Eastern Pretech Pte Ltd v Kin Lin Builders Pte Ltd
[2004] SGHC 195

Case Number : CWU 103/2004

Decision Date : 03 September 2004

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Sim Chee Siong, Edwin Lee and Kirindeep Singh (Rajah and Tann) for applicant / petitioning creditor; Tang Yock Miin (Gurbani and Co) for supporting creditor (substitute petitioning creditor) Eastern Pretech Pte Ltd; Troy Yeo (K K Yap and Partners) and Ratanesh Bal (Straits Law Practice LLC) for respondent / debtor and for the contributories Jong Huen Shin and Chin Choon Long; L Dason (Khoo Ng and Partners) for supporting creditors Rongde Metal Construction and S and T Construction Pte Ltd; Lee Hwai Bin and Ian de Vaz (Wong Partnership) for creditor Bintai Kindenko Pte Ltd; Chia Ho Choon (Khattar Wong and Partners) for supporting creditor BlueScope Lysaght (S) Pte Ltd; Martin F Decruz (Ang and Lee) for supporting creditor Bored Piling (S) Pte Ltd; Andrew Ang and Allister Lim Wee Sing (PK Wong and Associates LLC) for liquidator Deloitte and Touche; Toh Hwee Lian for Official Receiver

Parties : Eastern Pretech Pte Ltd — Kin Lin Builders Pte Ltd

Companies – Winding up – Whether winding up order to be set aside where company intended to file application for scheme of arrangement.

Companies – Winding up – Whether to allow substitution of petitioning creditor.

3 September 2004

Andrew Ang JC:

1 This originated as a winding up petition filed by Ligent Engineering Pte Ltd ("the petitioning creditor") to whom Kin Lin Builders Pte Ltd ("the Company") owed $18,000 arising from dishonoured cheques issued by the Company to the petitioning creditor. A statutory demand had been served on the Company at its registered office on 21 April 2004 and the Company had failed to meet the demand.

2 At the hearing of the Winding Up Petition on 18 June 2004, counsel for the Company sought an adjournment saying that the debt was disputed and that the Company would be filing a counterclaim but that there were voluminous papers he had to go through which he had received only three days earlier. No affidavit had been filed to oppose the petition. The application to adjourn was opposed by counsel for the petitioning creditor who asserted that counsel for the Company had been acting since 24 May 2004 and that the alleged counterclaim was not *bona fide*. I noted that there were supporting creditors so that even if the debt owed to the petitioning creditor was disputed on substantial grounds, the Company would still be faced with other creditors, including a judgment creditor. The response of counsel for the Company was that it was seeking to set aside the default judgment. In the absence of a substantial defence or cross-claim and being of the view that the application for adjournment was only to delay the winding up, I ordered that the Company be wound up.

3 Counsel for the Company then wrote in for further arguments and took out an application in Summons in Chambers No 3422 of 2004 which, amongst other things, sought leave of court to add two shareholders of the Company in the proceedings to oppose the winding up. At the hearing (on

25 June 2004) leave was granted for the two shareholders to appear. In his affidavit filed on 23 June 2004, in support of the summons in chambers application, Jong Huen Shin ("Jong") (a director and shareholder of the Company) deposed that the Company would be seeking, within a week, to apply for a judicial management order with a view to proposing a scheme of arrangement. He also painted a rosy picture saying that the Company expected "another $2m to come in from completed projects and on-coming projects within the next three to six months". He also contended that two of the biggest creditors of the Company, Bintai Kindenko Pte Ltd ("Bintai") (which was owed more than $1m) and Eastern Pretech Pte Ltd ("Eastern") (which was owed $1.5m) had not opposed an adjournment at the first hearing, in order for a scheme of arrangement to be proposed. As regards the debt owed to the petitioning creditor, he deposed that he would use his own funds to settle the debt.

4 Respective counsel for the creditors wanted a clearer picture of what the prospective scheme of arrangement would offer them so that their clients could make an informed decision. Thus, for example, if the petitioning creditor was indeed paid off, the supporting creditors would have to decide whether any of them would be prepared to step in as a substitute petitioning creditor. For this reason, by consent, the hearing of further arguments was adjourned to 7 July 2004. Meanwhile, I made an order under s 279(1) of the Companies Act (Cap 50, 1994 Rev Ed) staying all proceedings in relation to the winding up until the hearing on 7 July 2004, save and except that all parties were to be at liberty to file affidavits for the hearing.

5 By the date of the hearing on 7 July 2004, no further information had been furnished by the Company. However, counsel for the Company sought a further adjournment by consent and informed the court that it intended to file an application for a scheme of arrangement. As there was doubt whether the scheme of arrangement could be applied for while the winding up order was extant, I directed that the Company instead file an affidavit appending the papers that would be filed in the application for a scheme of arrangement were the winding up order to be set aside. This was so that the creditors would indeed have a preview of what the scheme of arrangement would offer. It created no hardship on the Company as its counsel had informed the court that papers for an application for a scheme of arrangement were in fact ready. The same day, Jong filed an affidavit appending the scheme of arrangement papers. (These papers included an affidavit by Jong filed earlier on 29 June 2004 in anticipation of a scheme of arrangement being applied for.)

6 At the hearing on 21 July 2004, having meanwhile been served Jong's affidavit of 7 July 2004, the creditors represented at the hearing informed the court that they would not support the proposed scheme of arrangement. These creditors included the major creditors Eastern and Bintai earlier referred to. A count was taken of the debts owed to the supporting creditors and the percentage of the Company's total unsecured debts that they represented. Both on a gross and net basis, the supporting creditors exceeded 25% of the unsecured creditors. (It was necessary to consider both bases because the Company had alleged that it had valid counterclaims against certain of the creditors. On the assumption that this was true, the debts owed to the respective creditors had to be reduced by the amount of the counterclaim against them.) This meant that if the scheme of arrangement were to be put to the vote at a meeting of creditors pursuant to s 210 of the Companies Act, it would certainly be defeated. This would be the case even if we were to assume that *all* other unsecured creditors were to vote in favour of the scheme of arrangement. In truth, the Company only managed to persuade a minority of creditors to sign a standard letter prepared by the Company stating that they "would like to consider the Company's proposal for repayment". (I note that Jong disingenuously contended in para 11 of his affidavit of 20 July 2004 that "a great majority of the creditors are supportive of the application for the scheme of arrangement and this includes small and big amounts". I totalled up the debts said to be owing to those creditors who had signed the Company's standard letter indicating that they "would like to consider the Company's proposal for

repayment". In so doing, I discovered that the amounts shown as owing were in many instances substantially inflated when compared with the amounts listed as owing to them in exhibit JHS-4 referred to in Jong's affidavit of 29 June 2004. (To complete the picture, in a couple of them the amount was understated; but overall there was a substantial overstatement of the amounts alleged to be owing.) Be that as it may, even assuming the amounts in the letter to be correct, the debts owed to these creditors were certainly a minority and far from the requisite majority of creditors to whom 75% of the unsecured debts must be owed.)

7 It was therefore clear that there was no reason for the court to set aside the winding up order. The petitioning creditor meanwhile having received a cheque for the debt of $18,000, Eastern applied to be substituted as petitioning creditor, an affidavit for this purpose having been filed on its behalf. This was opposed by counsel for the Company on the basis that Eastern was bound by an agreement with the Company to support the scheme of arrangement. An affidavit of Jong filed on the eve of the hearing exhibited correspondence passing between their respective solicitors. Upon review of the correspondence, I ruled that Eastern had only agreed to "consider" the scheme of arrangement. It could not have agreed to be bound by a scheme of arrangement *in vacuo*. Having since received Jong's affidavit of 7 July 2004 setting out the details of the scheme of arrangement and, presumably having considered the same, Eastern was well entitled to decline to support it. I therefore gave leave for the original petitioning creditor to withdraw and allowed the substitution.

8 I took into account the following:

(a) That the Company was undoubtedly insolvent. (The sorry financial state of the Company can be clearly seen from Jong's own affidavit of 29 June 2004 appended to his affidavit of 7 July 2004. In para 20 thereof, he admitted that the Company was unable to meet its liabilities as and when they fell due and that its total liabilities as disclosed in the management accounts exceeded $11m. In para 26, he again deposed that "in view of the Company's financial situation, the Company is unable to meet its payments as and when they fall due" and further disclosed that the Company faced "a litany of legal actions". Paragraph 22 deposed that 22 legal actions had been commenced against the Company (although the Company had counterclaims against same) and a further 35 parties had sent letters of demand.)

(b) That despite the original petitioning creditor having been paid, supporting creditors sought the winding up of the Company and not a single creditor made any argument in opposition. This was despite the fact that the scheme of arrangement promised a payment (on a best case basis) of up to 50 cents in the dollar if the scheme of arrangement succeeded, as against 3.4 cents in the dollar on a winding up. Obviously, the creditors did not believe the rosy prognostications of the Company's managing director, Jong. Without their support, there was no prospect of the scheme of arrangement succeeding. Parenthetically, I should add that it was not surprising that the creditors disbelieved Jong. He had made statements in his affidavit of 23 June 2004 which were clearly untrue and in respect of which, by my direction, he had to file a later affidavit (affirmed on 20 July 2004) seeking to expunge or correct the offending statements.

(c) That allowing the Company to drag on, defending the numerous suits against it, and to seek in vain to enter into a scheme of arrangement, would fritter away the scant financial resources of the Company at the expense of creditors.

9 In exercise of my discretion, I therefore declined to set aside the winding up order which I had made at the first hearing on 18 June 2004. I also lifted the stay order under s 279(1) of the

Companies Act which I had made at the second hearing on 25 June 2004 but ordered that the winding up order not be extracted until after the substitute petitioning creditor had filed papers in connection with the substitution, such filing to be done within seven days. I also ordered that the original and substitute petitioning creditors' costs be taxed and paid out of the assets of the Company.