Re Punj Lloyd Pte Ltd and another matter
[2015] SGHC 321

Case Number : HC/Originating Summons No 857 of 2015 (HC/Summons No 5100 of 2015) and HC/Originating Summons No 859 of 2015 (HC/Summons No 5460 of 2015)

Decision Date : 16 December 2015

Tribunal/Court : High Court

Coram : Aedit Abdullah JC

Counsel Name(s) : Patrick Ang, Low Poh Ling, Chew Xiang and Ng Kexian (Rajah & Tann Singapore LLP) for the applicants in HC/OS 857/2015 and HC/OS 859/2015; Mark Yeo & Jessie Huen (Engelin Teh Practice LLC) for Mirador Building Contractor Pte Ltd; John Lim and Eric Ng (Malkin & Maxwell LLP) for SLE Power Engineering Pte Ltd).

Parties : Punj Lloyd Pte Ltd — Sembawang Engineers and Constructors Pte Ltd

Companies – Schemes of arrangement

16 December 2015

Aedit Abdullah JC:

Introduction

1 These grounds address arguments made by separate sets of creditors to set aside orders I had given earlier ordering that meetings be held under s 210(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") to consider proposed schemes of arrangement in respect of Punj Lloyd Private Limited and Sembawang Engineers and Contractors Pte Ltd, which are related companies ultimately under Punj Lloyd Limited, an Indian company.

2 I declined to grant the applications, but indicated that I would give brief grounds of decision to allow the creditors to consider their next course of action, and also for the benefit of other creditors not involved in the arguments.

Background

3 The two companies in question are Punj Lloyd Private Limited ("PLPL") and its subsidiary, Sembawang Engineers and Constructors Pte Limited ("SEC"). SEC is a subsidiary of PLPL, which in turn is a wholly-owned subsidiary of Punj Lloyd Limited ("PLL"), a company listed on exchanges in India. The PLL group is primarily concerned with engineering and construction in energy and infrastructure.

4 Both PLPL and SEC have run into financial difficulties. PLPL incurred losses in SEC and SEC's previous subsidiary, Simon Carves Limited, a UK company ("Simon Carves"), as well as in its own projects. SEC was affected by the position of Simon Carves, losses in its own projects, and its inability to obtain new work from the end of 2012. SEC is a creditor of its parent, PLPL.

5 Both PLPL and SEC sought orders from the Court under s 210(1) of the Companies Act for meetings of creditors to be called to consider restructuring of its debts by way of schemes of arrangements. Among other things, PLPL's scheme would be dependent on SEC's scheme being approved. Both companies' schemes would ultimately be dependent on PLL assuming liabilities, subject

to it obtaining approvals from its creditors and other entities.

6 I had on 18 September 2015 granted the orders for the meetings to be held. Brief oral grounds were issued to record the reasons for rejecting opposition by one creditor of SEC: *Re Sembawang Engineers and Constructors Pte Ltd* [2015] SGHC 250. It was subsequently conveyed to me that some creditors wished to apply to set aside that order. The matter eventually came up for hearing on 3 December 2015. For ease of reference, I refer to the two sets of creditors collectively as the Creditors, and if it is necessary to distinguish them, by their lead creditor, as follows:

(a) those who opposed the PLPL meeting, as the PLPL Creditors; and

(b) those opposing the SEC meeting as the SEC creditors.

I refer to PLPL and SEC collectively as the Applicants, as they were the original applicants, and no real distinction was made in their respective positions.

7 Concerns were raised by the Creditors in respect of the following transactions and events within the Punj Lloyd Group. It was argued that these transactions were not sufficiently disclosed. These transactions were:

(a) A debt of S$91.8m owed by PLPL to SEC. The SEC Creditors contended that there was no explanation of how this amount came to be. As the amount was very substantial and constituted three times the value of other money owed by the unrelated and unsecured creditors, SEC would be the dominant creditor and this would affect the outcome of any meeting. The explanation given by the Applicants was that this represented money owed to SEC by PLPL in respect of Simon Carves.

(b) Preference shares held by PLL were redeemed by PLPL for $50m in December 2014.

(c) A transaction involving a Malaysian subsidiary of PLPL, Punj Lloyd Oil & Gas Malaysia ("PLOG"), which seemed to have undistributed reserves of RM 135m. It was eventually disclosed by the Company that PLOG was divested by PLPL, and that PLOG was to be transferred to Punj Lloyd Infrastructure Pte Limited ("PLIPL"), an entity owned by PLL. That transfer was pending approval. In return for the PLOG transaction, PLIPL assumed PLPL's liabilities to the sum of $188,571,873.

8 The meetings ordered under s 210(1) were to be held in mid-January 2016.

9 At the start of the hearing, I invited parties to consider *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another Appeal* [2012] 2 SLR 213 ("*RBS*") and *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 ("*Ng Huat*") in the course of their oral arguments.

The Arguments

The Arguments of the PLPL Creditors

10 The primary arguments were that there was no full and frank disclosure, and that the transactions in question were not intended to benefit the creditors, but instead were really intended to dissipate assets and put assets out of their hands.

11 The company was obliged to give full and frank disclosure of all material facts relevant to the

exercise of the court's discretion. It failed to do so in respect of the various transactions in the 12 months leading up to its application.

12 The $91m debt to SEC was not explained till late in the day, and only after the setting aside application was launched. The PLPL Creditors did not take substantive issue with the transaction but noted that the losses would have crystallised earlier.

13 As for the redemption of the preference shares, its effect was hidden by PLPL. As PLPL had already suffered large losses, it should not have redeemed these shares for $50m in cash. A solvency statement published by PLPL in 2014 indicated that it would be able to pay its debts over the next one-year period. PLL's ability to support PLPL moving forward was also put in doubt by the fact that PLL did not support the redemption. This transaction simply moved funds out to PLL and was liable to be set aside as the giving of an undue preference to PLL.

14 Information about the PLOG transaction was not disclosed earlier, including its very existence, the value of the assets standing as security for the syndicated facility, reserves held by PLOG and how the value of the PLOG transaction was determined. While the Company claimed that the PLOG transaction and its impact were sufficiently disclosed, it could not be determined from the financial statements and accounts that the transaction had taken place. The non-disclosure was intentional. It took place only 10 weeks before the approval of the s 210(1) application; it was not disclosed in the supporting affidavit for that application, or other supporting affidavits. The matter only arose after queries were made about the reserves. The PLOG transaction would be an unfair preference liable to be set aside under the Companies Act. Alternatively, it was an attempt to ringfence assets from PLPL's creditors. There were doubts whether the transaction was genuine, and whether it did take place at the material time. Because of the transaction, PLL was paid or secured in full in respect of S$114m owed to it by PLPL.

15 PLPL's intention behind the scheme application was simply to avoid or delay a winding up, and avoid any setting aside of the impugned transactions. At the very least, the PLOG transaction and share redemption were not done in the interest of PLPL's creditors. That these transactions were not beneficial to creditors and not intended to benefit them were relevant matters to be considered: *Re Halley's Departmental Store Pte Ltd* [1996] 1 SLR(R) 81 ("*Re Halley's*").

16 Additionally, a carve-out from an interim stay order made previously under s 210(10) was sought in respect of an on-going matter.

The Arguments of the SEC Creditors

17 It was alleged that there was inadequate information about SEC's state of affairs relating to the debt of $91.8m owed to it by PLPL. This debt arose from suspicious transactions, and there was an irresistible inference that the aim of SEC was to hinder the winding up applications filed against it and avoid investigations.

18 The reference to the debt in SEC's affidavit was very cursory. It was odd that no reason was given for SEC holding a debt in its parent. An adverse inference should be drawn by the Court. Contrary to what was asserted by SEC in its reply to a query about the debt, this issue was not a legal one, but a factual one. The issue was also one that went to the root of the current proceedings. The obligation to provide adequate information was underlined in various cases such as *Re Halley's and Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629. No informed decision could be made without an explanation being given, and SEC's assertions could not be verified. The return forecast for the scheme was not a better

alternative. The matter should be independently investigated by liquidators.

19 The cases also showed that the Court would support the investigative function of winding up, and scrutinise the *bona fides* of any proposed scheme, especially if its aim is to avoid investigations: *Re Halley's*. Aside from the questions about the $91.8m debt, there was also the issue of what happened to the net assets of $126,829,000 that was in SEC. In the circumstances fraudulent trading under s 340 Companies Act, the aim of which may be to put any liquidator out of the ability to rely on the statutory presumption to recover the $91.8m debt, might be made out. SEC was also not really insolvent—the evidence pointed to it being simply unwilling to recover the $91.8m from PLPL. Section 210 is dependent on the company being liable to be wound up.

20 The affidavit put in by SEC on 30 November also indicated that SEC was making advances to fund Simon Carves after it had become a wholly owned subsidiary of PLPL, without any benefit to itself. There were doubts about the transactions within SEC which merited further investigations.

The Arguments of the Applicants

21 In written arguments, the Applicants addressed the issues raised by the PLPL Creditors only. The primary point made was that the present application was under s 210(1); however, the issue of non-disclosure would only arise in the case of a scheme that had obtained the approval of creditors and, subsequently, the court under s 210(3). There was no material non-disclosure. The standard required at the s 210(1) stage was lower than that for s 210(3). At the s 210(1) stage, there are pressures and demands that require the company to act quickly and respond to a fluid situation. The court at this stage would not be able to go into an in-depth investigation. Leave at this stage would only be refused in clear-cut situations.

22 There was full disclosure as to the scheme, and any lack of details was addressed by subsequent disclosures. Any non-disclosure was not material. The impugned transactions were adequately explained:

(a) The PLOG transaction would remove secured liabilities form PLPL's books. The transaction was necessary to support projects undertaken by PLOG and its subsidiary, PLSB, to allow profits to be obtained for the benefit of the group, and for the support of PLPL and SEC. The transaction also removed from PLPL's books over $188m in liabilities. The transfer would put PLPL's unsecured creditors in a better position than if PLOG remained a subsidiary of PLPL. The transaction was disclosed in the accounts.

(b) The redemption of preference shares occurred in the context of greater amounts of money being put into PLPL by PLL, primarily due to loans advanced by PLL to PLPL to support Simon Carves. A substantial part of debt was converted to equity, by PLPL issuing to PLL $190 million preference shares. This was disclosed in financial statements. The redemption of $50m must be viewed against support of approximately 4 times as much being given by PLL.

(c) The SEC debt was *bona fides* incurred as a result of the failure of that subsidiary; the SEC debt was disclosed in the supporting affidavit. This arose in relation to the failure of a former UK subsidiary of SEC, Simon Carves. The group as a whole committed $467m in funds to Simon Carves. SEC advanced various sums of money to PLPL, both in relation to and separate from Simon Carves. The outstanding amount in respect of Simon Carves owed by PLPL to SEC was $91.8 million.

23 No carve-out should be granted, as the company had good grounds for its defences in the

various actions, and as a carve-out would open the floodgates since it would be unfair to suspend any actions brought by the other creditors.

24 Similar points were made in oral response to the arguments by the SEC Creditors.

The Decision

The Applicable Principles

25 The arguments made by the Creditors were for the orders under s 210(1) to be set aside. The arguments were made at this time as the Creditors were not in a position at the original s 210(1) hearing to oppose the Company's application then. To my mind, there is no significant distinction between the principles applicable to either an initial application for such an order or for the setting aside of that order subsequently, though in some circumstances, a creditor applying for a subsequent setting aside may need to explain why the setting aside was not sought earlier if the evidence relied upon was previously known and available. That issue does not arise here.

26 In considering whether an application for an order for a meeting to be convened under s 210(1) should be granted, the Court's concern would be to ensure that the classes of creditors at the meeting are fairly constituted. No meeting would be held if it is clear that it would be an exercise in futility, for instance, because the proportion of opposing creditors means any proposal would be defeated, or if the circumstances are such that the scheme would clearly be doomed to failure. Additionally, while this was not clearly foreshadowed in the cases cited to me, given the inherent jurisdiction of the court to ensure that its processes are not improperly invoked, an order under s 210(1) would be refused if it is shown that the application amounts to an abuse of process.

27 In the present case, I was satisfied that none of the allegations about the transactions impugned by the Creditors were such as to show that any of these concerns were made out. It was not shown that the proposed meetings would be futile. There was nothing to show any abuse of process; in particular, there was no material non-disclosure that indicated impropriety. What was of concern was whether it was appropriate in respect of PLPL's proposed scheme to have SEC in a class with the other creditors, as SEC would dominate the class. However, this concern was addressed by the Applicant's concession that SEC would be in a separate class. The proper categorisation of SEC should ideally have been done by the initial application. While not specifically provided for in s 210(1), in some circumstances where there is complexity in the financial position of those involved, some refinement of proposals, including classification, can be permitted. In general though it behoves applicants to assiduously consider the fairness of meeting classes right at the onset, to assure the court and creditors that fairness will be observed.

Analysis

Factors to be considered

28 The approach to be taken in s 210(1) applications was specified by the Court of Appeal in *RBS*. The Court of Appeal endorsed the observation in *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 1994, Issue 37 (July 2011 release)) at p L6 that a key task of the promoter of a scheme is to classify creditors according to interests: at [58]. The Court of Appeal then considered whether issues of classification should be raised at the s 210(1) stage, or whether it should be left to the sanction stage. The Court preferred the approach encapsulated in England's Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345. It was emphasised that the solicitors acting for the company had to unreservedly disclose all material information to assist the court in arriving at a

proper determination as to how the meeting is to be conducted: at [62]. At the same time, the Court of Appeal noted that the Court should not consider the merits and fairness of the scheme: what was in issue at this stage was the court's jurisdiction to give sanction if the scheme were to proceed: at [63], citing *Re Telewest Communications plc* [2005] BCC 29. The Court should also not grant an application if there is no realistic prospect of approval: at [64], citing *Ng Huat*.

29 What must be considered are the following factors:

(a) fairness of classification;

(b) anything showing futility of meeting; and

(c) matters that may otherwise indicate possible abuse of process.

30 The considerations at this stage are different from those that apply when a scheme has passed muster with the meeting of the creditors and the approval of the court is sought under s 210(3).

(1) Duty to Disclose

31 Bearing in mind the factors noted, the duty to disclose material information thus exists to ensure that the Court has all necessary information before it to be able to make a considered determination in respect of those factors. This obligation can be seen to be derived from the fact that the applicant company needs to move the court to exercise its statutory power to permit a meeting to be called. In the present case, the PLPL Creditors posited the duty as an instance of the obligation in *ex parte* summons for the applicant to disclose all material evidence. That obligation is founded on the duty of the solicitor to fulfil his overriding duty to the court, which is underlined in *ex parte* applications by the absence of opposing counsel.

32 I did not think it ultimately mattered in this case what the jurisprudential basis for material disclosure was. What was more pertinent was how that duty was to be interpreted in any given set of facts. To my mind, what counted as material was whether it affected either a matter of classification, the likelihood of success of the meeting, or anything indicating possible abuse of process.

33 Thus in *Ng Huat*, what were found to be material non-disclosure were matters going to the likelihood of viability of the scheme: there was the non-disclosure of the bankruptcy hearing in respect of a putative white knight, as well as the fact that an opposing creditor had obtained an arbitration award in its favour: *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [23]. Both of these would have meant that it was likely that the scheme would not be successfully adopted.

34 In the present case, I did not find that the allegations of material non-disclosure were made out. While it may be that effect of the relevant bits of information would not always be apparent on a casual perusal of the financial statements accounts or other documents, ultimately the information in question was only really relevant if one were to look at the merits of the proposed scheme. And as will be considered below, the allegations did not establish any abuse of process either; there was no material non-disclosure in this regard either.

(2) Relevance of matters raised as to the transactions

35 The various matters raised as to the transactions were generally not relevant in a s 210(1)

application. The various concerns raised may involve matters which call for explanation by the Company to its creditors, as to the actual financial position of PLPL and SEC, the viability of the proposals as well as its attractiveness and benefit for them. However, such concerns are generally not material at the s 210(1) stage, which requires primarily an assessment of the fairness of the meeting. These arguments made may be material in the court's consideration of whether approval should be granted if the proposals get through the meetings and come up to the Court for approval under s 210(3). The arguments made were thus premature.

36 It may be that, in some instances, questions as to the likelihood of the acceptance of the scheme may be raised if the schemes do not appear to be beneficial to the creditors. However, there needs to be proof of opposition to the scheme by such a significant number of creditors that the vote must clearly go against the proposal. There was no such evidence in the present case.

37 Additionally, it may be that allegations of possible undue preference, or ulterior motive, could show that there has been an abuse of process by the applicant for a s 210(1) order. The allegations in the present case fall short of that: the allegations did not conclusively show wrongdoing as such, and were not the sort of matter that would be clearly characterised as fraud. At this point in the process, there may be reasonable explanations or justification for what was done by PLPL and SEC.

38 The allegations made about the transactions did not show abuse of process. While it was contended that the Company intended to stave off liquidation and safeguard the assets of PLPL and SEC for the benefit of the holding company only, the evidence adduced by the Company gave the justification for the transactions. The redemption of the preference shares, the transfer of PLOG, and the incurring of the $91.8 million debt, were all on the Company's evidence, connected to efforts to keep the group going and afloat. In the face of such evidence, I could not conclude that the matter was so clearly indicative of wrong doing by the Company at this stage that it amounted to an abuse of process for the scheme applications to have been made.

39 It may be that when these transactions are scrutinised by the creditors, they may find the explanations given wanting, and reject the schemes. Additionally, even if the schemes pass muster with the required supermajority of creditors, it may be that the allegations suffice to convince the Court at the s 210(3) stage that the schemes should not be approved then. Different considerations are in play then as opposed to the present.

(3) SEC's classification

40 What was of greatest concern was SEC's classification at the meeting at PLPL. As pointed out by the PLPL Creditors, SEC would hold a substantial amount of debt by value in PLPL, and could dominate the meeting. This to my mind would be a substantial matter affecting the fairness of the meeting, and should have been disclosed at the initial application. However, Counsel for the Applicants indicated in the course of the arguments that the position that the Company would take is to have SEC in a separate class from the unrelated unsecured creditors. The reason given for this amendment being made at this stage was that the position was finely balanced, as SEC's own position had to be taken into account, as it was also the subject of a scheme proposal. Counsel for the PLPL Creditors argued essentially that this came too late to save the application.

41 The composition of classes for the meeting is an important matter, as it goes to the fairness and equity of the deliberations by the creditors at the meeting called under s 210(1) on whether a proposal should be adopted. Ensuring such fairness is important factor in the court's determination under s 210(1). Thus, applicants for orders under that section should generally ensure that when the application is first made, appropriate classes for meetings are proposed.

42 However, in the present case, it was material that SEC was itself under a scheme proposal, and I accept that there had to be some thought as to what would be fair to both PLPL's creditors and SEC's own creditors. I also accept that in proposals involving companies in a group, the position may be complicated and intricate. For these reasons, I was of the view that the original order should not be set aside. Some leeway for amendment and adjustment of the meeting composition could be made even at this relatively late stage.

43 But the general rule remains that s 210(1) applications at their inception should address questions of fairness head-on. One would expect those proposing a scheme to be assiduous in their treatment of non-related creditors, and to take all feasible steps to ensure the fairness of meetings and class categorisation. Anything short of that may prove fatal even at the s 210(1) stage. It may yet be that if a similar situation as the present arose in future, the court may not take kindly to a reclassification of creditors even before the meeting.

Miscellaneous points

44 The SEC Creditors raised concerns that the scheme was in effect an attempt to avoid investigations in insolvency and the effect of various provisions in winding up, including those protecting against fraudulent trading, as well as undue preference. It may be that the effect of the approval of a scheme would be to render those provisions inoperative—but that result would not be caused by anything sinister. The Company is saved from liquidation because of the requisite majority of its creditors have approved the proposal to rescue the company. The meeting of the requirements laid down by the legislature, namely obtaining the support of the majority of creditors, as well as the approval of the court, means that the Company legitimately avoids the liquidation process.

45 The argument was also made that s 210 could only operate in respect of companies liable to be wound up, *ie*, companies that are actually insolvent. Section 210(11) defines the term "company" to mean any corporation or society liable to be wound up under the Companies Act. There being nothing to show that SEC was in fact insolvent, it was contended that the requirements were not met and SEC was thus not entitled to the benefit of s 210. With respect, I do not read s 210(11) in that way. Section 210 applies not just to creditors, but also members, and could conceivably operate in respect of wholly solvent companies: *The Oriental Insurance Co Ltd v Reliance National Asia Pte Ltd* [2008] 3 SLR(R) 121. As noted in various authorities cited in that case, and the commentary in *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2009 Rev Ed), s 210 has been used in corporate reorganisations of going concerns. Such applications are made even today. The definition in s 210(11) is simply to limit the operation of s 210 to only those companies that could potentially be wound up by the Act, *ie*, it does not apply to those companies that lie outside the ambit of the winding up provisions of the Companies Act, *ie*, for instance foreign corporations without any assets or without any link to Singapore.

46 I did not grant the carve-out from the restraining order under s 210(1) sought by the PLPL Creditors for one of the actions filed against PLPL. It was argued that there no defences available in the case. That contention could be made in most, if not, all the cases against the Companies. As argued by the Applicants, acceding on this ground would probably open the door entirely to litigation by other creditors and render the restraining order nugatory. There was an application concerning a separate creditor which I adjourned to consider another day—the circumstances of that case raised different considerations which I thought merited further argument.

Conclusion

47 The setting aside by the Creditors was accordingly refused.

48 As to the question of costs, the Applicants argued that costs should be imposed considering that other creditors had been content to raise queries only and had not sought to set aside the original orders. As argued by the Creditors however, the Company's affidavit came late, and was filed without leave. Additionally, to my mind, the issue of categorisation of SEC for the PLPL meeting should have been given greater consideration earlier. For these reasons, I declined to make any order as to costs.