IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 198

Originating Summons No 825 of 2020 (Summons No 3576 of 2020)

In the Matter of Section 91 of the Insolvency, Restructuring, and Dissolution Act 2018 (Act 40 of 2018)

Between

Oversea-Chinese Banking Corporation Limited

… *Applicant*

And

KS Energy Limited

... Respondent

Originating Summons No 827 of 2020 (Summons No 3577 of 2020)

In the Matter of Section 91 of the Insolvency, Restructuring, and Dissolution Act 2018 (Act 40 of 2018)

Between

Oversea-Chinese Banking Corporation Limited

… *Applicant*

And

KS Drilling Pte Ltd

... Respondent

BRIEF GROUNDS

[Insolvency Law] — [Judicial management]
[Insolvency Law] — [Judicial management] — [Interim judicial management]

TABLE OF CONTENTS

INTRODUCTION **1**

BRIEF BACKGROUND **1**

INTERIM JUDICIAL MANAGEMENT **4**

THE STATUTORY FRAMEWORK 5

THE APPLICABLE CASELAW 6

CONCLUSIONS ON THE IJM ORDERS SOUGHT 8

FURTHER OBSERVATIONS **9**

CONCLUSION **10**

Re KS Energy Ltd and another matter

[2020] SGHC 198

High Court — Originating Summons No 825 of 2020 (Summons No 3576 of 2020) and Originating No Summons 827 of 2020 (Summons No 3577 of 2020)
Aedit Abdullah J
31 August 2020

18 September 2020

Aedit Abdullah J:

Introduction

1 These are brief grounds issued to assist interested parties as to the reasoning of the Court in granting an order for interim judicial managers to be appointed over both KS Energy Limited ("KSE") and KS Drilling Pte. Ltd. ("KSD") (collectively, the "companies) under s 92 of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018) ("IRDA"). In particular, I focus on my findings that the discretion conferred under s 92 of the IRDA is a broad one, and that the categories of cases for which interim judicial management ("IJM") may be ordered are not closed.

Brief Background

2 KSE is a publically-listed company on the Main Board of the Singapore Exchange. It is an investment holding company for a group of subsidiaries and associated companies (the "KSE Group"). The KSE Group provides services to the global oil and gas industry, and its activities include capital equipment charter, drilling, and rigging management services. The Group's principal revenue-generating businesses are in drilling and rigging, and these businesses

are operated through KSD, a subsidiary. At all material times, the management of KSE and KSD was helmed by:

(a) Mr Kris Taenar Wiluan, as Chairman of the KS Companies and CEO of KSE;

(b) Mr Richard James Wiluan, as an Executive Director of KSE and CEO of KSD; and

(c) Mr Samuel Paul Oliver Carew-Jones, as an Executive Director and CFO of KSE.

Mr Richard Wiluan is the son of Mr Kris Wiluan, while Mr Samuel Carew-Jones is Mr Kris Wiluan's son-in-law. Mr Kris Wiluan and Mr Richard Wiluan hold 65.59% of all issued shares in KSE.

3 The applicant bank has, over the past decade, extended several loan facilities to the KSE Group. These loan facilities are such that the applicant holds about 61.14% of KSE's total liabilities, and 86.14% of KSD's total liabilities. These facilities are said to include, *inter alia*, the following:

(a) A term loan dated 27 July 2010 (as amended and restated by, among other documents, a deed of amendment and restatement dated 18 January 2019) for up to US$282,283,332.20 granted by the applicant to KSD (the "Jumbo loan"); and

(b) A further bridging loan of S$5,000,000 granted by the applicant pursuant to a letter of offer dated 1 February 2017 (as amended by a supplemental letter dated 22 January 2019) to KSD (the "Bridging loan").

4 KSE executed a deed of guarantee dated 27 July 2010 (amended by, among other things, a supplemental deed of guarantee dated 25 September 2015) in respect of the Jumbo loan for up to US$150,000,000, as well as a further deed of guarantee dated 9 September 2017 in respect of the Bridging loan for up to S$5,000,000. It is alleged that under the terms of the deeds of guarantee referred to, KSE agreed to pay on demand and as a primary obligation all sums due and payable by KSD to the applicant. In addition to the guarantees, the KSE Group's cash accounts are charged to the applicant.

5 It is not contested that between 2016 and 2019, the KSE Group faced financial difficulties. The bank did not object to several comprehensive restructurings of the group's debts and obligations, and allowed for, *inter alia*, a) a 12-month debt moratorium on all principal and interest repayments under the Jumbo loan between 1 August 2018 and 31 July 2019, b) substantial reduction of interest margins, and c) extension of payment periods with lower principal instalments. Notwithstanding these measures, the group continues to face financial difficulty. In 2018, KSD and its subsidiaries recognised a loss after tax of US$74.9 million, and the larger KSE Group reported a loss after tax of US$53.9 million. In 2019, the reported loss after tax for the KSE Group nearly doubled to US$104.4 million, while KSD recognised a loss before tax of US$40.7 million in its unaudited financial statements for that financial year. These difficulties have been exacerbated by the market conditions in the global oil and gas sector in 2020, as well as by the Covid-19 pandemic.

6 Compounding the KSE Group's difficulties, Mr Kris Wiluan was charged with 112 charges on 5 August 2020 for engaging in false trading and market rigging of KSE shares. Mr Kris Wiluan has since resigned from the management positions referred to at [2(a)] above, and those roles have been filled by his son, Mr Richard Wiluan.

7 Given the circumstances outlined, the applicant has lost confidence in the management of KSE and KSD. It alleges that the KSE Group continues to suffer heavy losses, and has withdrawn support moving forward. The applicant also alleges that KSD is burning through slightly over US$1,000,000 per month in manpower and maintenance costs associated with its fleet of rigs. In light of all the details outlined above, the applicant seeks that KSE and KSD are placed under judicial management. Summonses 3576 and 3577 of 2020 deal specifically with the applicant's application for IJM to be ordered over KSE and KSD respectively.

8 Having heard parties, I ordered that the companies be placed under IJM pending the hearing of the substantive applications for judicial management.

Interim Judicial Management

9 The applicant argued that IJM should be ordered on four bases:

(a) First, the companies are "hopelessly insolvent" and will not be able to repay their debts while the current management remains in place;

(b) Second, the bank has lost all trust in the management helmed by the Wiluan family;

(c) Third, the companies are faced with an urgent cash crunch and are burning through moneys at an "alarming rate";

(d) Fourth, placing the companies under IJM would allow one or more of the statutory objectives for judicial management to be met. Specifically, the applicant indicated that, as the companies' majority creditor, it is willing to consider any acceptable restructuring proposals which the judicial managers or interim judicial managers may present.

Further, the bank argued that the judicial managers and interim judicial managers are the only parties able, at this point, to resuscitate stakeholder confidence such that the companies can continue as going concerns. Failing that, the bank contended that the judicial managers and interim judicial managers would be in the best position to implement an orderly realisation of the companies' assets, and to ensure that the rights of the companies' creditors are not prejudiced. The applicant therefore asserted that there would be a more advantageous realisation of the companies' assets under judicial management (and IJM) than if they were to be wound up immediately.

The statutory framework

10 The Court's power to make an order for judicial management is set out at s 91 of the IRDA. Specifically, s 91(1) provides that where a company or its directors or any creditor makes an application for an order that the company be placed under judicial management, the Court may make such an order only if it is satisfied that the company is or is likely to become unable to pay its debts, and the Court considers that the making of the order would be likely to achieve one or more of the purposes of judicial management mentioned in s 89(1) of the IRDA.

11 Section 89(1) of the IRDA provides as follows:

> The judicial manager of a company must perform the judicial manager's functions to achieve one or more of the following purposes of judicial management:
>
> > (a) the survival of the company, or the whole or part of its undertaking, as a going concern;
> >
> > (b) the approval under section 210 of the Companies Act or section 71 [of the IRDA] of a compromise or an arrangement between the company and any such persons as are mentioned in the applicable section;

> (c) a more advantageous realisation of the company's assets or property than on a winding up.

12 The power of the Court to appoint an interim judicial manager is provided for in s 92 of the IRDA:

> (1) At any time between the making of an application for a judicial management order and the making of the judicial management order or the determination of the application, the Court may, on the application of the person applying for the judicial management order, the company or any creditor of the company, appoint an interim judicial manager to act as such pending the making of a judicial management order.
>
> (2) The Court may, if the Court sees fit, appoint as interim judicial manager, the person nominated in the application for a judicial management order or any other licensed insolvency practitioner.
>
> […]
>
> (4) The interim judicial manager so appointed may exercise such functions, powers and duties as the Court may specify in the order.

What is clear from the above-cited statutory provisions is that there is no express guidance in the IRDA as to the precise circumstances in which IJM should be ordered. Reference should therefore be had to the caselaw on this question. As the IRDA provisions and their predecessor provisions under the Companies Act (Cap 50, 2006 Rev Ed) are *in pari materia*, the principles and caselaw governing the latter continue to be applicable

The applicable caselaw

13 In *Re a Company (No. 00175 of 1987)* (1987) 3 BCC 124 ("*Re a Company*") at 128, Vinelott J observed in relation to the making of an interim order for administration that:

> … I can see no reason why, if satisfied that the assets or business of a company are in jeopardy, and that there exists a prima facie case for the making of an administration order, the

> court should not abridge the time for service of the petition, and if at the hearing a person with power to appoint a receiver seeks further time in which to consider whether to exercise that power, should not adjourn the hearing and appoint the proposed administrator or some other suitable person to take control of the property of the company and manage its affairs pending the hearing. Such an appointment would be analogous to the appointment of a receiver of a disputed property which is in jeopardy. If the court cannot make such an order the court might be placed in an unenviable position in a case where an adjournment for a period sufficient to enable the person with power to appoint a receiver to make up his mind whether to make the appointment, might result in the destruction of a company although the survival of the company was the purpose for which the administration order was sought …

14 It is clear from Vinelott J's reasoning that an order for IJM would be appropriate where there is a *prima facie* case for the making of a judicial management order, and where the assets or businesses of the company are in jeopardy. That said, it is not a prerequisite to the grant of an order for IJM that all the criteria for the granting of a judicial management order are satisfied: *In Re Switch Services Ltd (In Administration*) [2012] BusLR D91 at 95.

15 As is apparent from *Re a Company* as cited above, the usual type of case in which an IJM order is made is where there is an immediate danger to the assets of the company. This danger typically manifests through either a) fraud or b) abandonment of the company by the management of the company. However, the categories of cases in which an IJM order may be made are not closed, nor is the discretion under s 92 of the IRDA one which should be unduly limited.

16 Rather, reference should be had to the *raison d'être* of interim relief in the context of judicial management. The protection of the assets and business of a company are the central consideration, and the Court's determination of whether or not an order for IJM should be ordered will depend at least in part

on the nature and imminence of the risks facing the company's business and assets.

17 In this regard, a useful comparison may be drawn with the appointment of provisional liquidators. Both the applicant and respondent on the instant facts were in agreement that useful parallels could be drawn between the making of an IJM order and the appointment of provisional liquidators. Buttressing this point, the authors of the *Annotated Singapore Companies Act* (Sweet & Maxwell, 2017) suggest at [227B.09] that "an analogy can be drawn from the appointment of a provisional liquidator pending [a] final winding up order" to the making of an IJM order. Applying that approach, I noted the observation of the Court in *Re Stephen Eric Consultants Pte Ltd* [1992] SGHC 212 that the evidence to justify the appointment of provisional liquidators would include facts to show that the company's assets were in some serious jeopardy. In particular, the appointment of a provisional liquidator was held to be "justified not only to protect the Company's assets but also to ensure that it [was] properly run and managed pending the hearing of the winding up petition". I took this as further indication that the categories of cases in which IJM orders may be appropriate should not be unduly limited.

Conclusions on the IJM orders sought

18 In situations as in the present, where there is a very clear case of balance sheet insolvency, even if not cash flow insolvency, and the application is sought by a substantial or super-majority creditor, meaning that any contrary scheme proposal would probably not pass muster, then a JM order would seem highly probable, if not almost inevitable, short of a miracle. While miracles can sometimes happen even in commercial settings, some evidence would typically need to be provided of a "white knight" on the verge of coming to the rescue.

In particular, figures and specific proposals should be placed before the court to show that the company will be able to answer an application for judicial management. In the present case, however, the companies would essentially require the cooperation of the very creditor seeking the IJM orders, and the likelihood of any rescue independent of that creditor is highly unlikely. Counsel for the companies rightly recognised that in all likelihood, the companies would have to engage with the applicant, and that any attempt at a scheme of arrangement without the applicant's support would likely fail.

19 Refracted through that lens, any refusal of an order for IJM would merely be postponing the highly likely or inevitable outcome, and in the meantime would put the companies' assets at risk of further deterioration because of the current insolvency. I was therefore satisfied that, considering the entirety of the circumstances, and the fact that denying IJM on the facts would merely postpone the inevitable and potentially cause deterioration to the companies' assets, an order for IJM was appropriate.

20 I therefore granted the orders sought.

Further Observations

21 Apart from my views outlined above, I make two further observations in relation to the facts of this case.

22 First, I bore in mind that the charges against Mr Kris Wiluan remain charges only and cannot be taken as indicative of guilt. In addition, I was of the view that the relevance of the charges to the applications sought was at best only indirect. In particular, the charges relate to market manipulation, which, while a serious offence if made out, would not pose a direct threat to the assets of the company, unlike charges of fraud or criminal breach of trust.

23 Second, reference was made to the involvement of the Economic Development Board ("EDB") and Enterprise Singapore ("ESG") in negotiations involving the companies. These agencies do have the role of encouraging commercial activity and, to a certain extent, might be expected to be involved in some way in situations such as the present. But insofar as any reliance is placed on their positions to support or undermine an application for judicial management, the Court will not give any weight to those positions if the agencies were involved as government agencies. Their positions as such cannot affect the accrued rights of parties and the discretion the Court possesses under the IRDA. Insofar as these agencies are involved in dealings as commercial parties, including as guarantors or contract counter-parties, they should, if they wish to put forward their position to protect their interests, come before the Court to present their arguments.

24 I note that I make the remarks in the preceding paragraph concerning EDB and ESG as general guidance only. I do not criticise or take issue with what has been disclosed in these proceedings of EDB and ESG's involvement in discussions concerning the companies.

Conclusion

25 For the above reasons, I granted the orders sought.

Aedit Abdullah
Judge

Sarjit Singh Gill SC, Daniel Tan Shi Min (Daniel Chen Shimin) and Hoang Linh Trang (Shook Lin & Bok LLP) for the applicant;
Nair Suresh Sukumaran, Foo Li-Jen Nicole and Tan Tse Hsien, Bryan (Chen Shixian) (PK Wong & Nair LLC) for the respondents.
