

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2022] SGHC 154

Companies Winding Up No 92 of 2022

Between

Teunis Eigenraam

... Applicant

And

Ngng Pte Ltd

... Respondent

FOUNDATIONS OF DECISION

[Insolvency Law — Winding Up]

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Teunis Eigenraam

v

Ngng Pte Ltd

[2022] SGHC 154

General Division of the High Court — Companies Winding Up No 92 of 2022
Lee Seiu Kin J
20 May 2022

30 June 2022

Lee Seiu Kin J:

Introduction

1 This was an application for winding up that came before me. The Applicant sought the following prayers:

- (a) That leave be granted to amend prayer 3 of the Originating Application;
- (b) An order under s 264(4) of the Insolvency, Restructuring and Dissolution Act 2018 (“IRDA”) that the procedural irregularity in the winding up application did not render it invalid; and
- (c) An adjournment for 6 weeks.

2 The Applicant had taken out the following advertisement in the Straits Times:

C9 | TUESDAY, MAY 10, 2022 | THE STRAITS TIMES |

IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

HC/CWU 92/2022
In the Matter of Section 125(1)(i) of the Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018)

And

In the Matter of **NGNG PTE. LTD.**
(Singapore UEN No. 201307582E)

Between

TEUNIS EIGENRAAM
(Netherlands Passport No. NWH4FK764)

... Claimant

And

NGNG PTE. LTD.
(Singapore UEN No. 201307582E)

... Defendants

ADVERTISEMENT OF WINDING UP APPLICATION

NOTICE is hereby given that an application for the winding up of the abovenamed NGNG PTE. LTD. (the "Company") by the General Division of the High Court was, on the 26th day of April 2022 filed by TEUNIS EIGENRAAM, a director and shareholder of the Company, and that the winding up application is directed to be heard before the Court sitting at Singapore at 10:00 am on the 20th day of May 2022; and any creditor or contributory of the Company desiring to support or oppose the making of an order on the winding up application may appear at the time of hearing by himself or his counsel for that purpose; and a copy of the winding up application will be furnished to any creditor or contributory of the Company requiring the copy of the winding up application by the undersigned on payment of the regulated charge for the same.

The Claimant's address is Graaf Adolffaan 3, 3136 Ah Vlaardingen, The Netherlands.

The Claimant's solicitors are Pereira & Tan LLC of 141 Middle Road #04-02/03, GSN Building, Singapore 188976.

PEREIRA & TAN LLC
Solicitors for the Claimant

Note: Any person who intends to appear on the hearing of the winding up application must serve on or send by post to the abovenamed Pereira & Tan LLC, notice in writing of his intention to do so. The Notice must state the name and address of the person, or, if a firm, the name and address of the firm, and must be signed by the person, firm, or his or their solicitor (if any) and must be served, or, if posted, must be sent by post in sufficient time to reach the abovenamed not later than 12 o'clock noon of the 19th day of May 2022 (the day before the day appointed for the hearing of the winding up application).

3 Rule 66(2)(b) of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (“Corporate Insolvency and Restructuring Rules”) states that the notice of the winding up application must “contain a note stating that any person who intends to appear on the hearing of the winding up application, either to oppose or support, must send notice of such intention to the applicant within the time and manner set out in rule 70”.

4 Rule 70 of the Corporate Insolvency and Restructuring Rules states that, among other things, a notice of intention to appear must either be served, or if delivered by post, reach the address of the applicant at least three clear working days before the day appointed for the hearing of the application.

5 The advertisement taken out by the Applicant did not comply with the requirements set out under Rule 66(2)(b) read with Rule 70 of the Corporate Insolvency and Restructuring Rules. It stated that the notice of intention to appear had to be served one clear working day, instead of the three clear working days provided for under the Corporate Insolvency and Restructuring Rules.

6 The Applicant therefore applied, under s 264(4) of the IRDA for an order that this procedural irregularity in the winding up application did not render it invalid. S 264(4) IRDA states:

(4) Subject to subsections (5) and (6) and without limiting any other provision of Parts 4 to 11, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under Parts 4 to 11 or in

relation to a corporation is not invalid by reason of any contravention of, or failure to comply with, a provision of Parts 4 to 11 or a provision of any of the constituent documents of a corporation;

(b) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(c) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under Parts 4 to 11 or in relation to a corporation (including an order extending a period where the period concerned expired before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding,

and may make such consequential or ancillary orders as the Court thinks fit.

7 The court may only grant an order under s 264(4)(a) if the following requirements under s 264(6) are met:

(6) The Court must not make an order under this section unless it is satisfied —

(a) in the case of an order mentioned in subsection (4)(a) —

(i) that the act, matter or thing, or the proceeding, mentioned in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is in the public interest that the order be made;

(b) in the case of an order mentioned in subsection (4)(b), that the person subject to the civil liability concerned acted honestly; and

(c) in every case, that no substantial injustice has been or is likely to be caused to any person.

8 I also note that s 264(2) of the IRDA states:

(2) A proceeding under Parts 4 to 11 is not invalidated by reason of any procedural irregularity unless the Court is of the opinion

that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

9 It is clear from s 264(2) that procedural irregularities do not render a winding up proceeding invalid, unless the court, having taken the view that the irregularity has caused or may cause substantial injustice that cannot be remedied, declares the proceeding to be invalid. The question however, given the order the Applicant had sought, was whether the court should grant a declaration pursuant to s 264(4)(a) that the proceedings were not invalidated by the procedural irregularity. Here, the requirements set out in s 264(6) must be met – in other words, if I was of the view that if the error was a procedural one and that the Applicant had acted honestly, and I was satisfied that that error has not, or will not be likely to cause any substantial injustice, it would be appropriate to grant the order sought under s 264(4)(a).

10 In the present case, I was satisfied that it was appropriate to grant the order sought (see [1(b)] above) pursuant to s 264(4)(a) of the IRDA. I explain.

11 In considering whether the error was of a procedural nature, it is useful to look at what constitutes a procedural irregularity as defined under s 264(1) IRDA. As Justice Ang Cheng Hock (“Ang J”) noted in *Mercantile & Maritime Investments Pte Ltd v Iceberg Energy Pte Ltd and another matter* [2022] SGHC 64 (“*Mercantile*”) (at [81] – [82]):

81 The wording of s 264 of the IRDA substantially replicates that found in s 392 of the Companies Act 1967 (2020 Rev Ed) (“the Companies Act”), which similarly deals with the treatment of procedural irregularities, albeit in the context of proceedings under the Companies Act. In *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 (“*Thio Keng Poon*”), which concerned s 392(2) of the Companies Act, the Court of Appeal stated that **the threshold burden of showing that the irregularity in question is of a procedural nature rests on the party seeking to uphold the proceeding** (at [54]). The

court also held that, **to determine whether the non-compliance in question is of a procedural or substantive nature, it must assiduously examine the aim or object of the requirement which was not complied with** (*Thio Keng Poon* at [69]). It also cited with approval the following proposition formulated by Palmer J in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 on the distinction between procedural and substantive irregularities (see *Thio Keng Poon* at [66]):

... what is a ‘procedural irregularity’ will be ascertained by first determining what is ‘the thing to be done’ which the procedure is to regulate;

... if there is an irregularity which changes the substance of ‘the thing to be done’, the irregularity will be substantive;

... if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.

The application of such a proposition in any particular case will depend upon ... defining ‘the thing to be done’. ...

82 As the foregoing would suggest, **an irregularity arises as a result of non-compliance with procedure or the requirements which govern how something is to be done ...**

[emphasis in bold]

12 In *Mercantile* (at [79]), Ang J rejected the argument that “[defects] associated with the [statutory demand] – namely, the timing at which it was served”, could be cured by the court pursuant to s 264 of the IRDA. There were “no requirements as to *when* a statutory demand must be served if it is to be relied on as the ground for a winding-up application pursuant to s 125(2)(a) of the IRDA” [emphasis in original] (*Mercantile* at [82]). Ang J therefore took the view that the defect with the statutory demand, specifically the timing at which it was served, could not be described as an irregularity to begin with, and thus s 264(2) of the IRDA was inapplicable.

13 The present case differed. Rule 66(2)(b) read with Rule 70 of the Corporate Insolvency and Restructuring Rules clearly set out the form

requirements for advertisements. The form requirement was not complied with. I was therefore satisfied that the error here was of a procedural nature as it fell within the definition of a procedural irregularity under s 264(1)(b) of the IRDA.

14 I turn now to consider the remaining requirements set out in s 264(6)(a)(ii) and s 264(6)(c). I do not find it necessary to consider s 264(6)(a)(iii) because the use of the word “or” suggests that s 264(6)(a)(ii) and s 264(6)(a)(iii) are disjunctive requirements.

15 The form requirements for advertisements set out in Rule 66(2)(b) read with Rule 70 of the Corporate Insolvency and Restructuring Rules were meant to bring to the attention of those who intended to appear at a winding-up application of the requirements they had to fulfil.

16 Here, there were only two shareholders of the company – the Applicant and one Ms Van Malleghem.¹ Both the Applicant and Ms Van Malleghem were also directors of the respondent company. There were no creditors. Counsel for the Claimant confirmed that they had been corresponding with the solicitors for Ms Van Malleghem, and that they were aware of these proceedings. Given that Ms Van Malleghem was the only other person who was likely to appear at the winding up proceedings, and that she had the benefit of legal counsel, it would have been likely that she would be properly advised that any notice of intention to appear had to be filed three clear days before the hearing, instead of the one clear working day as stated in the advertisement. It was therefore clear that no substantial injustice has been, or was likely to be caused to Ms Van Malleghem. It was also clear to me that the error here was an honest mistake. In the

¹ Claimant Affidavit dated 26 April 2022 at para 6.

circumstances, I was satisfied that the requirements under s 264(6) of the IRDA were satisfied, and that the order sought under s 264(4)(a) should be granted.

Conclusion

17 I therefore granted the prayers sought, and allowed an adjournment for six weeks.

Lee Seiu Kin
Judge of the High Court

Chan Chee Yun, Timothy (Pereira & Tan LLC) for the applicant.
The respondent absent and unrepresented.
