

October 2024

Envy Asset Management v. CH Biovest Pte Ltd [2024] SGHC 46 (“Biovest”)

In *Envy Asset Management v. CH Biovest Pte Ltd [2024] SGHC 46 (“Biovest”)*, the General Division of the Singapore High Court held for the first time that the profits of a “net winner” of a Ponzi scheme ought to be repaid to the insolvent company through which the Ponzi scheme was perpetrated. In particular, the Court held that such profits were recoverable pursuant to the statutory clawback provision under Singapore’s insolvency regime – namely, Section 224, Insolvency, Restructuring and Dissolution Act 2018 (“IRDA”) and Section 73B, Conveyancing and Law of Property Act 1886 (“CLPA”).

Judgment for *Biovest* was delivered in February 2024. The Court of Appeal has since dismissed an appeal against the High Court’s decision on 16 October 2024. Our Partners David Chan, Daryl Fong, Lin Ruizi, Senior Associate Sarah Chew and Associates Louis Lai, Tan Wei Sze and Mo Fei successfully acted for the Liquidators and EAM in this matter.

Biovest is the latest in a spate of decisions addressing the legal consequences of a Ponzi scheme. The decision stands in contrast to recent decisions dismissing claims arising from such schemes: e.g. *Chan Pik Suk v. Wan Hoe Keet and others [2024] SGHC(A) 23 and Perry, Tamar v. Esculier, Bonnet Servane Michele Thais [2023] SGCA(1) 2*.

Background

Biovest arose from a Ponzi scheme operated by the Envy Companies under which monies were received from investors for the purported purpose of trading in nickel. Over the course of the scheme, the Envy Companies received upwards of SGD 1 billion from their investors, and used these funds to pay fictitious “profits” to earlier investors.

The defendant in *Biovest* was one of these earlier investors. It entered into several Letters of Agreement (“LOAs”) with the 1st Claimant, Envy Asset Management (“EAM”), pursuant to which EAM promised returns based on the appreciation of its nickel investment portfolio. Although the defendant’s investment in EAM spanned only 10 months, the defendant had received “profits” of over SGD 2.3 million (“Overwithdrawn Sums”), which represented a return of 42.32% on its initial investment.

EAM was eventually placed into winding up with the rest of the Envy Companies. The Liquidators of EAM commenced the proceedings in *Biovest* to recover the Overwithdrawn Sums. The defendant maintained that it was entitled to retain the Overwithdrawn Sums, and its primary defence was that it provided consideration by way of *inter alia* the initial principal it invested.

The Court’s decision

The parties to *Biovest* agreed on certain facts: that EAM was operating a Ponzi scheme, that EAM’s nickel trading activity was non-existent, and that the monies paid to investors like the defendant merely originated from funds injected into the scheme by later investors. These facts, the Court in *Biovest* noted, were hallmarks of a Ponzi scheme.¹

Justice Goh Yihan held that EAM and its liquidators were entitled to recover “profits” paid to the defendant with interest, on two grounds.

First, EAM’s payment of the Overwithdrawn Sums to the defendant was done with the intent to defraud creditors pursuant to Section 73B CLPA. Since a Ponzi scheme operator must know that the scheme will eventually

¹ [114] of the Judgment.

collapse, Justice Goh accepted that the only inference is that the operator making the payment intended to defraud future investors.²

Second, Justice Goh also held that EAM's payment of the Overwithdrawn Sums were a transaction at an undervalue within the meaning of section 224(3)(a) IRDA. EAM was also insolvent at the time when the payments were made: section 226(2) IRDA. In making the latter finding, Justice Goh accepted that Ponzi schemes are insolvent from the outset as their total liabilities will always exceed their total assets from the time they take in their first investment.³

The pith and marrow of the dispute between parties was whether the defendant's investment was consideration for the Overwithdrawn Sums. This went towards whether there was any value received under section 224(3) IRDA, and whether the defence under section 73B(3) CLPA was available.

Justice Goh found that no consideration was provided for the Overwithdrawn Sums received. He reasoned that, since no nickel was purchased by EAM, there was no appreciation which the defendant was contractually entitled to. The Overwithdrawn Sums were, therefore, an extra-contractual payment which were not referable to the defendant's alleged consideration – namely, the initial invested principal.⁴

On the other hand, Justice Goh found that the defendant was not unjustly enriched at the expense of EAM. While EAM and its liquidators averred that there was a total failure of consideration, Justice Goh held that this was more properly a case where there was an absence of consideration for the payment of the Overwithdrawn Sums.⁵

On appeal, the Court of Appeal affirmed Justice Goh's decision and dismissed the defendant's contentions that there was consideration for the Overwithdrawn Sums. In an *ex tempore* oral judgment, the Court of Appeal held that the Overwithdrawn Sums were paid by way of gift. These payments were made for the purpose of maintaining the appearance of a successful trading operation, but the defendant had no right to retain the benefit of these sums as against the Liquidators.

Significance

The Singapore Courts have made clear that recovery from the collapse of a Ponzi scheme will depend on the specific facts of each case.⁶ *Biovest* is therefore a welcome addition to the jurisprudence on Ponzi schemes, and is a positive example of how such claims may succeed notwithstanding the *bona fides* of an unknowing beneficiary of the fraud.

There were two matters which were crucial to the decision in *Biovest*. The first was the terms on which EAM promised returns on the defendant's investment, which defined these returns based on EAM's own non-existent investment. The second was the nature of the Overwithdrawn Sums, which parties agreed originated from monies of other investors. Both were necessary for the Court to conclude that the Overwithdrawn Sums were extra-contractual payments which the defendant did not provide consideration for.

Biovest also sets itself apart from other cases because the claims were brought by liquidators. The fact that EAM was in insolvent liquidation meant that its liquidators had recourse to statutory causes of action for avoidance and clawback. Unlike claims based on the law of trusts or unjust enrichment,⁷ the *bona fides* of a defendant is irrelevant where the claim is brought under section 224 IRDA.

Should you have any queries on this case update or generally, please feel free to contact any one of the undersigned.

² [118] of the Judgment.

³ [120] of the Judgment.

⁴ [129]-[131] of the Judgment.

⁵ [193] of the Judgment.

⁶ See e.g. *Chan Pik Sun v. Wan Hoe Keet* [2024] SGHC(A) 23, at [177] (dissenting opinion of Justice Woo Bih Li JAD)

⁷ See e.g. *Perry, Tamar v. Esculier, Bonnet Servane Michele Thais* [2023] SGCA(I) 2, at [54]

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