Nova Leisure Pte Ltd v Dynasty Theatre Nite-Club KTV and Lounge Pte Ltd [2004] SGHC 273

Case Number : CWU 46/2003, SIC 5596/2004

Decision Date : 09 December 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Chia Cheok Sien (Chia and Tang) for the liquidator; Sunari bin Kateni (Insolvency and Public Trustee's Office) for the Official Receiver

Parties : Nova Leisure Pte Ltd — Dynasty Theatre Nite-Club KTV and Lounge Pte Ltd

Insolvency Law – Winding up – Liquidator – Application for authorisation to pay money into bank account other than Companies Liquidation Account – Whether court having power to authorise liquidator to pay money into account with any bank as may be selected by liquidator – Sections 274(1), 274(3) Companies Act (Cap 50, 1994 Rev Ed), r 153(1) Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed)

Insolvency Law – Winding up – Liquidator – Application for authorisation to pay money into bank account other than Companies Liquidation Account – Whether court having power to authorise liquidator to pay money into such other bank account – Whether court having power to authorise liquidator to pay money out of such other account unilaterally – Section 274(1) Companies Act (Cap 50, 1994 Rev Ed), rr 153(1), 153(2), 154(2) Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed)

Insolvency Law – Winding up – Liquidator – Whether liquidator requiring court authorisation to open bank account – Whether court may sanction breach of rr 103 and 153 Companies (Winding Up) Rules – Section 274(1) Companies Act (Cap 50, 1994 Rev Ed), rr 103(1), 103(2), 153(1), 153(2) Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed)

Insolvency Law – Winding up – Liquidator – Application for authorisation to pay money into bank account other than Companies Liquidation Account – Whether Official Receiver may direct liquidator to carry out functions of committee of inspection – Whether liquidator having locus standi to make application – Section 314(1) Companies Act (Cap 50, 1994 Rev Ed), r 188 Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed)

9 December 2004

Woo Bih Li J:

Introduction

1 On 30 July 2004, Dynasty Theatre Nite-Club KTV & Lounge Pte Ltd was wound up by an order of court. Mr Koh Hui Chang was appointed as liquidator ("the Liquidator").

2 Subsequently the Liquidator applied for various orders. I was concerned with part of his application which sought the following orders, *ie* that:

(a) the Liquidator be authorised to open and operate bank account(s) with such bank(s) as the Liquidator deems fit ("the Authorisation Order"); or alternatively,

(b) the bank account numbered 147-302-119-1 opened by the Liquidator with the United Overseas Bank Limited, Rochor Road Branch be deemed as having been opened with the authority of the court ("the Retrospective Order").

3 Eventually, I declined to make the above orders and I now set out below my written reasons.

Application for the Authorisation Order

4 The application for the Authorisation Order raised the following questions:

(a) firstly, who may apply for the Authorisation Order;

(b) secondly, whether the court has power to authorise a liquidator not only to pay money into a bank account which is not the Companies Liquidation Account ("CLA") but also to pay money out of such an account unilaterally; and

(c) thirdly, whether the court has power to authorise a liquidator to pay money into an account with any bank as may be selected by the liquidator.

As the answers to the above questions might affect the practice of the Official Receiver and the practice of private liquidators, whom I shall refer to as "liquidators" in plural and "liquidator" in singular, I asked the Official Receiver to attend before me to address me on the questions. The Official Receiver was represented by Mr Sunari. The Liquidator's counsel was Mr Chia Cheok Sien. The Official Receiver had not objected to the Liquidator's application. Indeed, the application was made by the Liquidator at the direction of the Official Receiver.

5 Section 274(1) of the Companies Act (Cap 50, 1994 Rev Ed) states:

> Every liquidator shall, in the manner and at the times prescribed by the rules, *pay the money received by him into such bank account* as is prescribed by those rules or as is specified by the Court. [emphasis added]

6 Rules 103(1) and (2), 104(1) and (2), 105, 153(1) and (2) and 154(1) and (2) of the Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed) ("the Rules") state:

> 103.—(1) Unless otherwise directed by the Court, every liquidator of a company which is being wound up by the Court shall pay, without deduction, all moneys received by him, as liquidator of the company, to the Companies Liquidation Account.
>
> (2) Such remittances are to be made once a week, or forthwith if a sum of $1,000 or more has been received by the liquidator. The remittances may be made by cheque crossed "Official Receiver, credit of Companies Liquidation Account".
>
> 104.—(1) All payments out of the Companies Liquidation Account shall be made by the Official Receiver.
>
> (2) All necessary disbursements made by a liquidator on account of a company which is being wound up by the Court to the date of his application for release shall be repaid to him out of any moneys standing to the credit of the company in the Companies Liquidation Account on application to the Official Receiver.
>
> 105. Notwithstanding any other provisions in these Rules, the Court may in any case give special directions with respect to the payment, deposit or custody of moneys or securities payable to or coming into the possession of a liquidator.
>
> 153.—(1) In a winding up by the Court, if the committee of inspection satisfies the Court

that for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is to the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court shall, *on the application of the committee of inspection*, authorise the liquidator to make his payments into *such other bank as the committee may select* instead of to the Companies Liquidation Account, and thereupon those payments shall be made in the prescribed manner.

(2) The Court may grant such authorisation *as is referred to in paragraph (1)* for such time and on such terms as it may think fit, and may at any time order the account to be closed if it is of opinion that the account is no longer required for the purposes mentioned in the application.

154.—(1) Where the liquidator in a winding up by the Court is authorised to have a special bank account, he shall *forthwith pay all moneys* received by him into that account to the credit of the liquidator of the company.

(2) All payments out of that account shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the company, and shall be signed by the liquidator, *and shall be countersigned by at least one member of the committee of inspection, and by such other person, if any, as the committee of inspection may appoint*.

[emphasis added]

7 As regards the question as to who may apply for the Authorisation Order, it is arguable that, notwithstanding r 153, a committee of inspection ("COI") is not the only party who may make the application and that a petitioner who is seeking a winding-up order may also make the application under s 274(1) at the time when the petitioner is seeking the winding-up order. My tentative view was that only the COI may make the application, otherwise, a liquidator may make that application if he is the petitioner pursuant to s 253(1)(d). The scheme in r 153 suggests that it is not for the liquidator to apply and although secondary legislation cannot override primary legislation, s 274(1) does not say who may apply. However, I say no more on this as it was not necessary for me to decide on it since the applicant before me was not the petitioner in any event.

8 As regards the COI, Mr Sunari initially relied on s 314(1) of the Companies Act which states:

Where a person other than the Official Receiver is the liquidator and there is no committee of inspection, the Official Receiver may, on the application of the liquidator, do any act or thing or give any direction or permission which is by this Act authorised or required to be done or given by the committee.

9 Mr Chia relied on r 188 which states:

Where there is no committee of inspection any functions of the committee of inspection, subject to the directions of the Court, may be exercised by the Official Receiver.

10 The effect of Mr Sunari's and Mr Chia's submissions was that the Official Receiver can direct a liquidator to carry out the functions of the COI. However, in my view, that is not what s 314(1) or r 188 states. Basically, these provisions allow the Official Receiver to exercise the functions of the COI where there is no COI. However, these provisions do not allow a liquidator to step into the shoes of the COI even at the direction of the Official Receiver. Accordingly, it was my view that the Liquidator had no *locus standi* to apply for the Authorisation Order.

11 As an aside, I would add that s 314(1) allows the Official Receiver to exercise the functions of the COI in relation to any act to be done by the COI under the Act but not under the Rules, whereas r 188 is wider and is not restricted to any act to be done by the COI under the Rules.

12 Even if the Official Receiver had made the application, there was a more significant obstacle. As mentioned above, the question was whether the court has power to authorise a liquidator not only to make payments into but also payments out of a bank account unilaterally. That was what was intended by the use of the word "operate" in the Liquidator's application.

13 After considering s 274(1) and the provisions in the Rules which I have set out above, it seemed to me that the scheme of things under the Act and the Rules is, generally, for all moneys received by a liquidator to be paid into the CLA. Any payment out of the CLA is to be made by the Official Receiver. However, if a COI were of the view, for some reason, that the CLA is not appropriate, then it may apply to the court to authorise the liquidator to make payments into a bank account other than the CLA. The fact that it is the COI who is to make the application provides a measure of protection to creditors, since the liquidator cannot initiate the application himself. The concern about providing protection for creditors is reinforced by the fact that even if the court were to authorise a liquidator to make payments into a bank account other than the CLA under r 153(1), r 154(2) provides that all payments out of that account shall be by cheque payable to order and shall be signed by the liquidator and countersigned by at least one member of the COI.

14 Indeed, a careful consideration of r 153(1) shows that the application will be to authorise the liquidator "to make his payments into such other bank as the committee may select". Rule 153(1) does not say that the application will be to allow the liquidator to "operate" that other bank account. If "operate" had been used, it would have suggested that the liquidator could have withdrawn moneys without any counter-signature. That clearly is not the intention as can be seen from the fact that r 153(1) mentions only payments into some other bank account and r 154(2) requires at least one counter-signature for payments out.

15 Is s 274(1) wider than rr 153 and 154 in that it allows the court to authorise a liquidator to operate some other bank account without the need for a counter-signature? When I considered s 274(1) again, I noted that, like r 153(1), it refers to the payment of money into a bank account and not to the operation of a bank account. Bearing in mind rr 153(1) and 154(2), it was clear to me that the reference in s 274(1) to money being paid into an account is deliberate.

16 In my view, the scheme of things envisaged under the Act and the Rules is to impose some control over liquidators in respect of the withdrawal of money. This is a form of protection against a liquidator's dishonesty.

17 As for r 153(2), which allows the court to grant authority for the liquidator to make payments into another bank account on such terms as the court thinks fit, I was of the view that the terms which the court may think fit to make must not be contrary to other provisions in the Rules, unless the Rules state specifically that the court may order otherwise. In other words, rr 153(2) and 154(2) must be read together and r 153(2) does not override r 154(2).

18 As for r 105, this provision gives the court powers notwithstanding any other provision in the Rules, to "give special directions with respect to the payment, deposit or custody of moneys or securities ... *coming into the possession of a liquidator*" [emphasis added]. It seemed to me that as regards money, this provision refers to payments to be made by a liquidator into an account and not

payments out of an account.

19 Interestingly, s 248(1) of the UK Companies Act 1948 (c 38) which is similar to our s 274(1) states:

> **Payments of liquidator in England into bank**
>
> Every liquidator of a company which is being wound up by the court in England shall, in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, pay the money received by him to the Companies Liquidation Account at the Bank of England, and the Board shall furnish him with a certificate of receipt of the money so paid:
>
> Provided that, if the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Board shall, on the application of the committee of inspection, authorise the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments shall be made in the prescribed manner.

20 Although s 248(1) refers to the making of payments into and out of some other bank account and might at first blush suggest that the liquidator may withdraw money unilaterally, that provision itself states that the payments shall be in the prescribed manner.

21 Rules 170(1) and 170(2) of the UK Companies (Winding-up) Rules 1949 state:

> **Special Bank account. Forms 82 and 83**
>
> 170.—(1) Where the Liquidator in a winding-up by the Court is authorised to have a special bank account, he shall forthwith pay all moneys received by him into that account to the credit of the Liquidator of the Company. All payments out shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the Company, and shall be signed by the Liquidator, and shall be countersigned by at least one member of the Committee of Inspection, and by such other person, if any, as the Committee of Inspection may appoint.
>
> (2) Where application is made to the Board of Trade to authorise the Liquidator in a winding-up by the Court to make his payments into and out of a special bank account, the Board of Trade may grant such authorisation for such time and on such terms as they may think fit, and may at any time order the account to be closed if they are of opinion that the account is no longer required for the purposes mentioned in the application.

22 Therefore, r 170(1) shows that even though a liquidator in England might have been authorised under s 248 of the UK Companies Act to make both payments into and out of a bank account other than the Companies Liquidation Account, the payments out still required a counter-signatory. This reinforces the view that the intention in England was also for there to be some control over liquidators in respect of the withdrawal of money.

23 Accordingly, I was of the view that in Singapore the court does not have the power to authorise a liquidator to pay money out of a bank account unilaterally.

24 I come now to the question whether the court has power to authorise a liquidator to pay money into an account with any bank as may be selected by the liquidator. Section 274(1) provides for payment into such bank account as is prescribed by the rules or "as is specified by the Court". Section 274(3) provides that any liquidator who pays any sums received by him into any account other than the one prescribed or specified under sub-s (1) shall be guilty of an offence. In my view, ss 274(1) and 274(3), when considered together, demonstrate that the court may only authorise a liquidator to open an account with a bank which must be specified by the court and the court is not empowered to give *carte blanche* to a liquidator to make payment into an account with any bank as the liquidator may select. This is consistent with the overall scheme of having some form of control over liquidators. Furthermore, r 153(1) suggests that it is for the COI to select the bank into which moneys are to be paid by the liquidator if payment is not to be made into the CLA. Accordingly, the court should specify in its order the bank selected by the COI.

25 While developments have shown that the concern for protection against a liquidator's dishonesty has diminished and it is common for applications to be made for a liquidator to open a bank account other than the CLA as well as to let the liquidator operate that account, it seemed to me that such applications were made on a misinterpretation of s 274(1), *ie* in assuming that this provision means that the court may authorise a liquidator to operate any bank account as the liquidator may select. I was aware that my decision on the second and third questions would affect the manner in which the Official Receiver and liquidators currently operate but, in my view, the answer lies in amending the relevant legislation and not in misconstruing it. Indeed, after I inquired whether the current practice might have been based on a misinterpretation of the relevant legislation, the Official Receiver did not submit otherwise. Accordingly, my view was and is that a court may only authorise a liquidator to make payments into an account with a bank specified by the court, but subject to r 154(2) about payments out.

26 However, if I had made such an order, the order would not have addressed the intention of the Official Receiver and the Liquidator in the application before me, which was for the Liquidator to operate a bank account and not to inconvenience the Official Receiver. Indeed, if I had authorised the Liquidator to make payment into a bank account specified by me which would still be subject to r 154(2), that would have caused greater inconvenience to the Official Receiver and to the Liquidator, assuming that the Official Receiver could even be the counter-signatory pursuant to r 188.

Application for the Retrospective Order

27 I come now to the application for the Retrospective Order. This application was made on the premise that s 274(1) of the Companies Act and rr 103 and 153 of the Rules require a liquidator to obtain the court's authorisation to open a bank account. It seemed to me that these provisions only require a liquidator to obtain the court's authorisation to make payment of money received by him into a bank account other than the CLA. The mere opening of a bank account does not require the court's authorisation and so there is no breach until a liquidator makes payment into that bank account without the court's authorisation.

28 Furthermore, even if there had been a breach by the Liquidator, for example, in making payment into a bank account other than the CLA without the court's authorisation, I was of the view that it was not for the court to sanction the breach, as it were. It would be for the relevant authority to decide whether it wished to take any step in relation to the breach.

Summary

29 In the circumstances, I made no orders in respect of the application for the Authorisation Order and the Retrospective Order, with liberty to apply.

No orders on the application for the Authorisation Order and the Retrospective Order.

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