

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

J.C.M. No.24 of 2018

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of Main Petition

01.02.2019.

Mr. Mikael Azmat Advocate for Petitioners.
Mr. Saad Abbasi, Advocate for SECP.

This is a Petition for merger of Petitioner No.2 into Petitioner No.1 and has been filed under Section 279 to 282 and 285(8) of the Companies Act 2017. The Petitioner No.1 was incorporated as Clover Foods Limited on 30.09.1986, and was thereafter named as Clover Pakistan Limited as of 29.03.1997. It is engaged in the business of manufacturing, producing, dealing in, trading and supplying all kinds of food products, consumer durables, plastic products and allied activities. The Petitioner No.2 was incorporated on 06.05.1950 in the name of Gestetner Pakistan Limited and thereafter was changed to Gestetner (Private) Limited on 22.12.1980, and as of today is working in the name and style of Hascombe Business Solutions (Private) Limited since 27.07.2006. The Petitioner No.2 is authorized to carry on business of manufacturing, merchandising, marketing, distributing and dealing in duplicating machines and accessories, typewriters, and calculating machines, office appliances, ink, paper, etc. etc. as well as all other related and connected extension of such business. Now the petitioners are desirous of merging Petitioner No.2 into Petitioner No.1 and the Scheme of Arrangement dated 19.9.2018 for such purposes has been annexed with this Petition as Annexure "D", wherein, the Share Exchange Swap Ratio as well as allotment of Shares of Petitioner No.1 to Petitioner No.2 has been mentioned so as to make the scheme of arrangement binding with Petitioners and the Shareholders of the Petitioners No.1 and 2 along with other persons.

The Petitioners are desirous to restructure and merge, by way of amalgamation, with the object of better and more economic reasons to run the same business. The Petitioners have agreed and entered into an agreement being the Scheme of Arrangement (Annexure "D") for merger and amalgamation which has been duly approved by the respective Board of Directors of the Petitioners and such resolutions have been placed on record.

The Scheme of Arrangement, attached as Annexure "D" to this petition gives full particulars as to the benefits of the merger / amalgamation, the purpose for the same, the consequences of the arrangement, the effective date of the merger / amalgamation, consideration and related matters, the effect on the employees of the Petitioner Nos.1 and 2 and general provisions with respect to the arrangement. It also provides the number of shares of Petitioner No.1 to be allotted respectively to shareholders of Petitioner No.2 on the basis of evaluation and SWAP ratio. Such Scheme of Arrangement is part and parcel of the petition. By seeking sanction of the Scheme of Arrangement through this Petition under the Companies Act, as above, the intention is to obtain approval of the terms, whereby, the entire undertaking and business, inclusive of all assets, properties, rights, liabilities, obligations and dues of Petitioner No.2, as more specifically stated in the Scheme of Arrangement, will be transferred to, stand vested and assumed by petitioner No.1, whereas, Petitioner No.1 will continue as a going concern under its same, whereas, petitioner No.2 at the same time shall stand dissolved and will cease to exist without winding up in the manner contemplated under the Scheme of Arrangement.

On 03.10.2018 on an application (CMA No.339/2018) on behalf of the Petitioners under Rule 55 of the Companies (Court) Rules, 1997, read with Section 151 CPC, the Court had permitted to convene separate meeting(s) of the members of the petitioners under Section 279(2) of the Companies Act, 2017 after publishing a notice in newspapers, and also inviting creditors, whereas, further directions were given for advertisement of the main Petition for publishing in terms of Rule 76 read with Rule 19 of the Companies (Court) Rules, 1997 and notice was also ordered to Securities & Exchange Commission of Pakistan. It appears that all requisite formalities have been completed as publication has been

made in daily “**THE NEWS**” dated 6.10.2018 and “**JANG**” dated 8.10.2018, whereas, report has been furnished by the Chairman in respect of convening of the meetings and the approval of the scheme. Comments were filed by SECP and certain objections have been raised. The first objection is in respect of obtaining of NOC from creditors of Petitioner No.1 and Petitioner No.2, namely Summit Bank Limited. To this along with report of Chairman in respect of Petitioner No.2 requisite NOC in favor of Petitioner No.2 has been annexed, whereas, learned Counsel for the Petitioners submit that it would suffice for both the Petitioners as presently the said Bank is not a creditor of Petitioner No.1, and even otherwise, it refers to NOC of merger; therefore no further NOC is deemed necessary. To this I am satisfied and accordingly the objection in this regard is overruled, as the NOC in question is for merger of Petitioners; hence, the creditor is fully aware of the consequences of the said merger and no further NOC is required.

Insofar as the other objection is concerned it is in respect of the methodology of Valuation and determination of the SWAP ratio which reads as under;

The share swap ratio computation is based on the standalone valuation of the companies by applying the discounted cash flows (DCF) methodology under the income approach and net asset valuation (NAV) methodology under the asset approach. The firm of Petitioner No. 1 (CPL) is valued at Rs. 39.10 per share based on NAV(25%) and DCF (75%) as on cutoff date of March 31, 2018, however average market price of Petitioner No. 1 (CPL) shares for last six months is Rs. 195.43 per share. In the aforementioned swap ratio, no consideration has been given to share price of the Petitioner No. 1 (CPL). Although Petitioner No. 2 is an unlisted company and its shares are not traded on the market, it does not mean that the value of share of Petitioner No. 1 is taken on such a lower side. Share price is a barometer of financial health and earning potential of a company and ignoring it altogether while calculating its worth does not seem justified.

Fossil Energy (Pvt.) Ltd acquired 55% shares of the Petitioner No. 1 (CPL) through share purchase agreement dated 13th June 2017 and public announcement was made under the Companies Act, 2015. Petitioner No. 1 (CPL) has started new business of food and beverages, along with oil and filters, car products, lubricants and related services after the cutoff date of March 31, 2018 and earned revenue of Rs. 157.421 million in last quarter of financial year 2018. Till the nine month period ended March 31, 2018 the Petitioner No. 1 (CPL) has nil revenue and the profit after tax of 3.55 million pertains to income from investment of financial assets (short-term investments). Therefore, the reason provided for assigned weightages of 75% to DCF, i.e. that both companies are involved in trading and services and ignoring market price of a well-established company i.e. Petitioner No. 1, is not cogent. Even though DCF is the method that can be used for newly established business, but it should not be to the disadvantage of an established company whose shares are traded in the market at a much higher value. As market value of Petitioner No 2 (HBSL), is not available, further weightage should be given to valuation of shares based on NAV.

The precise concern shown is in respect of the SWAP ratio and valuation thereof. To this it would be advantageous to refer to the evaluation and SWAP ratio working done by M/s Deloitte

Yousuf Adil, Chartered Accountants dated 18.9.2018 which reads as under;

Our Understanding of the transaction;

We understand that Fossil Energy (Private) Limited (FEPL) has approved the process in its Board meeting dated February 12, 2018 to merge HBSL a subsidiary of FEPL with and into CPL. Both Companies are subsidiaries of EFPL with 55% shareholding in CPL and 100% shareholding in HBSL.

By means of merger, all rights, assets, liabilities and obligations of HBSL will be transferred to and merged with and into CPL.

The scheme is envisage to be effective as of date i.e. the start of business on April 01, 2018 or a date as approved by High Court of Sindh.

The swap ratio has been computed on the transaction cutoff date of March 31, 2018.

Our Methodology

The share swap ration computation is based on the standalone valuation of the Companies by applying the Discounted Cash Flow (DCF) methodology under Income approach and Net Assets valuation (NAV) methodology under the Asset approach. We assigned weightages of 75% to DCF being the ratio, considering the business nature of the companies i.e. that the same are mainly involved in trading and services and are not asset intensive entities.

We were provided with historical financial statements and financial projection together with the explanation as and when required for this valuation.

Perusal of the above working by Deloitte reflects that SWAP ratio has been arrived at by applying the Discounted Cash Flows (DCF) methodology under the income approach and Net Assets Valuation (NAV) under the Asset approach. The DCF formula is used to determine the value of a business or a security. It represents the value an investor would be willing to pay for an investment, given a required rate of return on their investment (the discount rate). When assessing a potential investment, it is important to take into account the time value of money, or the required rate of return that one expects to receive. The report of Deloitte is based upon the fact that since the major business of the Petitioners is linked with and based on import trading and services, whereas, they are not asset intensive entities, therefore, more weightage has been assigned to DCF. Though a concern has been shown by SECP that the SWAP ratio is not fully justified as unlisted Company is being given 6.06 shares of Petitioner No.1, a listed Company, whereas, their net worth of shares is not known being an unlisted Company, and whilst appreciating the effort and assistance on the part of SECP, this Court is of view that firstly the working has been done by an expert in this field; and secondly,

despite publication in leading Newspapers, none has come forward to object, notwithstanding the fact that Petitioner No.1 is a listed Company, and must be having its shareholding with public. Despite this none has objected to this merger petition. Even otherwise, it is settled law that in this situation, the shareholders are the best judges of their interests and were better informed with the market trends than the Court which was least equipped in such valuation. It is indeed the concern as well as prerogative of the shareholders to see the commercial aspect of such determination of the SWAP ratio. At the same time, having said that, it is not that the Court is there only to affix a seal or stamp confirming the proposal of merger as well as valuation and SWAP ratio; but it is also the onerous duty of the Court to examine the same and after having satisfied itself, pass appropriate orders. If the powers are not defined or restrictive, then they are wide enough to be exercised as and when warranted. Once an objection has been raised specially by a shareholder, then it has to be examined fully and decided in the given facts and circumstances of the case. Insofar as this case is concerned, after examining the facts and circumstances as well as the SWAP ratio and valuation determined by M/s Deloitte, notwithstanding the objection raised by SECP, I am of the view that there is no impediment in the grant of this merger petition as all relevant formalities have been fulfilled, including the approval by the shareholders which is most crucial in nature. In addition a proper notice has also been published in the Gazette of Pakistan dated 31.10.2018.

In view of such position, since all formalities have been completed whereas, no objections (except the above already attended to) have been received from any quarter, there appears to be no impediment in granting this Petition which is accordingly allowed as prayed. For further proceedings and necessary fulfilment of the requirements under the Companies Act, 2017, the Petitioner may approach SECP accordingly.

J U D G E