Pacrim Investments Pte Ltd *v* Tan Mui Keow Claire and another [2010] SGHC 368

Case Number : Originating Summons No 165 of 2004 (Registrar's Appeal No 170 of 2010)

Decision Date : 22 December 2010

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Lisa Chong (Lisa Chong & Partners) for the plaintiff; Andre Maniam SC and Adeline Ong (WongPartnership LLP) for the second defendant.

Parties : Pacrim Investments Pte Ltd — Tan Mui Keow Claire and another

Companies

22 December 2010

Lee Seiu Kin J:

Introduction

1 In this action, the plaintiff ("Pacrim") seeks damages against the second defendant, Mainstream Limited ("MSL") for its failure to transfer certain MSL shares submitted by Pacrim for registration in September 2003. The matter before me concerns an appeal against the decision of the Assistant Registrar ("AR") on 14 April 2010 in which he held that Pacrim was bound by a scheme of arrangement ("the Scheme") under s 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). I dismissed the appeal and upheld the decision of the AR. Pacrim has appealed and I now give the grounds for my decision.

2 With regard to the background facts, I can do no better than to repeat what the AR had set out in his grounds of decision ("GD") given on 3 May 2010. They are as follows:

> 4 On 29 September 2002, Pacrim received the share certificates for 70m MSL shares from one Desmond Poh ("Poh"), together with blank transfers duly signed by him, as a pledge for a brokerage fee payable by Poh to Pacrim. The brokerage fee was in respect of an acquisition transaction brokered and arranged by the latter. Poh and Pacrim agreed that the payment of the fee would be deferred by one year but no later than 22 September 2003, failing which Pacrim would be entitled to transfer the 70m shares to itself or its nominees and to sell those shares to recover its brokerage fee. Pacrim subsequently released 20m shares to Poh for him to raise funds to pay part of the brokerage fee, leaving itself with only 50m shares. After the one-year restriction had expired, Pacrim submitted two transfers of 20m and 30m shares on 23 and 24 September 2003 respectively to MSL for registration. For various reasons (which are not material to the present application), MSL refused the registration.
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> 5 MSL's refusal led to the present proceedings commenced by Pacrim on 10 February 2004 (*ie*, Originating Summons No 165 of 2004 ("OS")) against the first defendant, MSL's company secretary, and MSL (the second defendant) for the orders that MSL register the transfers of the 50m shares and for damages to be assessed. The OS was heard and dismissed by the High Court at first instance on 3 August 2004 (see *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2005] 1 SLR(R) 141). On 18 April 2004, Pacrim filed a notice of appeal against the High

Court's decision.

6 While the appeal was pending, MSL was placed under judicial management on 22 April 2005. Subsequently, in 2007, a scheme of arrangement ("the Scheme") was proposed for MSL. The purpose of the Scheme as set out in cl 2 of the Scheme was as follows:

> **2. Purpose**
>
> 2.1 The purpose of this Scheme is to *resolve and satisfy Scheme Claims that Scheme Creditors may have while at same time trying to ensure the continued validity of the Company as a going concern*.
>
> 2.2 The Company proposes and agrees, subject to the acceptance by the requisite majority of Scheme Creditors at the Court Meeting (or adjournment thereof), and the approval by the Court of this Scheme pursuant to Section 210 read with Section 277X of the Act, to implement this Scheme.

7 Clause 1.1 of the Scheme in turn defined a "Scheme Creditor" as "any Creditor of the Company having a Scheme Claim, other than an Excluded Creditor [defined as Ferrier Hodgson]" and a "Scheme Claim" as:

> … the total amount of any claim for which the Company is or may be liable or indebted (whether *actual, contingently or otherwise*, whether such claim arises in contract, tort, restitution or otherwise, and whether liquidated or unliquidated, or sounding or resulting in damages or equitable compensation or otherwise) to that Scheme Creditor *in respect of or arising from any and all acts, omissions, agreements, transactions, dealings, matters and events whatsoever effected, occurring or otherwise taking place on or prior to the making of the Judicial Management Order on 22 April 2005*, which have not been paid, satisfied, extinguished, abated or otherwise diminished.

8 In other words, the Scheme sought to compromise and satisfy all Scheme Claims which arose from any act or omission or any event whatsoever that occurred on or prior to the making of the judicial management order on 22 April 2005 so as to save the company from insolvency and to ensure its survival. This compromise was to be achieved by way of a combination of cash payments and debt-to-equity swaps. On 10 July 2007, the Scheme was approved by all the Scheme Creditors who attended and voted at the meeting convened. The Scheme was subsequently approved by the High Court on 21 August 2007 pursuant to s 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") and took effect on 23 August 2007 when a copy of the court's order was lodged with the Accounting and Corporate Regulatory Authority. After the successful implementation of the Scheme, MSL survived the crisis and managed to emerge from judicial management on 2 October 2007.

9 During the entire period that MSL was under judicial management (including the implementation of the Scheme), Pacrim's appeal to the Court of Appeal was kept pending as parties sought several adjournments of the hearing. In any case, there was a stay of all proceedings following the making of the judicial management order. At one stage, leave was sought by Pacrim to continue with the appeal but this application was eventually withdrawn and Pacrim was happy to keep the appeal pending while MSL was under judicial management. As noted by Mr Low Ee Chin, Pacrim's Chief Executive Officer, in his affidavit dated 22 February 2010, "it did not make sense to incur additional costs and expenses [in pursuing the appeal] in the event that there is no value in the shares."

10 After MSL emerged from judicial management, the appeal was finally heard on 22 February 2008 and the Court of Appeal allowed Pacrim's appeal (see *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2008] 2 SLR(R) 898 ("*Pacrim Investments Pte Ltd*")). Accordingly, the requisite number of MSL shares (being 5m shares, following restructuring and amalgamation of 10 shares to one as a result of the Scheme) was transferred to Pacrim. Pacrim sold these shares between May and December 2008 and received a net sale proceeds of approximately $214,285. According to Pacrim, if the transfer of the initial 50m shares had been registered in 2003 when they were first submitted for registration and sold, the sale proceeds would have been around the region of $1,750,000, given the then higher stock price of MSL on the Singapore Stock Exchange. Pacrim thus sought to recover damages from MSL for its loss suffered in the sale of the shares.

11 A dispute arose between parties as to whether Pacrim was entitled to damages, given that the Court of Appeal in *Pacrim Investments Pte Ltd* had made no order as to damages … and that MSL, while the appeal was pending, had undergone the Scheme. It was subsequently clarified by the Court of Appeal that Pacrim was entitled to have damages assessed. However, the Court of Appeal also pointed out that the question of whether Pacrim had the right to proceed with assessment because of the Scheme was an issue not before the court and was to be decided by the court hearing the application to assess damages. This gave rise to the present application. At the start of the hearing of this application on 12 March 2010, Pacrim confirmed that it was only seeking damages from MSL and not the first defendant.

The preliminary issue

12 The preliminary issue before me was thus simply whether the Scheme had extinguished Pacrim's claim for damages. As will be seen, the resolution of this issue turned ultimately on a question of statutory construction given the arguments raised by the parties. It will be helpful to first set out, in gist, the parties' positions on this issue.

13 Pacrim's case in essence was that it was not a "creditor" of MSL for purposes of the Scheme since its claim had been dismissed by the High Court and it had yet to succeed in its appeal before MSL was placed under judicial management … Thus, it could not in anyway be bound by the Scheme which was binding only on Scheme Creditors. Pacrim submitted that the question of whether it was a creditor is "a legal issue and is not dependent on how "Creditor", "Scheme Claim" or "Scheme Creditor" are defined in the Scheme, but rather, on the legal definition of "creditor" within the meaning of Section 210 of the Companies Act (Cap 50)". Counsel for Pacrim, Ms Lisa Chong, accepted that if Pacrim were a creditor under s 210, Pacrim would naturally fall within the broad definition of "Scheme Creditor" under the Scheme and would be bound by it. She also accepted that the effect of the Scheme would be to extinguish Pacrim's claim for damages. However, given that Pacrim's claim against MSL had already been dismissed by the High Court at the material time, she submitted … that Pacrim could not in any way be a creditor under s 210.

14 MSL's position in turn was that Pacrim was for all intents and purposes a Scheme Creditor as Pacrim had a claim that was pending appeal when MSL entered into judicial management and/or when the Scheme was introduced, and such a claim was in respect of MSL's failure to register the share transfers in 2003 (which was prior to the making of the judicial management order …). Counsel for MSL, Mr Andre Maniam SC, suggested that since the Court of Appeal in the recent case of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*Oriental*") had endorsed the Australian approach that a scheme becomes an order of court once approved by the court, the "focus" should properly be on the terms of the Scheme and the issue properly framed should be whether Pacrim was a "Scheme Creditor" as defined in the Scheme.

However, he submitted …, disagreeing with Ms Chong, that, in any event, Pacrim was a creditor within s 210 of the Act.

15 Notwithstanding the slight dispute on how the issue should be properly framed, it would be clear from the positions taken by the parties (and both counsel have accepted this as well at the hearing) that the resolution of the preliminary issue would invariably turn on the definition of "creditor" in s 210 of the Act, and whether Pacrim fell within this definition. As mentioned, Pacrim accepted that if it were a "creditor" for purposes of s 210 of the Act, it would be a Scheme Creditor under the Scheme and would be bound by it, with the consequence that its claim would be extinguished.

[emphasis in original]

3 The nub of the matter is as follows. Pacrim's action in this originating summons was dismissed by the High Court on 3 August 2004, against which Pacrim lodged an appeal to the Court of Appeal. On 21 August 2007, while the appeal was pending, the Scheme was brought into force. On 22 February 2008, the Court of Appeal allowed Pacrim's appeal. The issue turns on whether Pacrim is bound by the terms of the Scheme and that in turn depends on whether Pacrim is a "creditor" within the meaning of s 210 of the Act, the relevant parts of which are as follows:

210. —(1) Where a compromise or arrangement is proposed between a company and its *creditors* ... 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) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned from time to time if the resolution for adjournment is approved by 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.

(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.

[emphasis added]

4 The term "creditor" is not defined. The issue is whether Pacrim, whose status at the time the Scheme came into force was that of a party that had a claim in damages against MSL that was dismissed by the High Court but whose appeal was pending, falls within that term. There is no binding authority on this point. The AR had, in his GD, traversed the relevant authorities and concluded that the term "creditor" in s 210 of the Act should be given a wide meaning. It is not necessary for me to similarly traverse those authorities because counsel for Pacrim, Ms Lisa Chong ("Ms Chong"), conceded that judicial attitudes in jurisdictions from which the Act was derived had moved towards a broad approach. Indeed, paras 4.11 – 4.13 of Ms Chong's written submission on the issue helpfully set out the positions taken in relevant decisions in various Australian jurisdictions:

4.11 The above extract shows [the] development of the legal definition of "creditor" in the Australian Courts in the following chronological order:-

a. In *Re Midland Coal, Coke and Iron Company* [1895] 1 Ch 267 ("*Re Midland Coal")*, the Court adopted the broad approach that "creditors" is used in the widest sense and "includes all persons having any pecuniary claims against the company";

b. In *Trocko v Renlita Products Pty Ltd* [1973] 5 S.A.S.R. 207 ("*Re Trocko"*), the Court held that "creditors" do not include persons with unliquidated claims sounding only in damages because of the absence of any machinery to ascertain the amount of such claim;

c. In *Re Glendale Land Development Ltd (No.2)* (1982) 1 ACLC 562 ("*Re Glendale"*), McLelland J held that "creditors" should be understood as embracing all persons with claims which would be entitled to be admitted to proof if the company were wound up;

d. In *Re R.L. Child & Co Pty Ltd* (1986) 4 ACLC 312 ("*Re Child"*), McLelland J reiterated his view that "creditors" should be understood as embracing all persons with claims which would be entitled to be admitted to proof if the company were wound up save ... persons having unliquidated claims in tort which [are] excluded as a creditor in winding up of a company which is insolvent ...

4.12 The Plaintiffs readily admit that the term "embracing" as used by McLelland J. denotes "inclusive" and therefore, as the Learned Judge himself stated, the mechanism of using provable debts to determine who [would] suffice as "creditors" should be a "guide".

4.13 The Plaintiffs also accept that many authorities have defined "creditor" as "any person having a pecuniary claim against the company capable of [being estimated]" – refer para 12.047 of *Palmer's Company Law Vol. 2* and *Re Midland Coal*. This includes those having "pecuniary claim whether actual or contingent" – refer para 5.1.0035 of *Australian Corporation Law Principles and Practice Vol.2* and whether such pecuniary claim is "unliquidated, prospective or contingent" ...

5 However in the paragraph that follows, Ms Chong stated that Pacrim's "acceptance of the broad legal meaning of "creditor" does not detract from the fundamental premise that the claim or liability in question must be one which is legally due or enforceable". Ms Chong's submission went on to state, in summary, that Pacrim's situation at the time the Scheme was established was one which did not fall within the broad definition that she accepted was the case. I saw no merit in that argument. At the time the Scheme was established, Pacrim had its claim dismissed by the High Court but its appeal was pending. This meant that in the event its appeal was allowed, it would be a creditor; indeed this was an eventuality that did materialise. There was no basis on principle to exclude persons in Pacrim's position from the scope of "creditors". In practice, doing so would unfairly benefit such companies who would be able to recoup its entire debt from a company resuscitated from the sacrifices of all the other creditors. Therefore there is also no basis on policy to do so. For these reasons I dismissed the appeal.