Sculptor Finance (MD) Ireland Ltd *v* Media Development Authority of Singapore [2013] SGHC 23

Case Number	: Originating Summons No 713 of 2012/P
Decision Date	: 24 January 2013
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Blossom Hing and Mohan Gopalan (Drew & Napier LLC) for the Applicant; Kenneth Lim Tao Chung, Goh Zhuo Neng and Cai Chengying (Allen & Gledhill LLP) for the Creditor.
Parties	: Sculptor Finance (MD) Ireland Ltd — Media Development Authority of Singapore

Credit and Security – Charges

24 January 2013

Tay Yong Kwang J:

Introduction

1 Originating Summons No 713 of 2012/P ("OS 713") was an application by Sculptor Finance (MD) Ireland Limited ("the Applicant") under s 137 of the Companies Act (Cap 50, 2006 Rev Ed) for an extension of time to register with the Accounting & Corporate Regulatory Authority ("ACRA") the charges created by RGM Group Pte Ltd ("RGPL") and RGM Media (Singapore) Pte Ltd ("RMSPL") under a Deed of Charge dated 3 August 2011 in favour of the Applicant (hereinafter referred to as "the Charges").

2 The Applicant sought the following orders in OS 713:

(a) That time for lodgement of the Charges be extended for a further 30 days from the date of the order;

(b) That the omission to register the Charges be rectified;

(c) That the order shall be without prejudice to:

(i) Any liability already incurred by RGPL or RMSPL or any of the officers of RGPL or RMSPL in respect of the default in lodgement for registration; and

(ii) The rights of any person claiming any interest in the property charged pursuant to any of the Charges if such interest was acquired before the time of the actual registration of the relevant Charge; and

(d) Such further or other relief, orders or directions deemed fit.

3 The Media Development Authority of Singapore, a creditor of RGPL ("the Creditor"), was represented at the hearing before me. After hearing counsel for the Applicant and the Creditor, I granted the Applicant's application and ordered that the costs of the application be borne by RGPL

and RMSPL. I also made the further order that in the event of winding up, the liquidator of RGPL and/or RMSPL is at liberty to apply to set aside my orders within 12 weeks of his appointment or such extended period as the court may order. The Creditor has appealed against my decision.

The facts

4 The Applicant is an investment fund company incorporated in Ireland. RGPL and RMSPL are companies incorporated in Singapore. RMSPL is wholly owned by RGPL. RGPL is wholly owned by One North Entertainment Limited ("ONEL"), a company formerly listed on the Australian Securities Exchange. The Creditor is a body corporate established under the Media Development Authority of Singapore Act (Cap. 172).

5 Between August and December 2011, the Applicant, together with two other investment fund companies known as Sculptor Finance (AS) Ireland Limited and Sculptor Finance (SI) Limited (collectively referred to as "the Sculptor Entities"), subscribed for a total of AUD $4,000,000 worth of convertible bonds ("the Bonds") issued by ONEL. Pursuant to a Deed of Charge dated 3 August 2011, RGPL and RMSPL each granted the Charges to the Applicant to secure all monies owing to the Sculptor Entities under or in relation to the Bonds. The Applicant holds the benefit of the Charges on trust for itself and the other two Sculpture Entities. The Charges are in the nature of fixed charges and floating charges over certain assets of each of the chargors.

6 It was undisputed that the Charges fell within the scope of s 131(3) of the Companies Act (concerning charges which are registrable). Section 131(1) provides that the failure to register such charges within 30 days would render them void against the liquidator and any creditor of the company. S 131(1) of the Companies Act reads:

> **Registration of charges**
>
> 131.—(1) Subject to this Division, where a charge to which this section applies is created by a company there shall be lodged with the Registrar for registration, within 30 days after the creation of the charge, a statement containing the prescribed particulars of the charge, and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

7 Since the Charges were created on 3 August 2011, they should have been registered with ACRA by 2 September 2011. The Applicant, however, did not do so as it did not have advice on Singapore law at the time that charges were created and was therefore unaware of the need to register the Charges. It was only when the Applicant appointed Singapore lawyers in May 2012 that the Applicant discovered that the Charges required registration and that this had not been done by RGPL or RMSPL. There was, however, an approximately two-month delay by the Applicant in taking any action (see [9] below).

8 On 27 June 2012, ONEL announced that its board of directors had approved the disposal of the whole of its interest in RGPL to Special Solutions Pty Ltd (LFF).

9 On 26 July 2012, approximately two months after being aware of the need to register the Charges (see [7] above), the Applicant filed OS 713 seeking the orders set out at [2] above. Notice of OS 713 was provided to the Creditor because the Applicant, having done a search on LawNet, became aware of pending proceedings brought by the Creditor against RGPL. Notice of OS 713 was also provided to ONEL as the Applicant was aware that ONEL had filed a judicial management

application in respect of RGPL in Originating Summons No 421 of 2012 ("OS 421"). ONEL eventually sought leave to withdraw OS 421, which I granted on 28 September 2012. The Creditor opposed the Applicant's application in OS 713 and filed a winding-up application against RGPL on 28 September 2012 in Companies Winding Up No 158 of 2012/H.

The issues to be decided

10 As a preliminary point, counsel for the Applicant submitted that leave of court under s 227C of the Companies Act was not needed to commence OS 713. The said provision reads as follows:

> **Effect of application for a judicial management order**
>
> **227C**. During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application —
>
> ...
>
> (c) *no other proceedings and no execution or other legal process shall be commenced or continued* and no distress may be levied *against the company* or its property *except with leave of the Court* and subject to such terms as the Court may impose.
>
> [emphasis added]

The Applicant relied on Millett J's comments in *In re Barrow Borough Transport Ltd* [1990] 1 Ch 227 ("*Barrow*") at p 232D-F to make its case:

> In my judgment, an application for an extension of time under the Companies Act 1985 for the registration of a charge cannot be described as "proceedings against the company or its property". It is an application which can equally well be made by the company, and which normally is made by the company while it is a going concern. I would not unless compelled to do so construe the Act as imposing an obligation upon a creditor to apply to the court for leave to register out of time. A double-barrelled application for leave is an absurdity. In my judgment, the Insolvency Act 1986 does not require it.

Counsel for the Creditor did not pursue this point at the hearing before me. I agreed with Millett J's views in *Barrow* that leave of court was not needed to commence OS 713 and proceeded to hear the parties on the substantive issues of the case.

11 The central issue in this dispute was whether this court should, given the factual matrix as at the date of the hearing on 5 October 2012, grant the Applicant an extension of time to register the Charges and order that the register be rectified pursuant to s 137 of the Companies Act. S 137 of the Companies Act provides as follows:

> **Extension of time and rectification of register of charges**
>
> **137.** The Court, on being satisfied that the omission to register a charge (whether under this or any corresponding previous written law) within the time required or that the omission or mis-statement of any particular with respect to any such charge or in a statement of satisfaction was *accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders or that on other grounds it is just and equitable to grant relief*, may on the application of the company or any person interested and on

such terms and conditions as seem to the Court just and expedient (including a term or condition that the extension or rectification is to be without prejudice to any liability already incurred by the company or any of its officers in respect of the default) order that the time for registration be extended or that the omission or mis-statement be rectified.

[emphasis added]

12 To exercise its powers to grant an extension of time and rectification of the register, the court must be satisfied that at least one of the grounds set out in s 137 of the Companies Act is made out. In other words, the Applicant must show that the omission to register the Charges was:

(a) Accidental;

(b) Due to inadvertence;

(c) Due to some other sufficient cause;

(d) Is not of a nature to prejudice the position of creditors or shareholders; or

(e) That on other grounds it is just and equitable to grant relief.

Counsel for the Applicant specifically relied only on grounds (b) and (e) to make its case. I will address both grounds below.

The ground of inadvertence

13 Counsel for the Applicant submitted that the Applicant's ignorance of the requirement for registration in Singapore law amounted to "inadvertence" for the purposes of s 137 of the Companies Act. Two cases revolving around the English equivalent of s 137 of the Singapore Companies Act were cited in support of this proposition. The first case was *In Re The Mendip Press (Limited)* (1901) 18 TLR 37 (Ch D) ("*The Mendip*"). In *The Mendip*, the company's secretary was imperfectly acquainted with the provisions of the English Companies Act with regard to the requirement of registration of debentures. Buckley J held that this amounted to "inadvertence" and granted the company an extension of time to register the debenture. Similarly, in *Re Heathstar Properties Ltd* [1996] 1 WLR 993 (Ch), the chargee's solicitors had advised the chargee that its charge did not require registration, so the chargee was unaware of the need to register its charge. Plowman J held that this fact amounted to "inadvertence" under the equivalent provision in the English Companies Act.

14 In response, counsel for the Creditor made two main arguments. First, it was submitted that the Applicant had failed to particularise its explanation for omitting to register the Charges as was required by law (see: *In re Kris Cruisers Limited* [1949] 1 Ch 138 at p 140 ("*Re Kris*"), *Re Public Bank Bhd* [2001] 6 MLJ 330 at p 337I and William James Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) at p 763). Second, it was submitted that the claim of inadvertence by the Applicant was inherently incredible. It was argued that the present case ought to be distinguished from *Re Kris* and *PD Manufacturing International Pte Ltd v ING Bank NV* [1999] SGHC 236 ("*PD Manufacturing*") since the Applicant's claim of inadvertence by reason of being unaware was different from inadvertence arising out of: (a) a belief that some other person would take care of the registration (as was in the case of *Re Kris*); and (b) a belief that a charge is not a security interest to which s 131 of the Companies Act applies (as was in the case of *PD Manufacturing*). Counsel for the Creditor also made the following points in arguing that the Applicant's claim was incredible:

(a) Since the same obligation to register charges exists under Australian company law, and given that the Applicant had in fact created several charges under Australian law under the same Bond Deed Poll, the Applicant ought to have been alive to the possibility of a similar requirement of registration of the Charges under Singapore law and/or the necessity of obtaining advice in relation to the same;

(b) The Applicant had been advised by an Australian law firm which prepared and drafted the Charges and the Bonds;

(c) It is difficult to believe that an investment fund company like the Applicant did not carry out basic due diligence by seeking advice on Singapore law on the formalities concerning the Charges;

(d) The Applicant had been put on notice of RGPL's financial difficulties and disputes with the Creditor as early as 2011;

(e) As a matter of practice, the lender (*ie*, the Applicant) will undertake the registration of the security (*ie*, the Charges), and it is the borrower (*ie*, RGPL) which will authorise the registration of the security by the lender. A close reading of Condition 12.1(b) of the Bonds reveals that such a practice was adopted by the Applicant as well as RGPL and RMSPL:

> **12.1 Affirmative undertakings**
>
> The Issuer must:
>
> (b) **authorisations**: maintain, and procure that its Subsidiaries maintain, all Authorisations necessary to be maintained by it to ensure the legality and enforceability of the Bonds Documents and the priority of the Security or required for the conduct of its business or ownership of its Secured Property.
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> [emphasis in original]

(f) Even if the Applicant truly believed that Condition 12.1(b) imposed a positive obligation on RGPL and RMSPL to register the Charges, it ought to have sought confirmation from them that it had been done.

15 Having considered the arguments by both parties, I held that the ground of inadvertence was made out. I was of the view that the Applicant had sufficiently particularised its explanation for omitting to register the Charges (*ie*, that it was simply unaware of the need for registration). I was not persuaded on the facts that the Applicant had known about the requirement for registration. I agreed with the English decisions in *Re The Mendip* and *Re Heathstar* that not being aware of the requirement for registration suffices as inadvertence for the purposes of s 137 of the Companies Act. Where the two cases which counsel for the Creditor relied on were concerned, namely *Re Kris* (where there was a mistaken belief that some other person would take care of the registration) and *PD Manufacturing* (where there was a mistaken belief that the charge was not a security interest to which s 131 of the Companies Act applied), I did not think that the present case ought to be distinguished from those two cases as there was, in all three cases, the common and crucial element of inadvertence in the sense of an oversight and/or a mistake as to the requirement for registration.

16 For these reasons, I allowed the application. However, in the interests of not prejudicing the creditors of RGPL and RMSP in the event of winding up (see below at [24]), the grant of the

application was subject to the liquidator's liberty to apply to set aside my orders in the event of winding up.

The "just and equitable" ground

17 Counsel for the Applicant relied on the alternative argument that the application should be allowed on the "just and equitable ground" even if the ground of inadvertence was not made out. Counsel for the Applicant submitted that the obligation to register the Charges rested not on the Applicant but on RGPL and RMSPL as chargors and it would not be "just and equitable" for the Applicant to be prejudiced by the failure of RGPL and RMSPL to fulfil their obligation. Support was drawn from three sources to make this point. First, it was submitted that s 132 of the Companies Act contemplates that it is the chargor which is under the obligation to register a charge. The said provision reads:

> **Duty to register charges**
>
> 132.—(1) Documents and particulars required to be lodged for registration in accordance with section 131 may be lodged for registration *by the company concerned or by any person interested in the documents*, but if default is made in complying with that section the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000 and also to a default penalty.
>
> (2) Where registration is effected by some person other than the company, that person shall be *entitled to recover from the company the amount of any fees properly paid by him on the registration*.
>
> [emphasis added]

Second, counsel for the Applicant relied on Lim Teong Qwee JC's statement at [12] of *PD Manufacturing* that "[i]t is the company that is required to register the charge and it is the company that is in default". Lastly, counsel for the Applicant relied on Clause 4.2(f) of the Deed of Charge read with Clause 11(m) of the Bonds. The two clauses are reproduced below:

> **4 Representations and warranties, undertakings**
>
> ...
>
> **4.2 Undertakings**
>
> (f) Each Chargor must ensure that no Event of Default occurs ...
>
> **11 Events of Default**
>
> A bondholder ... and any Bondholder acting with the authority [of] the Bondholders ... may give notice to the Issuer that the Bonds held by the Bondholder ... are, and the Bonds shall accordingly thereby immediately become, due and repayable at the Default Redemption Price if any of the following events (each an **Event of Default**) shall have occurred:
>
> ...
>
> (m) any action, condition or thing (including the obtaining or effecting of any necessary consent, approval, authorisation, exemption, filing, licence, order, recording or registration)

at any time required to be taken, fulfilled or done in order (a) to enable the Issuer or any Subsidiary lawfully to enter into, exercise their respective rights and perform and comply with its obligations under the Bond Documents, (b) to ensure that those obligations are legally binding and enforceable, and (c) to ensure that each Security creates the security interests contemplated by its terms and has the intended priority, is not or has not been taken, fulfilled or done;

...

[emphasis in original]

18 In response, counsel for the Creditor submitted that it would not be just and equitable to allow late registration of the Charges for three main reasons. First, as alluded to earlier at [14(e)], the Creditor took the position that it is the practice of the industry for the lender, not the chargor, to undertake registration. Second, it was argued that the winding up of RGPL was not only imminent, but inevitable, so it would not be just or equitable to allow the late registration of the Charges. Third, it was argued that this ground was not made out in view of the Applicant's delay in commencing OS 713 only on 26 July 2012 despite becoming aware of the need to register the Charges as early as May 2012.

19 I was of the view that it would be just and equitable to grant the application subject to the liquidator's liberty to apply to set aside the registration of the Charges. I agreed that the obligation to register the Charges fell on RGPL and RMSPL as chargors and that it would not be just and equitable for the Applicant to be prejudiced by the failure of RGPL and RMSPL to fulfil that obligation. Even if there is a practice in the industry for the lender and not the chargor to undertake registration, the legal responsibility ultimately still lies with the chargor.

20 On the issue of prejudice arising from the imminent winding up of RGPL, I agreed with the Applicant that there was no absolute certainty at the time of the hearing that a liquidation of RGPL would actually occur as it still remained possible for RGPL to restructure its debt through a scheme of arrangement or some other rehabilitation process. The fact that RGPL's sole shareholder, ONEL, had made an announcement to the effect that its directors had approved the disposal of the whole of its interest in RGPL (see [8] above), did not necessarily diminish the possibility of RGPL restructuring. Despite the announcement, ONEL had not, at the material time, disposed of its entire equity interest in RGPL and continued to be RGPL's sole shareholder. Furthermore, the business of one of RGPL's subsidiaries, RGM Artist Group Pty Ltd, was still operational and generating revenue.

21 While winding up was not necessarily imminent or inevitable, it was nevertheless clear on the facts that winding up was a real possibility. I was thus of the opinion that it would be just and expedient to grant the application subject to the liquidator's rights to set the registration aside in the event of winding up. I came to this conclusion after considering two lines of cases that seemed to point to different conclusions.

22 In the English case of *In re LH Charles & Company Ltd* [1935] WN 15 (Ch D), such an order was granted even though a notice had been sent out to all members to convene a meeting regarding the winding up of the company. Similarly, in the Singapore case of *PD Manufacturing*, the court granted a similar order in relation to an insolvent company to provide for the eventuality of winding up. However, in another line of cases, the courts have refused to grant similar orders. A closer examination of these cases though, revealed significant distinguishing factors. For example, in *In re Resinoid & Mica Products Ltd* [1983] 1 Ch 132 ("*Resinoid*"), Lord Denning MR was influenced not only by the fact that winding up was imminent but also by the fact that the chargees failed to register the

charge even after the loan in question had been in default for almost 20 months (see *Resinoid* at p 133D-E). In the case of *In Re Ashpurton Estates Ltd* [1983] 1 Ch 110 ("*Ashpurton*"), the Court of Appeal was swayed not just by the imminence of the winding up but also by the conduct of the applicant. The applicant became aware that its charge was not registered when it should have been but nevertheless chose to enforce it by selling the charged properties as it had been advised that an application to extend time to register the charge might alarm the company and precipitate a liquidation (see *Resinoid* at p 121D-E). In the words of Lord Brightman, "the court ... should look askance at a chargee who deliberately defers his application in order to see which way the wind is going to blow" (see *Resinoid* at p 132B).

23 Having considered the two lines of cases, I was of the view that while liquidation is a relevant factor that the court is entitled to take into account, the fact of imminent liquidation does not necessarily preclude the court from granting an extension of time. My conclusion is in accord with the views of Hoffmann J in *Re Braemar Investments Ltd* [1989] 1 Ch 54 ("*Braemar*") at p 62A-F:

> Mr. Bannister submitted that the effect of Lord Denning's remarks [in *Resinoid*] was that, as a general rule, an application for extension when winding up is imminent should be refused. *I do not think that Lord Denning M.R. was intending to pay down such a rule. His statement that the application was far too late was, in my view, made in the context of the facts of the case before him.* In [*Ashpurton*], Lord Brightman treated [*Resinoid*] only as authority for the proposition that the imminence of liquidation was a relevant factor. It was a ground on which the registrar had been entitled to exercise his discretion against the applicant. *It does not suggest that he should regularly or even ordinarily do so. There are a number of cases in which orders have been made when liquidation was imminent and there is nothing in [Ashpurton] to suggest that they involved an improper exercise of the discretion.* As a matter of strict law an application to extend time is not too late if the registration can be effected before the liquidation actually commences. The court may, as a matter of discretion, on particular facts decide that it is too late at an earlier date, but *the overriding question must be whether it would be just and equitable to grant the leave*.
>
> [emphasis added]

24 I decided to grant the application subject to the liquidator's right to set aside the registration in the event of winding up as I was of the view that such an order would be just and equitable in all the circumstances. If the winding up application is eventually granted, my orders would enable the liquidator to apply to set aside the registration and to render the Charges void. There would be no prejudice to the other creditors of RGPL. In the alternative scenario that the winding up application is dismissed, there would also be no prejudice to other creditors of RGPL. This is because s 131 of the Companies Act, which voids unregistered charges, does not come into play if there is no winding up (see *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 at [31] to [35] and *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [38]). If I did not allow the application, the Applicant would suffer prejudice since it had lent a substantial amount of money on the basis that it was secured by the Charges. It would be prejudicial for the Applicant to lose that security merely because RGPL and RMSPL failed in their statutory and contractual obligations to ensure that those Chargers were fully enforceable especially in the event of winding up.

25 The Applicant had delayed for about two months before commencing OS 713. While this was a relevant factor to consider, it did not carry much weight in the overall balance. I was still inclined to exercise my discretion to allow the application, subject to the liquidator's liberty to apply to set aside my orders in the event of winding up. This condition would preserve the position for both parties. After all, there may eventually be no need for the liquidator to apply to set aside the orders after he

has had the opportunity to study the true state of affairs.

Conclusion

26 For the above reasons, I allowed the application with costs to be borne by RGPL and RMSPL. In the event of winding up, the liquidator is at liberty to apply to set aside my orders (in respect of the application and of costs) within 12 weeks of his appointment or such extended period as the court may order.