# Commencing Creditors' Voluntary Liquidations

Philip Smart argues that the court's analysis in the recent case of Re Shop Clothing Ltd was clearly in error but that practitioners should nevertheless be advised to proceed with caution

Whilst there have been many assurances from financial experts that the worst of Hong Kong's recession is over, insolvency statistics are at record levels – and will doubtless remain high for many months or years to come. For example, in relation to personal insolvency, August 1999 saw some 430 bankruptcy orders made, which is more than the total number of orders made during the whole of 1989 and 1990 put together. Turning to corporate insolvency, 1999 is also set to be a record year when it comes to compulsory winding up orders. The figures for the voluntary liquidation of insolvent companies (ie creditors' voluntary liquidations) have also increased: 267 creditors' voluntary liquidations (CVLs) were commenced in the first nine months of 1999 and the total figure for 1999 is likely to be in the region of three times that for 1997. With up to as many as 60 CVLs being commenced a month (66 were commenced in February 1999) it is important that the relevant procedures are free from confusion. Unfortunately, recent comments from the companies judge have, in this commentator's opinion, muddied the waters when it comes to the commencement of a CVL under s 228(1) of the Companies Ordinance (Cap 32).

### *Re Shop Clothing Ltd*

A number of creditors presented a petition for the compulsory winding up of the company (which had traded as 'THEME'). At the hearing of the petition before Le Pichon J (see [1999] 2 HKLRD 280, [1999] 2 HKC 191) the company admitted that it was insolvent and that the petitioners' debt had not been paid. Nevertheless, the company sought the dismissal of the petition on the basis that an EGM had been convened, for the following week, at which it was proposed to seek the adoption of a special resolution to put the company into voluntary liquidation. The directors' view was that a voluntary liquidation would involve less expense than the compulsory procedure.

*where a petition had been presented against an admittedly insolvent company, the court retained a discretion to make a winding up order*

The somewhat unusual fact in *Re Shop Clothing Ltd* was that the petitioning creditors agreed with the company's stance and favoured the dismissal of the petition even though their debt had not been paid off by the company. Counsel for the company argued that, in light of the consensus between the parties, the court had no discretion and was obliged to dismiss the petition. Le Pichon J did not accept that submission and held that, having regard to the broader public interest raised where a petition had been presented against an admittedly insolvent company, the court retained a discretion to make a winding up order (see [1999] 2 HKLRD 280 at 285H):

> 'In my judgment, where, as in the present case, the petitioning creditors' debt has not been satisfied and the company is insolvent, the court is not compelled to give effect to the wishes of the petitioning creditors and the company to dismiss the petition. The court retains a discretion and, on the facts, the proper exercise of the discretion is to make an order to wind up the company ...'

The judge further pointed out: (1) that the court could not second guess whether any resolution to put the company into voluntary liquidation would be passed by the company's shareholders at the EGM (see 285D); (2) that no evidence had been put before the court as to the wishes of the majority of creditors; and (3) that if the creditors subsequently wished to proceed by way of a voluntary liquidation 'they may avail themselves of the provisions in s 209A of the [Companies] Ordinance and apply to convert the compulsory liquidation into a creditors' voluntary liquidation' (at 285G).

Thus far the judgment requires no particular comment except to mention that the case was apparently not argued as one where the *petitioner* decided at the hearing not to prosecute the petition and to consent to it being dismissed or struck out (see *Re Patent Cocoa Fibre Co* (1876) 1 Ch D 617 at 618 and *Re North Brazilian Sugar Factories Ltd* (1886) 56 LT 229). (Normally, although not invariably, this situation might occur where the company has paid the petitioner's debt together with an agreed sum for costs: see *Buckley on the Companies Act* (1981) p 546 – although the substitution of another creditor as petitioner is possible in such circumstances,

see Companies (Winding Up) Rules, r 33.)

But what is of more general importance is how Le Pichon J interpreted and applied s 228(1) of the Companies Ordinance.

## The Interpretation of s 228(1)

In addition to the points mentioned above, the judge also expressed the view that the company's proposed special resolution (to put the company into voluntary liquidation) was procedurally flawed.

Pursuant to s 228(1) of the Companies Ordinance there are two provisions under which shareholders can put a company into voluntary liquidation by passing a special resolution. Thus s 228 states:

> '(1) A company may be wound up voluntarily –
>
> (a) ...
>
> (b) if the company resolves by special resolution that the company be wound up voluntarily;
>
> (c) if the company resolves by special resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up;
>
> (d) ....'

It will be borne in mind that s 228(1) covers both types of voluntary liquidation, namely, where the company is solvent (ie a members' voluntary liquidation) and when the company is insolvent (ie a creditors' voluntary liquidation).

On the facts in *Re Shop Clothing Ltd* the admittedly insolvent company's proposed resolution was simply that 'the company would be wound up voluntarily' (at 282C). That is, the resolution was within s 228(1)(b) – the additional words found in s 228(1)(c) were not mentioned. Crucially, Le Pichon J's view was that if the company were to go into creditors' voluntary liquidation, then any resolution should have been in terms of s 228(1)(c) – s 228(1)(b) was only appropriate for a *members'* voluntary liquidation:

> 'The company asserts that the intention is to put the company into a creditors' voluntary liquidation ... However ... the resolution proposed is one pertaining to s 228(1)(b) (a members' voluntary winding up) rather than s 228(1)(c) (a creditors' voluntary winding-up) ...' (at 285A)

In short, the judge's opinion was that: 'For a creditors' voluntary winding up, the appropriate resolution is in the terms of para (c) rather than (b)' (at 283E). The question of broad importance is, therefore, as follows: whether s 228(1)(b) is restricted to a members' voluntary liquidation, so that a s 228(1)(c) resolution is always required for shareholders to commence a CVL?

*... prior to 1984 there could be no doubt that [s 228(1)(b)] could apply to an insolvent liquidation ...*

## The Legislative History of s 228(1)

Although the legislation creates two types of voluntary liquidation (members' and creditors') and s 228(1) deals (in para (b) and para (c)) with two situations in which a special resolution may be passed, the legislative history of the section is against Le Pichon J's conclusion. Section 228(1)(b) and (c) correspond to s 84(1)(b) and (c) of the Insolvency Act 1986 (UK), except that para (c) of the English legislation refers to an extraordinary resolution (rather than a special resolution). Prior to the Companies (Amendment) Ordinance 1984, s 228(1)(b) and (c) were identical to the then UK provision (Companies Act 1948, s 278(1)(b) and (c)). In both the UK and Hong Kong, para (b) referred to a special resolution, whilst para (c) required only an extraordinary resolution – a shorter notice period (14 days) was required for an extraordinary resolution than for a special resolution (21 days). The position in the UK today is the same as it was in Hong Kong in 1984; and it will be noted that the English textbooks make it quite clear that a CVL may be commenced under *either* para (b) or para (c) – although, of course, para (c) is more usually invoked. (See, for example, Fletcher, *The Law of Insolvency* (2nd ed, 1996) pp 504-505.) In other words, the principal difference between para (b) and para (c) in Hong Kong in 1984 was the *type* of resolution required.

In the Companies (Amendment) Ordinance 1984, all references in the Companies Ordinance to extraordinary resolutions were removed and replaced with special resolutions – this is why para (c) now refers to a special resolution. It is highly unlikely that the legislature, when changing from an extraordinary to a special resolution in para (c), intended to cut down the scope of para (b) (which was not amended). This commentator's view is that prior to 1984 there could be no doubt that para (b) could apply to an insolvent liquidation and that the amendment to para (c) in 1984 did not affect the position in relation to para (b).

## Other Companies Ordinance Provisions

Section 116 of the Companies Ordinance, it is suggested, makes it quite clear that a CVL may be commenced by a resolution under

s 228(1)(b). As is well-known, s 116(1) explains the meaning of a special resolution and provides that 21 days notice is generally required. But the proviso expressly allows the 21 days notice period to be reduced, subject to certain stated procedures. But the legislation (see s 116(1)(a)) provides that a minimum period of 7 days notice is required:

> 'in the case of a resolution for voluntary winding up pursuant to s. 228(1)(b) in circumstances *other than* a members' voluntary winding up.' (Emphasis added)

Accordingly, s 116(1)(a) requires a minimum of 7 days' notice in relation to a resolution for a creditors' voluntary liquidation under s 228(1)(b), but contains no such requirement in relation to a resolution for a members' voluntary liquidation under s 228(1)(b). (See also Tomasic and Tyler, *Hong Kong Company Law, Legislation and Commentary* (1998) at [I] 1085).

*s 228(1)(b) covers both members' and creditors' voluntary liquidations*

In short, this commentator cannot see how s 116(1)(a) can be read except to confirm that s 228(1)(b) covers both members' and creditors' voluntary liquidations (see also Bates (1985) 15 HKLJ at 344 for further support of this view).

## Conclusion

Whilst this commentator's view is that Le Pichon J's analysis of s 228(1)(b) in *Re Shop Clothing Ltd* can clearly be shown to be in error, and the judge's opinion is probably only obiter in any event, practitioners would be well-advised to play it safe. Care must be taken that those intending to put a company into creditors' voluntary liquidation rely upon s 228(1)(c) when drafting notices and formulating the relevant resolution. At least, that is, unless and until the Court of Appeal, acting as the fashion police, tells us that *Re Shop Clothing Ltd* is no longer in style.

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# 展開債權人自動清盤的程序

Philip Smart 認為在近期一宗案件 *Re Shop Clothing Ltd* 中，法庭的分析是明顯錯誤的，但不管如何，執業者在處理這類案件時仍應謹慎行事

雖然很多財經專家都說香港經濟已經「走出谷底」，但破產個案的統計數字卻屢創新高，預期在未來數月甚至數年間都會持續高企。以個人破產案件為例，單於 1999 年 8 月，法院便頒令了四百三十項破產令，這數字比 1989 和 1990 兩年的破產令的總數為高。至於公司清盤案件，就強制清盤令而言，1999 年的數字亦創出新高。無力償債公司的自動清盤（即債權人作出的自動清盤申請）個案的數目亦有增加：在 1999 年首九個月，已有二百六十七宗債權人作出的自動清盤的訴訟進行，而 1999 年全年的案件總數，更可能多達 1997 年的案件的三倍。面對每月多達六十宗債權人作出的自動清盤的申請（1999 年 2 月便有六十六宗），有關程序務須清晰明確。可惜，一位專責審理公司案件的法官就最近根據《公司條例》（第 32 章）第 228(1) 條所推行債權人作出的自動清盤訴訟案件中作出的評論，筆者認為把事情弄得混淆不清。

**案例：** *Re Shop Clothing Ltd*

在 *Re Shop Clothing Ltd (t/a Theme)* [1999] 2 HKLRD 280, [1999] 2 HKC 191 一案中，一群債權人提出呈請，要求把以 'THEME' 名義營商的公司 Shop Clothing Ltd 強制清盤。在原訴法庭法官郭美超審理的呈請聆訊中，公司承認經濟狀況已瀕臨破產階段，而各名呈請人的債項亦尚未得到清還，但公司卻要求法庭撤銷呈請，理由是在聆訊日後約一個星期，公司將召開股東特別大會，建議通過公司進行自動清盤的申請的特別動議。公司董事認為自動清盤所涉及的費用會較強制性清盤的程序為少。

該案耐人尋味的地方，就是作出公司清盤呈請的債權人亦同意公司的立場，即使公司欠下他們的債項尚未清還，他們亦贊成撤銷清盤呈請。代表公司的大律師指出，基於各方的共識，法庭在沒有酌情權情況下必須撤銷呈請。郭美超法官卻不接納該陳詞，並裁定當呈請是針對一家已承認經濟能力以達破產邊緣的公司而提出時，法庭須考慮更廣大的公眾利益，並保留作出清盤令的酌情權：

> 「在本人的判決中，假若（正如本案一般）提出呈請的債權人的債項尚未清還，而有關公司的經濟狀況已臨破產階段的話，法庭不會為了滿足該債權人和公司的要求而撤銷呈請的意願。法庭保留了酌情權，而根據本案的案情，法庭應適當地行使酌情權，作出公司清盤令 …」（見 [1999] 2 HKLRD 280, 在第 285 頁 H 段）

此外，法官指出：（一）法庭不能猜度公司的股東會否在股東特別大會中通過公司進行自動清盤的動議（見第 285 頁 D 段）；（二）並未有任何顯示大多數債權人的意願的證據呈堂；及（三）如果債權人其後希望以自動清盤方式進行清盤程序，「他們可以根據《條例》〔即《公司條例》〕第 209A 條的條款申請把強制清

盤轉為債權人作出的自動清盤」（見第 285 頁 G 段）。

至此，我們不須對判決作出任何特別的評論，但須留意的是，該案陳詞的基礎，顯然不是*呈請人*在聆訊時決定不繼續進行呈請並同意把之撤銷或剔除（另見 *Re Patent Cocoa Fibre Co* (1876) 1 Ch D 617 在第 618 頁；及 *Re North Brazilian Sugar Factories Ltd* (1886) 56 LT 229）（一般而言（但並非必然）這種情況可能發生在公司已清還欠下呈請人的債項和一筆經協定的訟費之時（見 *Buckley on the Companies Act*（1981 年）第 546 頁），雖然另一名債權人取代該名債權人為呈請人的機會也可在此產生（見《公司（清盤）規則》第 33 條）。

案中更為重要的問題，是郭美超法官對《公司條例》第 228(1) 條的釋義和應用。

## 第 228(1) 條的釋義

除了以上數點外，法官亦指出公司建議的特別決議（即把公司進行自動清盤）程序不當。

在《公司條例》第 228(1) 條下，股東可根據以下其中兩項條文通過特別決議而令公司自動清盤：

> 「(1) 公司在以下情況可自動清盤 —
>
> (a) …
>
> (b) 如公司藉特別決議，議決公司須自動清盤；
>
> (c) 如公司藉特別決議，議決公司因其負債而不能繼續其業務，並且適宜清盤；
>
> (d) …」

我們須留神的是，第 228(1) 條包含了兩種自動清盤形式，即當公司有償債能力時（即股東作出的自動清盤）和當公司沒有償債能力時（即債權人作出的自動清盤）。

在 *Re Shop Clothing Ltd* 一案中，該家承認無力償債的公司所建議的動議只是「公司被自動清盤」（見第 282 頁 C 段）。換句話說，這決議屬第 228(1)(b) 條 — 決議未有提及第 228(1)(c) 條中的附加字句。更重要的是，郭美超法官認為如果一家公司要進行債權人作出的自動清盤，有關決議的內容須跟隨第 228(1)(c) 條的字眼，因為第 228(1)(b) 條只是適用於「股東」作出的自動清盤：

> 「公司聲稱其意圖是進行債權人作出的自動清盤 … 可是 … 建議的決議是根據第 228(1)(b) 條（股東自動清盤）所提出，而不是根據第 228(1)(c) 條（債權人作出的自動清盤）提出的 …」（見第 285 頁 A 段）

簡言之，法官認為：「在債權人作出的自動清盤的情況下，適當的決議須引用第 (c) 段而不是第 (b) 段的字眼」（見第 283 頁 E 段）。這意見帶出了一個重要的問題：第 228(1)(b) 條是否只限適用於股東申請的自動清盤，故此若股東欲展開債權人清盤的程序，則必須使用第 228(1)(c) 條的決議？

## 第 228(1) 條的立法歷史

雖然法例設立了兩類自動清盤程序（股東和債權人），及第 228(1) 條 (b) 段和 (c) 段處理兩種通過特別決議的情況，但從第 228(1) 條的立法歷史來看，它是與郭美超法官所作的結論相抵觸的。第 228(1)(b) 和 (c) 條相當於英國的《1986 年破產法令》第 84(1)(b) 和 (c) 條（除了在英國法令的條文中，第 (c) 段所指的是特殊決議，而不是特別決議）。在《1984 年公司（修訂）條例》頒布前，第 228(1)(b) 和 (c) 條與當時的英國條文（即《公司法令 1948》第 278(1)(b) 和 (c) 條）相同。在英國與香港，第 (b) 段所提及的，均是特別決議，而第 (c) 段則只需特殊決議，分別在於特殊決議只需十四天的通知期，而特別決議則需要二十一天。英國目前的規定，仍與 1984 年時的香港情況相同。值得留意的是，英國的法律書籍清楚指出，債權人清盤程序可根據第 (b) 段或第 (c) 段展開，縱使第 (c) 段是比較常用的條文（可參閱 Fletcher 著 *The Law of Insolvency*（第二版，1996 年）第 504 至 505 頁）。換言之，於 1984 年，香港條文第 (b) 段和第 (c) 段的主要分別在於決議的*種類*。

《1984 年公司（修訂）條例》把《公司條例》中所有提及「特殊決議」的字眼改為「特別決議」，這解釋了為何現在的第 (c) 段所提及的是「特別決議」。當立法機關把第 (c) 段的字眼從「特殊決議」修改為「特別決議」時，斷不會打算收窄未經修訂的第 (b) 段的適用範圍。筆者認為，在 1984 年以前，第 (b) 段無疑適用於無力償債的清盤程序，而當年對第 (c) 段的修訂，沒有影響第 (b) 段的效力。

## 《公司條例》中的其他條文

筆者認為，《公司條例》第 116 條已清楚指明債權人作出的自動清盤的程序可根據第 228(1)(b) 條進行。眾所周知，第 116(1) 條解釋了特別決議的定義，和規定了一般需要二十一天的通知期。第 116(1) 條的但書則明確規定，若符合某些指定的程序，通知期可以縮短。然而，第 116(1)(a) 條規定，「如屬依據第 228(1)(b) 條的一項自動清盤決議（成員自動清盤除外）」，通知期則不可以少於七天（強調為筆者所加）。

這就是說，第 116(1)(a) 條規定，根據第 228(1)(b) 條的債權人提出的自動清盤決議的通知期不可少於七天，但根據第 228(1)(b) 條由股東作出自動清盤決議卻不受此限制（另可參閱 Tomasic 與 Tyler 著 *Hong Kong Company Law, Legislation and Commentary* (1998 年) 在 [I] 1085 頁）。

簡單地說，筆者認為，第 116(1)(a) 條只能被理解為支持第 228(1)(b) 條同時適用於股東和債權人作出的自動清盤的說法（Bates 著，載於 (1985) 15 HKLJ 第 344 頁的文章，進一步支持了這意見）。

## 結語

筆者認為在 *Re Shop Clothing Ltd* 一案中，郭美超法官就第 228(1)(b) 條的分析是明顯錯誤的。縱使她的觀點可能只是附帶意見，但執業者仍應小心行事，以防萬一。他們在草擬債權人作出的自動清盤的通知和有關決議時，若依據第 228(1)(c) 條作出者，務須謹慎行事，直至上級法庭裁定 *Re Shop Clothing Ltd* 一案的說法是不恰當為止。

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