IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 16

Originating Summons No 1391 of 2017

In the matter of Section 354B
and the Tenth Schedule of the
Companies Act (Cap. 50)

And

In the Matter of Article 15 of
the UNCITRAL Model Law
on Cross-Border Insolvency

And

In the Matter of the
Appointment of Chapter 7
Trustee in the United States
Bankruptcy Court in the
Central District of California –
Los Angeles Division (Lead
Case No.: 2:17-bk-21386-SK)
jointly administered with 2:17-
bk-21387-SK (Zetta Jet Pte,
Ltd., a Singaporean
corporation) dated 29
September 2017

And

In the Matter of
ZETTA JET PTE. LTD and

ZETTA JET USA, INC
(1) ZETTA JET PTE. LTD
(2) ZETTA USA, INC
(3) JONATHAN D. KING

… *Applicant(s)*

JUDGMENT

[Insolvency Law] — [Cross-border insolvency] — [Recognition of foreign insolvency proceedings]

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Introduction

1 This short form *ex tempore* judgment conveys my decision on the application for recognition by the interim Trustee acting in Chapter 7 proceedings in the United States Bankruptcy Court in the Central District of California – Los Angeles Division (the "US Bankruptcy Court").

Background

2 Zetta Jet Pte Ltd ("Zetta Jet Singapore"), is a company incorporated in Singapore. Zetta Jet USA, Inc ("Zetta Jet USA"), is a company organised under the laws of the State of California, US and is wholly owned by Zetta Jet Singapore. Jonathan D. King, is the Chapter 7 Trustee of Zetta Jet Singapore and Zetta Jet USA ("the Zetta Entities") appointed pursuant to US bankruptcy proceedings, and applying for recognition under Section 354B and the Tenth Schedule of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act").

The Intervener in this application, Asia Aviation Holdings Pte Ltd ("AAH"), is a shareholder of Zetta Jet Singapore. The principal business of the Zetta Entities is in aircraft rental and charter.[1]

3 The shareholders of Zetta Jet Singapore and their respective shareholdings are as follows[2]:

(a) AAH – 34%;

(b) Truly Great Global Limited ("TGGL") – 30%

(c) Stephen Matthew Walter ("Walter") – 23%;

(d) James Noel Halstead Seagrim ("Seagrim") – 13%;

The relationship between the shareholders is governed by the terms of the Subscription incorporating Shareholders' Agreement ("the SHA") dated 26 February 2016.[3]

4 On 15 September 2017, voluntary Chapter 11 bankruptcy proceedings were filed against the Zetta Entities in the US Bankruptcy Court and a worldwide automatic moratorium in the US came into effect.[4]

5 On 18 September 2017, Suit No 864 of 2017 was commenced in the High Court of Singapore by AAH and TGGL against Seagrim, Walter and Zetta Jet Singapore for commencing the Chapter 11 proceedings in alleged breach of

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1 Applicant's Skeletal Submissions dated 12 January 2018 at para 7.

2 Applicant's Skeletal Submissions dated 12 January 2018 at para 9.

3 Intervener's Written Submissions dated 12 January 2018 at para 16.

4 Applicant's Skeletal Submissions dated 12 January 2018 at para 16 and 49.

the SHA.[5] On 19 September 2017, AAH and TGGL obtained an injunction order from the High Court of Singapore ("the Singapore injunction") which enjoined Zetta Jet Singapore, Seagrim and Walter from carrying out any further steps in and relating to the bankruptcy filings relating to Zetta Jet Singapore and Zetta Jet USA in the US Bankruptcy Court until trial or further order.[6] On 1 November 2017, TGGL discontinued its action, leaving AHH as the sole Plaintiff in Suit No 864 of 2017.[7]

6 Subsequent to the issuance of the Singapore injunction, proceedings in the US Bankruptcy Court continued. On 5 October 2017, Jonathan D. King, was appointed the Chapter 11 Trustee of the Zetta Entities in the US bankruptcy proceedings.[8] On 4 December 2017, the Chapter 11 proceedings were converted to Chapter 7 proceedings as financing could not be obtained for the reorganisation plan under Chapter 11.[9] On 5 December 2017, Jonathan D. King was appointed the Chapter 7 Trustee in the Chapter 7 proceedings.[10]

7 On 11 December 2017, the US Bankruptcy Court authorised the Chapter 7 Trustee to commence recognition proceedings in Singapore.[11] On 13 December 2017, the Chapter 7 Trustee brought this application.[12]

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5 Applicant's Skeletal Submissions dated 12 January 2018 at paras 17 and 224.

6 Applicant's Skeletal Submissions dated 12 January 2018 at paras 17 and 48.

7 Applicant's Skeletal Submissions dated 12 January 2018 at para 225.

8 Applicant's Skeletal Submissions dated 12 January 2018 at para 20.

9 Applicant's Skeletal Submissions dated 12 January 2018 at para 22.

10 Applicant's Skeletal Submissions dated 12 January 2018 at para 23.

11 Applicant's Skeletal Submissions dated 12 January 2018 at para 23.

12 Applicant's Skeletal Submissions dated 12 January 2018 at para 24

8 Chapter 11 proceedings in the US may be briefly described as a form of protected restructuring or reorganisation, accompanied by an automatic moratorium or stay upon application. Such moratorium or stay operates, at least from the perspective of the US, on a worldwide basis.

9 Chapter 7 proceedings in the US is essentially liquidation. These may be contrasted with Chapter 13 proceedings, in which there is some attempt at a repayment plan.

10 In either instance, Chapter 11 or Chapter 7 proceedings, an insolvency representative, termed the Trustee is appointed by the Bankruptcy Court.

The legal framework

11 The 2017 amendments to the Companies Act introduced s 354B, which in turn brings in, through the Tenth Schedule of the Companies Act, the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"). Article 6 of the Model Law enacted in Singapore under the Tenth Schedule of the Companies Act ("the Singapore Model Law") differs from Article 6 of the Model Law in that the former omits the word "manifestly". The effect of this omission will be considered below.

12 Under Article 15 of the Singapore Model Law, a foreign insolvency representative may apply to the High Court in Singapore for recognition of the foreign insolvency proceeding in which the foreign representative has been appointed. Recognition essentially allows, among other things, the foreign representative to function as the insolvency representative in Singapore, with accompanying powers.

13 Under Article 17 of the Singapore Model Law, the Court must grant recognition if the various requirements are met. A foreign proceeding is recognised as a foreign main proceeding, if the foreign proceeding takes place where the debtor has its centre of main interests ("COMI"), or as a foreign non-main proceeding where the debtor has an establishment there, as defined under Article 2(d). Whether or not the foreign proceeding was properly commenced is not relevant to the granting of recognition.

14 However, under Article 6 of the Singapore Model Law, to which Article 17 is subject, a Singapore court may refuse recognition if such recognition would be "contrary" to the public policy of Singapore. Article 6 of the Model Law on the other hand requires recognition to be "manifestly contrary" to public policy for it to be refused.

15 In the present case, a number of issues were raised by both sides. It suffices for the present judgment to consider only two main areas: the determination of the COMI, and whether recognition would be contrary to public policy.

Determination of COMI

16 The determination of the COMI will establish whether recognition can be given to the Chapter 7 Trustee as a foreign representative in foreign main proceedings. Under Article 16 of the Singapore Model Law, the presumption is that the debtor's COMI is its place of registration. Zetta Jet Singapore is a Singapore-incorporated company, while Zetta Jet USA is incorporated in the US. In these proceedings, the COMI of Zetta Jet Singapore, was in issue.

17 The Intervener argues that in the case of Zetta Jet Singapore, the COMI is in Singapore as the Managing Director, before he was purportedly removed,

was based in Singapore; the employees were generally based out of the US; no offices were maintained in the US, and while it had a flight operation centre in the US, most operations were handled out of the other centre in Singapore. Flight scheduling and operations were conducted in Singapore, and Zetta Jet Singapore carried on business in Singapore and has creditors in Singapore.[13] The Intervener also points to the source of revenue, which it says is largely from outside the US.

18 The Applicant argues that various factors point to the US being the COMI of Zetta Jet Singapore. The pointers that the Applicant relied on included that the operations were carried out in the US through a maintenance facility, and operational control was at its hanger base, including sales, business operations, scheduling, maintenance and stocking. Substantial assets were, it is claimed, in the US rather than in Singapore. Employees were also largely in the US. Most business was centred on the US. Account books and bank accounts were maintained in the US generally, though there were Singapore links as well.[14]

19 The Applicant treats the Zetta Entities as a single whole.[15] I have my concerns about this approach. It is to my mind essential to observe the separate corporate personalities, and to treat each entity on its own, unless there is sufficient reason shown to deal with them as one. It may be that in this context we may not apply the full rigour of the common law on piercing the corporate veil, but some basis must be made out for the two entities to be treated as a single entity. The Applicant's affidavit in support does contain assertions that

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13 Intervener's Written Submissions dated 12 January 2018 at para 76.

14 Applicant's Skeletal Submissions dated 12 January 2018 at paras 152 and 157-164.

15 Applicant's Skeletal Submissions dated 12 January 2018 at para 154.

the entities were treated as one in practice. Though examples are listed, that is not enough to trigger a disregard of the separate corporate identities. I am not comfortable with the piercing of the veil and the treatment of the entities as a single whole. This I think merits further argument, taking into account both Singapore and English cases on separate corporate identities.

20 I do not wish to hold up the resolution however of the main question of the public policy bar, discussed below, particularly as at least, I am satisfied on the evidence adduced by the Applicant that Zetta Jet Singapore had an establishment, as defined under Article 2(d) of the Singapore Model Law, in the US. This is a basis for limited recognition of the US proceedings as a foreign non-main proceeding. There is of course no issue with respect to Zetta Jet USA. In view of my order in this application, the question of the proper approach to COMI and the appropriateness of treating the two companies as one can be relooked at later.

Public policy

21 If the US is the COMI of the Zetta Entities or if the Zetta Entities have an establishment in the US, then recognition would have to be granted to the Chapter 7 Trustee under Article 17 of the Singapore Model Law, unless the Court concludes it should not do so because recognition is contrary to public policy. As noted above, under the Model Law, the court can only deny recognition on this ground if recognition is "manifestly contrary" to public policy. Singapore's enactment of the Model Law omits the word "manifestly". This would seem to mean that recognition may be denied if recognition is merely contrary to public policy, without being manifestly so.

22 The reason for the omission of this term does not appear in the records of the Parliamentary debates or any preparatory materials, though it is stated generally in the explanatory statement to the Companies (Amendment) Bill 2017 (No 13 of 2017) that the Tenth Schedule contains the Model Law Articles, "with modifications to adapt them for application in Singapore", and also that the Tenth Schedule "is adapted with modifications" from Schedule 1 to the UK Cross-Border Insolvency Regulations 2006. There is apparently no other public statement on the omission of the term "manifestly" either. What can be surmised is that the omission is deliberate. If it was important enough for UNCITRAL to include the word "manifestly" in Article 6 to begin with, and for other jurisdictions, including the UK, to choose to enact the Model Law with it included, then its omission in Singapore had to be deliberate and conscious.

23 What flows from the omission being deliberate is that the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified. That is, in Singapore, recognition may be denied on public policy grounds though such recognition may not be manifestly contrary to public policy. Whether this will lead to a significant divergence from other jurisdictions remains to be seen. I have noted that the commentaries to Article 6 of the Model Law suggest that Article 6, as originally worded, would be taken to exclude purely domestic public policy concerns (see *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, UN Doc A/CN.9/442) If this were indeed so, then Singapore's version of Article 6 may not lead to the same conclusion.

24 I do note that there is commentary suggesting that a narrow reading of the public policy exception under Article 6 of the Singapore Model Law should be applied (see *Cross-Border Insolvency: A Commentary on the UNCITRAL*

Model Law vol 1 (Look Chan Ho gen ed) (Globe Law and Business, 4th Ed, 2017) at p 521).

25 I cannot on this occasion lay down specifically what would trigger the public policy bar in Singapore. But at the very least, I would interpret it as requiring denial of an application for recognition by foreign insolvency representatives appointed under proceedings enjoined by a Singapore court. Ignoring an injunction granted by a Singapore court undermines the administration of justice. Orders issued by a court are to be complied with. Those who do not comply are rightly subject to penalties. In particular, they cannot generally seek the assistance of the courts unless the non-compliance is rectified or purged. While the court's power to refuse recognition under Article 6 of the Singapore Model Law is discretionary, it would be rare for the court not to refuse recognition where there has been non-compliance with a Singapore court order.

26 But while I have examined this issue in the context of Article 6 of the Singapore Model Law, the same result would seem to follow even under Article 6 of the Model Law, which is in force in various countries including the US. In *re Gold and Honey Ltd* 410 BR 357 (2009), the US Bankruptcy Court of the Eastern District of New York denied recognition of an Israeli receiver appointed in the face of a Chapter 11 automatic stay in the US. As cited by Counsel for the Intervener, Bankruptcy Judge Alan Trust stated, at pp 371 - 372:

> A petition for recognition should be denied if recognition would be manifestly contrary to the public policy of the United States. 11 U.S.C § 1506. Recognition of the Israeli Receivership Proceeding as a foreign proceeding would be manifestly contrary to the public policy of the United States because such recognition would reward and legitimize [*sic*] [the] violation of both the automatic stay and this Court's Orders regarding the stay.

> While the legislative history of Section 1506 demonstrates that this exception should be applied narrowly, it should be invoked when fundamental policies of the United States are at risk.

11 US Code § 1506 contains the US implementation of Article 6 of the Model Law:

> Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

27 The Intervener also referred to cases on the recognition of foreign judgments; while these cases would perhaps be instructive if there were any doubt about the position, I do not think in the light of my conclusions here that I need to refer to them.

28 The fact that the Singapore injunction was obtained after the Chapter 11 proceedings were filed and any worldwide automatic moratorium in the US came into effect is irrelevant. The US moratorium does not bind the Singapore courts, any more than any Singapore moratorium or injunction would bind the US Courts either. The only thing that matters is that an order was made in Singapore, which was not complied with.

29 Recognising the Chapter 7 Trustee despite the breach by the pursuit of the US proceedings in the face of the Singapore injunction undermines the administration of justice in Singapore. That injunction remains in force, and prohibited the pursuit of the very proceedings that were the basis of the Trustee's appointment. It is furthermore an order made by a court of co-ordinate jurisdiction. There is nothing before me to show any error leading to the ordering of the Singapore injunction, but even if there were, the proper course would be to apply to set it aside or appeal. I cannot ignore or overlook the

Singapore injunction. But that would be the effect of granting general recognition of the Chapter 7 Trustee.

30 The Applicant argues, not strongly, that the Singapore injunction was not in fact breached as recognition is sought not of a Chapter 11 Trustee but one appointed under Chapter 7. That argument could not fly at all: the Singapore injunction prohibited proceedings from being pursued. It was not limited to Chapter 11 proceedings alone; it would have been surprising and odd if it had been. The Singapore injunction clearly prohibited further steps being taken in and relating to the bankruptcy filings relating to Zetta Jet Singapore and Zetta Jet USA in Case 2:17-bk-21387-BB, and Case 2:17-bk-21386-BB in the US Bankruptcy Court for the Central District of California – Los Angeles Division. That broad wording sufficiently covers the whole of the proceedings upon which recognition is founded. The conversion from Chapter 11 to Chapter 7 did not bring the proceedings in the US out of the ambit of the Singapore injunction.

31 However, my finding that the public policy exception bars recognition does not end the matter. As the Applicant has argued, if recognition is denied to the Chapter 7 Trustee, arguably no one else can come in to try to set the Singapore injunction aside. The companies are in liquidation in the US.

32 The Intervener argues that while the Zetta Entities are indeed in liquidation in the US, with the Chapter 7 Trustee stepping into their shoes in the US, the companies are still extant and live in Singapore. It is thus open, according to the Intervener, for the Chapter 7 Trustee to procure by the Zetta Entities themselves the institution of proceedings against the Singapore injunction. The Intervener points in support of his proposition to the inclusion of the companies in the title of this present application.

33 I do not accept that argument. As is argued by the Applicant, such an approach would open the door to covert actions by a foreign insolvency representative, purportedly acting through extant companies in Singapore, while in effect the companies would be in the process of being wound up abroad. Distinguishing between the status of companies in different jurisdictions is conceptually odd and to be avoided – such a company is not Schrodinger's Cat, suspended between life and death, whose fate depends on who is looking and when. As for the inclusion of the companies in the title of this application, this could not confer a legal right to pursue the setting aside. Indeed, properly speaking the title of this application should have referred to the Chapter 7 Trustee acting in such capacity on behalf of these companies, or some similar formula.

34 Justice and fairness entails that some opportunity be given to question the granting of the injunction. A sufficient balance needs to be struck between protecting the integrity of administration of justice in Singapore on the one hand, with fairness to the Trustee. This balance can be achieved by granting limited recognition to the Chapter 7 Trustee only for the purposes of applying to set aside or appeal the Singapore injunction, or matters directly related to such applications, such as extensions of time. A form of this was put forward by the Applicant and not strenuously objected to by the Intervener. Only if the Chapter 7 Trustee succeeds that far, should the question of general recognition be resurfaced. This approach is, I believe, consonant with the philosophy and objective of the statute and the Singapore Model Law, including the need to have regard to the international basis of the Model Law and the promotion of uniformity as required by Article 8. I read Article 6 of the Singapore Model Law as being broad enough to allow the Court the discretion exercised here. The limited nature of the recognition conferred may be characterised as either a form

of modification of recognition under Article 17.4 or, given that the Applicant has included something similar in its submissions, as a manner of relief under Article 21.1.

35 Of course this would mean that the Chapter 7 proceedings may be held up, and probably the Trustee will need to incur additional expense and time in his work, but that is unavoidable in the circumstances. Whether or not any application is made in respect of the Singapore injunction is a matter for the Trustee to weigh. To ensure however that any application in respect of the Singapore injunction is made by the Trustee as promptly as possible, I will give specific directions.

Order

36 In view of my conclusion that the Chapter 7 Trustee should be granted recognition to set aside or appeal the Singapore injunction, or make related applications, in the light of that limited recognition, it is appropriate to give parties the opportunity to revisit the question of COMI subsequently, as well as the other matters raised if they so wish. Thus, upon the conclusion of the proceedings in respect of the Singapore injunction, if the Trustee has succeeded that far, the Applicant may revisit the issue of wider recognition, on the basis of the US being the foreign main proceeding and perhaps convince the court that it would be appropriate to treat the Zetta Entities as one. But correspondingly, it would be open to the Intervener to revisit the arguments for not granting wider recognition as well. Both parties, in other words, may revisit the various issues as needed.

Other issues

37 Allegations were made by the Intervener that there has been breach of natural justice and abuse of process because of collateral purposes. I do not think either allegation needs to be addressed here in the light of my conclusion on public policy above. This again is without prejudice to the Intervener raising these issues should general recognition be sought eventually if the Chapter 7 Trustee is able to have the Singapore injunction set aside.

38 There were additionally written submissions on when COMI is to be ascertained. The matter is one of some nicety, and will be left for consideration if need be, to the application for full recognition, should there be one.

39 I had given permission to the Applicant to submit any further materials on the interpretation of Article 6 of the Singapore Model Law if any could be uncovered. However, the Applicant instead sent in further submissions which went beyond this. The only part of the further submissions that touched on the Article 6 issue was a reference to a Canadian case, *Hartford Computer Hardware, Inc. (Re)* 2012 ONSC 964, but that case does not assist in the present context. As the rest of the submissions went beyond the scope of the directions they were not considered: they touched on analogies with other statutes, the approach of the US courts to breaches of their injunctions, distinguishing *re Gold and Honey Ltd* 410 BR 357 (2009), arguments for the setting aside of the Singapore injunction, discussion of COMI and the question of prejudice to AAH. None of these to my mind would, in any event, have made a difference to my determination here.

40 I appreciate the work that was put in and the enthusiasm of counsel. But I would advise that counsel should seek permission from the Court for further

submissions after an oral hearing if judgment is reserved, or even as in this case, where further submissions were invited on a specific point, to go beyond the bounds of what was directed. This flows from fairness to the other side, and respect for the court process. Without the drawing of a line, matters will drag on interminably.

Costs

41 In the circumstances, especially as recognition is limited, I am not minded to make any order for costs in this application, save perhaps for anything flowing from the attempt to put in further submissions. I will give directions accordingly.

Aedit Abdullah
Judge

Tan Mei Yen and Ng Wei Long (Oon & Bazul LLP) for the Applicant;
N. Sreenivasan SC, Rajaram Muralli Raja, Jerrie Tan Qiu Lin and Kyle Gabriel Peters (Straits Law Practice LLC) for the Intervener.