dismissed with costs, among other reasons:-

(a) The Judgment appealed from is correct.

(b) This is an appeal on a pure exercise of discretion by the Courts below and the Appellants have shown no reason that the said discretion was erroneously exercised.

(c) There are no exceptional circumstances such as those appearing in the Wools Case, Re Southard & Co Ltd (1979) 1 All E R 528 and other similar cases warranting a stay or dismissal of this winding-up petition. RE cord

(d) There has been no violation of any principle of law or procedure resulting in a miscarriage of justice.

(e) The Respondents were driven in the circumstances to wind-up the Appellants.

LAI KEW CHAI

No. 30 of 1978

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ON APPEAL

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CASE FOR THE RESPONDENTS

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