Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) *v* Larsen Oil and Gas Pte Ltd
[2010] SGHC 186

Case Number	: Suit No 866 of 2009 (Summons No 6203 of 2009)
Decision Date	: 30 June 2010
Tribunal/Court	: High Court
Coram	: Tan Lee Meng J
Counsel Name(s)	: David Chan and Carol Teh (Shook Lin & Bok LLP) for the plaintiff; Leonard Chia and Eric Chew (Asia Ascent Law Corporation) for the defendant.
Parties	: Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) — Larsen Oil and Gas Pte Ltd

Arbitration

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 122 of 2010 was dismissed by the Court of Appeal on 28 September 2010. See [2011] SGCA 21.]

30 June 2010 Judgment reserved.

Tan Lee Meng J:

Introduction

1 The defendant, Larsen Oil and Gas Pte Ltd ("Larsen"), sought to stay an action ("the main action") instituted against it by the plaintiff, Petroprod Ltd ("Petroprod") for the purpose of avoiding a number of transactions that allegedly violate insolvency laws. Larsen contended that its dispute with Petroprod in the main action should be referred to arbitration in accordance with the terms of its contract with the latter. According to counsel, this is the first time in this jurisdiction that a stay of proceedings in favour of arbitration is being sought in relation to the type of claims in the main action.

Background

2 Petroprod, a Cayman Islands company, has a number of wholly-owned subsidiaries ("the four subsidiaries") that are relevant to the present proceedings. These are Petroprod 1 Ltd ("PP1"), Petroprod 2 Ltd ("PP2"), Petroprod 3 Ltd ("PP3"), and Petroprod D&P 1 Ltd ("DPL"). Petroprod pleaded in its Statement of Claim in the main action that it is a creditor of all the four subsidiaries at the material time.

3 PP1, PP2 and PP3 are "one-ship" corporations. Their business is to effect the conversion of their vessels into floating production and storage units. The conversion was performed at Jurong Shipyard. DPLwas engaged in constructing a jack-up rig, also at Jurong Shipyard. This project has since been terminated.

4 On 21 December 2006, Petroprod, which had no employees of its own, entered into a Management Agreement with Larsen, under which the latter agreed to provide management services to the former. Petroprod pleaded that, as a result of the Management Agreement and subsequent amendments, Larsen had control over the finances as well as the finances of the four subsidiaries.

5 On 17 July 2009, Petroprod was placed in official liquidation in the Cayman Islands by an Order of the Grand Court of the Cayman Islands. On 3 August 2009, it was placed in compulsory liquidation in Singapore by an order of the High Court. According to Petroprod, although the four subsidiaries were not placed in liquidation, they were technically insolvent as from 31 December 2008.

6 In the main action, Petroprod sought the following:

(i) the avoidance of a number of payments that it made to Larsen on the ground that these payments amounted to unfair preferences or transactions at an undervalue within the meaning of ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed), read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed); and

(ii) the avoidance of a number of payments made by the subsidiaries to Larsen pursuant to s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA") on the ground that they were made with the intent to defraud it as a creditor of the subsidiaries.

Whether the main action should be stayed

7 Clause 18 of the Management Agreement, which requires the parties to resolve their disputes through arbitration, provides as follows:

> GOVERNING LAW AND ARBITRATION
>
> This Agreement shall be construed and enforced in accordance with and governed by the laws of Singapore. Disputes which cannot be resolved amicably shall be resolved by arbitration in Singapore in accordance with the provisions of the Singapore Arbitration Act. Chapter 10.

8 Although Larsen's application for a stay was made pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), its counsel, Mr Eric Chew, clarified at the hearing that his client was in fact relying on s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed).

9 Section 6(1) and (2) of the Arbitration Act provides as follows:

> **Stay of legal proceedings**
>
> 6. — (1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —
>
> (a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
>
> (b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

10 Petroprod submitted that the question of staying the main action in favour of arbitration did not arise because the issues that required determination are not arbitrable in the sense that they relate to a type of dispute that can only be resolved by the courts. As for what type of disputes are not suitable for arbitration, it is explained in Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 5th ed (Oxford: Oxford University Press, 2009), at pp 123–125, as follows:

> Arbitrability, in the sense in which it is used both in this book and generally, involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts…
>
> In principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court…
>
> *However, it is precisely because arbitration is a private proceeding with public consequences that some types of dispute are reserved for national courts, whose proceedings are generally in the public domain*. It is in this sense that they are not 'capable of settlement by arbitration'.
>
> *National laws establish the domain of arbitration, as opposed to that of the local courts*. Each State decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy….
>
> [Original emphases removed; emphasis added]

11 As for the arbitrability of insolvency disputes, the learned authors added at para 2.128 as follows:

> *Issues of arbitrability arise in respect of insolvency law due to the conflict between the private nature of arbitration and the public policy driven collective procedures provided for under national insolvency laws*. Courts and tribunals in various countries have sought to identify where the boundary of arbitrability should lie, and which insolvency issues are only suitable for resolution by a court. In this regard a distinction can be made between 'core' or 'pure' insolvency issues which are inherently non-arbitrable (for example, matters relating to the adjudication of the insolvency itself or the verification of creditors' claims), and the remaining circumstances of other cases involving the insolvency of one of the parties to a commercial arbitration agreement. *The precise location of this dividing line varies between countries, and will depend in part on national insolvency laws*.
>
> [Emphasis added]

12 In the IAA, the concept of arbitrability is recognised in s 11(1), which provides that any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so. In contrast, there is no explicit reference to the concept of arbitrability in the Arbitration Act. Even so, this concept ought to be taken into account when a court is asked to exercise its discretion to grant a stay under s 6(2) of the Arbitration Act. With this in mind, the specific nature of Petroprod's claims in the main action will now be considered.

Claim under the Bankruptcy Act and Companies Act

13 As has been mentioned, Petroprod's claims relate to ss 98 and 99 of the Bankruptcy Act read with s 329(1) of the Companies Act, as well as s 73B of the CLPA. The position under the Bankruptcy Act and the Companies Act will be considered first.

14 It is convenient at this juncture to set out the relevant statutory provisions. Sections 98 and 99 of the Bankruptcy Act provide as follows:

> **Transactions at an undervalue**
>
> 98.—(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.
>
> **Unfair preferences**
>
> 99.—(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.

Section 329(1) and (2) of the Companies Act provides as follows:

> **Undue preference**
>
> 329.—(1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act (Cap. 20) (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.
>
> (2) For the purposes of this section, the date which corresponds with the date of making of the application for a bankruptcy order in the case of an individual shall be —
>
> (a) in the case of a winding up by the Court —
>
> (i) the date of the making of the winding up application; or
>
> (ii) where before the making of the winding up application a resolution has been passed by the company for voluntary winding up, the date upon which the resolution to wind up the company voluntarily is passed,
>
> whichever is the earlier; and
>
> (b) in the case of a voluntary winding up, the date upon which the winding up is deemed by this Act to have commenced.

15 The policy underlying avoidance provisions such as those referred to above was explained by Professor Roy Goode in his monograph, *Principles of Corporate Insolvency Law*, 3rd ed (London: Sweet

& Maxwell, 2005) at pp 410–411 as follows:

> [T]he principle of equity among creditors that underlie the *pari passu* rule of insolvency law will in certain conditions require *the adjustment of concluded transactions which but for the winding-up of the company would have remained binding on the company*, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect.
>
> …
>
> The conditions of avoidance varying according to the particular ground of avoidance involved but are for the most part dictated by a common policy, namely *to protect the general body of creditors against a diminution of the assets available to them by a transaction which confers an unfair or improper advantage on the other party*. All but two of the grounds of avoidance known to insolvency law [which are irrelevant for present purposes] involve the unjust enrichment of a particular party at the expense of other creditors, whether they are preferential creditors or ordinary secured creditors. Once this crucial point is grasped much of the legislative structure falls into place.
>
> [Emphasis added]

16 In short, the rights created by the avoidance provisions exist for the benefit of the general body of creditors in an insolvency or insolvency-related context. This is why avoidance rights may be exercised even if the relevant transaction is binding under general law on the company. It is also pertinent to note that undervalue transactions and undue preferences can be avoided only when the company is being wound up. In my view, the policy underlying the avoidance provisions in question would be compromised if their enforcement is subject to private arrangements, including an agreement to arbitrate, between the company and the wrongfully advantaged creditor or transferee. In this regard, a company's rights under the avoidance provisions should be contrasted with its rights under the general law.

17 In this regard, the decision of the New South Wales Supreme Court in *New Cap Reinsurance Corporation Limited v A E Grant & Ors, Lloyd's Syndicate No 991* [2009] NSWSC 662 ("*New Cap Reinsurance*") is instructive. In that case, Barrett J, who took the view that avoidance claims under s 588FF(1) of the Australian Corporations Act 2001 did not fall within the arbitration clause in that case, explained at [87] and [88] as follows:

> 87 [E]ven on the most generous interpretation of the words "[a]ll matters in difference between the parties arising under, out of or in connection with [the reinsurance contract in which the arbitration agreement was contained]", they do not extend to the present proceeding under s 588FF(1) of the Corporations Act in which the liquidator of one party to the reinsurance contract seeks an order for the payment of money to that contracting party by the other contracting party. This proceeding has nothing to do with the reinsurance contract. It is a proceeding upon a statutory cause of action maintainable by the liquidator of one of the former contracting parties. *The cause of action is not available to the contracting party itself. Its `liquidator, when suing upon the statutory cause of action, does not attempt to enforce some right of the contracting party…*
>
> 88 In summary, the "matters in difference" in these present proceedings are matters between [the insolvent company's] liquidator and the defendants. They are matters arising from events that happened after the agreed termination of the reinsurance contract and, following the commencement of [the insolvent company's] winding up, caused a statutory cause of action to

become vested in the liquidator. T*here was no cause of action and no claim upon the defendants until the winding up of [the insolvent company] intervened*. The arbitration provision in the reinsurance contract - which ceased to be in force between [the insolvent company] and the defendants when, in December 1998, they became parties to the commutation agreement – *has no bearing on the statutory right that the subsequently appointed liquidator of [the insolvent company] subsequently acquired to seek orders against the defendants under s 588FF(1)*.

[Emphasis added]

18 While Barrett J did not clearly distinguish between the interpretation of the arbitration clause and the arbitrability of the dispute, it is quite obvious that his conclusion was influenced by the nature of the Australian avoidance provisions.

19 Larsen did not challenge the correctness of *New Cap Reinsurance*, but it argued that it was premised on a regime where a liquidator was treated distinctly from the company in liquidation. Such a formal distinction cannot be sustained. Whether the avoidance claims are brought in the name of the company in liquidation or the liquidator does not detract from their nature and underlying purpose, which is decisive of the issue of arbitrability.

20 Larsen also asserted that there is a legislative policy in favour of arbitrating claims in bankruptcy. He referred to the following part of s 148A of the Bankruptcy Act:

Arbitration agreements to which bankrupt is a party

148A. — (1) This section shall apply where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy.

…

(3) If the Official Assignee does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings —

(a) the Official Assignee; or

(b) any other party to the agreement,

may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement.

21 Section 148A does not support Larsen's case. Apart from the fact that it only applies to a matter to which the arbitration agreement applies, the court has a discretion in deciding whether or not to refer the matter to arbitration. In my view, s 148A leaves room for the applicability of the concept of arbitrability.

22 For the reasons stated, I hold that the avoidance claims in relation to the payments made by Petroprod to Larsen are not arbitrable.

Claim under s 73B(1) of the CLPA

23 I now turn to Petroprod's claim under the CLPA with respect to the payments made by its subsidiaries to Larsen. Section 73B(1) of the said Act provides as follows:

Voluntary conveyances to defraud creditors voidable

73B.—(1) Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

24 The policy considerations which were mentioned with regard to the avoidance provisions in the Companies Act and the Bankruptcy Act apply with equal force here. Admittedly, it is arguable that the dispute between Petroprod and Larsen regarding the payments by the former's subsidiaries to the latter should be resolved through arbitration since Petroprod, the allegedly prejudiced creditor, had agreed with Larsen to have its differences with the latter resolved by means of arbitration. However, there is likely to be a substantial overlap of factual issues when considering the claims in relation to the payments made by Petroprod's subsidiaries to Larsen and the claims in relation to Petroprod's own payments to Larsen. In the interest of a swift, economical and internally consistent settlement of all the disputes in question, it would be preferable if all the claims made by Petroprod are considered in the same forum: see *Taunton-Collins v Cromie* [1964] 1 WLR 633. As some of these claims are non-arbitrable in nature, that forum is undoubtedly the High Court.

Conclusion

25 For the reasons stated, Larsen's application for a stay of the main action in favour of arbitration is dismissed.

26 Petroprod is entitled to costs.