IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 194

Originating Summons No 787 of 2017

In the matter of Order 80 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of the registered business trust known as the Croesus Retail Trust constituted by a Deed of Trust dated 7 May 2012 as amended and supplemented by the amending and restating deeds dated 29 June 2012, 7 November 2012, 24 April 2013, 30 April 2013 and 27 October 2016

And

Croesus Retail Asset Management Pte. Ltd.

… *Applicant*

GROUNDS OF DECISION

[Civil Procedure] – [Trusts] – [Business Trust]

Re: Croesus Retail Asset Management Pte. Ltd.

[2017] SGHC 194

High Court — Originating Summons No 787 of 2017
Aedit Abdullah JC
1 August 2017

8 August 2017

Aedit Abdullah JC:

Introduction

1 An *ex parte* application was made by Croesus Retail Trust ("Croeseus"), a business trust registered under the Business Trusts Act (Cap 31A, 2005 Rev Ed) ("the Act") and listed on the Singapore Exchange, for orders relating to the proposed acquisition of all units in Croesus by Cyrus Bidco Pte Ltd ("Cyrus"). These brief grounds are issued to assist practitioners in the restructuring of business trusts.

Background

2 Croesus is a retail business trust that invests primarily in retail real estate in Japan and the rest of the Asia-Pacific region. It was established by a Deed of Trust in 2012 ("the Trust Deed") and was registered under the Act the following year. The Trust Deed has been amended on a number of occasions. In 2017, an expression of interest was made by affiliates of The Blackstone Group L.P to

Croesus for the acquisition of all the units in Croesus by way of a trust scheme ("the Trust Scheme"). An agreement, known as the Implementation Agreement, was entered into between Croesus and Cyrus, which is apparently an entity of the Blackstone private equity group, for this purpose. The required announcements were made on SGXNET.

3 In brief, under the Trust Scheme, all units are to be transferred to Cyrus in return for payment to each existing unit holder. A number of conditions precedent ("Scheme Conditions") were stipulated, including:

(a) the approval of unit holders at a general meeting representing not less than 75% of the voting rights of holders present and voting at a general meeting of the amendment to the trust deed to facilitate the implementation of the Trust Scheme;

(b) the approval of more than 50% of the number of unit holders representing at least 75% in value of the units held by holders present and voting in person or by proxy at the general meeting of the Trust Scheme; and

(c) the court's approval of the Trust Scheme under O 80 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

4 Under the Takeover Code issued by the Monetary Authority of Singapore, the acquisition of units in a registered business trust such as Croesus may be effected by way of a trust scheme. The Takeover Code sets out rules in relation to such acquisitions. However, it allows the Securities Industry Council ("SIC") to exempt such a trust from certain rules if certain conditions are met. On 23 June 2017, the SIC indicated that it had no objections to the Scheme

Conditions and that the Trust Scheme would be exempted from certain rules under the Takeover Code if the stipulated conditions are met. These shall be referred to as the "SIC Conditions". The most pertinent of the SIC Conditions are that an independent financial adviser be appointed to advise unit holders on the Trust Scheme, that the Trust Scheme be approved by 75% in value of unit holders or class of unit holders present and voting either in person or by proxy at a meeting convened to approve the Trust Scheme and that the court's approval of the Trust Scheme be obtained under O 80 of the ROC.

The Application

5 The present application was then made seeking orders that:

(a) the amendments to the Trust Deed to facilitate the implementation of the Trust Scheme, if approved by the unit holders as stipulated, would be within the powers of amendment contained in the Trust Deed and under the Act;

(b) the applicant be at liberty to convene a meeting of the unit holders within 3 months to obtain approval of the amendments to the Trust Deed and the Trust Scheme; and

(c) the applicant be at liberty to apply for the court's approval for the Trust Scheme at a further hearing of the court should the amendments to the Trust Deed and the Trust Scheme be approved at the meeting of unit holders.

The applicant stated that the meeting would be convened in accordance with a schedule stipulating various matters, including the giving of notice and

conditions governing voting by proxy. The schedule was annexed to the application.

6 It was apparent that the proposed orders largely paralleled that in an application for a scheme of arrangement under s 210 of the Companies Act (Cap 50, 2006 Rev Ed).

The Decision

7 I granted the orders sought in respect of the holding of the meeting and the further hearing by the court. I was satisfied that these fell within the powers granted to the court under O 80 of the ROC ("O 80"), as determination by the court of questions relating to a trust, and that such powers should be exercised in the manner sought.

8 I was not however satisfied that the court should make an order that the proposed amendments to the Trust Deed would be within the powers of amendment conferred by the Trust Deed and the Act. This order, being a declaratory order, should only be made where affected persons have been made parties to the proceedings. As the present application was one made *ex parte*, it was inappropriate to grant such an order. I therefore deferred the determination of the order till the further hearing before the court. Both Croesus and Cyrus, the latter of which had its counsel present on a watching brief, accepted that this was within the terms of the Implementation Agreement.

Analysis

9 I considered that the orders sought were within the ambit of the Act and O 80, and that the proposed approach, modelled on s 210 of the Companies Act,

was acceptable. I pause to note that although the application under O 80 was mandated by the SIC, that by itself does not establish an appropriate basis for the application.

The Business Trusts Act

10 The applicant is a registered business trust, governed by the Business Trusts Act, rather than the Trustees Act (Cap 337, 2005 Rev Ed). The Business Trusts Act provides for the governance and regulation of registered business trusts, some of which, such as the duties of the trustee-manager, management, audit and winding-up, are similar to provisions under the Companies Act. The similarities reflect the fact that business trusts are essentially alternative vehicles for the channelling of commercial investment by unit holders through a joint enterprise. Nonetheless, a business trust is a type of trust—the legal and beneficial interests in the property under the trust are separate and the owner of the legal title is subject to obligations owed to the owner of the equitable interest. A business trust thus remains within the scope of O 80.

11 I did note that Croesus differs from an orthodox and traditional trust since the unit holders are expressly stated not to have any equitable proprietary interest in the trust property but only a right to compel due performance by the trustee (see clause 5.2 of the Trust Deed). However, I did not consider this difference to have altered the nature of the business trust to the extent that it could not come within O 80.

Order 80

12 Order 80 of the ROC is primarily concerned with administration actions. These are essentially situations in which the whole of the administration is

passed to the court (see David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees* (LexisNexis, 19th Ed, 2016) at para 86.2 on Order 85 of the English Rules of the Supreme Court (now known as Practice Direction A to the Civil Procedure Rules Part 64, para 3)). Aside from the general administration of a trust, O 80 r 2 of the ROC also permits the court to determine any question or to grant relief in respect of a trust, provided that such a determination or grant of relief is one that could have been made in an administration action. This effectively means that applicants can avoid invoking a full-fledged administration action, and may seek guidance or approval by the court on specific questions through an O 80 application. O 80 r 2(2) sets out a non-exhaustive list of questions that may be brought for determination by the court, including questions in respect of the execution of a trust (O 80 r 2(2)(a) of the ROC), or the rights or interest of a person claiming to be beneficially entitled under a trust (O 80 r 2(2)(c) of the ROC).

13 In an O 80 r 2 application, the main focus is on the interests of the beneficiaries and the terms of the trust. In this specific instance, I also considered it important to bear in mind that the object of the business trust was to function as an investment vehicle. The fact that the trust arrangement was intended to facilitate investment by the unit holders in the activities of the business trust should be a consideration that inform the court's determination of what is appropriate and proper. A different conclusion may thus be reached as compared to a traditional trust, which may have a greater protective element vis-à-vis the beneficiaries.

14 The adoption of a mechanism consisting of the calling of a meeting of the unit holders to approve the amendments and scheme, followed by a further

hearing to allow objections to be raised, is clearly modelled on s 210 of the Companies Act. Such a regime gives voice to the affected persons, through voting at a meeting and offers an opportunity for any aggrieved person to contest the decisions of the super majority, on grounds that any of these requirements are not met: compliance with the statutory provisions, that those voting were representative of the class and there was no coercion to promote interest adverse to the class, and that the scheme is one which a man of business or an intelligent and honest member of the class acting in his interest would reasonably approve (see *The Royal Bank of Scotland NV and others v TT International Ltd and another appeal* [2012] 2 SLR 213 at [70] ("*TT International"*)).The stipulations as to giving notice of the meeting also follow those that apply in respect of s 210 applications under the Companies Act. These safeguards thus justify the imposition of the will of the majority on the minority.

15 These safeguards similarly apply to the unit holders here. In a traditional trust, the interests of a single beneficiary may nonetheless trump those of a majority of others in some circumstances. In these situations, the court may be loath to impose, for instance, an outright sale of that beneficiary's interest. As presently advised, and subject to any argument that may be raised at the further hearing, I do not find that such considerations are likely to apply in respect of a business trust and the interests of individual unit holders.

16 The adoption of an s 210-like mechanism provides a safe harbour for the proposed restructuring of the trust through the amendments and Trust Scheme. That said, there may be some disadvantages to the adoption of the s 210 regime in this context, such as the time taken and the requirements for a super majority to approve. As noted above, these are laudable safeguards. But whether they are

needed in any specific case, or whether there are other measures that may nonetheless protect the interest of the unit holders of a business trust, will depend to a great extent on the terms of the trust deed, the composition of the beneficiaries or unit holders, and the objectives of the trust arrangement, among other matters. It may be that other mechanisms will pass muster in an application under O 80: it must be left to the ingenuity of counsel to consider whether there are alternatives that address the court's concerns. But always uppermost in the court's consideration would be adequate protection in the circumstances for unit holders as the putative beneficiaries in an investment vehicle.

17 By analogy with s 210 applications, the guidance given in *TT International* as to the requirements in relation to fairness of the process is pertinent. However caution will need to be exercised in transposing all of the usual requirements that would apply to a calling of a meeting under s 210. In particular, what needs to be considered is whether the proposed scheme reasonably addresses the interests of the unit holders as beneficiaries of the trust, bearing in mind that they have become beneficiaries of the trust for the purposes of investment. A premium over the market value may be indicative, but may not always be determinative.

Application to the facts

18 In the present application, I was hesitant in granting the prayer seeking an order of court that the Trust Deed amendments are within the powers of amendment in the Trust Deed and the BTA. As for the rest of the application, the focus was on issues relating to the giving of adequate notice and the use of proxies. Although a single voting class was proposed, I did not take issue with

this as I did not think that there was a criteria that could meaningfully differentiate the unit holders. There was also nothing questionable as to the meeting proposed.

Effect of the Trust Deed Amendments

19 Though not expressed as such, the first prayer seeking an order that the Trust Deed amendments are within the powers of amendment contained in the Trust Deed and under the Act was really a prayer for a declaration by the court. A person affected by such an order should be brought before the court or joined, because of the prejudice that could result (see *London Passenger Transport v Moscrop* [1942] AC 332). This requirement remains even if the question is framed as one under O 80. Furthermore, the question that the prayer sought to address was one that could fall away if the vote went against the amendments and the Trust Scheme—at the point of an application, there was only a theoretical question rather than a real issue. This would have been an additional reason for the court to decline to make the order had Croesus persisted.

20 By the time of the meeting, any aggrieved person would have had sufficient notice of what was being sought at the further hearing. The prayers sought also included liberty for any affected person to attend the further hearing to make such applications as required. In view of that, and subject to any contrary arguments, I was inclined to conclude that the requirement for affected persons to be before the court would be achieved in substance by the further hearing as such affected persons would have been given adequate opportunity to raise issues and present arguments to the court at the further hearing before the order is made.

Adequate Notice

21 A schedule to the application laid out the steps in relation to the giving of notice by way of the publication and furnishing of a scheme document. This largely paralleled the usual s 210 requirements, but what gave me pause was that foreign unit holders would not be sent the documents in the first instance, so as to avoid issues about Croesus conducting business in those jurisdictions. I inquired whether it was possible for the depository agent to convey the documents, but this did not appear to be available. As effective notice would be given by newspapers and on the SGX website, and on the basis that foreign unit holders would be expected to have factored in the lack of direct notice in their decision to participate in Croesus, I determined that there would be sufficient notice given.

Proxy voting

22 The proxy provisions to be applied allowed only one proxy rather than two. This was in contrast to the Trust Deed, as well as s 181 of the Companies Act. Counsel for Croesus stated that the understanding was that s 181 was not intended to apply to s 210 meetings. Despite not having had full arguments on this issue, I did not see anything untoward in stipulating one proxy only and accordingly did not prohibit that.

Section 210 applications generally

23 I should note that Ms Tan XeauWei and her team appearing for Croesus assisted me well in this particular application. I emphasise that the following remarks are not aimed at her and her team.

24 Since these are grounds are released for the benefit of practitioners, I should highlight that in respect of unopposed s 210 applications proper, while the court does appreciate that there are many moving parts that lawyers have to deal with, the lawyers involved are expected to give assistance to the court when applications are made. The court needs to consider carefully, even in an unopposed scheme, the proper exercise of the powers and discretion conferred by legislation. Lawyers should be prepared to answer the likely queries that are posed by the court. The fact that approvals have been obtained from regulatory agencies or the relevant exchange does not mean that the court will not have any questions, that such questions are unnecessary, or that the application is merely a formality. The court would not want to unnecessarily hinder commercial and investment transactions, but the court is there to ensure that the law is complied with, and that the rights of affected persons protected. The majority of counsel appearing in unopposed applications understand this; it is hoped that this will continue to be so.

Conclusion

25 In the event, I ordered, *inter alia*, that the scheme meeting be called within 3 months of the date of the order, that a further hearing be held for the Trust Scheme to be approved and the Trust Scheme be effected; that persons affected may attend at the further hearing; and that sufficient notice be given according to the schedule attached to the summons. A long stop date was given for the further hearing.

Epilogos

26 In contrast to what Herodotus recounted in his *Histories*, the Croesus here seeks to do a deal with Cyrus; I do not know if anyone has played the part of the Pythia in all of this, but it should warm the heart that somewhere in the world of high finance, an erstwhile classicist seems to be somewhat gainfully employed. One can only hope that the Asian classics will not be neglected.

Aedit Abdullah
Judicial Commissioner

Tan XeauWei and Lim Jun Rui, Ivan (Allen & Gledhill LLP) for the applicant;