Re Sembawang Engineers and Constructors Pte Ltd
[2015] SGHC 250

Case Number : Originating Summons No 859 of 2015

Decision Date : 23 September 2015

Tribunal/Court : High Court

Coram : Aedit Abdullah JC

Counsel Name(s) : Patrick Ang, Low Poh Ling and Chew Xiang (Rajah & Tann Singapore LLP) for the applicant; Jonathan Tang (Wongpartnership LLP) for creditor opposing application.

Parties : *Re* Sembawang Engineers and Constructors Pte Ltd

Companies – Schemes of arrangement

23 September 2015

Aedit Abdullah JC [delivering the oral judgment]:

1 I made a number of brief oral remarks when conveying my decision on an application under s 210(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") by Sembawang Engineers and Constructors Pte Ltd ("the Company") for it to be granted liberty to convene a meeting with its creditors, within six months or such other extended period ordered by the court, for the purpose of considering and, if thought fit, approving with or without modification a scheme of arrangement proposed to be made between the Company and its creditors (the "Proposed Scheme"). My remarks are set out below.

2 While an application of this nature is normally heard *ex parte*, a number of creditors of the Company as well as its related entity, Punj Lloyd Pte Limited, were present in court as this application was scheduled together with other winding-up applications, and several of them had been informed of the application. Three of the creditors had also presented applications to wind-up the Company. These applications were scheduled for hearing before me on the same day. Counsel for Rigel Technology (S) Pte Ltd ("Rigel"), one of the creditors applying for the Company to be wound-up, opposed the Company's s 210(1) application.

3 In written submissions, which were well prepared despite the lack of time, Rigel argued that the Company's Proposed Scheme was lacking in details and that the Proposed Scheme was not likely to be approved by the court given its lack of specificity. It also pointed out that some of the measures in the Proposed Scheme were conditional upon Punj Lloyd Pte Ltd and Punj Lloyd Ltd (the Company's ultimate India incorporated holding company) carrying out certain actions or securing relevant approvals which were matters that the creditors of the Company had no control over. It was also argued that the application should be refused as the Company was hopelessly insolvent: *Re Pheon Pty Ltd* (1986) 11 ACLR 142. It was suggested that insolvency was to be measured in the commercial sense – *ie*, the inability to meet current demands: *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31. It was argued that the company was hopelessly insolvent as there was a clear shortfall to meet current demands. The winding-up applications against the Company were also cited as reasons to refuse the application, as was also the lack of any assurance that the Company could continue as a going concern.

4 In oral submissions, counsel for the Company responded that notwithstanding the fact that the Proposed Scheme was not complete, it had given adequate details concerning the same. As to the measures concerning the related companies, it was argued that these were legitimately included since they will ultimately benefit the Company. Further, counsel contended that the Company was not hopelessly insolvent, although it may be so on a balance sheet test. It was also pointed out that the Company had support from the rest of the companies in the group it was part of.

5 Having considered these arguments, I decided to allow the Company's application under s 210(1) of the Companies Act, although with modification of the time granted for convening the meeting with the Company's creditors. I ordered that such a meeting be called within four months as opposed to six months, as suggested by the Company. I did not think that significant issues were raised by the arguments based on firstly, lack of details concerning the Proposed Scheme and secondly, the lack of control by the Company's creditors over measures conditional upon third party actions. The following remarks primarily concern the issue of whether a company's 'hopeless' insolvency should be an automatic bar to allowing that company's application under s 210(1) of the Companies Act:

(a) The objective of s 210 of the Companies Act is to permit companies in financial difficulties to seek a way out by way of an agreement worked out with their respective creditors. In assessing whether a meeting should be held, the court will need to be mindful of various factors, which may point in different directions. The company should generally be permitted to at least have a discussion with its creditors and allow them to consider its proposed scheme of arrangement. But it would be pointless to allow the company to convene a meeting with its creditors to consider a proposal which, on its face, is doomed to fail or be rejected by the creditors. It is in this context that the court may look to see whether the company's debts are so overwhelming that any scheme of arrangement proposed by the company would have no chance of garnering sufficient creditor support. With all due respect, I decline to adopt the test of balance sheet or commercial insolvency as a determining factor in an application under s 210(1) of the Companies Act. Many companies may be insolvent and hopelessly insolvent by this measure, but schemes of arrangement may be proposed, which depending on the facts, may yet be viable. The Malaysian and Australian authorities take a different line, but I would respectfully not follow those cases.

(b) It would be difficult for the court to make any searching assessment of the commercial viability of a proposed scheme of arrangement at this stage as it would not have all the information. However, the court should be careful to ensure that the interests of creditors are not affected by the class groupings and voting mechanisms that are proposed – although I note that this was not in issue in this case. The court should also be mindful that the interests of creditors are not unduly harmed by any undue delay or lapse of time before the meeting is held. Beyond these factors though, s 210 of the Companies Act envisages that the creditors should look after their own positions and express these at the meeting, and vote accordingly.

(c) I note that the Company and Punj Lloyd Pte Ltd are involved in a great many projects with many creditors. That would be a factor that would weigh in favour of allowing a scheme of arrangement to be considered by the creditors.

6 Counsel for the Company, in my view rightfully, did not ask for costs.

7 I will hear the parties separately on another date on the Company's application for a restraint order under s 210(10) of the Companies Act. I ordered an interim restraint order pending the hearing of that matter.

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