*SEMINAR*

# *INSOLVENCY*

# *AND*

# *THE CONTRACTOR*

*By*

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Singapore Institute of Building Limited

*"Insolvency and the Contractor"*

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## Paper 1 – Symptom of insolvency : a prelude to Liquidation or Bankruptcy

1. Definition of Insolvency
2. Symptoms of Insolvency
3. Consequences of Insolvency

## Definition of Insolvency I

*Re Great Eastern Hotel (Pte) Ltd [1988] SLR 841*

- *Practical Q* – "has the Co failed to meet a current demand for a debt already due?"
- *Theoretical Q* – whether there is a deficit after balancing overall liabilities against assets

## Definition of Insolvency II

*Re Great Eastern Hotel (Pte) Ltd [1988] SLR 841* – "Quick Assets" Test

- Quick assets are compared to current liabilities where quick assets are those which can be readily converted into cash.

## Definition of Insolvency III

*Re Sanpete Builders (S) Pte Ltd [1989] SLR 164 I*

- Fact dependent on all circumstances
- Proof that a C's debt has not been paid *per se* does not est an inability to pay debts within CA
- Conclusion of insolvency ought not to be drawn from evidence of a temporary lack of liquidity

## Definition of Insolvency IV

*Re Sanpete Builders (S) Pte Ltd [1989] SLR 164 II* – Sanpete found insolvent

- Accumulated losses exceed capital
- Assets are only book debts
- Current liabilities exceed current assets
- No indication tt fresh capital will be injected or tt payments will be recd

## Definition of Insolvency V

*Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo & Ors [2004] 1 SLR 434* – No single test of insolvency

- There are various tests : quick assets test, balance sheet test, cash flow test – different measures of solvency
- A surplus or deficiency of net assets is indicative but not necessarily determinative in establishing whether or not an entity is able to pay its debts as and when they become due and payable

## Definition of Insolvency VI

*Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo & Ors [2004] 1 SLR 434* – No single test of insolvency

- It is neither helpful nor necessary to lean in favour of one or the other test.
- There is no single test for insolvency.
- Regard is given to all of the evidence that appears relevant to the Q of insolvency.

## Some Symptoms of Insolvency

- Work falling behind programme
- Fewer materials on site
- Unusual movement of plant off site
- SCs not being paid; NSC requesting for direct payment
- Reduction & change in site mgt
- Garnishee orders

## Consequences of Insolvency

- **Liquidation – Winding-up**
- **Judicial Management**
- **Receivership**
- **Schemes of Arrangement**
- **Revival of Debt under Limitation Act**
- **Limits of Asset Recovery**

## Liquidation – Winding-up I

***Re Sanpete Builders (S) Pte Ltd [1989] SLR 164 [Chao Hick Tin JC (as he then was)]***

**"It is well-established principle that a winding-up petition should not be used as a means to enforce payment of a debt which is bona fide disputed. However, the debt must be disputed on some substantial grounds... . Whether a debt is disputed on substantial ground is a question of fact...."**

## Liquidation – the position of directors I

***Re Lion City Holdings Pte Ltd [2003] 3 SLR 493 [Tay Yong Kwang J]*** **– Examination of Directors**

"The liquidators are under a duty to try and obtain as full a picture as possible of the company's affairs. The person sought to be examined was the managing director of the company and would be well placed to fill the gaps. It would be wrong to discharge the order for examination simply on the basis that [the MD] asserted that he had already disclosed what he knew."

**Liquidation – the position of directors II**

*Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo [2004] 1 SLR 434 at 450 [Belinda Ang J]*

"A director who allows a dividend to be paid when there are no profits commits a breach of his fiduciary duty by misapplying the company's funds. Such a director may be made liable to replace the money paid out."

**Judicial Management**

*Re Genesis Technologies International (S) Pte Ltd [199413 SLR 390 [GP Selvam J]*

"JM is an alternative to winding up because, as long as a JM order is in force, no resolution may be passed or order made for the winding up of a company. *Its primary objective is to give the company a new lease of life as a going concern.* It is, therefore, a device to save the company from creditors who may wish to destroy the company when it can be rehabilitated for the benefit not only of the shareholders but the unsecured creditors as well."

**Receivership**

*Roberto Building Material Pte Ltd v OCBC (No 2) [2003] 3 SLR 217 [CA]*

"...In the words of Oliver J in *Shamji v Johnson Matthey Bankers Ltd [1991] BCLC 36 at 42*: 'The appointment of a receiver seems to me to involve an inherent conflict of interest. The purpose of the power is to enable the mortgagee to take management of the company's property out of the hands of the directors.'"

## Schemes of Arrangement I

*Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd [2001] 4 SLR 35 at 51 [CA]*

"...in approving a scheme under s 210 ...the duty of the court is to consider ...whether the *scheme is fair & reasonable to the creditors as a whole*, whether *the company & the majority creditors are acting bona fide*, & whether the *minority is being coerced to promote the interest of the majority*: see In *Re English, Scottish, & American Chartered Bank, [1893] 3 Ch 385; Re Dorman, Long & Co [1934] Ch 635.*"

## Schemes of Arrangement II

*Wah Yuen Electrical Pte Ltd v Singapore Cables Manufacturers Pte Ltd [2003] 3 SLR 629 at 638 [CA]*

"Quite apart from statutory authority, it is an independent principle of law that the creditors should be put in possession of such information as is necessary to make a meaningful choice."

## Revival of Debt under Limitation Act

*Chuan & Company Pte Ltd v Ong Soon Huat [2003] 2 SLR 205 [CA]*

"Thus, a judgment may be entered on such a claim unless the debtor raises the limitation defence. A judgment may also be entered if there is a subsequent acknowledgement of the debt. Therefore our scheme of things does not render a debt which is time-barred non-existent; it only renders the debt irrecoverable if limitation is pleaded."

## Limits of Asset Recovery I

*Panorama Development Pte Ltd (in liquidation) v Fitzroya Investments Pte Ltd [2003] 1 SLR 93 [Woo Bih Li J]*

- At page 118, "Sections 9(5) and 9(6) make it clear that the moneys from payments (under cl 3 of the S&P) which are required to be put into the Project Account are not the property of the developer and vest in the liquidator only to carry out the purposes for which the moneys in the Project Account are authorized, by rules made under the Housing Developers Act, to be withdrawn."

## Limits of Asset Recovery II

*Panorama Development Pte Ltd (in liquidation) v Fitzroya Investments Pte Ltd [2003] 1 SLR 93 [Woo Bih Li J]*

- At page 119, "The entire scheme under the Housing Developers Act is that the purchasers are to be preferred to other creditors generally."
- At page 120, "As far as statutory set-off under any particular legislation is concerned, that set-off should prevail over the principle of pari passu distribution under the Companies Act."

## Risk of custodial sentence for Bankrupts

*Public Prosecutor v Choong Kian Haw [2002] 4 SLR 776 [Yong Pung How CJ]*

"Fines are, in general, not a suitable means of punishment since bankrupts would typically lack the means to pay for the fines themselves. If they had funds to pay the fines, these monies should clearly be channeled instead to the unpaid creditors. If they lacked the funds and a third party paid for them, the punitive effect of the punishments is diminished. These concerns apply with equal force to the sentencing of bankrupts in general."

**Thank you**

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Paper 2 – *Termination under SIA & PSSCOC and its consequences*

1. Grounds for termination
2. Performance Bond
3. Materials & Equipment on Site
4. Payment to SCs & Suppliers
5. Insurance

Grounds of Termination (Insolvency) I

SIA - Clause 32(7) – *Automatic Termination*

- If C becomes bankrupt or insolvent or makes a composition with Crs
- If any winding-up order of any kind is made, or if a receiver or manager of C's assets is appointed or possession taken / execution levied by Crs or debentures or under a floating charge, or if a judicial manager is appointed

## Grounds of Termination (Insolvency) II

PSSCOC - Clause 31.1(2) E may issue NOT

- C has committed an act of bankruptcy
- C becomes a bankrupt or a winding up order is made against the Contractor
- C becomes insolvent
- C makes a composition with Crs
- A receiver or manager is appointed in respect of C's assets
- a judicial manager is appointed
- possession taken / execution levied by Crs or debentures or under a floating charge

## Continuance of Contract

- Mutual agt
- Er has not exercised right to terminate the contract [NA to SIA ctts]
  - SIA cl 15(1) "...nor shall any C's R or L be entitled to carry out such functions w/o E's consent"
- A liquidator who decides to carry on with ctt is bound by both benefits & burdens of "adopted" contract – *Panorama Development Pte Ltd (in liquidation) v Fitzroya Investments Pte Ltd [2003] 1 SLR 93*

## Performance Bond I

Clause 4.5(3) PSSCOC

"The Employer may utilise the Security Deposit to make good any loss or damage sustained or likely to be sustained *as a result of any breach of contract* whatsoever by the Contractor, including any liquidated damages."

## Performance Bond II

*Newtech Engg Construction Pte Ltd v BKB Engg Construction Pte Ltd [2003] 4 SLR 73*

"The entire circumstances of the case suggested strongly that the [C] had an ulterior motive in calling on the bonds. It did not appear to be based on any bona fide claim they had against the P [SC]. Although they had staved off the attempt to wind them up and were on the brink of financial ruin, they could not be said to be in good financial health either. The call on the bonds appeared to have been made *to ameliorate their cash flow problems*."

## Materials & Equipment on Site I

Materials

- Unfixed materials becomes fixtures – *People's Park Chinatown Development Pte Ltd (in liquidation) v Schindler Lifts (S) Pte Ltd [1993] 1 SLR 591*

## Materials & Equipment on Site II

SIA Cl 16(1) Vesting

- All plant and temporary buildings brought onto Site by the C shall, until completion of the Works… be deemed to be the property of the Employer.

## Materials & Equipment on Site III

SIA Cl 16(1) Removal

- **All plant and temporary buildings brought onto Site by the C ...shall not be removed therefrom without the prior consent in writing of the Architect...**

## Materials & Equipment on Site IV

PSSCOC Cl 24.2 Vesting

- **All Construction Equipment, Temporary Works, Plant, materials and goods owned by the C, or by any co in which the C has a controlling interest, shall, when on the Site, be deemed to be the property of the Employer.**

## Materials & Equipment on Site V

PSSCOC Cl 24.1 Removal

- **the Contractor shall not remove the same or any part of such Construction Equipment, Temporary Works, Plant, materials or goods except for the purpose of moving it from one part of the Site to another, without the consent in writing of the SO.**

## Materials & Equipment on Site VI

- *Forestry Commission of New South Wales v Stefanetto 133 CLR 507* – may only take possession of plant "which are owned by the contractor"
- *AG v Ko Hon-mau [1989] 1 HKLR 351* – in mutual terminations, C being first to terminate may remove plant although lawfulness of termination disputed

## Materials & Equipment on Site VII

Retention of Title in Goods

- Supplier : *W Hanson (Harrow) Ltd v Rapid Civil Engineering Ltd and anor (1987) BLR 106*
- SC : *Dawber Williamson Roofing Ltd v Humberside CC (1979) 14 BLR 70*

## Materials & Equipment on Site VIII

SIA Cl 16(4) Incorporation of Cl in Subcontracts

"In the case of ...plant or equipment owned by any third person or associated or subsidiary company of the C but not the C himself, no such plant shall be brought on to the Site w/o consent of the A, *...unless the owner of the plant or equipment gives an undertaking in writing* to the E that, in consideration of the plant or equipment being permitted to be used on the Site, (a) *the owner will consent to the assignment by the C to the E of the benefit of any agreement* made with the Contractor in respect of the said plant or equipment ...."

## Materials & Equipment on Site VIII

PSSCOC Cl 24.6 Incorporation of Cl in SCs

"The C shall, where entering into any subcontract for the execution of any part of the Works, incorporate in such subcontract (by reference or otherwise) the provisions of this Clause in relation to the Construction Equipment, Temporary Works, materials or goods brought on to the Site by the subcontractor."

## Payment to SCs & Suppliers I

SIA *5th Ed 1996* cl 30(4) – Direct Payment

"Upon the issue of a Certificate of Non-payment the E may, but shall not be bound to, pay some or all of any sums so certified directly to the SC or S named in the Certificate, and having done so may (w/o prejudice to and the A's powers under cl 31(10)...) at any time thereafter before Final Cert deduct some of all of any sum so paid from any sums due or subsequently becoming dus to the C..., or otherwise recover the same from the C."

## Payment to SCs & Suppliers II

PSSCOC SC cl D5 – Direct Payment

"If the C fails to supply such proof then, unless the C:

(a) satisfies the SO in writing that he has reasonable cause for withholding or refusing to make payment of such amounts; and

(b) produces to the SO reasonable proof that he has so informed such nominated subcontractor in writing,

the Er shall be entitled *to pay to such NSC direct*, upon the certificate of the SO, all amounts, less retentions, provided for in the nominated subcontract, which the Contractor has failed to pay to such NSC and to deduct by way of set-off the amount so paid by the Er from any sums due or to become due from the Er to the C."

## Payment to SCs & Suppliers III

*Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd [1990] SLR 278* – on the direct payment cl, it was held that, "*...clearly the operation of such a contractual provision in the liquidation of the P would infringe the insolvency law providing for distribution of the insolvent's property pari passu among its creditors; ...the liquidator is entitled, and indeed is obliged, to disregard it*"

## Payment to SCs & Suppliers IV

*Hitachi Plant Engineering & Construction Co Ltd & anor v Eltraco Int'l Pte Ltd and anor appeal [2003] 4 SLR 384*

- parri passu principle does not extend to Schemes of Arrangement
- Right to direct payment determined by the provision in the Scheme
- Every creditor is entitled to challenge the Scheme in court

## Payment to SCs & Suppliers V

*Re Tiong Polestar Engineering Pte Ltd (formerly known as Polestar Engineering (S) Pte Ltd) [2003] 4 SLR 1*

"It is incumbent on a creditor [who obtained a garnishee order] to try and get payment as soon as possible and if receipt of payment is delayed by the act of another party, whether it be, for example, a bank or the baliff, then the interests of the general creditors will have to prevail."

## Payment to SCs & Suppliers VI

***Lim Boon Kwee (t/a BK Lim & co) v Impexital SRL (Sembawang Multiplex Joint Venture, garnishee) [1998] 2 SLR 953***

- "...the garnishee was entitled in law to avail itself of any set-off or counterclaim existing prior to the garnishee order nisi being served on the garnishee..."

## Insurance I

- Obligation to Obtain
- Default
- Application of insurance money

## Obligation to Obtain under SIA

- Clauses 19(1), 19(2), 20(1) – C to obtain
  - Exception cl 19(2)(a) impossible or impracticable to obtain
- Clause 19(3), 20(1) – Er to obtain upon C's default
- Clause 20(1) – endorsement on C's general policy

**Obligation to Obtain under PSSCOC**

- **Clauses 27.1, 27.2 7 28.1 – C to obtain**
- **Clause 27.3 – Er to obtain upon C's default**
- **Clause 28.1(4) – endorsement on C's general policy**

**Default**

<u>SIA Clauses 19(3) & 20(1)</u>

- **Er to obtain policy & deduct sum from monies due or become due to C**

<u>PSSCOC Clauses 27.3 & 28.1</u>

- **Er to obtain policy & recover premiums paid from C**

**Application of insurance money under SIA**

- **Clause 20(2) "...any moneys, if and when received, from the insurance under this clause shall be paid in the first place to the Er and then (less only the aforesaid percentage for professional fees, if any) released to the C by instalments on the interim certificates of the A, calculated as from the date of receipt of the moneys in proportion to the extent of the work of restoration, replacement or repair previously carried out by the C..."**

## Application of insurance money under PSSCOC

- **Clause 28.2(1) "Any moneys, if and when received under the policies of insurance under this Clause shall be paid in the first place to the Er and then (less only the aforesaid percentage for professional fees, if any) released to the Cr by instalments on the interim certificates of the SO."**
- **Clause 28.2(2) "The amounts released as aforesaid shall be calculated as from the date of receipt of the moneys in proportion to the extent of the work of restoration, replacement or repair previously carried out by the C."**

## Thank you

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