Re Wan Soon Construction Pte Ltd
[2005] SGHC 102

Case Number : OP 8/2004

Decision Date : 14 June 2005

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong JC

Counsel Name(s) : Kelvin Poon Kin Mun (Rajah and Tann) for the applicant; Leung Wing Wah (Sim and Wong LLC) for the respondent

Parties : —

Credit and Security – Remedies – Writs of seizure and sale – Respondent unsecured creditor obtaining and registering writ of seizure and sale against company's property before company placed under judicial management – Writ not executed before commencement of judicial management of company – Whether respondent entitled to proceeds of sale of company's property – Whether court should empower judicial managers to set aside incomplete execution of writ of seizure and sale against company – Sections 227X, 334(1) Companies Act (Cap 50, 1994 Rev Ed)

14 June 2005

Andrew Phang Boon Leong JC:

Introduction

1 The present case witnessed the confluence of company law and land law – the former constituting the broader canvas on which the details of the latter operated. It bears mentioning that these two areas of the law are both technical and (on occasion at least) complex. However, their importance – particularly in the commercial sphere – cannot be gainsaid and the present proceedings illustrate this point with limpid clarity.

2 Wan Soon Construction Pte Ltd ("the company") petitioned for a judicial management order on 22 July 2004. It was placed under judicial management on 1 October 2004.

3 On the same day it petitioned for a judicial management order (*viz* 22 July 2004), the company granted an option for the purchase of its property to Ad Graphic Pte Ltd ("the purchaser"). This property comprised a 30-year Jurong Town Corporation ("JTC") lease at 12 Loyang Lane ("the company's property"), which property is mortgaged to Singapura Finance Limited ("SFL"), which is now known as Hong Leong Finance Limited.

4 The purchaser exercised the option on 17 September 2004. Both JTC and SFL gave their consent to the sale. The judicial managers also adopted the sale after being informed of the existence and (more importantly) of the exercise of the said option. They were of the view, *inter alia*, that the purchase price for the property was reasonable and that the said sale would ultimately benefit the company's creditors as a whole. Completion was fixed for 23 January 2005.

5 However, prior to the above events, the respondent in the present proceedings, Deschen Holdings Ltd, had, on 31 May 2004, obtained final judgment in a suit (Suit No 411 of 2004) against the company in the sum of US$500,000 (together with interest and costs).

6 The respondent had then obtained a writ of seizure and sale ("WSS") against the company's property on 19 June 2004, and had registered the WSS against the property on 28 June 2004.

7 It should be noted that the respondent's actions with respect to the WSS took place prior to the granting of the option for the purchase of the company's property and its acceptance by the purchaser, and also prior to the petition for (and placement under) judicial management. Indeed, neither the judicial managers nor the respondent alleges either fraud or bad faith on the other's part. The issue here is, at its most basic level, a straightforward one: What is the legal effect of the respondent's WSS? Did it confer upon the respondent the legal right to the entire proceeds of the sale of the company's property? If so, what was the legal basis? If not, what were the rights (of the company and its other creditors) which trumped the respondent's right? And what was the legal basis?

8 But I have run slightly ahead of the story, for before the date of completion of the purchase and sale of the company's property, the respondent's WSS had first to be removed. The judicial managers in fact requested that the respondent remove the WSS. The fact of the matter was that as the company was under judicial management, a statutory moratorium applied, which prevented the respondent from proceeding with the WSS.

9 Not surprisingly, perhaps, the respondent refused to accede to the request to remove the WSS. The judicial managers then applied to the High Court for, *inter alia*, an order requiring the respondent to remove the WSS, as well as for a declaration to the effect that the respondent was not entitled to any portion of the sale proceeds relating to the company's property in priority to the general body of unsecured creditors to satisfy its judgment against the company after the WSS had been removed.

10 Choo Han Teck J, on 17 January 2005, ordered the respondent to remove the WSS in order to enable the company to complete the sale of the said property on 23 January 2005 as scheduled (see [4] above). The learned judge also ordered that the sale proceeds (amounting to some $310,000, after deduction of the relevant costs) be held by M/s Rajah & Tann as stakeholders, pending the outcome of the present hearing to determine whether the respondent had any right to these proceeds.

11 On 1 February 2005, the judicial managers filed a winding-up petition. On 25 February 2005, the winding-up petition was adjourned to 11 March 2005, presumably pending the outcome, once again, of the present hearing.

The issues

Introduction

12 I have already alluded to what appears to me to be the salient legal issues (see [7] above). At this juncture, it would conduce towards clarity to set them out more fully.

The* pari passu *principle

13 An initial issue that arises relates to the precise legal effect of the WSS registered by the respondent against the company's property. In this regard, it should be noted that, because of the statutory moratorium which was triggered by the order for judicial management, the respondent was *unable to execute the WSS*. Indeed, as we have seen, Choo J in fact ordered that the WSS be removed in order to facilitate the sale of the property.

14 However, counsel for the respondent, Mr Leung, has steadfastly maintained that, although the WSS was never (and can now never be) executed, it is nevertheless the case that once the WSS

was *registered*, the respondent was *entitled to the entire proceeds of sale*. It is extremely important to note, however, that Mr Leung *admitted* that the respondent was an *unsecured creditor*. Although this proposition is relatively obvious, it is to counsel's great credit that he did not belabour the point.

15 On the other hand, counsel for the company, Mr Poon, argued that the *overall principle* in *judicial management* was that unsecured creditors should share *pari passu* in the pool of assets ultimately to be shared amongst a company's creditors, citing the *dicta* of Lai Kew Chai J in the Singapore High Court decision of *ERPIMA SA v Chee Yoh Chuang* [1998] 1 SLR 83 at [3]. Hence, the respondent could *not* succeed in its claim against the proceeds of sale and this would have been the situation even if the respondent had managed to execute the WSS.

16 Mr Poon further argued that there was, in any event, a statutory moratorium with the onset of judicial management and that, therefore, the respondent would have been unable to execute the WSS, save with the leave of court – leave which, as counsel forcefully put it, would not have been granted by the court. If, however, Mr Poon argued, this court permitted the respondent to steal a march on the rest of the unsecured creditors and share in the sale proceeds, that would – in substance – permit the very execution of the WSS which would not otherwise have been permitted in the first instance.

Section 227X(b) of the Companies Act

17 Counsel for the company also argued that the court ought to exercise its power under s 227X(*b*) of the Companies Act (Cap 50, 1994 Rev Ed) to order that s 334(1) of the same Act be applied in the context of judicial management. If so, the judicial managers would then be empowered to set aside any incomplete execution of the WSS against the company (reference may also be made in this regard to the English Court of Appeal decision of *In re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24 and (albeit in the context of bankruptcy proceedings) the Singapore Court of Appeal decision of *Official Assignee of the Property of Lim Chiak Kim (a bankrupt) v United Overseas Bank Ltd* [1988] SLR 52).

18 It would be appropriate, at this juncture, to set out the provisions just mentioned.

19 Section 227X itself reads as follows:

> **Application of certain provisions in Parts VII and X to a company under judicial management.**
>
> **227X.** At any time when a judicial management order is in force in relation to a company under judicial management —
>
> (*a*) section 210 shall apply as if for subsections (1) and (3) thereof there were substituted the following:
>
> "(1) Where a compromise or arrangement is proposed between a company and its creditors, the Court may on the application of the judicial manager order a meeting of creditors to be summoned in such manner as the Court directs.
>
> (3) If three-fourths in value of the creditors present and voting either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement, if approved by the Court, is binding on all the creditors and on the judicial manager."; and

(*b*) *sections 337, 340, 341 and 342 shall apply as if the company under judicial management were a company being wound up and the judicial manager were the liquidator, but this shall be without prejudice to the power of the Court to order that any other section in Part X shall apply to a company under judicial management as if it applied in a winding up by the Court and any reference to the liquidator shall be taken as a reference to the judicial manager and any reference to a contributory as a reference to a member of the company.*

[emphasis added]

20 Section 334 reads as follows:

Restriction of rights of creditor as to execution or attachment.

334.—(1) Where a creditor has issued execution against the goods or land of a company or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up, but —

(*a*) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of this section be substituted for the date of the commencement of the winding up;

(*b*) a person who purchases in good faith under a sale by the bailiff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and

(*c*) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

(2) For the purposes of this section —

(*a*) an execution against goods is completed by seizure and sale;

(*b*) an attachment of a debt is completed by receipt of the debt; and

(*c*) an execution against land is completed by sale or, in the case of an equitable interest, by the appointment of a receiver.

21 Counsel for the respondent argued, naturally, that these provisions were inapplicable both as a matter of general principle as well as of actual application.

22 I turn now to an analysis of the various arguments by counsel in the light of the issues set out above.

Analysis

The* pari passu *principle

23 The first relates to the *pari passu* principle. Counsel for the company argued, *inter alia*, that this particular principle applied (in so far as unsecured creditors were concerned) in the context of judicial management as well. Consequently, the respondent was precluded from claiming priority to the proceeds of sale in the present case.

24 It is clear that the *pari passu* principle applies with regard to unsecured creditors in the context of a winding up. In the English Court of Appeal decision of *In re Atlantic Computer Systems Plc* [1992] Ch 505 at 527, Nicholls LJ (as he then was), who delivered the judgment of the court, observed that "[t]he basic object of the winding up process, in the case of an insolvent company, is to achieve an equal distribution of the company's assets among the unsecured creditors" (and see, in the local context, the Singapore Court of Appeal decision of *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* [2001] 4 SLR 154 ("*Hinckley Singapore Trading*") at [8], where *In re Atlantic Computer Systems Plc* is cited and applied, as well as the Singapore High Court decision of *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] SLR 278 at 288, [18]).

25 However, I was not persuaded that the principle ought to apply in the context of judicial management as well. Indeed, what authority there appeared to be seemed to point in the opposite direction: see, in particular, the Singapore Court of Appeal decision of *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR 384 ("*Hitachi Plant Engineering*") (reference may also be made to *In re Atlantic Computer Systems Plc* at 527–528).

26 In *Hitachi Plant Engineering*, the Court of Appeal held (although it was not strictly necessary to do so on the facts of the case itself) that the *pari passu* principle did *not* apply in schemes of arrangement (pursuant to s 210 of the Companies Act or, in the context of a judicial management, s 210 read with s 227X(*a*)). This was, of course, in contrast to the situation involving the winding up of a company (and see [24] above). Of particular interest is the following observation by Yong Pung How CJ, delivering the judgment of the court, at [81], as follows:

> Further, one has to remember that a scheme of arrangement is a corporate rescue mechanism. As with other corporate rescue mechanisms, *such as judicial management*, it seeks to rehabilitate the company and achieve a better realisation of assets than possible on liquidation. [emphasis added]

27 Although not direct authority as such (if nothing else, because the case itself involved the issue of whether or not the *pari passu* principle applied in the context of schemes of arrangement), the observation just quoted does suggest that there is, *per se*, *no* reason in principle why this principle ought to apply in situations of judicial management as opposed to those relating to the winding up of the company. The issue is, of course, rendered moot if s 227X(*b*) of the Companies Act can be utilised in order to introduce the winding up regime to a situation of judicial management. That is, in fact, the nub of the next major issue to be dealt with shortly in the very next section of this judgment.

28 In other words, the non-application of the *pari passu* principle was not fatal in the least to the company's success in the present proceedings if (as already pointed out in the preceding paragraph) it succeeds on the next issue, to which I now turn.

Section 227X(b) of the Companies Act

29 Section 227X of the Companies Act has already been reproduced above (see [19] above). It is an entirely novel provision, having (at least as far as I could tell) no analogue in any other jurisdiction. There is no mention of the provision in the Parliamentary Debates: see generally

Singapore Parliamentary Debates, Official Report (5 May 1986) vol 48 ("*Parliamentary Debates*, vol 48"), especially at cols 39–41 and *Parliamentary Debates, Official Report* (26 March 1987) vol 49 ("*Parliamentary Debates*, vol 49"), especially at cols 1182–1183. Neither is there any explicit mention as such of the provision in the Select Committee Report on the Bill: see generally *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 9/86)* (Parl 5 of 1987, 12 March 1987). However, it was present when the Bill become law as the Companies (Amendment) Act 1987 (Act No 13 of 1987).

30 The provision was, as already mentioned, present in the original Bill (see cl 46 of the Companies (Amendment) Bill (Bill No 9/86)), albeit as a new s 227W (it was ultimately renumbered as s 227X because of the addition of a further provision, *viz*, what is now s 227S, which deals with trade union representation on behalf of members who are creditors and employees of a company). Unfortunately, the relevant Explanatory Note is not, with respect, very illuminating and reads as follows:

> New section 227W enables a judicial manager to apply to the Court under section 210 for an order to call a meeting of creditors where a compromise or arrangement is proposed between a company and its creditors. If the Court sanctions the compromise or arrangement it is binding on the judicial manager. *It also enables certain provisions in a winding up under Part X to apply to a company under judicial management*. [emphasis added]

31 What *precisely* s 227X was intended to achieve (including its underlying rationale) still stands, at this point, in need of explication.

32 As we have seen, the precise provision sought to be invoked by counsel for the company in the instant case was s 227X(*b*) (also reproduced above at [19]).

33 I should mention, at this juncture, that the inclusion of s 227X(*a*) appears to be less problematic. As we shall see below (particularly with reference to s 227B(1)(*b*)(ii) at [37] below), one ground which might persuade the court to make a judicial management order is that such an order would be likely to result in a scheme of arrangement under s 210. In my view, s 227X(*a*) is intended to ensure that that purpose is achieved and s 227X(*a*) is thus complementary in nature and function with respect to s 210.

34 There is, however, more potential difficulty with regard to s 227X(*b*), which is both specific and (more importantly) broad.

35 I have been unable to locate the precise purpose for the inclusion of the potentially wide-ranging provision in s 227X(*b*). Counsel for the company suggested that because the judicial management regime was novel when first implemented, this provision was introduced as a bridging provision to allow the courts to allow the powers of liquidators to be exercised by judicial managers in appropriate situations. This line of reasoning could in fact be generalised. It would appear that s 227X was introduced as a gap-filling provision in order to avoid the effects generated by unintended *lacunae* in the law. In the process, I gather that it was the intention of the Legislature that, by filling in these gaps, the implementation of the scheme of judicial management as a whole would be more nuanced and fruitful. There is a hint – and no more than this – which appears to support such an interpretation in the then Minister for Finance's observation during the Third Reading of the Bill, as follows (see *Parliamentary Debates*, vol 49 at col 1183):

> Nevertheless, it should be recognized that Part VIIIA introduces an area of law new to Singapore, that notwithstanding the amendments and refinements which have been made in Select

Committee, only experience gained from observing how this new judicial management procedure works in practice will reveal other defects that may exist.

36 In particular, it seems to me that s 227X(*b*) was intended to ensure that where the provisions relating to liquidation in Pt X of the Companies Act were appropriate in facilitating the general mission and purpose of judicial management (which is, *inter alia*, to achieve the better realisation of the company's assets), those provisions should, apart from the four specific provisions expressly set out in s 227X(*b*) itself (*viz*, ss 337, 340, 341 and 342), apply where, in the *court's discretion*, this was appropriate.

37 In this regard, it might be apposite, at this juncture, to recall the basic philosophy behind the concept of judicial management itself. Section 227A(*b*) of the Companies Act refers to "a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up". And s 227B(1)(*b*) refers to the following purposes that the making of a judicial management order would be likely to achieve, at least one of which must exist before the court can even consider making a judicial management order:

(a) the survival of the company, or the whole or part of its undertaking as a going concern;

(b) the approval under s 210 of the Companies Act of a compromise or arrangement between the company and any such persons as are mentioned in that section;

(c) a more advantageous realisation of the company's assets would be effected than on a winding up.

38 The following observations by the then Minister for Finance, Dr Hu Tsu Tau, during the Second Reading of the Bill introducing the scheme of judicial management itself, may also be usefully noted (see *Parliamentary Debates*, vol 48 at col 40):

It would be noted that the benefits of a successful company rescue accrue not only to its shareholders but to employees, the business community and the general public. A key element in a company rescue is the provision of a breathing space during which plans can be put together to achieve the purposes just mentioned … The new judicial management procedure, therefore, provides a legal framework that would, in a suitable case, enable the rescue of a potentially viable business and thus prevent a premature liquidation.

39 And in what is still the leading work in the local context, *Judicial Management in Singapore* (Butterworths, 1990), Mr T C Choong and Mr (now Justice) V K Rajah succinctly observe (at p vii), as follows, with regard to the basic aims of judicial management:

Its aims are simple: to minimize the depletion of economic resources and to offer the unsecured creditor a platform to make his views heard. Unlike liquidation and receivership, judicial management approximates legal hospitalisation.

40 The learned authors then proceed to observe thus (*ibid*):

Despite recent dicta as to their wider duties of care, liquidators and receivers usually wear the spectacles of the secured creditors involved in any given company. Resuscitating the company is not a priority; even if it is a hazy objective. The judicial manager, however, wears the hat of the company doctor comfortably. He is accountable primarily to the court. He makes an objective

prognosis of the patient and apprises the court of his findings and views. Often, his mandate would be to save the company and, if this is not possible, to minimize the fragmentation of assets and to maximize the sale proceeds from the company's assets.

41 The aims of judicial management as set out above are also echoed in *Halsbury's Laws of Singapore: Company Law* vol 6 (Butterworths Asia, 2000) at para 70.491.

42 And, in so far as the local *case law* is concerned, the following observation by L P Thean JA, delivering the judgment of the court in the Singapore Court of Appeal decision of *Electro Magnetic (S) Ltd v Development Bank of Singapore Ltd* [1994] 1 SLR 734 at 745, [33], might be usefully noted:

> [T]he purpose of Part VIIIA of the Act is to enable the appellants through the judicial managers to carry on the business as a going concern with a view to achieving one or other of the objectives provided in s 227B, and to enable the judicial managers to carry on the business there must be available to him the right to use the appellants' property without any interference from the creditors. For this purpose, ss 227C and 227D (to the extent therein provided) impose a moratorium on the enforcement of rights of the creditors. But ss 227C and 227D are not intended to deprive a secured creditor of a company under judicial management of his security.

43 Reference may also be made to the observations of Chao Hick Tin JA, delivering the judgment of the court in *Hinckley Singapore Trading* ([24] *supra*) at [8]–[9], as well as those of Judith Prakash J in the Singapore High Court decision of *Re Boonann Construction Pte Ltd* [2002] 3 SLR 338 at [7] *ff*.

44 Returning to the specific issue at hand, the literal language of s 227X(*b*) itself is clear. There are four specific provisions where it is *mandatory* that they "shall apply as if the company under judicial management were a company being wound up and the judicial manager were the liquidator" (see also [36] above). I would suggest that the reason for the mandatory nature in which these provisions for winding up apply in the context of judicial management as well is one centring on *public policy*. Let me elaborate.

45 Section 337 relates to a *criminal offence* committed by "[a]ny person who gives or agrees or offers to give to any member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the company's liquidator".

46 Section 340 relates to *fraudulent trading*, whilst s 341 relates to the power of the court to *assess damages* against *delinquent officers* of the company. Section 342 relates to the *prosecution* of *delinquent officers as well as members* of the company.

47 Enough has, in my view, been stated to demonstrate that the application of all the four provisions briefly considered in the preceding paragraphs in the context of judicial management would clearly facilitate the general mission and purpose of judicial management (see also [37]–[43] above). Perhaps the point would come out more clearly by way of a proposition as to what would happen if those provisions did *not* apply. If, indeed, those provisions did not operate to safeguard the assets of the company, judicial management would – in the context of that particular company – become an exercise in futility. Indeed, so *serious* are the matters which are encompassed within the four provisions above that the Legislature has *mandated* that they apply, *mutatis mutandis*, in the context of judicial management.

48 What, then, of the *remaining provisions* in Pt X of the Companies Act? Here, s 227X(*b*) is

also, in my view, equally clear: the court has the power (and, hence, discretion) "to order that any other section in Part X shall apply to a company under judicial management as if it applied in a winding up by the Court and any reference to the liquidator shall be taken as a reference to the judicial manager and any reference to a contributory as a reference to a member of the company".

49 What is clear, however, is that the court is not a mere "rubber stamp" inasmuch as it will accede to any and every request to order such other sections or provisions to apply almost, or even wholly, as a matter of course.

50 When, then, ought the court to order such provisions to apply? In particular, on the facts of the present case, ought the court to order s 334 of the Companies Act to apply (s 334 is reproduced at [20] above)? There can, in this regard, be no pat formula. However, there can be broad guidelines. The most important guideline would be that which accords with the very pith and marrow of the concept of judicial management itself and which is encompassed in the views cited above (see [37]–[43] above). Put succinctly, would the application of the provision inure to the benefit of the unsecured creditors generally and/or aid the company in its attempt at economic recovery? It is at this juncture that the law interacts, as it were, with the actual factual matrix (reference may also be made generally to the Singapore High Court decision of *Chew Eu Hock Construction Co Pte Ltd v Central Provident Fund Board* [2003] 4 SLR 137). This is consistent with the very nature of the discretionary power accorded under the second (and more general) part of s 227X(*b*) of the Companies Act itself.

51 Looked at in this light, it is clear that, on the facts of the present case, allowing s 334 to apply pursuant to the power conferred under s 227X(*b*) would indeed conduce towards the benefit of the company in general and the unsecured creditors in particular. The assets and economic resources generally of the company would be preserved for the benefit of all concerned. As the respondent has admitted that it is an unsecured creditor, there is no reason in principle why it ought to be allowed to steal a march on the remaining unsecured creditors and, in this respect, the application of s 334 would ensure that this does not occur (interestingly, it might be mentioned, there is in fact provision for *secured* creditors in s 227H). If the respondent had in fact completed execution of the said WSS, it would have reaped the full benefits concerned and, indeed, the present proceedings would have been unnecessary. The fact of the matter, however, is that it had not.

52 For completeness, I should add that it does not follow that a WSS that was registered but unexecuted is of no legal effect whatsoever. It would clearly take priority over other WSS registered against the same property or assets of the company had it been registered first. As it turned out, on the facts of the case, however, this was apparently the only WSS that had been registered.

Conclusion

53 The company had two strings to its legal bow. It fails on one (centring on the *pari passu* principle), but succeeds on the other (centring on the applicability of s 334 of the Companies Act pursuant to the power conferred under s *227X(b)* of the same Act).

54 To recapitulate, I hold, firstly, that there is no reason why the *pari passu* principle ought to apply in the context of judicial management.

55 However, I hold, secondly, that on the facts of the present case, s 334 of the Companies Act would apply, *via* s 227X(*b*) of the same Act, to prevent the respondent from retaining the benefit of the registration of the WSS since it had not completed the execution of the WSS before the date of commencement of the judicial management.

56 I therefore hold that the company succeeds in its application and that the respondent is therefore not entitled to the proceeds of sale of the company's property. I further order that the respondent pay to the judicial managers the costs of the present application and that the proceeds of sale be paid to the solicitors for the judicial managers.

Application allowed.