Raiffeisen Zentralbank Osterreich AG *v* Continental Chemical Corp Pte Ltd [2010] SGHC 71

Case Number : Originating Summons No 463 of 2009

Decision Date : 08 March 2010

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Andrew Chan and Guo Zhuo Neng (Allen & Gledhill LLP) for the plaintiff; Ashok Kumar, Mark Tan and Jason Yang (Stamford Law Corporation) for the defendant.

Parties : Raiffeisen Zentralbank Osterreich AG — Continental Chemical Corp Pte Ltd

Insolvency Law

8 March 2010

Choo Han Teck J:

1 An application was brought by Continental Chemical Corporation Pte Ltd ("the Company") for the adjournment of winding up proceedings brought against it for six months. The winding up application was made by Raiffeisen Zentralbank Osterreich Aktiengesellschaft ("RZ Bank"), an unsecured creditor. I granted a five-month adjournment to the Company, and now give the grounds of my decision.

2 The Company was at all material times undisputedly insolvent. It had financial problems from the third quarter of financial year 2008 and as of 31 December 2008, its total liabilities amounted to US$356,853,982, comprising US$266,559,693 owed to secured creditors, US$87,630,290 owed to unsecured creditors, and US$2,664,000 worth of contingent liabilities. As a result of its financial problems, the Company was in default of a facility granted by RZ Bank. On 24 February 2009, RZ Bank served a statutory demand on the Company for the repayment of the sum of US$3,567,097.62. The Company did not repay RZ Bank. On 7 May 2009, based on the unsatisfied statutory demand, RZ Bank filed an application to compulsorily wind up the Company. On 12 July 2009, the Company filed an application for a stay of proceedings and for leave to convene creditors' meetings to approve a scheme of arrangement. I granted this application and ordered a stay of all further proceedings until 7 January 2010.

3 By January 2010, the Company was still not ready to propose a scheme of arrangement to its creditors, despite having thought out a plan for the Company's rescue. The Company was in negotiations with two interested potential investors to raise capital for a restructured entity created by merging the Company, its subsidiaries and another group of petrochemical companies, into a new holding company. It was envisaged that after the merger, this entity would be able to continue operating as a going concern. As consideration for the extinguishment of all the secured debt of the Company, the secured creditors would be allotted shares in the merged entity. It was envisaged that the Company's unsecured creditors would enjoy a greater prospect of recovering their debts if the proposed merger was successful. The Company applied on 14 January 2010 for a further adjournment of six months for the completion of due diligence exercises and negotiations, so that the Company can propose a scheme of arrangement to its creditors. In support of the Company's application, it urged the court to consider that the investors had entered into a non-binding Heads of Agreement with the Company and its secured creditors on 24 December 2009, which created an indicative

timeline for the entry into agreements on the proposed merger in five months' time.

4 The Company's application for an adjournment was supported by the secured creditors, who, like the Company, urged the court to consider that a scheme of arrangement would result in the better realisation of the Company's assets. In support of the Company's position, they relied on a liquidation analysis on the likely consequence of winding up the Company. The report revealed that if the Company was put into liquidation, it would have insufficient assets to repay the secured creditors, and thus subjecting the unsecured creditors to face the prospect of zero recovery. The Company argued that the court's discretion to adjourn winding up proceedings should be exercised in its favour because RZ Bank, the only opposing creditor, was a minority creditor who would in any event face no prospect of recovery in the event of a winding up. The Company also urged the court to consider the fact that the secured creditors, who were majority creditors in number and value, were in support of its application.

5 The application was opposed by RZ Bank, who was an unsecured creditor whose debt constituted only 1% of the Company's entire debt. RZ Bank argued that a winding up order should be made because it would allow an independent liquidator to investigate whether there had been any breach of directors' duties on which the Company might sue, and thereby resulted in an increase in its assets. Furthermore, RZ Bank complained that no details or general principles of the proposed scheme were given to it, and thus, it objected to a further delay in winding up proceedings.

6 Therefore, the first issue before me was whether it was proper to adjourn the hearing of the winding up application for another six months, pursuant to s 257(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("*Companies Act*") even though the general principles of the proposed scheme of arrangement had not been presented to the court. Alternatively, the issue was whether I had the discretion to grant the adjournment pursuant to s 210(10) of the *Companies Act*. In my view, I felt it was proper to grant a five-month adjournment to allow the Company to complete negotiations and to present a scheme of arrangement to the creditors. Generally, a creditor who has successfully proven its debt against a company is entitled to a winding up order *ex debito justitiae* in the absence of a good reason for not granting the order (see *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [15]–[16] ("*BNP Paribas*")), However, the court has a discretion to grant an adjournment on the basis of s 257(1) of the *Companies Act*, which provides that:

> **Powers of Court on hearing winding up application**
>
> **257**. —(1) On hearing a winding up application, the Court may *dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit*, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of an application by a contributory that there will be no assets available for distribution amongst the contributories. [emphasis added]

Section 257(1) is *pari materia* with s 125(1) of the English *Insolvency Act 1986* (c 45)(UK). As the English Court of Appeal held in *Re P & J Macrae Ltd* [1961] 1 WLR 229 ("*Re P & J Macrae Ltd*"), the court's discretion under s 125(1) of the *Insolvency Act 1986* (c 45)(UK) is complete and unfettered.

7 Before me, counsel for RZ Bank cited Hong Kong case law in which applications for the adjournment of winding up proceedings to allow the parties to pursue a scheme of arrangement were not allowed. For example, in *Re Cheery City Contractors Ltd* [2004] 3 HKC 165, an adjournment application was rejected because the court held that there was no good reason to grant an adjournment where general principles of a proposed scheme of arrangement had not been presented

to the creditors. However, that case merely amounted to an example of the manner in which a court exercised its discretion, and did not amount to a principle of law which was persuasive to this court. As Lord Upjohn stated in his dissenting judgment in *Re P & J Macrae*, (at 237):

> Reported cases can only be quoted as examples of the way in which past judges have thought fit to exercise the discretion, and judicial decision cannot fetter or limit the discretion conferred by statute or even a binding rule of practice...

Decided cases may be relied upon insofar as they lay down principles guiding the exercise of the court's discretion to grant an appropriate order. However, they may not be treated as casting in stone factors which would warrant an exercise of the court's discretion in any party's favour. The court's role is to consider only the relevant factors, and to disregard the irrelevant factors, and decide what the appropriate order to make should be given in the circumstances.

8 In addition to the above, the following principles laid down by Neuberger J in *Re Demaglass Holdings Ltd (Winding Up Petition: Application for Adjournment)* [2001] 2 BCLC 633 ("*Demaglass*") also guide the exercise of the court's discretion. Where a winding up application is opposed, the court should consider whether making a winding up order would bring about some prospective benefit to the applicant. Justice Neuberger also held that although the fact that the majority creditors oppose the making of a winding up order was a significant factor, the exercise of the court's discretion was not merely a mathematical exercise. In considering the views of creditors, less weight should be given to the views of secured creditors, because they are entitled to proceed against their security. Thus, in *Demaglass*, Justice Neuberger held that there was good reason to grant a 10-week long adjournment to enable the company, which was the subject of winding up proceedings, to achieve a more advantageous realisation of the company's assets through administrative receivership, especially in a case where the majority creditors were in support of a stay of winding up proceedings.

9 With the above principles in mind in the exercise of my discretion, I took into account the wishes of the creditors, in particular the secured creditors who were majority creditors both in number and value. Another factor in the Company's favour was the remote prospect of recovery of any unsecured debt if the Company were to be wound up. Given that RZ Bank was an unsecured creditor of only 1% of the Company's total debt, and faced almost no prospect of recovering its debt, I did not accord great weight to its objection to the adjournment application. Importantly, if I were to stay the proceedings, and if the proposed merger were successfully concluded, the Company might get a better realisation of assets. In the perspective of RZ Bank, I were also of the view that five months was not so long a period that would cause it undue hardship.

10 Having decided that an adjournment was permissible on the basis of s 257(1) of the *Companies Act*, it became unnecessary for me to consider whether it was permissible to grant an adjournment of the winding up proceedings on the basis of s 210(10) of the *Companies Act*. I declined to hear further arguments on this application because they were the same as those canvassed before me during the hearing. I also ordered that costs be reserved, and that there shall be liberty to apply.