United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd
[2005] SGHC 50

Case Number : CWU 163/2004, SIC 444/2005

Decision Date : 10 March 2005

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong JC

Counsel Name(s) : Chan Kia Pheng and Ang Keng Ling (Khattar Wong and Partners) for the petitioner; P Padman and Niko Issac (Tito Issac and Co) for the respondent; Ronald Choo and Corrinne Chia (Rajah and Tann) for the supporting creditor, Samwoh Resources Pte Ltd; Sunari bin Kateni (Insolvency and Public Trustee's Office) for the Official Receiver

Parties : United Overseas Bank Ltd — Ng Huat Foundations Pte Ltd

Companies – Winding up – Respondent company applying for stay of winding-up proceedings pending outcome of appeal against rejection of application for scheme of arrangement – Whether appeal being used as excuse by respondent to delay its winding up – Whether stay of winding-up proceedings should be granted – Factors to be considered

10 March 2005

Andrew Phang Boon Leong JC:

Introduction

1 The issues in the present case stemmed from two closely-related applications: one party ("the petitioner") was petitioning for the winding up of the company ("the respondent"), whilst the respondent was applying for a stay of the winding-up proceedings.

2 It was clear that there was a *prima facie* case for winding up the said company pursuant to s 254(1)(e) read with s 254(2)(a) of the Companies Act (Cap 50, 1994 Rev Ed).

3 What was really at the heart of the present case was whether the present winding up proceedings ought nevertheless to be stayed in the light of the fact that the respondent was appealing against a decision by Lai Kew Chai J (in Originating Summons No 1611 of 2004) on 19 January 2005, rejecting its application for a scheme of arrangement with creditors under s 210 of the Companies Act.

Procedural and substantive justice

4 It is axiomatic that every party ought to have its day in court. This is the very embodiment of *procedural* justice. The appellation "procedural" is important. Procedural justice is just one aspect of the holistic ideal and concept of justice itself. In the final analysis, the achievement of a substantively just result or decision is the desideratum. It is more than that, however. It is not merely an ideal. It must be a practical outcome – at least as far as the court can aid in its attainment.

5 However, the court must be extremely wary of falling into the flawed approach to the effect that "the ends justify the means". This ought never to be the case. The obsession with achieving a substantively fair and just outcome does not justify the utilisation of any and every means to achieve that objective. There must be fairness in the *procedure or manner* in which the final outcome is achieved.

6 Indeed, if the procedure is unjust, that will itself taint the outcome.

7 On the other hand, a just and fair procedure does *not*, in and of itself, ensure a just outcome. In other words, procedural fairness is a necessary but not sufficient condition for a fair and just result.

8 The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how, I believe, laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced.

9 It is true, however, that in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt, as I have pointed out in the preceding paragraph, to *resolve* this tension. There is a *further* task: it is to actually attempt, simultaneously, to *integrate* these two conceptions of justice in order that justice in its fullest orb may shine forth.

The issues considered

10 The present case is no exception. There was no doubt in my mind that, in the final analysis, counsel for the petitioner, Mr Chan, was absolutely right in arguing that the respondent had used any and every means to stave off its winding up (the winding-up petition having been filed by the petitioner as far back as 30 July 2004, with the present case constituting the sixth hearing of the winding-up petition). It was clear, as counsel for the respondent, Mr Padman, himself admitted during the course of these proceedings, that the company was woefully insolvent (for example, he stated that while "[i]t has been suggested that a liquidator can chase [the various possible] claims [on behalf of the respondent- company] … there are *no funds in the company at present*" [emphasis added].

11 One ought also to note, in the context of an application under s 210 of the Companies Act, the following statement of principle by G P Selvam J in the Singapore High Court decision of *Re Halley's Departmental Store Pte Ltd* [1996] 2 SLR 70 at 74, [16]–[17]:

> In my view, in an application for approval of a scheme of arrangement under s 210 of the Act, the primary question the court must ask is whether the proposed arrangement is a fair one. In effect this means that the scheme of arrangement must be of some real benefit to the creditors and not result in the creditors getting nothing or nearly nothing or the creditors being deprived of a legitimate advantage they would get by winding up the company. The court should not put its imprimatur on what in effect is a scheme of confiscation of the rights of some minority unsecured creditors.
>
> The court, further, must look into the realities of the case and take into consideration all relevant matters. A court exercising a discretionary power may, and indeed must, take into consideration the connection between the company and other companies and information about persons closely connected with the company, as well as the motives of such parties and ignore the fact of separate personality.

12 What reason, therefore, was there for not granting the present petition? In a nutshell, in fact, this was the very thrust of Mr Chan's arguments when they were reduced to their irreducible core. Indeed, the attainment of a *substantively* fair and just result was inherent within his arguments.

13 Counsel for the respondent, on the other hand, based his arguments on the need for *procedural* justice. To quote him, "There is no substantial prejudice to the creditors but substantial prejudice to the respondents."

14 In this simple sentence lies the very pith and marrow of the respondent's case in the present proceedings. The use of the word "substantial" is, perhaps, apt to confuse. What Mr Padman *really* meant was that his client wanted *procedural* justice.

15 However, it must be borne in mind that the present proceedings were just one instance in a *long string* of procedural applications taken out by the respondent over a substantial period of time. It is no wonder, therefore, that counsel for the petitioner argued that the issue was not simply a question of prejudice suffered but, to quote him, "more an issue of abuse of the process of court".

16 I hasten to add at this juncture that counsel for the respondent clarified that his firm had been instructed only more recently. I agreed with him, but, as I stated to him, the issue of dilatoriness did not, in fairness, concern him but, rather, related to his *client*, the respondent. It was telling, in my view, that counsel for the respondent stated candidly in response, "For that I have no answer." Whilst I appreciate counsel's candour, it was amply apparent that, from a *substantive* perspective, the justice of the case lay with the *petitioner and creditors generally instead*.

17 Perhaps as telling was Lai Kew Chai J's rejection of the respondent's application for a scheme of arrangement with its creditors pursuant to s 210 of the Companies Act. As already mentioned, the appeal against the learned judge's decision constituted the nub of the respondent's present application to this court for a stay of the winding-up proceedings (see [3] above). The issue which, therefore, arose from this was a simple, yet crucial, one: Would the appeal against Lai J's decision be an exercise in legal futility, and was it therefore just another device on the part of the respondent to stave off what appeared to me to be the inevitability of the winding up against the respondent itself?

18 At the heart of the respondent's argument lay the appeal to *procedural* justice. In other words, a stay of the present winding-up proceedings ought to be granted because the respondent ought to be given its day in court. More specifically, it ought to be allowed the opportunity to argue before the Court of Appeal that Lai J's decision ought to be reversed. Although counsel could not cite a local case directly on point (*viz*, dealing directly with a stay of winding-up proceedings), counsel for the petitioner did cite a number of decisions in analogous situations – in particular, those relating to attempts to stay the execution of a judgment or a mandatory injunction whilst an appeal was pending (see the Singapore Court of Appeal decision of *Lee Sian Hee v Oh Kheng Soon* [1992] 1 SLR 77 and the Singapore High Court decision of *Swiss Singapore Overseas Enterprise Pte Ltd v Navalmar UK Ltd (No 2)* [2003] 1 SLR 688, respectively).

19 Other arguments were also canvassed by the respondent – principally, those dealing with the alleged lack of *locus standi* on the part of the petitioner and the supporting creditor, Samwoh Resources Pte Ltd ("Samwoh"), respectively, to appear in the proceedings mentioned in the preceding paragraph (see also [3] above). Counsel for the petitioner, however, helpfully cited a number of cases that demonstrated that there had in fact been the requisite *locus standi* (see, for example, *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31 and *Re Foursea Construction (M) Sdn Bhd* [1998] 4 MLJ 99). Mr Chan's arguments seemed to me to be very persuasive and it came as no surprise when counsel for the respondent stated that he was not pursuing this point any further. I

therefore return to the central point in this case – which is whether a stay of the present winding-up proceedings ought to be granted in favour of the respondent, in order that it might be afforded the opportunity to argue before the Court of Appeal that Lai J's decision rejecting its application for a scheme of arrangement in favour of creditors under s 210 of the Companies Act ought to be reversed.

20 The general principle which ought, in my view, to be applied is this – that where the pending appeal is an exercise in legal futility, the boundaries of procedural justice would have been crossed, or, more correctly in my view, abused. Although rendered in a slightly different context, the following observation by Yong Pung How CJ, who delivered the judgment of the court in *Lee Sian Hee v Oh Kheng Soon* ([18] *supra*) at 80, [9], is apposite:

> If a bald assertion of the likelihood of success is adequate, then a stay would be granted in every case, for every appellant must expect that his appeal will succeed.

21 At this juncture, where legal futility would result, the ostensible grant of procedural justice would, in the balance and scheme of things, result in the exact *opposite* of what was originally desired – in other words, the attainment of *substantive injustice* instead. The balance wheel of justice would, in other words, be diverted from its rightful course and be sent careening into a legal abyss instead. At this point, the means would have been used to thwart the ends (see also [7] above). In my view, this is precisely one such case. Let me elaborate.

22 Lai J rejected the respondent's application for a scheme of arrangement with creditors under s 210 of the Companies Act for two main reasons. These reasons are to be found in para 11 of the written submissions of counsel for the petitioner (which he helpfully elaborated upon during oral argument). It is significant that counsel for the respondent at no point whatsoever contested the accuracy of these reasons. They were as follows.

23 First, Lai J found that there had been material non-disclosures on the part of the respondent. In particular, it was not disclosed that the "white knight" of the respondent, its director and shareholder, Ms Lee Ah Poh, had *bankruptcy proceedings* filed against her and that, in fact, the application was due to be heard *the next day* (see Bankruptcy Suit No 4855 of 2004). Further, it was not disclosed that another creditor, Samwoh, had obtained an arbitration award against the respondent. Indeed, counsel for Samwoh, Mr Choo, was helpfully present at this hearing to assist this court in its deliberations. The bankruptcy proceedings against Ms Lee have, at the time of the present hearing, at least, been adjourned; so at least, technically speaking, Ms Lee is not a bankrupt, but, here again, we find the respondent (albeit through Ms Lee) taking advantage of *yet another procedural application*.

24 Secondly, the learned judge held that even if the application were granted, it would have been an exercise in legal futility inasmuch as two of the main creditors (Samwoh and the petitioner, *both*, incidentally, present at this very hearing) clearly opposed the proposed scheme of arrangement and, more importantly, represented more than one-fourth in value of the total debts owed. In addition to the existing sums owed by the respondent to the petitioner, Samwoh had also obtained substantial damages against the respondent in the arbitration award mentioned in the preceding paragraph. In the circumstances, there would (as we shall see in [31] below) be no way that the scheme of arrangement proposed by the respondent under s 210 of the Companies Act could possibly have succeeded. In this regard, s 210(3) is apposite, and reads as follows:

> 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.

25 In this regard, reference was also helpfully made by counsel for the supporting creditor to Andrew Ang JC's decision in *Eastern Pretech Pte Ltd v Kin Lin Builders Pte Ltd* [2004] SGHC 195 (at [6]), where it was clear on the facts that "if the scheme of arrangement were to be put to the vote at a meeting of creditors pursuant to s 210 of the Companies Act, it would certainly be defeated".

26 However, it did not, initially at least, appear to me that the requirements in s 210(3) of the Companies Act would inevitably be satisfied on the facts of the present case. This was, first, because s 210(3) mandates "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" [emphasis added] as one of the requirements, and this requirement might not in fact be met since both the petitioner and Samwoh comprised only two of the creditors (see also *In re Wedgwood Coal and Iron Company* (1877) 6 Ch D 627 at 633–634). However, when further questions were posed by me to counsel (in particular, counsel for the respondent), it was discovered that the majority of creditors were *related* creditors. That is to say, these creditors were, in some way or other, related to the respondent. They would, of course, be biased in favour of the respondent. Indeed, of the related creditors, the two main creditors were the director/shareholder of the respondent, Ms Lee Ah Poh, and a company controlled by the shareholders of the respondent, Ng Huat Construction Pte Ltd. The two other related creditors were, respectively, another director/shareholder of the respondent and another company which was controlled by the shareholders of the respondent.

27 It seems to me that such related creditors ought not, in principle, to be considered, on the basis that they would be at least perceived to be prejudiced or biased. However, the literal language of s 210(3) suggests otherwise.

28 It appears clear, nonetheless, that the court would, in considering whether or not to grant an application for a scheme of arrangement under s 210 of the Companies Act, take into account the fact that there were related creditors and exercise due caution accordingly. Indeed, in addition to the observations of G P Selvam J in *Re Halley's Departmental Store* quoted above ([11] *supra*), the following observation in *Halsbury's Laws of Singapore: Company Law* vol 6 (Butterworths Asia, 2000) at para 70.489 is also relevant:

> The votes of those who have collateral motives in voting or divergent interests are of little value in determining whether the scheme [under s 210 of the Companies Act] is fair and reasonable.

29 Reference may also be made to the following pertinent observations of Malins VC in *In re Wedgwood Coal and Iron Company* ([26] *supra*) at 637:

> Now, therefore, [the] cases shew distinctly that it is not enough merely to obtain the statutory majority. The Court, before it gives its sanction (without which the resolution cannot be acted upon), must be satisfied that the resolution has been carried *bonâ fide* by persons who really have regard to the interests of the company, and who have not voted merely for the purpose of exonerating themselves from a liability which they have incurred.

30 Further reference may be made to the following views of Lindley LJ in the English Court of Appeal decision of *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company*

[1891] 1 Ch 213 at 238–239, as follows:

> [W]hat the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting *bonâ fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bonâ fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

31 However, even if one took into account the related creditors, it is clear that with both the petitioner and Samwoh representing over one-fourth *in value* of the creditors, there would, in any event, be no way that the proposed scheme of arrangement could have passed muster since *that* requirement would *not* have been satisfied.

32 Further, counsel for the petitioner drew my attention to the state of affairs prevailing as at 30 November 2004 and which demonstrated that the petitioner was, in fact, on *its own*, merely a whisker shy of achieving the one-fourth value required to scupper the proposed scheme of arrangement.

33 The fact remained that what would clearly bring the value over the one-fourth mark would be the inclusion of moneys owed to Samwoh as a result of the said arbitration proceedings. However, the respondent invoked *yet another procedural device* to stymie the enforcement of the arbitration award. This took the form of an application for leave to appeal against the learned arbitrator's decision on a *point of law* (pursuant to s 28 of the Arbitration Act (Cap 10, 1985 Rev Ed)). The point of law concerned was rather interestingly framed, and could be found in Ms Lee Ah Poh's affidavit of 24 February 2005,[1] and which comprised the originating motion (Originating Motion No 2 of 2005) taken out in respect of these arbitration proceedings.

34 To quote from the Originating Motion filed on behalf of the respondent, specifically prayer 2 thereof, "[t]he question of law that arises is whether a party to a joint venture contract which has accepted the repudiatory breach of the other party is entitled to the entire benefit thereafter of assets of the joint venture including to retain for itself all profits from such assets earned after acceptance of the repudiatory breach".

35 It is not proper for me to prejudge the issue and pronounce (even in the most tentative of fashions) whether the point of law sought to be argued for by the respondent is one for which leave to appeal will be given. I note, however, that counsel for Samwoh did observe that "[t]he way the proposition [of law] has been phrased [in the Originating Motion] is quite startling" inasmuch as the proposition concerned is "claiming that a blameworthy party, who is in repudiatory breach, which repudiatory breach has been accepted, is entitled to profits after the repudiatory breach has been accepted". This observation (which is a corollary of the question of law stated in the preceding paragraph) is not, in my own view, entirely without merit, but, as I have mentioned, the status of this proposed proposition of law, is not before the court today. It bears mentioning, however, that leave to appeal *vis-à-vis* a point of law, in so far as arbitration proceedings are concerned, is by no means given as a matter of course. Indeed, the basic principles which ought to guide the court were

recently reaffirmed in the Singapore Court of Appeal decision of *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494, which also helpfully surveyed all the leading authorities in both Singapore as well as England.

36 What did concern me, however, was the fact that if the respondent were ultimately successful in its appeal against the learned arbitrator's decision, this might possibly furnish the respondent with sufficient funds. More importantly, it would undermine Samwoh's status as a creditor of the respondent and impact on the value mentioned in s 210(3) above.

37 On further consideration of the issue, however, I found myself unable to take what, in the final analysis, was a relatively convoluted line of reasoning into account as a crucial factor in favour of the respondent's present application for a stay of the winding-up proceedings.

38 It seemed to me, first, that even if the respondent were in fact to succeed with regard to the appeal against the arbitration award, there remained Lai J's other grounds for dismissing the application by the respondent pursuant to s 210 of the Companies Act and which, as we have seen, centred on material non-disclosures (see [23] above).

39 I also took into account the fact that, as already mentioned above, the petitioner itself was extremely close to the threshold requirement in terms of value (see [32] above), and whilst it is true that it did not technically meet it, I had also to take into account, *inter alia*, the fact that the respondent's own argument (especially in [26] above) was not clearly in its favour. In addition, if Samwoh were even partially successful, the money owed to it (together with that already owed to the petitioner) would clearly have rendered any proposal for a scheme of arrangement under s 210 by the respondent nugatory as s 210(3) would not have been satisfied. Finally, I note that there was (as counsel for the respondent himself conceded) no evidence of any creditor agreeing with the respondent's proposal, save for the related creditors (who would, of course, agree). However, even if I am wrong, the fact remains that the petitioner was on extremely solid ground *vis-à-vis* Lai J's first ground mentioned in the preceding paragraph.

40 The upshot was that the respondent's appeal against Lai J's decision was doomed to failure. Whilst it is true that I should not prejudge the appellate court's decision, the various authorities (cited at [18] above) do require me to make some assessment of the likelihood of success. In this, it is apparent to me that this is an extremely clear case. The respondent was clearly utilising the appeal against Lai J's decision as *yet another delaying tactic* to stave off winding up. This constituted a blatant abuse of the process of court. As we have already seen, this matter has already been delayed for a very substantial period of time.

41 I also note that if the respondent is wound up, there is nothing precluding the liquidator from continuing with the various actions and appeals on behalf of the respondent. Needless to say, even new actions can be commenced if the liquidator decides that there is merit in doing so. In other words, the respondent will have its day in court and, to that extent, the requirements of *procedural* justice would *also* have been met, albeit not in the manner preferred by the respondent. What will *not* happen, however, will be the *continued and unjustified delay* that has been based on one technical application after another.

Conclusion

42 In the circumstances, I dismissed the respondent's application for a stay of the petition for winding up, and granted the petitioner's application for the respondent to be wound up and for the Official Receiver, Singapore, to be appointed as the liquidator of the respondent.

43 Although counsel for the petitioner was adamant that Ms Lee Ah Poh, as the alleged alter ego of the respondent, ought to bear the costs of this action, I did not (whilst sympathising with his argument) find sufficient evidence to merit such a draconian course of action, and therefore awarded costs against the respondent instead.

44 I was very grateful for the various clarifications, particularly of related proceedings, by counsel for the supporting creditor, and, although costs are not customarily awarded in favour of supporting creditors, I nevertheless thought it appropriate, at Mr Choo's request, to award disbursements for the filing of affidavits.

A coda

45 As a not altogether irrelevant coda, there was a suggestion during the hearing by Mr Choo, counsel for Samwoh, that one possible approach might be for a provisional liquidator to be appointed either voluntarily or by the court (see ss 291 and 267 of the Companies Act, respectively). To this end, both Mr Choo and Mr Chan, counsel for the petitioner, explored the possibility of appointing a liquidator by consent of the parties. Both counsel were clearly addressing my concerns about procedural justice or due process being stretched to its legitimate limits, if at all possible. However, despite their valiant efforts, this avenue collapsed, although (so I am told) the parties were very close to agreement. After hearing further arguments, I was not convinced that I should appoint a provisional liquidator under s 267 of the Companies Act and ordered that the respondent be wound up instead.

46 I commend Mr Chan and Mr Choo for attempting their level best to arrive at a pragmatic resolution in an attempt to address the competing tensions. They need not have adopted this course of action which seemed to me to tend, in fact, more in favour of the respondent. Notwithstanding the fact that this proposed course of action did not ultimately come to pass, the attempts by both these counsel are examples of the spirit in which lawyers ought to conduct their respective cases.

Application for stay of the petition for winding up of the respondent dismissed.
Petition for winding up of the respondent granted.

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[1]Exhibit LAP-1