Re TPC Korea Co Ltd
[2010] SGHC 11

Case Number : Originating Summons No 1373 of 2009
Decision Date : 12 January 2010
Tribunal/Court : High Court
Coram : Philip Pillai JC
Counsel Name(s) : Kevin Kwek and Corrine Taylor (Legal Solutions LLC) for the applicant.
Parties : Re TPC Korea Co Ltd

Companies – Section 210 (10) Companies Act Cap 50

Companies – Availability to unregistered company foreign scheme of arrangement

Admiralty and Shipping – Admiralty in rem *jurisdiction*

12 January 2010 Judgment reserved.

Philip Pillai JC:

The application

1 The application, as amended during the hearing, is for a Singapore court order founded on s 210(10) Companies Act (Cap 50, 2006 Rev Ed), and sought, *inter alia*, the following:

> The [Applicant] be at liberty to convene a meeting of its creditors in Singapore for the purpose of considering and if thought fit, approving, with or without modification, the rehabilitation plan to be proposed on or before March 2010 in Seoul, Korea between the Company and its creditors (the "Scheme of Arrangement").

and

> That pending approval by the Court of the said Scheme of Arrangement or until the rehabilitation proceeding in Korea is terminated (whichever is the later), all contingent or fresh suits, actions or proceedings against the Applicant or any arrest, attachment, sequestration, seizure, detention, enforcement or execution against any assets of the Applicant, including but not limited to any vessels in the Applicant's ownership and including any actions or proceedings (whether *in rem* or *in personam* or otherwise) be restrained as at the date of the Order to be made herein and forthwith, except by leave of the Court and subject to such terms as the Court imposes.

The applicant has no presence or assets in Singapore save interests in the vessels

2 The Applicant, TPC Korea Co., Ltd is a company incorporated in the Republic of Korea ("Korea"). The Applicant had filed an *ex parte* application because the Applicant is currently unaware of any creditors in Singapore. The Applicant has no presence in Singapore, has no representative office, and has no assets in Singapore. To the best of its knowledge, no suit has been filed against the Applicant.

3 The Applicant has interests in 5 vessels which come into the port of Singapore regularly. The vessels are: MV "TPC AUCKLAND", "MV WELLINGTON" and MV "TPC NAPIER", which were all demise chartered to the Applicant; MV "TPC ARIRANG", a leased vessel where the registered owner is KEB Capital Inc and operated and leased to the Applicant; and MV "TAURANGA", which is owned by the Applicant (the "Relevant Vessels").

The Korean rehabilitation process

4 The Applicant is concerned about the possibility that its vessels might be arrested in Singapore while in port, and how that possibility might jeopardise the rehabilitation process currently in progress in its country of incorporation, Korea. The Korean rehabilitation process is similar to a Chapter 11 process in the United States of America. The Applicant has received various court orders under the Korean Debtor Rehabilitation and Bankruptcy Act (Act No 7895, 2006), including a Preservation Order, a Stay Order and a Commencement Order. Counsel informed me that, under those orders, any new *in rem* proceeding against a ship which is founded upon a rehabilitation security right is prohibited and any existing proceeding and arrest is automatically stayed. The Korean rehabilitation process contemplates creditor meetings and approval from two-thirds of the unsecured creditors and three-quarters of the secured creditors and (only if the total assets of the company exceed its total liabilities) the majority of shareholders are required to approve the rehabilitation plan. The process is expected, if duly approved, to be completed by March or April 2010.

5 The application is for a s 210 (10) Companies Act pre-emptive restraining order in Singapore against any proceedings including the Relevant Vessels that might be initiated in Singapore, whether *in rem, in personam* or otherwise, except by leave of the Court. It is proposed that a copy of the Rehabilitation Plan will be sent to all Singapore creditors and a meeting will be convened in Singapore to approve or modify the Rehabilitation Plan proposed in Korea, *viz* the country of incorporation.

6 It is self-evident that a Singapore court order as applied for would be beneficial to or facilitate the rehabilitation process in the country of incorporation and would be something a Singapore court would, where it has jurisdiction, be minded to support in the interest of comity.

What is the scope of section 210(11) of the Companies Act?

7 The key question in this application is whether or not s 210(11) of the Companies Act confers jurisdiction on this court to issue a s 210(10) restraining order on a non-Singapore incorporated or registered company which has commenced a rehabilitation process in its country of incorporation, Korea. The Applicant does not have a place of business in Singapore, it does not carry on business in Singapore and it has no assets in Singapore save for interests in that the Relevant Vessels which regularly call at the port of Singapore. As a result of the Relevant Vessels being occasionally present in Singapore, they become susceptible to the admiralty jurisdiction of the Singapore courts.

8 The Companies Act applies primarily to companies incorporated in Singapore under it or its predecessor companies legislation. It also applies to foreign incorporated companies which are registered as such where they either carry on business or have assets in Singapore. Whether a provision applies only to Singapore incorporated companies or extends to foreign companies or other unregistered companies (as defined in the Act) depends on its interpretation. In the Companies Act the terms "companies", "corporations", "foreign companies" and "unregistered companies" are each defined generically or specifically under different Parts of the Act. The provision in issue, *viz* section 210(11), is contained in Part VII of the Act, which provides for schemes of arrangement, reconstructions and amalgamations governing the process under which a Singapore incorporated company may present schemes to shareholders or creditors for prescribed thresholds of approval.

Within this process, the Court is also empowered under s 210(10) to restrain proceedings against the company, when such a scheme has been proposed. Such restraint may include a pre-emptive moratorium on actions against the company.

9 A s 210(10) Companies Act restraining order is not just available to Singapore incorporated companies. Pursuant to s 210(11), the availability of Part VII of the Companies Act is extended to "any *corporation* or society *liable to be wound up* under this Act." [Emphasis added.] "Corporation" is defined in s 4 Companies Act to include a "foreign company" and a "foreign company" is also there defined, to mean a company, corporation or other body incorporated outside Singapore.

What is the proper construction of section 210(11) of the Companies Act?

10 Counsel for the Applicant submits that it may invoke s 210(11) Companies Act because s 350(1) defines a company for the purpose of unregistered companies to "include a foreign company". Section 4 Companies Act defines "foreign company" to, *inter alia*, mean a company, corporation, society, association or other body incorporated outside Singapore …" As the Applicant is a foreign company within this definition and accordingly an unregistered company as defined in s 350(1), it is, according to counsel, *ipso facto* a company liable to be wound up in Singapore.

11 There are two difficulties with respect to this submission. First, s 210(11) of the Companies Act does not refer *simpliciter* to "foreign companies" or "corporations" but rather explicitly refers to corporations which are *liable to be wound* up under the Companies Act. In addition to establishing that the Applicant is a foreign company, it is further necessary to establish that it is further *liable to be wound up* under the Companies Act. Second, the Applicant invokes s 350(1) Companies Act, which is merely a definition provision and not an operative provision. It defines unregistered companies for the purposes of Part X Division 5 of the Companies Act. By itself, s 350 does not determine when a foreign company would be liable to be wound up under the Companies Act. A company or corporation which is liable to be wound up in Singapore would ordinarily mean a company incorporated in Singapore or a corporation or unregistered company with assets or carrying on business in Singapore which may be established on the prescribed grounds under which it may be wound up. Section 351 Companies Act throws further light on what is intended to come within the framework of winding up of unregistered companies. First s 351(1)(a) and (c) contemplate that it has a principal place of business in Singapore. Second, s 351(3) contemplates that a company being wound up, dissolved or ceasing to exist as a company under the laws of the place under which it was incorporated does not preclude its being wound up in Singapore as an unregistered company.

12 There is established authority for the proposition that a court will favourably consider making a winding up order against a foreign company provided assets exist in Singapore or there is a sufficient nexus or connection with Singapore. The protection of local creditors is the primary foundation upon which this jurisdiction is exercised. For a Singapore court to have the jurisdiction to make a winding-up order in respect of a foreign company, it must be shown either that the foreign company has assets in Singapore or that it has a sufficient nexus or connection with Singapore: *Re Griffin Securities Corporation* [1999] 3 SLR(R) 346 and *Re Projector SA* [2008] 2 SLR(R) 151. Peter Gibson J further held in the case of *In re A Company* (No 00359 of 1987) [1988] Ch 210 at 225 –226 that "provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company." See also *In re Compania Merabello San Nicholas S. A*. [1973] Ch 75. These cases indicate that a court is inclined to exercise jurisdiction to wind up a foreign company, where there is some asset within the local jurisdiction, to enable an orderly liquidation, collection and distribution of such assets in favour of eligible creditors. Counsel conceded that he was unable to find any authority in which a court had ordered a winding up of a foreign company whose only asset or nexus within the

jurisdiction was that of vessels which ply its ports.

Is section 210(10) of the Companies Act restraining order otherwise available solely to displace Admiralty proceedings?

13 The question that is before me is not whether there are assets or a nexus in Singapore which would be to the benefit of local creditors as would be the operating regime in the case of foreign companies registered as such under the Companies Act. What is being sought is a pre-emptive restraining order against all creditors, whether or not in Singapore, from invoking the admiralty jurisdiction of the Singapore courts against the Applicant's vessels which may be in the port of Singapore from time to time.

What are the implications of conflating a foreign scheme into a section 210 of the Companies Act scheme?

14 The Applicant's counsel would, in my opinion, assuming he has satisfied the Court that the Applicant is a corporation liable to be wound up in Singapore, next be obliged to comply with the substantive requirements prescribed by s 210 Companies Act with respect for schemes of arrangement. Counsel has accordingly applied orally for leave to amend its originating summons in an effort to subsume the draft rehabilitation scheme within the rubric of s 210 Companies Act. In furtherance of the amended application, counsel cites *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180 where, in relation to the Malaysian equivalent of s 210(1) of our Companies Act, George J observed at p 182:

> In my view, what must be available to the court when considering a [s 210(1)] application must be a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further, the court has to be satisfied that there is or that there would be a *bona fide* [s 210(1)] application.

By the proposed amendments, counsel sought to bring the Korean Rehabilitation Plan into a Section 210 scheme and for it to be treated as a Singapore scheme. The effect would be to fold any potential Singapore creditors into the Korean rehabilitation process and for them to vote and be subsumed within the wider group of all unsecured and secured creditors of the Korean corporation and become bound by the rehabilitation plan approved by the prescribed majorities. This would be different from the statutory logic of enabling an orderly distribution of Singapore located assets in favour of eligible Singapore creditors regardless of events in the country of incorporation. A standard s 210(1) Companies Act process applicable for Singapore incorporated companies or such other companies as are contemplated by s 210(11) would be one under which the universe of eligible creditors would be confined only by the prescribed thresholds of eligible Singapore creditors.

15 There are considerable downstream substantive matters prescribed by s 210 Companies Act which do not sit easily with counsel's proposed approach. The authors of *Halsbury's Laws of Singapore* vol 6 (Lexis Nexis, 2006 Reissue) write (at para 70.475):

> In the interim, before the necessary resolutions are passed or before the court approves the scheme, an application may be made to court for an order that proceedings pending against the company may be stayed.
>
> A stay can only be granted in respect of an action or proceeding already commenced. An

application for such a stay should not be made ex parte but rather inter parties summons in the pending action [*Re Reid Murray Acceptance Ltd* [1964] VR 82 at 87-88 per Adam J]. This would be fairer to the persons affected by such a stay, since they would not have had an opportunity to be heard on an ex parte application. However, as a matter of practice, in some cases a stay is requested in the same originating summons as the application for the calling of meetings under section 210(1).

16 The inappropriateness of conflating the Korean process with a Singapore scheme in relation to a Korean corporation which has no assets or operations in Singapore save for its interests in vessels that ply the port of Singapore, becomes clearer from the downstream operation of the s 210(10) Companies Act regime. *Halsbury's Laws of Singapore* vol 6 (*ibid*) at para 70.477, citing *Re Dorman, Long & Co* [1934] Ch 635 at 655 – 656, explains that:

> The scheme will not bind the company and its members and creditors until the court approves it. The function of the court is twofold: firstly, it must ensure that the statutory procedure has been complied with and that the resolutions are passed by the requisite majority in value and in number at the meetings duly convened and held; secondly the court must determine the scheme is fair and reasonable.

By conflating the Korean process with a Singapore scheme, the immediately evident anomaly is that s 210 Companies Act prescribes a majority in number representing three fourths in value of the creditors or class of creditors voting in favour. The Korean process prescribes an altogether different threshold comprising two-thirds of the unsecured creditors and three-quarters of the secured creditors and (only if the total assets of the company exceed its total liabilities) the majority of shareholders. There is also the potential of a Singapore court coming to a conclusion about the fairness and reasonableness of the scheme, which is at variance with the conclusion reached by a court in the Applicant's country of incorporation, *viz* Korea.

17 Counsel conceded that a Singapore s 210 Companies Act scheme of arrangement will not be granted extraterritorial effect in any other country, save by applicable treaty or in accordance with applicable law which enables this. A Singapore incorporated company which has properly in place an effective scheme of arrangement and restraining order will nevertheless remain susceptible to any foreign assets or interests in assets being subject to a foreign court winding up order or indeed legal attachment commenced under applicable foreign law.

18 The Applicant is not only requesting that a Singapore court issue a pre-emptive moratorium of the nature sought with respect to a company not incorporated or registered in Singapore, and which has no assets in Singapore other than the interests in the Relevant Vessels that might occasionally be present in Singapore. It is also additionally seeking to displace the admiralty jurisdiction conferred on the court by the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) and proceedings thereunder.

19 As the Applicant has no assets whatsoever in Singapore, other than interests in the vessels that may ply the Singapore port in future, I am unable to grant the application, given the absence of clear statutory jurisdiction to do so, the forced construction proposed and its far reaching implications. The absence of any treaty or applicable Singapore legislation which confers such jurisdiction and the fact that there is a self-contained admiralty regime to address such proceedings should they arise reinforce this conclusion.

20 The application is denied.