Re Beaufort Sentosa Development Pte Ltd
[2001] SGHC 220

Case Number : OS 601054/2001

Decision Date : 14 August 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Tan Tian Luh (Helen Yeo & Partners) for the applicant

Parties : —

Companies – Capital – Reduction of capital by cancellation of preference shares and repaying sum to shareholders – Company unable to redeem preference shares by usual manner due to insufficient profits – Whether company has right -Whether prejudice to creditors – Whether reasonable objection from preferred shareholders -Whether court empowered to sanction such method of capital reduction – ss 70 & 73 Companies Act (Cap 50, 1994 Ed)

: This is an application by the applicant Beaufort Sentosa Development Pte Ltd (`the applicant`) for an order approving its proposed reduction of share capital under s 73 of the Companies Act (Cap 50, 1994 Ed) (`the Act`). This application is unusual only because the reduction sought involved the cancellation of the entire 149,500 preference shares of $100 each and the repayment of that sum to the shareholders.

Ordinarily, preference shares may be redeemed under s 70 of the Act. Such a redemption may only be made out of profits or proceeds from the issue of fresh shares made for the purposes of the redemption.

The applicant, however, does not have sufficient profits to redeem its preference shares under s 70 and propose to extinguish those shares by capital reduction under s 73. The application sought the cancellation of the shares and the repayment of the value to the shareholders thereby reducing the capital as well as cancelling the shares.

To this end, a special resolution in the following terms were passed at a meeting of the company on 5 May 2001:

> *That the capital of the Company, now consisting of S$57,344,800.00 divided into 45,050,000 ordinary shares of S$1.00 each, and 149,500 preference shares of [S]$100.00 each, all of which have been issued and are fully paid, be reduced to 45,050,000 divided into 45,050,000 ordinary shares of S$1.00 each by cancelling and/or extinguishing the paid up capital to the full extent of S$100.00 upon each of the 149,500 preference shares of S$100.00 each and repaying to the holders of those preference shares the sum of S$100.00 per share.*

There are four shareholders of the applicant, namely, Beaufort Holdings Ltd, Zayucel Ltd, Redbridge Ltd and Beauwin Singapore Pte Ltd. This application was made as part of the applicant`s share restructuring exercise. Article 10(3) of the applicant`s articles of association provides that the preference shares `shall be redeemable on and subject to and in accordance with the provisions of the Act`.

The internal requirements of the applicant had been complied with, including art 67(2) of the applicant`s articles of association which requires the consent of the Sentosa Development Corp. That consent had been duly obtained and exhibited in the affidavit of Cheung Tseung Ming as `CTM-4`.

The preference shares in question were due for redemption 30 June 1999, 30 June 2000 and 30 June 2001 in various tranches. These dates passed but the shares could not be redeemed because the applicant did not have sufficient profits.

The only issue which needed some consideration was whether this court is empowered to sanction the application to reduce the applicant`s share capital by cancelling the preference shares. Mr Tan appearing on behalf of the applicant in this application, made by way of an ex parte originating summons, was unable to produce any local authority save a textbook commentary by Walter Woon in his second edition of ***Company Law*** in which the author stated:

> *If it is desired to reduce the capital redemption reserve in any other way, the proper procedure for capital reduction will have to be followed. For instance, instead of redeeming the preference shares, a company may choose to reduce its capital by paying off the preference shareholders. This will be subject to the normal rules relating to reduction of capital under s 73.*

The sixth edition of ***Ford`s Principles of Corporations Law*** recited a similar sentiment (at para 831) and referred to **Re Holders Investment Trust** [1971] 2 All ER 289[1971] 1 WLR 583 as authority for the proposition. However, that case is obliquely relevant in the sense that although Megarry J appears to accept the principle that the company may redeem its preference shares by means of a simple reduction of capital, he nonetheless refused the application because on the facts before him he was not satisfied that the supporting trustees voted for the reduction in the bona fide belief that they were acting in the interests of the general body of members of that class. The requisite sanction passed by them was therefore held to be ineffectual.

In the Australian case of **Re Birkenshaw Holdings** [1975] 10 SASR 577, Zelling J in a short judgment held that:

> *notwithstanding the careful provision for the replacement of capital contained in s 61 [our s 70] by payment out of a capital redemption reserve account, a court can in a proper case apply the provisions of s 64 [our s 73] and approve a reduction of capital where the reduction consists in the repayment of redeemable preference shares.*

This decision met with approval by Messrs Paterson & Ednie the editors of ***Australian Company Law*** . The ***Birkenshaw*** approach was rejected by Needham J in another Australian case, namely, **Re Steel Improvement Holdings** [1980] NSWLR 569. The judge said, at p 572:

> *In my opinion, s 61(3) is mandatory and is a special provision, as distinct from the general provisions of s 64. One could perhaps test the validity of a conclusion that, despite s 61(3)(a), redeemable preference shares may be redeemed out of capital without the issue of new shares, by asking whether the court, under s 64, could confirm a resolution reducing capital by the redemption of redeemable preference shares which were not fully paid up. The answer must be a firm negative.*

Subsequently, in **Re Morganite Australia** [1989] NSWLR 343, McLelland J noted the conflicting Australian decisions and decided to follow ***Re Birkenshaw Holdings*** (supra). He referred to s 120(3)

and s 123 of the New South Wales Code, which are the equivalent of our s 70 and s 73 respectively, and said that:

> *... it seems to me, as a matter of construction of the Code, that the expression "redeemed" in s 120(3) means redeemed pursuant to the liability to redemption included as a term of the issue, pursuant to the power to issue preference shares having such a term, conferred on a company by s 120(1). In other words it refers only to a contractual redemption which can be effected by virtue of s 120 without any confirmation by the Court.*
>
> *I find it difficult to understand, as a matter of policy, why the legislature would exclude from the general provisions of s 123, permitting a reduction of capital subject to confirmation by the Court, a particular case where the reduction was to effect a cancellation of cumulative preference shares. In my opinion there is no reason why such a reduction should not be held to fall within the general terms of s 123. Having regard to what I regard as the limited meaning of the word "redeemed" in s 120(3) there is no reason to regard that subsection as imposing some blanket prohibition which prevents the Court from acting under s 123, where the practical effect of the reduction of capital would be equivalent to a contractual redemption of preference shares.*

Mr Tan also referred me to the English case of **Re Saltdean Estate Co** [1968] 3 All ER 829 in which Buckley J approved a petition to reduce the company`s share capital by extinguishment of preferred shares notwithstanding opposition to the petition by the preferred shareholders. The judge there was of the view that the proposed reduction of capital was not unfair because the preferred shareholders were always at risk that their right to participate in profits might at any time be frustrated by a liquidation or a reduction of capital properly resolved on by a sufficient majority of the members of the company. For my part, I am not in full agreement with the view that the preference shareholders were not dealt with unfairly because they must have known from the outset that they may never get to share the profits. I differ in my view because I believe that the premise and the conclusion may not have been sufficiently bridged. It might have been justifiable in the specific instance before Buckley J but I would be slow to accept it as a general principle. That issue, however, was not before me because all relevant parties in the present case save the trade creditors support the application for capital reduction in the manner proposed. The weight of the authorities in the UK as well as in Australia seem to lean in favour of recognising the right of the company to reduce its share capital by extinguishment of preferred shares provided, of course, that the creditors are not prejudiced. And further, in my view, there must be no reasonable objection from the preferred shareholders themselves. I accept the capital reduction by cancellation of preferred shares as a commercially expedient method of managing a company`s capital and debt. All the necessary conditions have been complied with in the present application before me. So, in these circumstances, and as was done in **Re A Lesser & Co** [1929] VLR 316, I dispensed with the advertisement of the presentation of this petition as well as the settlement of the list of creditors, and granted an order in terms of the application.

Outcome:

Application allowed.