HCCW 107/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 107 OF 2012

IN THE MATTER of Pedagogic Innovations Limited

and

IN THE MATTER of Sections 177(1)(f) and 168A of the Companies Ordinance, (Chapter 32)

BETWEEN

HO MAN KIT JOHN Petitioner

and

FUNG CHU KWONG 1st Respondent

HYDROGEN EVOLUTION INCORPORATED 2nd Respondent

PEDAGOGIC INNOVATIONS LIMITED 3rd Respondent

Before: Hon Harris J in Chambers

Date of Hearing: 8 November 2013

Date of Judgment: 8 November 2013

J U D G M E N T

1. I have before me an application issued by the Petitioner to stay a winding up of the 3rd Respondent ("**Company**") commenced on 5 August 2013 by a resolution of its director purportedly passed pursuant to s 228A of the Companies Ordinance. The Petitioner was represented by Mr Jose Maurellet and Miss Connie Lee, and the 1st and 2nd Respondents by Mr Vincent Lung.

2. The background to the application is this. On 30 March 2012 the Petitioner issued a Petition pursuant to s 168A and in the alternative seeking relief under s 177(1)(f) of the Companies Ordinance arising from alleged unfair prejudice. The allegation of the Petitioner and the 1st and 2nd Respondents who are the shareholders owning 75% of the Company's capital and in the case of the 2nd Respondent, its sole director, have also resulted in leave being granted to the Petitioner to commence a derivative action on behalf of the Company against the 2nd Respondent and proceedings by the Company, under the control of the 1st and 2nd Respondents, against the Petitioner.

3. On 5 August 2013 the sole director, the 2nd Respondent, caused a resolution to be passed pursuant to s 228A. Section 228A of the Companies Ordinance provides:

> "(1) The directors of a company or, in the case of a company having more than 2 directors, the majority of the directors, may, if they have formed the opinion that the company cannot by reason of its liabilities continue its business, resolve at a meeting of the directors and deliver to the Registrar a statement in the

> specified form (the ***winding-up statement***), signed by one of the directors, certifying that a resolution has been passed to the effect that–
>
> (a) the company cannot by reason of its liabilities continue its business;
>
> (b) they consider it necessary that the company be wound up and that the winding up should be commenced under this section because it is not reasonably practicable for it to be commenced under another section of this Ordinance; and
>
> (c) meetings of the company and of its creditors will be summoned for a date not later than 28 days after the delivery of the winding-up statement to the Registrar."

4. The 2nd Respondent used the Companies Registry standard form W2 and gave in section 3 the following reasons for winding up the Company under 228A:

> "1. The company's bank account has been frozen by a winding up petition leading to lack of cash for daily operation.
>
> 2. Reluctant of shareholders in providing further financial support.
>
> 3. Carrying on business under this situation will prejudice creditors' interest."

5. A notice of meeting of creditors dated 9 August 2013 was issued by the 2nd Respondent stating that a voluntary liquidation was commenced on 5 August 2013 and that Ms Wong Ming Lai was appointed Provisional Liquidator.

6. On 21 August 2013 Ms Wong wrote to the Petitioner's solicitors. Ms Wong said, amongst other things, this in her letter:

> "In any event, as the Company has gone into liquidation, all matters, including causes of action accruing to the Company or against the Company are to be pursued and conducted by the Liquidators who will be appointed at the creditors' meeting. I, therefore, expect that:-

1. In respect of HCA 945/2013, no action be taken unless with the express instructions from ourselves as Provisional Liquidators of the Company or from the Liquidators (when appointed);
2. In respect of HCCW 107/2012, as the Company is in winding up already, I expect the proceedings be dismissed or stayed indefinitely; and
3. In respect of HCA 965/2012, as the Company has been put into liquidation, Section 182 of the Companies Ordinance would prevent the Company disposing of assets. I request you to give a general stay to the proceedings so that the Provisional Liquidators/Liquidators could assess the matter before responding to you (acting for the Defendants). If necessary, I shall consider applying for a stay of proceedings."

7. On 30 August 2013 a meeting of creditors took place and Ms Wong Ming Lai and Mr Leung Chung Yin were appointed the joint and several liquidators of the Company.

8. The Petitioner challenges the commencement of the voluntary liquidation on 2 grounds. First, that the s 228A procedure was improperly invoked and this of itself justifies staying the winding up. Secondly, that s 228A has been misused, it is, says the Petitioner, an attempt to avoid a trial of the Petitioner's complaints, and points to Ms Wong's letter of 21 August 2013 as demonstrating what must have been appreciated by the 1st and 2nd Respondents to be the disruptive consequences of a winding up.

9. I will deal with the 2 objections in reverse order. It is clear that as the 1st and 2nd Respondents control the board of the Company and could pass a resolution of members to put the Company into liquidation, that whatever flaws there may have been in the use of s 228A they could lawfully seek to achieve the same result that they purported to achieve through s 228A. Mr Maurellet argued that if the Petitioner had received

notice of an extraordinary general meeting to pass a resolution to put the Company into liquidation, his client could have applied to enjoin the Company. I have some difficulty seeing how this would have been the correct course as it would have been possible to continue with the unfair prejudice petition. The derivative action could have either been continued by the liquidator or leave sought to continue it under s 186A which, if there was any doubt about the desirability of leaving the matter with the liquidator, could have been granted in order to ensure that the Petitioner's complaints were not stifled by the liquidation.

10. It follows from what I have said above that it was open to the 1st and 2nd Respondents to put the Company into voluntary liquidation by a resolution of shareholders.

11. Perhaps paradoxically, given the argument I have just addressed, this is the basis upon which the Petitioner says that s 228A was improperly used. Section 228A(1)(b) provides that:

> "(b) they consider it necessary that the company be wound up and that the winding up should be commenced under this section because it is not reasonably practicable for it to be commenced under another section of this Ordinance; …"

If it was reasonably practicable for a member's resolution to be passed the 2nd Respondent could not, if properly advised have thought that s 228A(1)(b) was satisfied. Mr Maurellet took me to *Bozell Asia (Holding) Ltd v CAL International Ltd & Anor* [1997] HKLRD 1; *SEG Investment Ltd v SEG International Securities (HK) Ltd & Ors* HCMP 4211/2003 (Unrep) 14 October 2005; *SEG Investment Ltd v SEG International Securities (HK) Ltd & Ors* CACV 369/2005 (Unrep) 6 February 2008, which he submits establishes that s 228A is only to be used where there is

no reasonable practical alternative procedure to wind up the Company not simply because the directors think that it is more convenient.

12. Mr Lung very fairly accepted at the outset both that an extraordinary general meeting could have been convened and a member's resolution passed and that it could not be fairly suggested that the need to wind up the Company was so urgent that the swifter procedure provided by s 228A was necessary. He argued that in the present case it was quite clear that the majority wanted the Company wound up and that any defect in using s 228A was purely technical. This is not, he said, a case like *SEG* in which the board deprived the shareholders of the opportunity to decide the matter.

13. I accept that if the decision to wind up the Company had been left to the shareholders the result would have been the same. However, it seems to me that the following are determinative of the matter. First, s 228A, uses very clear language and it is to be applied strictly. Unless a genuine reason exists for using its procedure rather than convening an extraordinary general meeting, it cannot be used. If it is wrongly used the resulting liquidation has been wrongly commenced. Secondly, it is important that the requirement for a company to hold meetings of members to decide important issues is respected. Members are entitled to be informed of important matters affecting a company's affairs (and there can be nothing more important than the suggestion that a company be wound up) asking directors' questions and exercising their voting rights. Mr Lung's submission amounts to a suggestion that those rights can be ignored if the views of the majority are known and immutable. I disagree.

14. For these reasons in my view the resolution passed on 5 August 2013 was defective and the liquidation wrongly commenced. I will, therefore, order that the winding up commenced on 5 August 2013 be stayed.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Jose Maurellet and Miss Connie Lee, instructed by Alvan Liu & Partners, for the petitioner

Mr Vincent Lung, instructed by S.T. Cheng & Co, for the 1st and 2nd respondents

Attendance of the Joint & Several Liquidators, Wong Ming Lai and Leung Chung Yin, was excused

The 3rd respondent: Pedagogic Innovations Limited, was not represented and did not appear