Chew Eu Hock Construction Co Pte Ltd (under judicial management) v Central Provident Fund Board
[2003] SGHC 199

Case Number : OS 495/2003

Decision Date : 08 September 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Patrick Ang and Lynette Lee (Rajah & Tann) for the Judicial Manager; Lim Fung Peen (John Tan & Chan) for The Central Provident Fund Board

Parties : Chew Eu Hock Construction Co Pte Ltd (under judicial management) — Central Provident Fund Board

Companies – Schemes of arrangement – Appropriate time to object to scheme of arrangement – Whether objections need to be raised before the court sanctions scheme of arrangement

Companies – Schemes of arrangement – Scheme providing that all claims of unsecured creditors be settled by conversion into shares of public listed company – Central Provident Fund Board rejecting scheme of arrangement after scheme becoming effective – Whether Central Provident Fund Board enjoys, at law, priority over the other unsecured creditors visa-a-vis approved scheme of arrangement

The facts

1 Tay Swee Sze was appointed the interim Judicial Manager and then the Judicial Manager (JM) on the 7 November and 23 November 2001 respectively, in Originating Petition No. 600027 of 2001 (the OP) which petition was presented by Chew Eu Hock Construction Co Private Limited (the Company). The appointment of the JM in the OP was for the following purposes:

(i) the approval under s 210 of the Companies Act (Cap 50) of a compromise or arrangement between the Company and any such person as mentioned in that section and**;**

(ii) the survival of the Company, or the whole or part of its undertaking as a going concern.

The purpose in (i) was to take place in tandem with the capital and debt restructuring exercise of the Company's parent company Chew Eu Hock Holdings Ltd (CEH), which involved a reverse takeover of CEH by another group of companies.

2 The Company which is in the construction and civil engineering business, had incurred net losses for the financial years ending 31 July 2000 and 31 July 2001, in the sums of $7.5m and $26.2m respectively. A further loss of $54.1m was incurred for the 8 months between August 2001 and 31 March 2002. These losses resulted in the Company's net tangible assets being reduced to a negative figure prompting the OP to be filed by the Company.

3 The Company is a wholly-owned subsidiary of CEH which is a public company quoted on the Stock Exchange of Singapore (SGX). CEH had, on 10 April 2002 obtained the court's sanction for its capital reduction exercise whereby the par value of its ordinary shares was reduced from $0.20 to $0.005; the capital reduction was deemed to have taken effect on 19 April 2002.

4 As part of its own debt restructuring plan, CEH entered into an agreement with Hiap Hoe Holdings Pte Ltd (Hiap Hoe) on 30 January 2002. Under the terms thereof, Hiap Hoe granted to CEH a

call option, requiring Hiap Hoe to sell the entire issued share capital in the Hiap Hoe group of companies to CEH in consideration for which acquisition, Hiap Hoe would be issued new shares in the capital of CEH. The Hiap Hoe group of companies comes under Hiap Hoe Limited, also listed on the SGX and which business activities are similar to CEH's, namely piling and civil engineering. The acquisition would result in Hiap Hoe Limited becoming a major shareholder of CEH.

5 Part of the scheme of arrangement proposed under s 210 of the Act for the Company was for CEH to assume liability for the claims of the unsecured creditors of the Company, to the extent and for the amount admitted by the JM. The JM was also the manager of the scheme. CEH undertook to settle the unsecured claims by converting the same into shares of par value $0.005 each in CEH. Such allotment and issuance of shares would constitute a full and final settlement of all liabilities owed by the Company to its unsecured creditors.

6 By an Order of Court obtained on 19 June 2002 in Originating Summons No. 738 of 2002, the Court directed the Company to convene a meeting of its unsecured creditors for the purpose of approving the scheme. The meeting was held on 29 November 2002 at which the JM presented the scheme for approval as well as a Statement of Proposals pursuant to s 227M of the Companies Act. More than 96% in value of the creditors present and voting approved the scheme as well as the Statement of Proposals.

7 On 2 December 2002, CEH held an extraordinary general meeting to obtain its shareholders' approval to the allotment of shares to the Company's unsecured creditors; approval was given. CEH applied for and obtained, the sanction of the court to the scheme of arrangement on 11 December 2002; the Order of Court was lodged with the Registrar of Companies on 16 December 2002. The scheme of arrangement thereby became effective. On 16 January 2003, CEH alloted and issued shares to the unsecured creditors of the Company pursuant to the scheme.

The dispute

8 The only outstanding claim against the Company was that of the Central Provident Fund (CPF) Board (the defendants) which caused a dispute to arise between the JM and the defendants culminating in these proceedings. The defendants' solicitors had written to the JM on 31 December 2002, rejecting the shares issued by CEH to settle the Company's liability for arrears of CPF contributions (outstanding since April 1998) of $322,866/- ($232,148/- plus interest of $90,702/-) as at 23 November 2001 (when the JM was appointed). The defendants took the stand that they could only accept cash not shares, to discharge the Company's outstanding liability for CPF contributions, citing regulation 4 of the CPF Regulations.

The application

9 The JM did not accept the defendants' stand. Consequently, on 3 April 2003, he commenced this Originating Summons (OS) on behalf of the Company and prayed inter alia for the following reliefs:

(i) for an order that the defendants be bound by the terms of the scheme of arrangement effected on 16 December 2002 between the plaintiff, unsecured creditors of the Company and CEH;

(ii) for an order that the allotment and issuance of shares in CEH to the defendants in accordance with the terms of the scheme of arrangement constitutes a full and final discharge of the liabilities owed by the plaintiff to the defendants, and

(iii) costs.

10 The OS came up before me on 12 May and after hearing counsel for the parties, I granted an order in terms of the above prayers and made the following additional order:

> the shares issued to the defendants shall be deposited with the Central Depository (Pte) Ltd (CDP) by the plaintiffs who shall upon depositing the shares notify the defendants, and the defendants shall within seven (7) days of such notification advise the JM as to whether the shares shall continue to be held by the JM as trustee for the defendants, or are to be sold, failing which the JM shall be at liberty to sell the shares so held and pay the nett sale proceeds (less sales commission and other charges) to the defendants.

11 In support of the OS, the JM filed an affidavit stating largely what I have set out in paras 1 to 7 above. He pointed out that notices were placed on the 4 and 6 February 2002 in the Straits Times and Lianhe Zaobao newspapers respectively, advising creditors to prove their debts and claims against the Company on or before 18 July 2002. Pursuant to the notices, the JM received a proof of debt from the defendants in the amount of $322,866 for arrears of CPF contributions due to certain employees of the Company.

12 The JM deposed he placed another notice in both newspapers on 15 November 2002 giving creditors notice that a meeting would take place on 29 November 2002. On the same day, the JM posted separately notices of the meeting to all creditors including the defendants, enclosing therewith copies of the scheme of arrangement, Statement of Proposals, proxy forms and explanatory statement. The defendants did not attend the meeting of creditors held on 29 November 2002.

13 On 3 December 2002 the JM wrote to all creditors informing them that the scheme and the Statement of Proposals he proposed had been approved by an overwhelming majority. By a letter dated 17 December 2002, the defendants informed the JM that they were unable to accept shares in CEH as payment of the arrears of CPF contributions owed by the Company. Th defendants followed up with a demand on 6 January 2003 to the Company, for CPF contributions totalling $232,148/- and late interest payment of another $90,718/-.

14 Further exchange of correspondence did not resolve the impasse between the parties as each side would not compromise on the stand it took; hence this OS.

15 A senior executive of the defendants Ng Beng Huat (Ng) filed an affidavit where he *inter alia* deposed:

(i) that the defendants did not attend the creditors' meeting held on 29 November 2002 as in the past, judicial managers of other companies under judicial management had always treated the defendants as preferential creditors, they being a statutory board tasked to collect and manage a fund for the benefit of all its members;

(ii) judicial managers have always paid the defendants cash;

(iii) the defendants' solicitors had written to the JM on 31 December 2002 to reject the latter's payment of the Company's CPF contributions by way of shares pointing out that the defendants did not have a CDP account or any means by which to hold shares:

(iv) in a subsequent letter dated 20 January 2003 from their to the JM's, solicitors, the defendants had reiterated that they are not unsecured creditors and CPF contributions cannot be

left to the vagaries of how unsecured creditors chose to vote to determine whether such contributions are paid;

(v) the JM's stand that the defendants have no priority as a creditor in judicial management proceedings goes against legislative intent.

16 In support of the defendants' stand, Ng cited ss 7 and 12(1) of the Central Provident Fund Act Cap 36 (the CPF Act) as well as Regulations 4 and 15(4)(d) made thereunder and case-law, which I shall refer to later.

17 Ng also relied on s 68 of the CPF Act for his contention that even in executions proceedings (by way of writs of seizure and sale, mortgagee sales and garnishee proceedings), an employee who is owed CPF contributions would have priority of payment from the execution proceeds ahead of the execution creditors. He (see para 11 of his affidavit) accepted that s 68 is not incorporated into the provisions governing judicial management under the Companies Act. However, he contended that *judicial managers have always exercised their wide powers in a way that CPF Board is given preference, and not treated on par with ordinary creditors.*

18 In his affidavit, Ng deposed that the JM's approach was flawed from the very start by failing to recognise the defendants' priority and, to provide a special category for them or to treat them as preferred creditors. The scheme of arrangement for the Company should have been drafted to give recognition to the defendants' priority status. He said the defendants were therefore justified in not attending the creditors' meeting and objecting to the scheme as, their presence would not have made any difference. Ng's views were misconceived for reasons which I shall set out later.

The decision

19 I accepted the submissions of the Company that claims for CPF contributions/arrears do not enjoy priority in judicial management proceedings and accordingly granted the orders sought by the JM.

20 It would be useful at this stage to refer to the relevant provisions of the Companies Act in this regard; s 210 states:

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

(2) …….

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement, the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

while s 227(X) states:

> At any time when a judicial management order is in force in relation to a company under judicial management —
>
> (a) section 210 shall apply as if for subsection (1) and (3) thereof there were substituted the following:
>
> '(1) Where a compromise or arrangement is proposed between a company and its creditors the Court may on the application of the judicial manager order a meeting of creditors to be summoned in such manner as the Court directs.
>
> (3) If three-fourths in value of the creditors present and voting either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement, if approved by the Court, is binding on all the creditors and on the judicial manager'; and
>
> (b) sections 337, 340, 341 and 342 shall apply as if the company under judicial management were a company being wound up and the judicial manager were the liquidator, but this shall be without prejudice to the power of the Court to order that any other section in Part X shall apply to a company under judicial management as if it applied in a winding up by the Court and any reference to the liquidator shall be taken as a reference to the judicial manager and any reference to a contributory as a reference to a member of the company.

[Part X of the Companies Act relate to the winding up provisions].

21 The defendants had relied on s 12(1) of the CPF Act; it states:

> All sums recovered or collected on account of contributions to the Fund under this Act shall be paid into or carried to the Fund in such manner as may be prescribed

while Regulation 4 made under the CPF Act states:

> All contributions to the Fund and all fees and charges payable to the Board may be paid
>
> (a) in cash at the Board's office or at any post office in Singapore duly authorised to receive money on behalf of the Board;
>
> (b) by money order, postal order or cheque drawn on any bank in Singapore delivered or sent by post to the Board's office;
>
> (c) by any electronic means as the Board may permit from time to time, subject to such terms and conditions as the Board may impose in connection with the use of such means; or
>
> (d) in such other manner as the Board may from time to time authorise in any particular case or class of cases.

22 Counsel for the JM did not dispute the propositions of law in the two (2) authorities cited by the defendants, to which I now turn. The first case *PN Electronic Pte Ltd v PP* [1984-85] SLR 529 spelt out that the objectives behind the CPF Act were to provide a scheme for compulsory contributions to ensure every employee would, upon retirement have a nest egg to live on. *Soon Aik*

Marine & Engineering Pte Ltd [1987] SLR 247 stood for the proposition that every employer is required at law to pay CPF contributions, the defendants are expressly appointed the trustees of the fund, contributions made to the fund belong to a member absolutely and the defendants may sue and recover sums due to the fund as if they were debts due to the government.

23 With respect, the above cases and the legislation relied on by the defendants are not relevant to the OS and do not advance their case. It is also not a relevant consideration that two (2) directors of the Company have been issued summonses for the Company's failure to pay CPF contributions to employees nor is the outcome of those prosecutions material. What is in issue is not whether the defendants occupy a special position at law (they do) or whether the Company's statutory liability to its employers for CPF contributions can be disputed (it cannot) nor whether cash appears to be the authorised mode of payment for CPF contributions (it is) but, whether the defendants at law enjoy priority over other unsecured creditors vis a vis the approved scheme of arrangement of the Company.

24 There is currently no legislation that accords CPF contributions priority in payment, where a corporate employer is placed under judicial management and schemes of arrangements/compromises of the company's unsecured claims have been approved by its creditors and sanctioned by the court. Consequently, the stand adopted in Ng's affidavit by the defendants, that the JM owed a duty to the defendants to ensure CPF claims have priority of payment is unfounded and unreasonable.

25 The legislation relevant to this OS is to be found in the Companies Act, in particular ss 210 and 227(X) which provisions have already been set out above. Section 328 of the same Act was also referred to by the defendants for their proposition that the JM should have regard to their special position under the law. That section however, sets out the priority in payment by liquidators in winding-up cases, starting with costs of the petitioning creditor and ending with GST (goods and services tax); CPF contributions rank fifth under subsection (e) thereof. The priorities under s 328 are not incorporated into s 227(X)(b). Ng however argued (in his para 26) that even if the JM was not obliged to, he should have at least drawn the Court's attention to the outstanding CPF contributions presumably so that the court can exercise its discretion under s 227(X)(b) to accord priority to the claim.

26 A consideration which I took into account was the defendants' failure to attend the creditors' meeting and voice the objections which they now sought to raise in Ng's affidavit. As was rightly pointed out by counsel for the JM, the defendants raised their objections far too late (on 17 December 2002), well after the order sanctioning the scheme had been obtained and lodged with the Registry of Companies pursuant to s 210(5) of the Companies Act. To accept the defendants' objections at such a late stage would be unfair, unreasonable and prejudicial to the JM, the new investor (Hiap Hoe) of the Company and to other creditors alike. The defendants' explanation for their failure to attend the creditors' meeting was unacceptable, more so as they expected the Court to exercise its powers under s 227(X)(b) of the Companies Act in their favour. It was for the defendants not the JM, to ask the court on 11 December 2002, to give special consideration to the claim for CPF contributions.

27 Counsel for the JM had relied on *Re UDL Holdings Ltd* [2002] 1 HKC 172 for his argument that the defendants should have raised their objections when the JM applied to court for sanction of the scheme of arrangement. There, the Hong Kong Court of Final Appeal dealt with s 166 of the Companies Ordinance which provisions are *in pari materia* with our s 210 (1) and (3). In that case, a similar objection was raised by former employees of 7 subsidiaries to schemes of arrangement approved by creditors of the parent and subsidiary companies. The court inter alia held (at pp 184) that it is the responsibility of the company putting forward the scheme to decide whether to summon

a single meeting or more than one meeting. If the meeting or meetings are improperly constituted, objection should be taken on the application for sanction and the court bears the risk that the application will be dismissed.

28 Much the same was said in the local decision (unreported) in OS 1017 of 2000 of *Eltraco International Pte Ltd v Sennet Electrical Engineering Pte Ltd & 7 others* — objections to the scheme must be made before it is approved and sanctioned by the court; I see no reason to depart from the rule.

29 In the Australian decision of *Chief Commissioner of Pay-Roll Tax v Group Four Industries Pty Ltd* 8 ACLR 973 the plaintiff sought a declaration he was not bound by the scheme of arrangement reached between the defendant company with certain of its creditors (and approved by the court under s 315(4)(b) of the Companies (NSW) Code), by virtue of his having statutory priority in a liquidation. McLelland J refused the application and held that the Commissioner was bound (at p 976) as

> otherwise, despite approval by the court there could never be any certainty that a compromise or arrangement was legally operative, and it might remain open to collateral challenge indefinitely on grounds not susceptible to ready discovery or investigation. ……..

Consequently, McLelland J held that once the court made an order under s 315(4)(b) approving a compromise or arrangement and an office copy had been lodged with the Commission pursuant to s 315(12), the compromise or arrangement was binding, notwithstanding any defect or irregularity that may have occurred in the steps leading up to the making of the order. The judge further endorsed the comments of Hart J in *Frick Australia v Pen Pak Ocean Products* [1971] Qd R 286 that

> the public would never be safe in treating a scheme as valid and great inconvenience would result to companies, to creditors, to shareholders and to the community

if a Court accepts the contention of a party that he is not bound by a scheme of arrangement approved by the Court, on the ground that there had been no separate meeting of a distinct class of creditors to which he claimed to belong. Another Australian case in the same vein cited by counsel is *Ray Brooks Pty Ltd v New South Wales Grains Board* 41 ACSR 631.

30 The defendants had conceded that s 328 of the Companies Act does not apply to judicial management situations. If indeed other judicial managers in the past have accorded priority of payment to CPF contributions, that was an indulgence shown to and not a statutory right of, the defendants. It does not follow that the JM was obliged to do so here. If it was the legislative intent that the provisions under s 328 of the Companies Act should equally apply to judicial management proceedings, then Parliament would need to amend the Companies Act to address the present lacuna.

31 One other (late) objection raised by the defendants to the Company's scheme of arrangement was that the CPF Act disallowed payment of CPF contributions other than in the form of cash, relying on s 12(1) of the CPF Act and Regulation 4 made thereunder (para 21 *supra*). Counsel for the JM countered that even if the provisions of s 328 of the Companies Act applied to judicial management, it would not necessarily result in the defendants receiving cash for the outstanding CPF contributions. He said it was precisely because the Company was cash-strapped that the scheme of arrangement called for the issuance of shares in CEH to the Company's unsecured creditors.

32 I note that the words in Regulation 4 are *'all contributions to the Fund …may be paid in cash'* not *'must be'*. The defendants were being unnecessarily inflexible. The acceptance of CEH shares in

lieu of cash contributions was a temporary measure as the shares could be sold and converted into cash for payment to the defendants. Consequently, I ordered the JM to establish a CDP account for and on behalf of the defendants and, when no sale instructions were forthcoming from the defendants pursuant to my direction, I made a further order on 23 May 2003 for the shares to be sold and the nett sale proceeds thereof paid to the defendants. Finally, I granted an order discharging the JM since, once he complied with my directions, he had discharged/completed all the duties for which he was appointed.