Hong Investment Pte Ltd *v* Tai Thong Hung Plastics Industries (Pte) Ltd [2010] SGHC 375

Case Number : Companies Winding Up No 239 of 2003 (Summons No 4244 of 2010)

Decision Date : 28 December 2010

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Lim Chee San (TanLim Partnership) for the petitioner; Edmond Pereira (Edmond Pereira & Partners) for the respondent.

Parties : Hong Investment Pte Ltd — Tai Thong Hung Plastics Industries (Pte) Ltd

Insolvency Law

28 December 2010

Tan Lee Meng J:

1 These proceedings concerned an application by the petitioner, Hong Investment Private Limited ("HIPL"), for an order that Mr Roland Mah Kah Eng ("RM") and his younger brother, Mr Jason Mah Kah Leong ("JM"), be removed as the liquidators of Tai Thong Hung Plastics Industries (Pte) Ltd ("the Company") and that Mr Chung Siang Joon ("Mr Chung") be appointed as the liquidator of the Company. After hearing the parties, I ordered that the present liquidators be removed and that Mr Chung be appointed as the new liquidator of the Company. I now set out the reasons for my decision.

2 On 17 October 2003, both RM and JM were appointed as liquidators of the Company by the court after HIPL successfully petitioned to wind up the Company on the basis of the latter's failure to pay a judgment debt to it. More than 7 years have passed since they were appointed the liquidators of the Company.

3 HIPL's application to have the liquidators removed was prompted by a letter that its solicitors received from the Official Receiver on 24 August 2010, part of which was as follows:

> 2 From the 6 monthly liquidator's accounts filed to date, it would appear that the private liquidators have been charging regular expenditure against the accounts of the Company. *We have queried the liquidators and found their reply to be unsatisfactory*.
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> 3 Meanwhile, we understand that one of the 2 liquidators, Mr Jason Mah Kah Leong, had not renewed his licence. Accordingly, you may wish to advise your Client, the petitioner of the Company to consider applying to court to appoint another liquidator in place of the said Mr Mah. The new liquidator may then request for an audit be made on the liquidation accounts and for the liquidator's fees to be taxed in Court.
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> [emphasis added]

4 While the Official Receiver may have had concerns about the liquidators' accounts, it was not true that JM had not renewed his licence to act as a liquidator for the purposes of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") as his licence, which was renewed by the Accounting and

Corporate Regulatory Authority on 1 April 2009, was valid until 31 March 2012. When HIPL informed the Official Receiver about this, the latter replied that its position remained the same, namely that it would not object to the removal of the liquidators.

Whether the liquidators should be replaced

5 Section 268(1) of the Act provides that a "liquidator appointed by the Court may resign or on cause shown be removed by the Court". The position is summed up in Woon & Hicks, *The Companies Act of Singapore - An Annotation*, (LexisNexis, Looseleaf Ed, 2004, Issue 2) at para 3105-3125 as follows:

> *Removal of liquidators for cause* See also s 268(1). A liquidator may be removed if there is some unfitness of the person by reason of his personal character, or from his connection with other parties or from the circumstances in which he is involved: *Sir John Moore Gold Mining Co* (1879) 12 Ch D 325, 331 per Jessel MR. Thus, for instance, if a liquidator refuses to take action against miscreant directors because he is one of them or because they are his friends, he may be removed by the court: *Chua Boon Chin v McCormack* [1979] 2 MLJ 156. If the liquidator is not independent or impartial because of his connection with persons against whom there might be pending claims, there would be cause to have him removed: *Re: Charterland Goldfields* (1909) 26 TLR 132. Similarly, if it appears that the liquidator is in a position where his duty and interest conflict: *Re International Properties Pty Ltd* (1977) 2 ACLR 488, 492.
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> The court has power to remove a liquidator not only because of his personal unfitness, but also on the ground that it is in the interest of the liquidation that he should be replaced: *Chua Boon Chin v McCormack* [1979] 2 MLJ 156 , 158; *Re Adam Eyton Ltd*(1887) 36 Ch D 299, 303-304. In *Procam (Pte) Ltd v Nangle* [1990] 3 MLJ 269 Thean J declined to order the removal of a liquidator on the ground that it was not in the interest of the liquidation to do so, given the advanced state of the liquidation. Moreover, the errors made by the liquidator were made in good faith and did not prejudice the liquidation.

6 In *Re Keypak Homecare Ltd (No 1)* [1987] BCLC 409, Millet J pointed out that the words "on cause shown" are very wide and it would be wrong for a court to limit or define that kind of cause which is required as circumstances vary widely. He added that it may be appropriate to remove a liquidator even if nothing can be said about him personally or about his conduct of the particular liquidation. In *Yap Jeffrey Henry and anor v Ho Mun-Tuke Don* [2006] 3 SLR(R) 427, Judith Prakash J adopted Millet J's view and stated at [22] that the removal of the liquidator "does not necessarily mean that fault of any sort has been found with the liquidator" and it may well be that "in the circumstances that have arisen in the case the court considers that there was cause to remove him".

7 JM contended that it is better to allow the present liquidators to complete the final stage of the liquidation. However, according to HIPL, there was cause for the replacement of the liquidators. It pointed out that based on the liquidators' accounts filed with the Official Receiver, the liquidators have made a number of payments to Vorspann Pte Ltd ("Vorspann"), of which JM is the managing director and a shareholder. The payments to Vorspann included $6,000 for accounting fees, $660 for secretarial fees, $900 for liquidation account fees and $1,500 for audit fees. Apart from paying Vorspann, the liquidators have also paid "secretarial fees" amounting to $6,800 to RM's own firm.

8 Also rather alarming was the fact that liquidators' fees amounting to $45,690 have been paid to RM and JM without complying with s 268(3) of the Act, which provides as follows:

> (3) A liquidator, other than the Official Receiver, shall be entitled to receive such salary or

remuneration by way of percentage or otherwise as is determined —

(a) by agreement between the liquidator and the committee of inspection, if any;

(b) failing such agreement, or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than 75% in value and 50% in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted for the purpose of voting, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) failing a determination in a manner referred to in paragraph (*a*) or (*b*), by the Court.

9 There being no committee of inspection and no meeting of creditors to approve the liquidators' remuneration, the $45,690 should have been approved by the Court. No application was made to the court for the requisite approval.

10 After having labelled the $45,690 paid to him and his brother as "professional fees" paid to liquidators, JM subsequently claimed that the amount in question was a "retainer" for Liquidators' Office management fees. According to him, this sum was paid for the use of his and RM's offices for liquidation work and for the cost of employing staff in these two offices for administrative work. This was a rather belated attempt to circumvent the provisions of the Act requiring proper approval for a liquidator's remuneration.

11 Leaving aside the serious concerns about the liquidators' accounts for the moment, what was rather unsatisfactory was the liquidators' attitude towards their obligations as liquidators. RM, who did not contest the application, was in poor health and was not interested in carrying on as the liquidator of the Company. On 14 September 2010, he wrote a letter to HIPL's solicitors, Messrs Tan Lim Partnership, part of which is as follows.

I, myself am over 62 years old and I want to retire gracefully as I am limping as I underwent cerebral haemorrhage/stroke and operations five years ago. *It is a miracle that I am still alive*. In fact *I do not wish to act as a Liquidator anymore though I renewed my license as a Liquidator for this year*.

[emphasis added]

12 Remarkably, in his letter of 14 September 2010, RM also voiced some dissatisfaction about his co-liquidator. He stated:

Under the law a person who is not a member of [the Institute of Chartered Public Accountants Singapore] should not be a Court Appointed Liquidator. In fact I had a discussion with my brother over this issue. *He believes that though he is not a member of ICPAS he can act also in a Court-Appointed Liquidation. In fact he has the cheque books* and both of us are authorised signatories and one signature is not enough. In fact I insisted on it for good internal control.

I have been advised by other lawyers the custody of the clients cheque book should be mine and not be kept at Jason Mah's office.

[emphasis added]

13 After voicing his concerns about his co-liquidator and saying that the Company's cheque book should not be in JM's possession, RM wrote to the Official Receiver on 20 September 2010 to say that there is no need to replace the liquidators. Part of his letter is as follows:

> I believe that this is a very minute matter and I advise without prejudice *that you inform Mr Lim Chee San of TanLim Partnership ... that [Mr Jason Mah and I] have been appointed by the High Court as Court Appointed Liquidators of [the company]. This will obviate the need to appoint Mr Chung Siang Joon as the Liquidator of [the company]*.
>
> I believe that my fellow Liquidator, Mr *Jason Mah Kah Leong is rather distressed* on this matter. To myself *all disputes should be peacefully settled by all parties concerned*. Don't let anybody advise anybody to aggravate the matter ... by bringing this matter to court.
>
> [emphasis added]

14 The fact that a liquidator has been appointed by the Court does not mean that he will not be replaced with another liquidator by the Court if the situation warrants this. Furthermore, an application to remove a liquidator is a rather serious matter and the allegations by HIPL do not, as RM claims, concern a "very minute matter". RM ought to have known that whether or not his brother was distressed with an application to remove him as the liquidator is not a matter that is relevant to a decision by the court to retain or replace the Company's liquidators.

15 As for the second liquidator, JM, whose registration as a public accountant was cancelled with effect from 19 November 2007 by the Oversight Committee appointed under the Accountants Act (Cap 2, 2005 Rev Ed), his explanation as to why he had consented to become the liquidator of the Company raised eyebrows. On 16 September 2010, he e-mailed HIPL's solicitors as follows:

> With reference to our teleconversation this morning, I wish to place on record that; I have intimated to you that *my co-liquidator (also my elder brother) had already suffered a stroke ... and that, his state of health, even today, is at best fragile. That is the reason why I got myself "dragged" into this rather unpalatable job*. I sincerely hope that you and Mr Chung consider this " fact" seriously before proceedings further on this matter. If you have any doubt over this "fact", do not hesitate to contact me and I [will] immediately set up a meeting (in Roland Mah's office, of course) so that both of you can assess for yourself, how serious this issue can become.
>
> [emphasis added]

16 Liquidation of a company should be undertaken by a committed liquidator and it was unfortunate that JM regarded himself as having been "dragged" into the "rather unpalatable" task of liquidating the Company on account of the sickness and fragile health of the other liquidator, who happens to be his brother.

17 The tenor of a second e-mail sent by JM to HIPL's solicitors on 16 September 2010, may also be viewed with concern. Part of this second e-mail was as follows:

> My apologies, Mr Roland Mah's cerebral haemorrhage occurred in 2002, not 2003, as intimated earlier. He has recovered somewhat, but his speech is still slurred, and needs someone to support him when he walks (he relied also, on a "4-legged" cane). *Another stroke could result in his death. Having advised you, such an occurrence will not be on my head*.
>
> [emphasis added]

18 JM should have realised that it was in the Company's interest that RM be replaced as a liquidator of the Company in view of the latter's health. In *Re Adam Eyton Ltd* (1887) 36 Ch D 299, Bowen LJ pointed out that for the purpose of determining whether a liquidator should be removed on the basis of due cause having been shown, the due cause is measured in relation to the "real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed". He added that while fair play to the liquidator himself is not to be left out of sight, the measure of due cause is the substantial and real interest of the liquidation.

19 After considering all the circumstances, I found that there was cause for the replacement of both the current liquidators. As such, I ordered that they be replaced by Mr Chung, who had given his consent to act as the liquidator of the Company.