Lai Shit Har and Another v Lau Yu Man
[2008] SGCA 33

Case Number : CA 97/2007, CWU 110/2006

Decision Date : 28 July 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; V K Rajah JA; Woo Bih Li J

Counsel Name(s) : Tan Bar Tien and Winston Quek Seng Soon (B T Tan & Company) for the appellants; Philip Jeyaretnam SC, Ajinderpal Singh, Elizabeth Yeo and Zhulkarnain Abdul Rahim (Rodyk & Davidson LLP) for the respondent

Parties : Lai Shit Har; Wong Yiat Hong Raymond — Lau Yu Man

Companies – Winding up – Applicant for winding up being sued by company for breach of director's duties – Application brought long after ground for winding up came into existence – Whether winding-up application an abuse of process – Duty of judge in evaluating merits of winding-up application

28 July 2008

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Lau Yu Man v Wellmix Organics (International) Pte Ltd* [2007] SGHC 223 ("the second GD"), where he ordered that Wellmix Organics (International) Pte Ltd ("the Company") be wound up pursuant to s 254(1)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed) on the basis that the Company had suspended its business for more than a year. This winding-up order followed hard on the heels of the Judge's refusal to grant an extension of time to the Company to make good its persistent disregard of the requirements of the Companies Act and the Companies Regulations (Cap 50, Rg 1, 1990 Rev Ed) in accordance with his earlier order in *Lau Yu Man v Wellmix Organics (International) Pte Ltd* [2007] SGHC 96 ("the first GD"). The appellants vigorously contested the winding-up order on the basis that the Judge failed to assess all the relevant factors in exercising his discretion to wind up the Company, including the consideration that the winding-up application was in itself an abuse of process.

2 Having carefully considered the submissions of both parties and reviewed the evidence before us, we allowed the appeal. We now give the detailed grounds for our decision.

Background facts

3 The appellants comprise Mdm Lai Shit Har, an 85-year-old lady who is the majority shareholder of the Company, as well as Wong Yiat Hong ("Wong"), her son and the general manager of the Company.

4 The respondent, Lau Yu Man, is a director and minority shareholder of the Company. The respondent also has a variety of business interests abroad, including a group of companies bearing the "Wellmix" name based in Hong Kong ("the Wellmix Group"). The parent company of the Wellmix Group is Cheer Union Development Ltd ("CUDL"), in which the respondent is the chairman of the board of directors. It is an assumed fact in these proceedings that the respondent controls the Wellmix

Group and CUDL.

5 The Company was incorporated on 15 October 1998 to distribute fertiliser procured from the Wellmix Group. It is not disputed that the respondent invested $100,000 in the Company in exchange for a 10% shareholding in the Company. In addition, the appellants were obliged to arrange for the injection of a further $500,000 as additional capital for the Company. However, whether or not they did so is in issue.

6 Sadly, less than two years after the Company was incorporated, an intractable dispute emerged between the respondent and Wong as to whether the Company's distributorship included the exclusive right to distribute Wellmix fertilisers in Malaysia. From that point on, the parties' relationship entered into a downward spiral and soon irretrievably broke down. Litigation ensued.

Events leading to the winding-up application

7 In 2000, the Company initiated proceedings in Suit No 600041 of 2000 against CUDL, alleging the supply of defective goods, as well as a breach of contract arising from the award of the Malaysian distributorship of Wellmix fertilisers to a company known as MATTRA. Although there was a proposed compromise in that action, where CUDL was to pay the Company $20,000 in consideration of the Company removing the word "Wellmix" from its name as well as relieving the respondent of his directorship in the Company, the compromise was never implemented. Nevertheless, the Company discontinued Suit No 600041 of 2000 on 11 May 2000.

8 On 26 May 2001, the Company filed Suit No 642 of 2001 ("the Suit"), claiming approximately $12.8m in damages and losses for the respondent's alleged breach of his duties as a director of the Company. The Company alleged that the respondent had breached his fiduciary duties by poaching clients of the Company, including MATTRA, for the benefit of CUDL or the Wellmix Group. The respondent robustly denied this and contended that he had been induced to become a director of the Company because of misrepresentations made by Wong.

9 The Suit has been ongoing since 26 May 2001. Delays occurred early on, with the respondent only entering an appearance more than a year after setting aside an interlocutory judgment in default of appearance obtained by the Company. The Company, in turn, only filed its summons for directions more than a year after the defence was filed, perhaps because of a change of solicitors. Although the trial was eventually scheduled to commence on 30 August 2004, the hearing was delayed and rescheduled to 4 July 2005 because the Company required more time to file and exchange affidavits of evidence-in-chief as well as to amend its statement of claim. Further interlocutory applications caused the trial date to be vacated once again and finally, on 15 June 2006, the trial was fixed for hearing on 21 August 2006. However, yet again the hearing of the trial did not materialise. On 31 July 2006, shortly before the trial was to commence, the respondent filed an application for security of costs, further discovery and the production of proof that the Company had authority to commence the Suit. An assistant registrar heard the application on 10 August 2006. He stayed the action pending production by the Company of ratification of the action. The Company appealed against this order on 23 August 2006. In response, only three days later, on 26 August 2006, the respondent applied to wind up the Company.

The Judge's first decision

10 Upon hearing the winding-up application on 5 February 2007, the Judge found that the Company had suspended its business since 2001 and that it was being kept alive purely to sustain the action against the respondent – indeed, this claim was the Company's only asset (see the first GD at

[11]). The Judge also unhappily noted that the Company was in "disarray" and "not operated as a company" (*ibid*); it had additionally failed to maintain proper audited accounts in compliance with the Companies Act and the Companies Regulations since inception.

11 Nevertheless, invoking his generous discretion pursuant to s 254(1)(*c*) of the Companies Act, the Judge considered that winding up the Company would "suppress a claim by an impecunious plaintiff (the Company …)" (*ibid*). In the words of the Judge (at [10]):

> [The Company] is hampered by a *lack of resources* as [the respondent] was the main financier and, combined with the long interlocutory battles that have dragged the case over five years, *the Company has reached breaking point in terms of its ability to continue the suit*. [emphasis added]

12 In order to assuage the Judge's concerns about the suppression of the appellant's claims, counsel for the respondent gave an undertaking that the respondent would only seek from the liquidator prospective costs if the liquidator decided to proceed with the suit. This undertaking was reiterated when we heard the present appeal.

13 Faced with the conflicting interests of the respondent as a contributor who wanted the Company to be put into the hands of an independent liquidator so that he could discover how his $100,000 had been utilised and whether the further $500,000 had been injected into the Company on the one hand, and of Mdm Lai as a main shareholder who desired the Company to carry on business on the other, the Judge concluded that this was a "difficult case" (at [12]). Ultimately, he accepted the suggestion of counsel for the Company and directed that the Company take steps to file its audited accounts to rectify its previous breaches and comply with the Companies Act and the Companies Regulations within four months (ending 5 June 2007). He adjourned the application and gave liberty to the respondent to apply for a winding-up order after 5 June 2007 if the Company failed to comply by that date.

The Judge's second decision

14 The Company failed to file its audited accounts. On 6 June 2007, counsel for the respondent requested the Registry to restore the winding-up application for hearing. About one month later, on 4 July 2007, the Company filed Summons No 2865 of 2007 requesting an extension of time to file its audited accounts as well as a further adjournment of the winding-up application.

15 The Judge heard both applications on 16 July 2007. He subsequently explained his approach in assessing the competing views as follows (see the second GD at [7]):

> [T]his has been a difficult case and a finely balanced matter. On 5 February 2007 it seemed to me that it would tilt in the company's favour if I gave it four months to comply. In the circumstances that obtained on 16 July 2007, particularly in view of the fact that Wong had been given his chance and not only was he unable to seize it, I was not convinced that he made much effort to do so. In the circumstances I was of the view that the best course of action would be to order the winding up of the company rather than delay it any further.

The Judge accordingly refused to grant an extension of time and, after hearing the winding-up application in open court, ordered the Company to be wound up pursuant to s 254(1)(*c*) of the Companies Act (*ibid*).

16 We note at this juncture that although the appellants appealed against this order, they did

not appeal against the Judge's orders on 5 February 2007 or the findings contained in the first GD.

Issues arising on appeal

17 In their written submissions, the appellants identified two issues – the first related to whether the Judge had wrongly refused to grant an extension of time for the Company to comply with the Companies Act and the Companies Regulations and the second was whether the Judge had erred in winding up the Company on 16 July 2007. It was unnecessary for us to consider the first issue because our determination on the second issue resolved the entire matter.

18 As we saw it, the real issues that surfaced in this appeal were as follows:

(a) whether the winding-up application was an abuse of process; and

(b) whether the Judge erred in ordering the Company to be wound up without holistically evaluating the merits of the case.

Our decision

19 In our judgment, the respondent's winding-up application was an abuse of process because the respondent only initiated the application several years after the ground relied on for winding up had come into existence (see [10] above) and, even more crucially, only after the Company's suit against the respondent had, after several procedural lapses on the part of both parties, painfully reached a decisive stage (see [11] above). It could be readily inferred from these facts that the application was brought for the collateral purpose of preventing the Company from pursuing its suit against the respondent altogether or, at the very least, to make it more costly and time-consuming for the Company to do so. The respondent could not plausibly explain why it had until then allowed and indeed participated in adopting an altogether different process to resolve his disputes with the appellants. This was, to put it in a nutshell, our primary reason for allowing the appeal.

20 As a secondary point, we also think it is important to underscore the duty of a judge, in appropriate cases, to assess all the material evidence and consider all the relevant issues before him before exercising his discretion to wind up a company. Based on the grounds of decision given by the Judge and the notes of argument, we found that the Judge failed to adequately appraise and appreciate the merits of the winding-up application before he made the winding-up order.

21 Although there was no appeal against the Judge's initial decision made on 5 February 2007, we felt it was also necessary to review this decision together with the second decision of 16 July 2007. Both decisions were closely intertwined. In the second GD, the Judge quoted extensively from the first GD and it was evident that his earlier findings heavily influenced his subsequent decision. Further, the Judge seemed to suggest in the second GD that his decision of 16 July 2007 inevitably flowed from the appellants' failure to comply with the order made on 5 February 2007 (see [15] above). In these circumstances, it was only appropriate for us to consider both the Judge's first and second decisions in this appeal.

Abuse of process

22 The court has inherent jurisdiction to prevent an abuse of its processes. In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 at [34] ("*Chee Siok Chin*") the Singapore High Court set out four categories of the type of proceedings that would amount to an "abuse of process", one of which was "proceedings where the *process of the court [was] not being fairly or honestly used but*

[was] employed for some ulterior or improper purpose or in an improper way" [emphasis in original]. *Chee Siok Chin* has most recently been followed in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [71].

23 In the present context, it has also been recognised that a winding-up application brought for a collateral purpose may be summarily dismissed as being an abuse of process. In *Re Mechanised Construction Pte Ltd* [1989] SLR 533, a winding-up order was sought on the basis that the company was unable to pay its debts. The debt was allegedly owed pursuant to a sales contract whereby the creditor company agreed to supply, fabricate and install structural steelworks for the debtor company in connection with a school construction project. Unfortunately there were delays in completing the works and the debtor company eventually ceased making payments. The debtor company, *inter alia*, challenged the value placed on the amount of work done and also took issue with the slow progress of the works; on the other hand, the creditor company alleged that it had been given the site late and was not bound by previous timelines. Chao Hick Tin JC found that the application was brought for the improper purpose of enforcing payment of a debt which was *bona fide* disputed and dismissed the petition as an abuse of process.

24 Here, the remarkable timing of the winding-up application unequivocally affirmed that it must have been brought solely for the collateral purpose of either seriously delaying or wholly derailing the Suit.

25 First, the winding-up application was brought after a very substantial delay from the time when the ground relied on for winding up had surfaced and long after the initiation of the Suit. The principal ground that the respondent relied on for winding up the Company, that the Company had suspended its business for a whole year, had come into existence in 2002 – a year after the Company suspended its business in 2001 (see [10] above). Yet, the respondent only brought the winding-up application on 26 August 2006, approximately four years later. Counsel for the respondent proffered two reasons for the delay in making the winding-up application. The first was that the financial disarray of the Company was discovered only in August 2006 when the respondent obtained inspection of the Company's records. We did not find this explanation persuasive because the respondent had only attempted to gain access to the Company's records very late in the day – the letters exhibited by the respondent in which he sought disclosure of the Company's accounts are dated 13 October 2005 and 20 October 2005. This was despite the respondent having been aware as early as 27 December 2002 that the Company's accounts were not properly kept, when the respondent's then solicitors, M/s Tan Lee & Partners, sent a letter to the company secretary of the Company. In that letter, the respondent's solicitors stated that the respondent had received a reminder from the Registry of Companies to file the annual returns of the Company before 4 February 2003, failing which proceedings would be brought against the respondent as an officer of the Company. The subsequent correspondence confirmed that the issue was never resolved. The second reason given to us was that the respondent had only been advised of the option of winding up the Company after a change of solicitors on 19 July 2006. We do not doubt that the respondent was so advised, but it could not justify such a late application in circumstances which clearly demonstrated that the only motive for winding up the Company was to prevent or delay the Suit from proceeding as scheduled.

26 Second, the chronology of events prior to the filing of the winding-up application had also significantly contributed to our finding of a collateral purpose. Although the trial of the Suit was set for 21 August 2006, the respondent only filed, at the eleventh hour, an application for security for costs, further discovery and the production of proof that the Company had authority to commence the Suit, on 31 July 2006. On 10 August 2006, an assistant registrar heard the application and ordered a stay pending production by the Company of evidence of the ratification of the action. On

23 August 2006, the Company appealed, *inter alia*, against the assistant registrar's order staying the proceedings. We thought it telling that even before these issues for security of costs, discovery and ratification could be resolved, the respondent suddenly decided to initiate the winding-up application on 26 August 2006.

27 In addition to the timing of the application, the respondent's statement in his reply affidavit filed on 2 October 2006 was further confirmation that the winding-up application was brought for a collateral purpose. The respondent stated at para 14 of his reply affidavit[note: 1] that:

> [The inspection of the Company's records on 2 August 2006] fortifies my belief that the Company has not been properly run at all since 2000. *It has been kept in existence only as a shell behind which … Wong can hide and pursue litigation against me, hoping that I will pay him off. This is why I took up this winding up application against the Company.* [emphasis added]

In our view, if the respondent's genuine concern was that the Company was being used as an oppressive vehicle against him, the proper cause of action would be a minority oppression action under s 216 of the Companies Act and not a winding-up application. This statement plainly and, perhaps, unwittingly reveals the true intention of the respondent in bringing the winding-up application, which was to smother the Suit.

28 Counsel for the respondent strenuously denied that the winding-up application was brought for an improper purpose. He argued that even if the Company were wound up, the liquidator could still continue with the Suit if it was deemed to be in the best interests of the Company. It was also possible, he added, for the liquidator to cede control over the Suit to the appellants if the appellants were willing to fund the Suit. Finally, counsel for the respondent relied on the respondent's undertaking to seek only prospective costs from the liquidator in respect of the Suit as proof that there was no intention to disrupt the prosecution of the Suit. We were not convinced by these arguments.

29 The fact remains that if the Company were wound up and a liquidator appointed before the trial, time would unavoidably be needed to resolve the underlying dispute. In the process, perhaps substantially more costs would be incurred. The respondent's undertaking also rings hollow when viewed in the light of the timing of the winding-up application. If the respondent had no intention to delay or derail the Suit, he could still have commenced the winding-up application immediately after the Suit had been resolved against him. No reason was given to us as to why this could not have been done. In fact, since the respondent had already waited approximately four years to bring the winding-up application, it could not be credibly said that there was any urgency in resolving that particular issue. We therefore quite readily concluded that the winding-up application was an abuse of process.

Duty of judge to evaluate merits of winding-up application

30 It was, in our view, on the facts of this matter plainly incumbent on the Judge to evaluate the merits of the winding-up application before making the winding-up order at the second hearing. Such an evaluation required the Judge to carefully consider and assess all the relevant issues before him.

31 A case on point, which we drew counsel's attention to, was *In the Matter of the Companies Ordinance, Cap 32 and in the Matter of Power Point Engineering Limited* [2000] HKCFI 800; [2000] HKCU 501 ("*Re Power Point Engineering*"), a decision of the High Court of Hong Kong. That case similarly concerned a contributories' petition to wind up a company on, *inter alia*, the basis that

the company had suspended its business for a whole year under s 177(1)(b) of the Companies Ordinance (Cap 32) (HK), which is the equivalent of s 254(1)(*c*) of the Companies Act. The company was a joint venture set up by the two petitioning contributories and the opposing contributory to assume the role of a sub-contractor in certain large-scale government projects. It commenced work for the main contractor on the projects on 1 April 1998 but was then instructed to stop work two weeks later on 15 April 1998. The company engaged in no further business after that. Subsequently, the main contractor awarded the sub-contracting work to another company that had been newly formed by the girlfriend and wife respectively of the two petitioners on 28 April 1998.

32 The court first considered the chronology of events and noted, in relation to s 177(1)(b) of the Company's Ordinance, that although it was plain that the company had not carried on business since 15 April 1998, it still had to "enquire into the reasons *why [the company] had to cease business*" [emphasis added] (at [45]). On the facts of the case, the court concluded that compelling circumstances existed requiring the court to carefully appraise the exercise of its discretion to make a winding-up order. The court found that the suspension of the company's business was solely attributable to the petitioners' breach of fiduciary duty – they had acted in concert with the main contractor to oust the company from the projects – and held at [46] that:

> [W]here the relevant misconduct was causative of the circumstances giving rise to the discretion, *prima facie*, the absence of clean hands would disentitle the petitioners to the relief sought.

In addition, the court considered that although the company had indeed lost its substratum and there was a deadlock between the contributories, there was another reason for it not to wind up the company, namely, that winding up the company would prevent the company from making a claim against the petitioners for their breach of fiduciary duty (at [47]):

> The reality is that were [the court] to wind up the Company, *the liquidator will have no funds with which to pursue any misfeasance proceedings against the petitioners*. [emphasis added]

33 We agree with the principles relied on in *Re Power Point Engineering*. We recapitulate. Although the statutory grounds for winding up a company may have been technically established, the court retains the residual discretion to consider all the relevant factors, including the utility, propriety and effect of a winding-up order as well as the overall fairness and justice of the case, before deciding whether or not to wind up the company. In the context of s 254(1)(*c*) of the Companies Act, this may include, in appropriate cases, careful consideration as to whether the petitioner could have been responsible in any meaningful way for the company's suspension of business and whether winding up the company would prevent the company from pursuing misfeasance proceedings against the petitioner. *In most cases, this enquiry will be a brief one, but in some, the court is duty-bound to evaluate the evidence and weigh all the factors before making a determination.*

34 This matter was one of those situations requiring a detailed and close enquiry because the factual matrix gave rise to mixed issues of fact and law apropos:

(a) whether the winding-up application was an abuse of process (as in the case of *Re Mechanised Construction Pte Ltd* described at [23] above);

(b) whether the respondent could have been responsible for the Company's business being suspended (as was the case in *Re Power Point Engineering* described at [31]–[32] above); and

(c) whether the Company's claim against the respondent in the Suit was a *bona fide* claim

(see *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR 491 at [17] and [23] where this court explained that a bona fide dispute was one in which there were triable issues).

If the answer to any of the above issues was in the affirmative, that would be good reason for the Judge to prevent the winding-up application from proceeding further or to dismiss it entirely.

35 Although these issues were initially adverted to by the appellants (but, quite naturally, not by the respondent) in the court below, the Judge unfortunately failed to adequately consider them. This was evident from both the first GD and the second GD where the Judge made no reference to any of the issues, save for a comment on the last-mentioned issue (at [11] of the first GD, quoted at [2] of the second GD):

> The parties have not submitted to me on the strength of the Company's claim against Lau. I therefore made my decision on the basis that there is a claim and there is a defence.

Apparently, the Judge did not consider whether the Company's claim against the respondent was a *bona fide* one because the parties did not properly assist him on such an issue.

36 The notes of argument provide a further insight into the Judge's uncertainty. On 5 February 2007, the Judge stated[note: 2] that:

> Parties have not submitted to me on the strength of the Company's claim against the Plaintiff. *I don't know if it is relevant for me in this application to consider it*, but as I've said, parties have not submitted to me on this, and I make my decision on the basis that there is a claim and there is a defence. [emphasis added]

The issue of the *bona fides* of the Company's claim *was* indeed very relevant to the winding-up application. As was held in *Pacific Recreation Pte Ltd v S Y Technology Inc* at [20]–[21], there is no obvious line demarcating an enquiry into whether a *bona fide* dispute exists and a decision on the merits of the dispute itself; deciding whether or not a *bona fide* dispute exists may sometimes involve deciding on the merits of the dispute itself. Here, however, the Judge need only have considered whether a *bona fide* dispute existed.

37 Instead, after denying the appellants an extension of time to comply with his first order, the Judge proceeded to wind up the Company without more (see [14] to [15] above). This apparently was the consequence of counsel agreeing that a winding-up order would immediately ensue from the refusal to grant an extension of time. In turn, this situation only arose because of the Judge's earlier order that the Company file its audited accounts. We would observe that although this order was made at the suggestion of counsel for the appellants, the Judge should not have taken it up as it only served to delay the trial of the Suit. The Company, to the knowledge of the respondent, had suspended its business for more than six years. If the respondent was interested in the accounts of the Company, he would have asked for them much earlier. In fact, he was only interested in winding up the Company to prevent the Suit from being heard.

38 Counsel for the respondent relied on *Pham Thai Duc v PTS Australian Distributor Pty Ltd* [2005] NSWSC 98 ("*Pham Thai Duc*") and sought to persuade us that, as in that case, a winding-up order had to be given to ensure fairness in the present situation. We disagree.

39 In *Pham Thai Duc*, the Supreme Court of New South Wales exercised its discretion to wind up a company on the just and equitable ground that the relationship between the petitioner and the opposing contributory, who were the only shareholders and directors of the company, had

irretrievably broken down. In doing so, the court considered the effect of appointing a liquidator on potential claims by the company and the issue of the petitioner's fault and held (at [16]–[18]) as follows:

> It was submitted on behalf of Mr Tang [the opposing contributory] that the court should, in its discretion, refuse a winding up order because of the additional layer of cost by way of liquidator's remuneration. That, of course, is an incident of every winding up. *If a case for winding up is shown, it will rarely, if ever, be appropriate to regard matters of cost alone as sufficient to cause the court's discretion to be exercised against the making of an order.* In the present case, the company is said by each of its principals to have a claim against the other principal. *In its present configuration, the company is unable to make any informed and dispassionate decisions on those alleged claims. If a liquidator is installed, he or she will be in a position to do so, subject to practical considerations of cost and funding*.
>
> I mention in conclusion that *this is a case in which each party has contributed to the breakdown upon which Mr Pham [the petitioner] relies in pursuing his winding up application* …
>
> … In my opinion, [Mr Pham's] apparent or arguable fault, viewed in the context of the fault of Mr Tang, should not deter the court from making an order for winding up on the just and equitable ground so that the paralysis to which I have referred may be eliminated, a competent functionary (in the person of a liquidator) may be placed in control of [the company's] affairs and that functionary may address the question of where the best interests of [the company] lie regarding the litigation affecting it ...
>
> [emphasis added]

40 In our judgment, the approach in *Pham Thai Duc* is not relevant to the present case. On the issue of the cost of appointing a liquidator, the respondent has mistakenly submitted that, just as in *Pham Thai Duc*, this ought to carry little weight. In our view, that argument does not accurately reflect the court's principal holding in *Pham Thai Duc*. The court in *Pham Thai Duc* had placed little weight on costs simply because the countervailing consideration was that installing a liquidator would allow the company to make a proper assessment as to whether the claims against *either* the petitioner or opposing contributory were worth pursuing. This is consistent with the principle that the court ought to consider and weigh all the relevant factors before deciding whether or not to make a winding-up order. Here, there was no claim made by the Company against the appellants, only one against the respondent. There was therefore no similar need to have an impartial liquidator to assess and resolve contradictory claims. Further, the relevance of costs in the present proceedings was the result of a different issue altogether – namely whether the winding-up application was an abuse of process because its true purpose was to delay or derail the Company's claim against the respondent.

41 On the issue of fault, the court in *Pham Thai Duc* found that both the petitioner and the opposing contributory had contributed to the breakdown upon which the winding-up application was based. In those circumstances, it was not deterred by this factor in exercising its discretion to wind up the company. In contrast, the Judge here made no finding as to whether or not the respondent or the appellants had caused the Company to suspend its business. Indeed, he could not do so on the available evidence. Rather than advancing the respondent's case, *Pham Thai Duc* also illustrates the fundamental point that, in appropriate cases, a court is bound to assess all the relevant evidence and make findings on the material issues before it exercises its discretion.

42 In the result, we were of the view that the Judge failed to properly evaluate the merits of the winding-up application before making a winding-up order. He did not consider the very live issues

of whether the winding-up application was an abuse of process, whether the respondent could have caused the Company's business to be suspended, and whether the Company had a *bona fide* claim against the respondent. We are not suggesting that it is incumbent on a judge to invariably examine all such issues when the ground relied on for the winding up of a company has been satisfied. However, when the basis for the winding up is inextricably linked to critical facts that may have preceded the existence of the ground relied on, a court may have to review the whole matter holistically.

Conclusion

43 For the foregoing reasons we allowed the appeal and made no order as to costs here and below. We also made the usual consequential orders. No costs were awarded because both parties had also to bear responsibility for failing to press the relevant issues before the Judge.

[note: 1] See Appellant's Core Bundle vol 4 at p 847.

[note: 2] See Appellant's Record of Appeal vol 9 at pp 1627–1628.