Ho Wing On Christopher and Others v ECRC Land Pte Ltd (in liquidation) [2006] SGHC 16

Case Number : CWU 102/1999, SIC 600611/2004

Decision Date : 26 January 2006

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Francis Xavier and Lai Yew Fei (Rajah and Tann) for the applicants; Oommen Mathew (Haq and Selvam) for the respondent

Parties : Ho Wing On Christopher; Shum Sze Keong; Lee Yen Kee Ruby; Law Kwok Fai Paul; E-Zone (Plaza) Pte Ltd; The Grande Group Limited; East Coast Works Pte Ltd; Hong Kong Aberdeen Seafood Restaurant Pte Ltd; Nakamichi Pte Ltd; Cafe Al Fresco Pte Ltd — ECRC Land Pte Ltd (in liquidation)

Insolvency Law – Winding up – Liquidator – Liquidators bringing action on behalf of insolvent estate – Whether liquidators personally liable to winning party for shortfall in costs owed by insolvent estate if liquidators in breach of estate costs rule

26 January 2006

Lai Kew Chai J:

1 In a case where a liquidator unsuccessfully brought an action on behalf of an insolvent estate, was the liquidator personally liable to the winning party for any shortfall in costs owed by the insolvent estate if the liquidator was in breach of the estate costs rule? This was the sole issue which came up for determination in the present proceedings.

Background

2 ECRC Land Pte Ltd ("the respondent") was incorporated in late 1994 as a joint-venture vehicle to redevelop the premises located at 1000 East Coast Parkway into a world-class amusement theme park. One of the parties to the joint venture was Grande Leisure Management Pte Ltd, which, together with the fifth to tenth applicants, belonged to the Grande group of companies. The first to fourth applicants were directors of the respondent as well as the fifth to tenth applicants at the material times.

3 In 1999, however, the respondent was ordered to be wound up. Mr Chee Yoh Chuang and Mr Lim Lee Meng ("the liquidators") of M/s Chio Lim & Associates were appointed as the liquidators of the respondent. In the course of their investigations into the respondent's affairs, the liquidators uncovered transactions which, to their minds, suggested improper, unreasonable and dishonest behaviour on the part of the applicants, *vis-à-vis* the respondent.

4 In September 2001, the liquidators took out Suit No 1210 of 2001 on behalf of the respondent against the applicants ("the action"). The action was based on fraud, breach of fiduciary duty, constructive trust and conspiracy. The respondent sought, *inter alia*, damages and/or repayment of alleged wrongful payments by the respondent to the applicants as well as compensation for rental concessions granted by the respondent to the applicants.

5 The respondent's claims were dismissed by Tay Yong Kwang J who only allowed the claims against the fifth and sixth applicants for operating expenses between January to March 1995. In the circumstances, Tay J ordered the respondent to pay all the applicants 80% of the costs of the action. Thereafter, the respondent appealed against Tay J's decision, whereupon the Court of Appeal

dismissed the appeal with costs (the costs of the action and of the appeal which were awarded to the applicants are hereafter referred to collectively as "the costs").

6 In the proceedings before the Court of Appeal and the High Court, the applicants had obtained orders for security for costs in the total sum of $105,000, which was duly paid to the applicants in the course of these proceedings.

The present proceedings

7 Before me, the applicants took out two applications which I heard together. In the first application, Summons in Chambers No 600479 of 2004 ("SIC 600479/2004"), I allowed the application and ordered that the respondent paid the costs to the applicants in priority to all other claims and expenses, including the liquidators' own remuneration and costs, but subject to the liquidators' costs of getting in, maintaining and realising the assets of the respondent.

8 The above order was made pursuant to the estate costs rule. It was undisputed that the costs should be paid out of the respondent's assets in priority to the liquidators' remuneration and costs since the applicants had successfully defended the action: *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd* [1999] 2 AC 1.

9 As enunciated by the Court of Appeal in *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR 571 at [46], the rationale for the estate costs rule was that where an action was taken by a liquidator for the benefit of an insolvent estate, it was only fair that the successful defendant's costs were entitled to priority over the liquidator's expenses and remuneration and the claims of the unsecured creditors in general. The liquidator should take the risk for his own actions: see also *In re Home Investment Society* (1880) 14 Ch D 167; *In re Pacific Coast Syndicate, Limited* [1913] 2 Ch 26 ("*Re Pacific*").

10 In the liquidators' affidavit of 31 August 2004, they confirmed that the respondent's remaining funds amounted to $18,105.76 and there were no further assets belonging to the respondent that could be realised. As the applicants alleged that the liquidators had previously paid out moneys in breach of the estate costs rule, the applicants took out the second application, Summons in Chambers No 600611 of 2004 ("SIC 600611/2004"), in which they sought two orders.

11 The relief sought in the applicants' first prayer was that the liquidators should make good the sums previously paid out in breach of the estate costs rule. The applicants pointed to various instances where the liquidators had used the moneys of the respondent to pay legal costs and their own remuneration. These payments were made in breach of the estate costs rule as the applicants' costs should have been paid in priority to these payments but the liquidators failed to do so.

12 On the respondent's part, it was highlighted in the liquidators' affidavit of 22 November 2004 that the sums paid out for legal expenses were reasonably and properly incurred, while the payments to themselves for their fees and disbursements were reasonable and made in good faith. To this end, I noted that one of the payments for the liquidators' fees and disbursements had taken place before the action was even initiated.

13 For present purposes, I need not deal with the first prayer of SIC 600611/2004 at length. Suffice to say that I asked the parties to come up with the relevant figures to be coughed up by the liquidators to make good their breach, pursuant to my order in SIC 600479/2004.

14 As there would still be a shortfall in the costs due to the applicants even after the liquidators

made good their breach ("the shortfall"), the applicants sought to convince me that I should accede to their second prayer in SIC 600611/2004 and order that the liquidators be made personally liable for the shortfall, *ie*, order that the liquidators pay the shortfall out of pocket. After considering all the authorities cited to me, I found myself unable to agree with the applicants and dismissed their second prayer with costs. The applicants have appealed against my decision in this regard. Accordingly, I now give the reasons for my decision.

The submissions

The applicants' arguments

15 The applicants stressed that they were not seeking for the liquidators to be made personally liable as non-parties to the proceedings. Instead, the applicants said that they were entitled to a personal costs order as against the liquidators because the latter had been in breach of the estate costs rule. Since the liquidators had failed to accord due priority to the costs payable to the applicants, the applicants argued that the court should exercise its supervisory jurisdiction over the liquidators and order them to not only use those sums paid to themselves to meet the costs, but to also make up the shortfall out of their own pockets.

16 Another assertion made by the applicants was that if the liquidators were not made personally liable for the shortfall, it would make a mockery of the estate costs rule since the liquidators would be allowed to flagrantly flout the rule without having to account for their actions. The applicants further contended in their submissions that:

> In fact, it is the defendants who need the protection of the courts from liquidators commencing an action behind the cloak of a company and then flagrantly flouting the Estate Costs Rule. The hapless defendant [*sic*] will have no recourse in respect of their costs in defending the action.

The respondent's arguments

17 The respondent had no serious quarrel with the application of the estate costs rule. However, it submitted that the court's jurisdiction to make a personal costs order against the liquidators should only be exercised sparingly, where there had been misconduct or impropriety on their part. After all, there would be a greater public interest in ensuring that liquidators were not unnecessarily deterred from taking all reasonable steps to recover assets belonging to the insolvent company. Parties such as the applicants could protect their position by applying to the court for an order for security for costs.

My decision

18 While the liquidators in the present proceedings were admittedly in breach of the estate costs rule, they had already been ordered to return the sums paid to themselves so as to meet the applicants' costs. The applicants failed to persuade me that they were entitled, over and above that order, to a personal costs order against the liquidators for the shortfall. They were unable to offer any convincing explanation or pertinent authorities to support their assertion that the liquidators' breach of the estate costs rule should translate into personal liability for the shortfall in the costs incurred in the action.

19 It was established by the English Court of Appeal in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 ("*Metalloy*") that where a liquidator commenced an action in the name of the company, he would be a non-party to the action and could not be ordered to pay costs personally. In

that case, Waller J held at 1618 that the court would only order a liquidator to pay costs personally in *exceptional circumstances* where there had been impropriety on the liquidator's part, having regard to public policy considerations and the fact that the normal remedy of an order for security for costs was available. In situations where a liquidator brought proceedings in his own name, he could also be personally liable for costs though he might or might not be entitled to recover out of the company's assets: *Kumarasamy v Haji Daud* [1972] 2 MLJ 16; *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274; *Metalloy* (*supra* at 1620) *per* Millett LJ.

20 In the present case, the liquidators had brought the action in the respondent's name. As a non-party to the action, a personal costs order would not ordinarily be thrust upon them unless there was some compelling evidence that they had acted improperly. Although the applicants wanted the liquidators to bear personal liability for the shortfall, they did not provide any arguments or evidence as to any alleged impropriety or misconduct by the liquidators. The applicants merely maintained that the liquidators acted unreasonably in instituting and proceeding with the action, and should have known that the respondent had insufficient funds to satisfy any costs ordered against it.

21 It seemed to me that the applicants did not want an inquiry into the liquidators' conduct in the action. Indeed, they confirmed in their submissions that they were not attempting to render the liquidators personally liable for the shortfall on that basis. Instead, the applicants simply sought to use the liquidators' breach of the estate costs rule as an alternative ground for obtaining a personal costs order against them. This was a rather novel proposition. However, to my mind, it was as disingenuous a proposition as it was novel.

22 In support of their contention that a breach of the estate costs rule could, in itself, ground a personal costs order for the shortfall, the applicants referred me to a number of cases. In *Re Pacific*, a case which factual matrix was similar to the present facts, the defendants obtained judgment with costs against the company in liquidation. Having first paid legal expenses from the company's assets, the liquidator of the company was unable to make full payment of the costs awarded to the defendants. The defendants applied to court for the liquidator to pay them the shortfall. Neville J held at 28–29 that:

> Here the liquidator had moneys in his hands which would now have been applicable to the payment of the taxed costs of the applicants had he not applied them in payment of his own solicitors' costs which were subject to the prior claim of the applicants. I hold, therefore, that *he must pay the applicants their taxed costs of the action, and he may repay himself out of any further assets that may come to his hands*. [emphasis added]

23 The applicants in the present proceedings relied on the above passage for the proposition that a liquidator would be personally liable for any sums paid out in breach of the estate costs rule. In my opinion, *Re Pacific* did not establish such a broad principle. I was in agreement with the respondent that *Re Pacific* merely emphasised the application of the estate costs rule. Neville J's judgment set out clearly that where judgment with costs was ordered against a company in liquidation, the party entitled to the costs was entitled to payment of the costs before the liquidator's costs were paid, regardless of whether the order was merely for costs, or for costs to be paid out of the company's assets, or for the liquidator to pay costs with liberty to repay himself out of the company's assets.

24 While Neville J had ordered the liquidator to pay the defendants the costs of the action, this merely meant that the liquidator had to cough up the sums paid to himself from the company's assets in breach of the estate costs rule, and pay them to the defendants. Once the defendants' costs had been paid, the liquidator would be able to repay himself if he was able to realise any other assets

belonging to the company. Neville J's order did not envisage or entail the liquidator having to bear personal liability for the defendant's costs on the sole basis that he had paid out moneys in breach of the estate costs rule.

25 In any event, the sums to be repaid by the liquidator in *Re Pacific* were sufficient to meet the costs owing to the defendants. As such, the issue of whether the liquidator could be made to bear any shortfall in costs personally, despite having returned moneys paid in breach of the estate costs rule, did not arise for the court's consideration.

26 Next, the applicants drew my attention to several cases which apparently illustrated that where a liquidator effected payments in breach of priority rules, he would be personally liable for the consequences of such payments. The applicants argued that this should, in principle, include any shortfall in the moneys owed to a party having priority.

2 7 *Re Circuit Development Ltd, ex parte Mortimer* [1981] 2 NZLR 243 ("*Re Circuit Development*") was a case where a judgment creditor applied for leave to enforce an order that arrears of rent owed to him by an insolvent company be paid by its liquidator. It transpired that the liquidator had paid himself and his advisers their remuneration but the company still had sufficient funds remaining to satisfy the judgment. The High Court of Auckland held that since the rental arrears were expenses incurred in the winding up, they ought to be paid immediately, and following *Re Beni-Felkai Mining Company, Limited* [1934] Ch 406, the expenses of a winding up ought to be paid before the remuneration of the liquidator. As such, the High Court ordered that the liquidator or his agents should use the remuneration received from the company to pay the judgment sum if the company's assets were inadequate.

28 According to the applicants in the present proceedings, if neither the assets of the company in *Re Circuit Development* nor the return of the liquidator's remuneration had been sufficient to satisfy the judgment sum, the liquidator in that case should, in principle, have been made to top up the shortfall out of pocket. I was unable to accept this argument. In the first place, the applicants offered absolutely no explanation or authority to support their argument. All they could say was that there was no reason why their argument should not stand.

29 I also found the applicants' reliance on *Re Circuit Development* to be wholly misconceived. *Re Circuit Development* was really a case about an application of the estate costs rule, and how a liquidator who had paid himself in breach of the rule could be ordered to return the moneys to a party having greater priority. It did not stand for the principle that where a liquidator had breached priority rules, the liquidator should be held personally liable for a shortfall in moneys owing to a party with priority.

30 In any event, the application of the estate costs rule was not in issue in the present proceedings since the liquidators had already been ordered to make good those payments made in breach of the estate costs rule.

31 The applicants also referred me to various passages in the cases of *In re Dominion of Canada Plumbago Company* (1884) 27 Ch D 33 and *In re Staffordshire Gas and Coke Company* [1893] 3 Ch 523. However, I found that these passages similarly did not assist the applicants as they merely affirmed the estate costs rule or showed how the rule was to be applied, *viz*, a liquidator having to subordinate the payment of his costs to the payment of the winning party's costs.

32 I found the case of *Deputy Commissioner of Taxation v Tideturn Pty Ltd* 37 ACSR 152 to be similarly unhelpful to the applicants' case. There, upon the application of the Deputy Commissioner of

Taxation, a liquidator was held personally responsible for his failure to retain moneys for tax purposes, and was made to cough up the moneys he had failed to hold back. Again, this case was irrelevant to the present proceedings. There was nothing at all in the case to convince me that a liquidator should be ordered to pay a shortfall in costs personally after failing in legal proceedings commenced on behalf of an insolvent estate.

33 Another case relied on by the applicants was *Re AMF International Ltd; Chontow v Elles* [1995] 2 BCLC 529 ("*Re AMF International*"). There, the liquidator of a company, Mr Elles, made distributions to its parent corporation which agreed to indemnify the company against its liabilities. In the meantime, the company occupied certain premises under a lease. Subsequently, the applicant creditors issued an originating application against Mr Elles, asking that he admit their proof of debt for rental arrears and pay the amount in full or alternatively that Mr Elles be removed and made to pay the costs of the application personally. Mr Elles then paid the creditors part of the arrears and called on the parent corporation to pay the balance under its indemnity but the parent corporation failed to make any such payment.

34 Subsequently, when the creditors' application was heard, Mr Elles had already been voted out of office and the creditors had to look to the new liquidator for their claim. Nevertheless, the creditors asked that Mr Elles paid their costs for the application personally. Ferris J accepted the creditors' arguments and ordered Mr Elles not only to bear the creditors' costs personally but to bear his own costs as well. Ferris J found that Mr Elles, in paying the parent corporation, had breached the principle that shareholders were not entitled to anything in a winding up until all the debts had been paid. Moreover, he opined that Mr Elles had brought the proceedings upon himself due to his unacceptable dilatoriness in dealing with the creditors' claim.

35 In the present proceedings, the applicants argued that *Re AMF International* supported their position that the liquidators should be made personally liable for the shortfall. Contrary to their assertions, I failed to see how *Re AMF International* assisted them. Mr Elles had been ordered to bear the creditors' costs himself because his unreasonable and reprehensible conduct had forced the creditors' hand in taking out the application against him. This was materially different from the present facts where the liquidators had brought the action on behalf of the insolvent estate and there had been no allegation of impropriety of the liquidators' conduct. There was plainly no reason why the liquidators in this case should be made to bear the shortfall themselves.

36 The applicants also raised several Australian authorities as support that the court could order a liquidator to be personally liable for a costs order made against the company even where he was not a party to the proceedings. I did not find these cases to be particularly helpful and need only refer to two of them.

37 In *Hypec Electronics Pty Ltd (in liq) v Mead* 50 ACSR 448 ("*Hypec*"), the defendants applied for an order that the liquidator pay costs personally for unsuccessful proceedings initiated by the liquidator on the company's behalf. The liquidator argued, *inter alia*, that he could not be held personally liable as he was not a named party to the proceedings.

38 In the Supreme Court of New South Wales, Campbell J considered that the court had the jurisdiction to make the liquidator personally liable for costs. He ruled that the conduct to be expected of the liquidator in commencing the proceedings in the company's name would be the same standard as that of a trustee in bankruptcy. He further held that in deciding whether a liquidator could be indemnified by the company for costs which he was ordered to pay, the test laid down in *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 ("*Beddoe*") should apply; that is, whether the conduct which gave rise to the burden of costs ordered to be paid was reasonably as well as honestly

incurred.

39 I did not find *Hypec* to be of much assistance. The fact remained that the applicants in the present proceedings had not adduced any concrete evidence to show that the liquidators in bringing the action had acted in any manner which would be improper in the *Beddoe* sense. Thus, even on an application of the *Beddoe* test, which was less robust than the standard of impropriety in *Metalloy*, the liquidators would still not be held personally liable for the applicants' costs, as it was not shown that the *Beddoe* test was satisfied.

40 In *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477 ("*Belar*"), the Supreme Court of Queensland held (at [36]) that where a company in liquidation unsuccessfully brought proceedings and the costs ordered against the company could almost certainly not be recovered from the company's assets:

> *The most usual order in such a case is that the liquidator pay the costs, and it is recognised that this makes the liquidator personally liable for such costs*. It is usual in such cases to permit the liquidator to recover costs so far as this is feasible, from company assets, provided there has not been misconduct or other unusual circumstances. The exercise of such a discretion by the courts along the above lines is consonant with the principles under which orders for costs may be made against non-parties. [emphasis added]

41 On the above reasoning, the applicants in the present case averred that if a liquidator could be held personally liable for costs as a non-party even in the absence of misconduct, *a fortiori*, the liquidator should also be made personally liable where he breached the estate costs rule.

42 In my view, this argument was unsustainable, given the far-reaching consequences of such a proposition. I did not accept the principle enunciated in *Belar*, as interpreted by the applicants, to represent the position in Singapore, *ie*, that a liquidator would typically be made personally liable for costs in an unsuccessful action brought by a company if the company's assets were insufficient to pay the costs. In any event, the principle in *Belar* did not support the applicants' specific proposition that a liquidator should be made personally liable where he was in breach of the estate costs rule.

43 I noted that the applicants were unable to provide any authority that *Belar* was good law in Singapore or that it reflected the local position. Instead, I was somewhat fortified in my views by the Court of Appeal's decision in *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* ([9] *supra*). While the facts of that case were not on all fours with the present facts, the discussion by the Court of Appeal at [49] was most instructive as to the usual consequences befalling a liquidator who had unsuccessfully commenced an action for the estate's benefit:

> We appreciate that until the liquidator commenced action and failed, there could be no question of any costs being payable. We agree that *the action having been commenced for the benefit of the estate of the company in question, the estate and the liquidator must bear the consequences that follow therefrom*. The question is, what consequence or consequences. *The normal consequence is standard costs* … [emphasis added]

44 The above passage was discussed in the context of priority under the estate costs rule. In this light, what the Court of Appeal meant by the costs consequences to be borne by the *liquidator* where he commenced an action for the company and failed, was that the payment of the liquidator's expenses and remuneration would enjoy lesser priority than the payment of the winning party's costs. The liquidator would not be able to pay himself out of the estate's assets until the costs of the winning litigant were paid. I would add that the liquidator would have to repay any assets used in

payment of his remuneration and expenses in order to give effect to the estate costs rule. The liquidator, therefore, took the risk that the estate might have insufficient assets to pay for his remuneration and costs.

45 As a matter of principle, it was hard to see how the costs consequences for a liquidator, as considered above, could in any way translate into the proposition that he would, as a rule, be made to pay the costs of a winning party out of pocket where he had instituted an action on behalf of a company in liquidation and the company had insufficient assets to pay the winning party's costs. Even where a liquidator was a party to proceedings and the assets of the insolvent company were insufficient for payment of the winning party's costs, it has been long established that the liquidator would not be automatically deemed personally liable for the shortfall unless his conduct justified such personal liability: *In re R Bolton and Company* [1895] 1 Ch 333. To then make a liquidator who was a non-party to proceedings automatically personally liable for shortfalls in costs would be to run counter to such an established rule.

46 In my opinion, the wide principle propounded in *Belar* was also at odds with the clear statement in *Metalloy* ([19] *supra*) that a liquidator who was a non-party would only be held personally liable for costs in exceptional circumstances where impropriety on his part was proved. I accepted the respondent's submission that, in the face of proceedings brought by a company in liquidation, an appropriate remedy for a party facing such an action should be to seek an order for security for costs at the earliest opportunity. This, the applicants had availed themselves of.

47 I was also in full agreement with the respondent's unassailable submission that the court should exercise considerable caution in determining whether to order costs personally against liquidators. There were powerful policy considerations in this regard, in particular, that office holders such as the liquidators should not be unduly restricted or held back in the honest and proper performance of their duties for fear of incurring personal liability for costs simply because they acted for an insolvent company with insufficient assets to pay the costs of a winning party. Otherwise, the very purpose of the liquidator's role in realising as much of the company's assets as was possible would be subverted. I concurred with Millett LJ's astute observation in *Metalloy* that a liquidator was under no obligation to a defendant to protect his interest by ensuring that he had sufficient funds in hand to pay the defendant's costs as well as his own if the proceedings failed.

48 This accorded with the observations of Lindsay J in *Eastglen Ltd (in liq) v Grafton* [1996] 2 BCLC 279 at 293:

> It is a familiar experience of those concerned with liquidations that liquidators find themselves without liquid resources sufficient to launch, or to launch and sustain, proceedings which they regard as necessary or desirable for a due performance of their duties. There is a public interest in liquidators being able satisfactorily to carry out the duties which the statutory scheme … confers on them. … If, by reason of their having supported unsuccessful proceedings by a liquidator, creditors are likely to find themselves liable not only for the finite and ascertainable sums which they may have agreed to make available to the liquidator but for the unknowable costs of the successful adverse party, even where the liquidator's proceedings are not said not to be bona fide and where there is no judicial criticism of their institution or conduct, support from creditors, I feel sure, would be yet harder to achieve. Justice in liquidations would be even more elusive and defaulting directors and others susceptible to proceedings would have even greater incentives than already exist to ensure that the incoming liquidator would find the company completely devoid of the funds necessary to fund litigation against them.

49 Alluding to the above passage, the public interest in allowing liquidators to carry out their

duties and not exposing them to personal liability for costs, similarly militated against the applicants' submission that the liquidators in the present proceedings should be made personally liable for the shortfall simply because they had breached the estate costs rule.

50 Lastly, the applicants seemed to be saying at [16] above that another reason why the liquidators should be out of pocket for the shortfall was because the liquidators should be censured for paying out moneys in breach of the estate costs rule. If they were not so punished, they would be given the green light to flout the rule with impunity. I found this argument to be unpersuasive. The liquidators had already been ordered to make good their breach of the estate costs rule. Holding them personally liable for the shortfall would neither give effect to the estate costs rule, nor meet the rationale behind it, but would instead run contrary to those policy considerations discussed above.

Conclusion

51 Ultimately, it was clear to me that the applicants had failed to provide any proper basis in law to substantiate their assertion that a personal costs order for the shortfall should be made against the liquidators for having breached the estate costs rule. No such principle was established. In fact, it seemed that the applicants were clutching at straws since the authorities cited in support of their case were mostly of no relevance or application to the present proceedings.

52 As the liquidators had already been ordered to repay the sums paid out in breach of the estate costs rule, and it had not been shown that there was any impropriety on their part, I could see no reason whatsoever for ordering them to cough up the shortfall as well. In the circumstances, I dismissed the second prayer of SIC 600611/2004 with costs. I would also like to thank counsel for providing written submissions which have been of considerable assistance.