

Restructuring & Insolvency

## Can a Shareholder or Contributory Oppose a Creditor's Winding Up Application?

### Introduction

In the course of corporate insolvency, there are certain obstacles that must be navigated in order to progress from initiating a winding up application to the actual winding up of the company. One such roadblock is that the applicant must overcome any opposition filed against the winding up. The question then arises as to who is entitled to oppose a winding up application.

In *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd* [2022] SGHC 258, the Singapore High Court had the opportunity to consider the relatively unexplored issue of whether a shareholder/contributory has standing to oppose a creditor's winding up application. After assessing the legislation and the existing authorities, the Court held that a shareholder/contributory does in fact have such standing.

The case involved a shareholder and contributory of a company who sought to oppose a creditor's application to wind up the company. The Court found in favour of the shareholder/contributory, finding that she had legal standing to oppose the application, and that she had successfully challenged the winding up application. The Court also provided guidance on the factors it would consider in determining whether to grant a shareholder/contributory leave to oppose a winding up application.

This Update provides a summary of the decision, highlighting the key point relating to the winding up process.

### Brief Facts

The Claimant had entered into a Loan Credit Facility with the Defendant's subsidiary company ("**Subsidiary**"). The Defendant then entered into a guarantee to pay the Claimant all sums due and payable by the Subsidiary ("**Guarantee**"). The Defendant's board of directors had passed a resolution for the Defendant to enter into the Guarantee.

The Subsidiary failed to repay the sum due under the Loan Credit Facility. The Claimant sought payment from the Defendant under the Guarantee. However, the Defendant failed to pay, secure, or compound the amount. After issuing a statutory demand to the Defendant, the Claimant proceeded to file an application for a winding up order to be made against the Defendant on the basis that the Defendant was unable to pay its debts.

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A non-party to the winding up application ("**Monica**") sought and obtained leave to oppose the application. Monica was a 32.6% shareholder and contributory of the Defendant. Monica submitted that the debt owed by the Defendant was disputed, that the Defendant remained a going concern, and that the winding up application was an abuse of process by the Claimant.

The Court thus had to determine whether Monica had legal standing to oppose the winding up application and, if so, whether she had successfully challenged the application.

### Holding of the High Court

The Court allowed Monica's application and dismissed the Claimant's winding up application.

#### Legal standing

As a preliminary point, the Court noted that as Monica had been granted leave by a High Court Judge to file her affidavit to oppose the Claimant's application, the issue had already been decided by the Judge who granted such leave. However, even on a substantive basis, the Court agreed that Monica had the legal standing as a shareholder/contributory to oppose the winding up application.

- (a) **Interpretation of legislation** – While the legislation did not explicitly confer a right on a contributory/shareholder to oppose a winding up application, the Court found that the relevant subsidiary legislation was not inconsistent with such a right.
- (b) **Authorities** – The Court considered the English authorities on this point, which supported the position that a shareholder/contributory has legal standing to oppose a winding up application. The Court found that the English authorities were highly applicable in the local context.

The Court further acknowledged the need to prevent shareholders/contributories from flooding the Court with frivolous applications to oppose a winding up and provided the following non-exhaustive list of factors to guide the Court in determining whether leave should be granted for shareholders/contributories to oppose a winding up application:

- (a) Whether the shareholder/contributory owns a significant portion of the company's shareholding such that they have a substantial interest in opposing the winding up application;
- (b) Whether the shareholder/contributory can demonstrate that the company is solvent;
- (c) Whether the shareholder/contributory is acting *bona fide* (eg, no delaying of winding up proceedings unnecessarily); and
- (d) The weighing of the interest of the shareholder/contributory against the wishes of an unpaid creditor. In this regard, the Court would ordinarily attach little weight to the wishes of

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shareholders/contributories in comparison to the weight it would attach to the wishes of any creditor in the situation where the creditor proves both that he is unpaid and that the company is "unable to pay its debts".

### **Challenging the application**

The Court found that Monica had successfully challenged the claimant's application.

Monica had shown the existence of a substantial and *bona fide* dispute of the debt underlying the statutory demand. In particular, Monica had raised a triable issue as to the validity of the board resolution which authorised the Defendant to enter into the Guarantee, due to issues relating to whether the requisite quorum for the relevant meeting was met and whether the authorisation for a director of the Defendant to execute the Guarantee was effective.

The Court thus dismissed the Claimant's application for a winding up order to be made against the Defendant.

### **Concluding Words**

The Court's decision provides welcome clarity on the issue of whether a shareholder or contributory of a company can oppose a winding up application against the company. This is an important acknowledgement of the interests of shareholders/contributories in the company and in its preservation as a going concern.

However, the Court has adopted a balanced approach by providing that it will take certain factors into account to disallow frivolous applications by shareholders/contributories to oppose a winding up. This is to safeguard against unnecessary disruptions to the winding up process, which would increase the cost of proceedings.

For further queries, please feel free to contact our team below.

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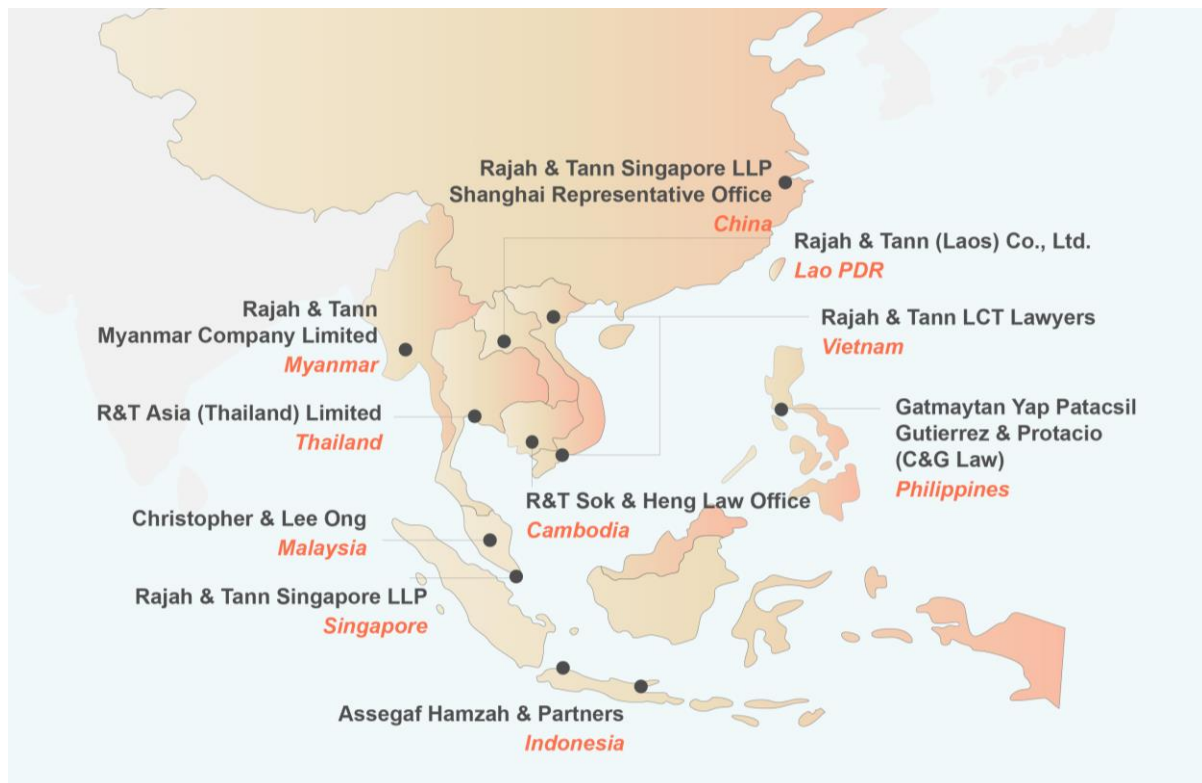
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