Re Pinkroccade Educational Services Pte Ltd (formerly known as PDA Pink Elephant Pte Ltd) (in creditors' voluntary winding up)
[2002] SGHC 186

Case Number : OS 529/2002

Decision Date : 21 August 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Manoj Sandrasegara and Jaime Tey (Drew & Napier LLC) for the liquidators; Lawrence Quahe and Yeo Khung Chye (Harry Elias Partnership) for the claimant

Parties : —

Companies – Winding up – Liquidators' application for court's sanction to refund moneys mistakenly paid to company in liquidation – Principle in Ex p James – Conditions to fulfil before granting of sanction – Whether principle applicable

Trusts – Constructive trusts – Mistaken payment of moneys to company in liquidation – Claimants notifying company of mistake before winding up – Separation of moneys from company's other moneys – Whether conscionable for company to keep moneys – Whether to impose constructive trust on company

Judgment

GROUNDS OF DECISION ***Cur Adv Vult***

1 This is an application by Liquidators of the Company under s 310(1)(a) of the Companies Act. The Liquidators ask for the following substantive order:

> *"that the Court sanction the payment of AUD112,472.00 by the Company to P.T. HM Sampoerna TBK"*

2 The Claimant, P.T. HM Sampoerna TBK, is a public company in Indonesia in the business of manufacturing, distribution and sale of tobacco and tobacco-related products. Sometime in 1991 the Claimant engaged an Australian company, Pink Elephant International Pty Ltd ("PEI"), to conduct courses for its staff in Indonesia. PEI has some connection with the Company but they are separate entities. After the courses were conducted, PEI rendered an invoice to the Claimant on 19 December 2001. This was sent to the Claimant's office in Singapore and is for the sum of AUD135,608.00. The Claimant instructed its bank to make payment of AUD112,472.00 on the invoice. But the instruction mistakenly cited the bank account of the Company instead of PEI. It turned out that the Claimant had prior dealings with the Company and its bank account information was stored in the Claimant's computer records. The mistake was made by human error, presumably due to the similarity in the names. In the event, the Claimant's bank paid the sum of AUD112,472.00 ("the Monies") into the bank account of the Company on 30 January 2002. As no payment was received by PEI, its representative contacted the Claimant on 8 February to inquire about it. It was then that the Claimant realised that it had made the payment to the wrong account.

3 Meanwhile, things had been going badly for the Company. By January 2002 it was already insolvent and the directors had decided to go for a voluntary winding up. The eventual Liquidators, Mr Michael Ng Wei Teck and Mr Neo Ban Chuan of the accounting firm KPMG Singapore ("KPMG"), were brought into the picture by early March 2002. It was at this time that the Claimant came in contact with the Liquidators-to-be. The Claimant had asked PEI for assistance in obtaining a refund of the Monies from the Company and was referred to KPMG. There followed a number of communications

between the Claimant and KPMG. It is not clear from the affidavits how the first contact was initiated, but on 8 March 2002, Mr Phillip Reynolds of KPMG sent an e-mail to the Claimant's Efiana Chressida requesting for a statement of the exact sequence of events behind the mistaken payment so that KPMG would *"have all the facts to pass onto the lawyers."* In response to this, the Claimant sent a letter to Reynolds on 12 March 2002 which described the circumstances that I have outlined above. The letter ended with a request to refund the Monies by transferring it to the Claimant's bank account with ABN Amro Bank N.V. in Surabaya, Indonesia.

4 On 18 March 2002 the Company passed a special resolution to be wound up voluntarily pursuant to s 290(1)(b) of the Companies Act and the Liquidators were duly appointed. The Claimants then instructed M/s Harry Elias Partnership ("HEP") on the matter. On 3 April HEP wrote to the Liquidators to demand the return of the money. The Liquidators' solicitors, M/s Drew & Napier LLC ("DN") replied on 5 April and requested for a week to obtain their clients' instructions. Very properly, DN confirmed that in the meantime the Liquidators would not draw down on the money. The parties eventually agreed to take out this application for a determination as to the Claimant's rights in respect of the Monies. Because the payment was made in Australian currency, the Monies have throughout been kept separate and identifiable from the other funds of the Company.

5 The Claimant based its claim on two alternative grounds:

(1) on the principle in *Ex parte James*; and

(2) on the basis that the Company is a constructive trustee of the Monies.

The *Ex parte James* principle

6 Counsel for the Claimant, Mr Quahe, submitted that on the principle in *Ex parte James, re Condon* (1874) LR 9 Ch App, the Court ought to order the Liquidators to refund the Monies. In *Re PCChip Computer Manufacturer (S) Pte Ltd* [2001] 3 SLR 296, I had applied the principle in *Ex parte James* and ordered the Liquidators to refund a sum of money mistakenly paid by the bank to them in the course of the winding up of the company. In coming to that decision I had been guided by the four conditions suggested by Walton J in *In re Clark (A Bankrupt), Ex parte The Trustee v Texaco Ltd* [1975] 1 WLR 559, viz:

(i) There must be some form of enrichment of the assets of the bankrupt by the claimant;

(ii) The claimant must not be in a position to submit an ordinary proof of debt;

(iii) In all the circumstances of the case an honest person would consider that it would only be fair to return the money to the claimant; and

(iv) The principle applies only to the extent necessary to nullify the enrichment of the estate.

Mr Quahe submitted that all four conditions were met in the present case and therefore the Court ought to make a similar order.

7 I pointed out to Mr Quahe that condition (ii), i.e. that the claimant must not be in a position to submit an ordinary proof of debt, was not met in the present case. This is because the payment of the Monies was made before the Company passed the special resolution for winding up. In *Re PCChip*,

although the bank had mistakenly credited the company's account before the winding up order was made, the money was paid over to the liquidators only after the winding up order. Merely to credit the company's bank account does not tantamount a payment as it is in the nature of the banking relationship that this only reflects a debt owed by the bank to its client.

8 However as I had pointed out in *Re PCChip* (at 36), the four conditions distilled by Walton J in *In re Clark* are not rigid rules of law because the principle in *Ex parte James* is a statement of general policy. While those conditions are useful as a guide to the application of the principle, especially in a border-line situation, the failure to meet one or more conditions does not by itself determine the matter.

9 The more important factor that distinguishes the present case from *Re PCChip* is the fact that here the Company is being wound up voluntarily. The Liquidators are not appointed by the Court but by resolution of the Company. Mr Quahe urged that there should not be any distinction drawn between liquidators appointed by the Court and those appointed by special resolution of the company. Indeed support for his position can be found in (2001) 2 SAL Ann Rev at 14.23 in which the learned reviewer stated as follows:

> 14.23 Another consequence is that, according to the English courts, the application of the principle is restricted only to court-appointed liquidators and does not apply to liquidators conducting a voluntary liquidation (*Re T H Knitwear (Wholesale) Ltd* [1988] 2 WLR 276). This is anomalous given that, in reality, the roles and responsibilities of a liquidator in both types of winding up are similar to a very large extent, not to mention the awkward implication that a liquidator of a voluntary winding up need not act honourably. Neither is it clear why the legal result should differ according to whether a recipient of a payment made under a mistake is in compulsory or voluntary liquidation. Notably, there is an Australian authority which has held that the *Ex parte James* principle applies to both types of liquidators (*Re Autolook Pty Ltd* (1983) 8 ACLR 419).

10 Unfortunately the existence of an anomaly cannot grant the Court a jurisdiction that it otherwise does not have. In the cases where the *Ex parte James* principle has been applied, jurisdiction is founded on the fact the liquidator is appointed by the Court pursuant to its statutory powers under the Companies Act. The liquidator acts under the supervision and direction of the Court which will not permit him to exercise his powers unconscionably. This principle has been developed by the Courts in response to situations where injustice could otherwise result. The fact that the Court would be unable to apply this principle in the case of a voluntary liquidation does not make it any less valid.

11 The decision of the Supreme Court of New South Wales in *Re Autolook Pty Ltd* (1983) 8 ACLR 419 represents a very interesting application of the *Ex parte James* principle. The liquidator there had applied to the court for directions as to whether he ought to disclose to the Commissioner of Taxation information he had uncovered in the course of his examination of the company's officers which indicated that the income of the company was probably much higher than was disclosed in the documents that he had earlier submitted. The liquidator's intention in that application was (at p.420): *"to know whether he should alert the … Commissioner to this probability, or whether he is justified in saying nothing about it."* Needham J considered the relevant legislation and held there was no legal obligation on the part of the liquidator to give this information. He then continued (at p.420):

> " If there is a duty in the liquidator, therefore, to alert the … Commissioner … it must arise out of general principle. It is clear that a liquidator has a duty to act

> impartially and a duty to discover who are the creditors of the company … I was not referred to, nor have I found, any case in which the liquidator has been held liable where he fails to inform a creditor who lodges a proof that the evidence in his possession would indicte that creditor had filed to claim the full amount due to him. Any such duty must be implied from his duties to act honestly and impartially.
>
> It is my opinion that if a liquidator were aware that a creditor had understated his claim he would be acting less than honestly and impartially if he distributed that assets available for payment to creditors without informing the creditor of the facts known to him. In doing so he would be acting on what he knew was a false basis and he would be preferring the other creditors to the extent that the one creditor had understated his claim. I do not think that any different principle would apply where the information in the liquidator's possession fails to instil complete conviction that the claim is understated but leads to a sense of strong probability that it is.
>
> The principle to which I have referred is, I think, supported by the well-known statement of Sir W M James LJ in *Ex parte James* …:
>
> "I am of the opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands moneys which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."
>
> I do not think that the principle applies only to officers of the court. Any liquidator, whether an officer of the court or not, who applies to the court for directions, should have those directions which require him to perform his duties honestly.

12 The judge then directed the liquidator to advise the Deputy Commissioner of the matter. As can be seen from the last paragraph cited above, the basis for this is that a court will require any liquidator who applies to the court for directions, whether or not he is an officer of the court, to act honestly. However the court there did not appear to have considered *Re TH Knitwear (Wholesale)* [1988] Ch 275 in which the English Court of Appeal unanimously and firmly decided against giving a similar direction to a private liquidator. Slade LJ, with whom Glidewell LJ agreed, said (at p.289) that the *Ex parte James* principle introduced "*a less than welcome element of uncertainty*" and said that he would not extend it to private liquidators. The third judge of the court, Caulfield J also agreed with this, noting that the authorities point to the principle being restricted to officers of the court. In view of this, and of the fact that the basis of the *Ex parte James* principle is that a court will not allow its officers to act dishonourably, I must respectfully disagree that the decision in *Re Autolook Pty Ltd* should be followed in Singapore.

Constructive trust

13 Mr Quahe submitted that in the circumstances of the case, the Liquidators are constructive trustees of the Monies of which the Claimant is the beneficiary. Those circumstances are as follows:

(i) the Claimant had paid the Monies to the Company under a mistake of fact;

(ii) the Company was notified of the fact of the mistake before the winding up resolution was made;

(iii) the Monies are kept in a separate account and are not mixed with the other funds of the Company;

14 Counsel for the Liquidators, Mr Sandrasegara, did not dispute the facts outlined above. Indeed, Mr Sandrasegara informed me that the Liquidators do not really dispute the claim but they seek the sanction of the Court for any payment. However Mr Sandrasegara adopted an adversarial position in order to provide the Court with full arguments, for which I am extremely grateful. In relation to the question of knowledge, Mr Sandrasegara pointed out that there was no evidence that the officers of the Company were notified of the matter. The Claimants were only in communication with the officers of KPMG who had become involved in the affairs of the Company in anticipation of liquidation. Mr Sandrasegara submitted that this did not impute knowledge on the Company. While I accept that this appears to be correct, for the purpose of the present action, such knowledge on the part of KPMG would be a relevant factor because the Company was effectively inoperative at the time and KPMG had gone into the Company to prepare for the eventual liquidation. Crucially, the KPMG officer had held out to the Claimant that he was in a position to deal with the matter. If he had advised that he was not in such a position, the Claimant could have taken some other course of action.

15 Mr Quahe relied firstly on the decision of English High Court in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] 1 Ch. 105. That case concerned a mistaken payment of some US$2 million by the plaintiff, a New York bank, to the defendant, a London bank. A few months after the payment, the defendant was ordered to be wound up. The question before the court was whether the plaintiff was entitled in equity to trace the mistaken payment and to recover it. Goulding J held that where money was paid under a mistake of fact, the payer retains an equitable property in it and the recipient, whose conscience is subjected to a fiduciary duty to respect this proprietary right, holds the money as a trustee for the payer. On this basis, the payer is entitled to trace the money founded on a persistent proprietary interest.

16 However the *Chase Manhattan* decision was criticised by Lord Browne-Wilkinson in *Westdeutsche Bank v Islington LBC* [1996] AC 669, where he said as follows (at p 714):

> It will be apparent from what I have already said that I cannot agree with this reasoning. First, it is based on a concept of retaining an equitable property in money where, prior to the payment to the recipient bank, there was no existing equitable interest. Further, I cannot understand how the recipient's "conscience" can be affected at a time when he is not aware of any mistake. Finally, the judge found that the law of England and that of New York were in substance the same. I find this a surprising conclusion since the New York law of constructive trusts has for a long time been influenced by the concept of a remedial constructive trust, whereas hitherto English law has for the most part only recognised an institutional constructive trust: see *Metall und Rohstoff A.G. v. Donaldson Lufkin Jenrette Inc.* [1990] 1 Q.B. 391, 478-480.

17 Mr Quahe submitted that, notwithstanding the criticism of Lord Browne-Wilkinson, the *Chase Manhattan* case had been followed by the High Court in *Standard Chartered Bank v Sin Chong Hua Electric & Trading* [1995] 3 SLR 863. In the latter case the court found that the first defendant had

induced the plaintiff bank to pay over a sum of money through a fraudulent scheme and that the second, third and fourth defendants to whom the money were eventually paid, were not bona fide purchasers for value. Accordingly they became constructive trustees of the plaintiffs' money in their possession. The court did not rely on the *Chase Manhattan* case for this conclusion and only cited it for the proposition that the plaintiff was entitled to trace such money founded on a persistent equitable proprietary interest. The *ratio decidendi* of the *Chase Manhattan* case, which is that the recipient of money paid under a mistake of fact holds it as trustee for the payer, was not followed in *Standard Chartered Bank v Sin Chong Hua Electric & Trading*.

18 The ratio in the *Chase Manhattan* case has not been followed in any Singaporean decision submitted before me. Indeed in *PP v Intra Group (Holdings) Co Inc* [1999] 1 SLR 803, Yong CJ pointed out that the finding in the *Chase Manhattan* case, i.e. that there was a proprietary claim, did not sit on all fours with the decision in the *Westdeutsche Bank* case.

19 However Lord Browne-Wilkinson, in his speech in *Westdeutsche Bank*, suggested that the *Chase Manhattan* case could be explained on the basis that the defendant bank knew of the mistake two days after it was made. He said this at p.715:

> However, although I do not accept the reasoning of Goulding J., *Chase Manhattan* may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys: see at p. 115A. The judge treated this fact as irrelevant (p.114F) but in my judgment it may well provide a proper foundation for the decision. Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust: see *Snell's Equity*, p. 193; *Pettit, Equity and the Law of Trusts*, 7th ed. (1993) p.168; *Metall und Rohstoff A.G. v. Donaldson Lufkin Jenrette Inc.* [1990] 1 Q.B. 391, 473-474.

20 The *Westdeutsche Bank* case concerned an interest rate swap agreement between the bank and a local authority. It was later determined that the authority had acted *ultra vires* in entering into the agreement. However by that time the bank had paid certain sums of money to the authority. The bank obtained judgment for the principal sum and was awarded compound interest. One of the issues in the appeal to the House of Lords was whether the authority held the money on a resulting trust, in which case compound interest could be awarded. Lord Browne-Wilkinson set out four propositions fundamental to the law of trusts at p.705:

> (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
>
> (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

21 Applying these principles to the facts of the present case, the persons in effective control of the Company (the KPMG officers) had knowledge that the Monies were paid by mistake before the winding up resolution was passed. The Monies are an identifiable fund in a separate account that is not mixed with the other funds of the Company. This last fact puts it in a stronger position than the *Chase Manhattan* case where there was no finding that the money was not mixed by the time the mistake was notified to the defendant two days after the payment. In *Westdeutsche Bank* Lord Browne-Wilkinson had himself warned of the danger of wholesale importation of equitable principles into commercial law (at p.704):

> My Lords, wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs: see *Barnes v. Addy* (1874) L.R. 9 Ch.App. 244, 251 and 255; *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694, 703-704. If the bank's arguments are correct, a businessman who has entered into transactions relating to or dependent upon property rights could find that assets which apparently belong to one person in fact belong to another; that there are "off balance sheet" liabilities of which he cannot be aware; that these property rights and liabilities arise from circumstances unknown not only to himself but also to anyone else who has been involved in the transactions. A new area of unmanageable risk will be introduced into commercial dealings. If the due application of equitable principles forced a conclusion leading to these results, your Lordships would be presented with a formidable task in reconciling legal principle with commercial common sense.

22 None of the problems pointed out is a feature of the present case due to the fact that the Monies have not been mixed with the Company's funds. Moreover the Claimant had not intended to enter into a commercial transaction with the Company; it was purely a case of the Monies being paid to the wrong party. So the present case is different from the situation in *Chase Manhattan*, where the plaintiff had intended to pay the defendant the money but had mistakenly made a second payment. That case involved a payer who had intended to give the money to the recipient, although under the mistaken belief that he was obliged to do so. The present case is one where the Claimant had intended to pay a third party, but due to a mistake the payment is made to the Company. The moment the Company learnt of the mistaken payment it was unconscionable on its part to retain it. However it was perfectly reasonable for the Company to investigate the matter before returning the Monies and pending such investigation, the Monies were rightly kept separate and unmixed. Unfortunately the winding up resolution intervened before the Monies could be returned. I can see nothing in the present case that would stand in the way of the imposition of a constructive trust.

23 I therefore hold that the Company holds the Monies under a constructive trust for the benefit of the Claimant prior to the winding up. Accordingly sanction would be given to the Liquidators to make payment of the Monies to the Claimant. As to costs, counsel informed me that the parties have a prior agreement on this and that I should make no order in that respect.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

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