Sia Leng Yuen v HKR Properties Limited
[2001] SGHC 352

Case Number : OSB 600073/2001, RA 600158/2001

Decision Date : 23 November 2001

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Intekhab Khan (J Koh & Co) for the appellant; Liew Yik Wee (Wong Partnership) for the respondent

Parties : Sia Leng Yuen — HKR Properties Limited

Judgment

GROUNDS OF DECISION

1 This is an appeal against the decision of Assistant Registrar May Loh who dismissed the application of the Appellant ("Sia") to set aside a statutory demand dated 1 March 2001 served on him by the Respondent ("HKR"). On 23 October 2001, after hearing counsel for the parties, I dismissed the appeal. Sia has since appealed and I now give my grounds of decision.

2 By an agreement ("the Loan Agreement") dated 18 November 1997, HKR lent US$3 million to Murex Co. Ltd ("Murex"), a Thai company that is the developer and owner of the Blue Canyon Country Club ("BCCC"). Pursuant to clause 7 of the Loan Agreement, Murex issued to HKR 250 new club memberships in BCCC as security for the loan.

3 The US$3 million loan was repayable on 31 March 1998. On 27 March 1998 Murex requested HKR for an extension of time. HKR agreed to extend it to 30 April 1998 in consideration of Sia unconditionally guaranteeing payment of all the indebtedness of Murex to HKR. Sia duly executed this guarantee ("the Guarantee"). However on 30 April 1998 Murex was still unable to make payment. HKR agreed to a further extension on condition that Sia confirmed in writing that the Guarantee remained good and valid. This he did on 28 May 1998.

4 In the event, Murex was unable to pay HKR and the latter commenced Suit No. 2239/1998 against Sia to recover the debt pursuant to the Guarantee. That action was settled and on 12 January 2000 the parties entered a consent order ("the Consent Order") in the following terms:

> THIS ACTION having on 12 January 2000 come on for trial before The Honorable Judicial Commissioner Amarjeet Singh,
>
> AND the parties having agreed terms of settlement,
>
> BY CONSENT IT IS ORDERED
>
> that:
>
> 1 Judgment be entered against the Defendant:
>
> a. for the amount set out in the Statement annexed hereto;
> b. interest at the rate of 15% per annum on the amount outstanding; and
> c. costs to be taxed if not agreed.

2 The Defendant will make payment of all amounts due and owing to the Plaintiffs as follows:

a. USD500,000 on or before entering of the Consent Judgment;
b. USD750,000 on or before 31 January 2000;
c. USD1 million on or before 28 February 2000; and
d. the balance amounts due on or before 15 March 2000.

3 With the receipt of each payment, the Plaintiffs will release to the Defendant, the number of memberships based on the amount received, rounded down to the nearest number of memberships. The value of each membership to be fixed at USD23,500.

4 Upon payment of all sums due and owing to the Plaintiffs, all memberships are to be released to the Defendant.

5 Execution proceedings against the Defendant shall be taken out only in the event of default of any of the above terms.

5 Sia made some payment pursuant to this consent order but defaulted on the rest. On 1 March 2001 HKR, through its solicitors, issued a statutory demand ("the Statutory Demand") pursuant to section 62 of the Bankruptcy Act to Sia to demand the remaining sum, which was around US$2.2 million. Before the Assistant Registrar below Sia sought to set aside the Statutory Demand on the following grounds:

(i) that service of the Statutory Demand was irregular; and

(ii) that the Statutory Demand failed to state that HKR held new club memberships in BCCC as security for the loan.

However before me counsel for Sia, Mr Intekhab, said that he was only proceeding on the second ground, i.e. the failure to state in the Statutory Demand that HKR held the new club memberships as security for the loan.

6 First of all it should be noted that the club memberships were not issued by Sia, who is the guarantor of the loan. They were issued by Murex. Mr Intekhab, argued that this became security from Sia pursuant to the Consent Order. I am unable to see how this can be so. Paragraph 3 is the relevant part of the Consent Order. But that merely states that upon receipt of each instalment, HKR was to release to Sia a number of memberships depending on the amount repaid. Mr Intekhab argued that the last sentence, which states: *"The value of each membership to be fixed at USD23,500"*, means that the club memberships were held as security with each one valued at US$23,500. With respect I cannot see how this can be. First of all, I note that it is a well known fact that club memberships fluctuate in value depending on supply and demand. Although no evidence was given as to the value of the memberships in question, I note that the number still held by HKR was in excess of 200 and to dispose of such a large number to realise the security would most certainly entail a drop in its market price. Mr Intekhab did not dispute that the market value of the club memberships may very well not be US$23,500. He said that this was what the parties had agreed was the value. But quite apart from those facts, as a general proposition, I cannot see the logic in any creditor agreeing with the debtor as to the value of any security he holds. The usefulness of any security lies in the ability of a creditor to dispose of it and use the proceeds to repay the debt. If there is a shortfall, the

creditor would normally look to other means to enforce the debt. In certain situations, e.g. where the creditor is prepared to keep the chattel he holds as security, he might agree with the debtor as to its value and in default of payment, the creditor would obtain ownership of it with the agreed value accruing to the debtor. However the present case is clearly not a situation where the creditor had agreed on the value of a security. In fact the club memberships were not issued by Sia but by Murex. As the guarantor against whom HKR had proceeded, Sia would be entitled by way of subrogation to the club memberships held by HKR as security for the loan. The Consent Order clearly recognises this and provides for HKR to release to Sia the security it holds in proportion to the instalment payments. Hence the fixing of the value of each club membership at US$23,500 in order to determine the appropriate number to release at each stage. It would be for Sia to dispose of the memberships and account to Murex for them. In my opinion, it is not possible to construe paragraph 3 of the Consent Order as providing that the club memberships constitute security given by Sia.

7 The second point that Mr Intekhab raised was that even if it was Murex that had provided the security, it was nevertheless *"security for the debt"* for the purposes of rule 94(5) of the Bankruptcy Rules, which provides as follows:

> (5) If the creditor holds any property of the debtor or any security for the debt, there shall be specified in the demand
>
> > (a) the full amount of the debt; and
> >
> > (b) the nature and value of the security or the assets.

Where this rule is breached the statutory demand will be set aside by the court pursuant to rule 98(2)(c) which states that:

> (2) The court shall set aside the statutory demand if
>
> > (c) it appears that the creditor holds assets of the debtor or security in respect of the debt claimed by the demand, and either rule 94(5) has not been complied with, or the court is satisfied that the value of the assets or security is equivalent to or exceeds the full amount of the debt;

8 In *Re Loh Lee Keow & Anor, ex p Keppel TatLee Bank Ltd* [2001] 2 SLR 503, Woo JC held that on a proper interpretation of the Bankruptcy Rules made under the Bankruptcy Act, the word "security" in rules 94(5) and 98(2) meant "security on the property of the debtor". In the present case, the security for the debt was not provided by the debtor, i.e. Sia, but by Murex. Following *Re Loh Lee Keows case*, it would not be necessary to state in the Statutory Demand the fact that HKR held the club memberships as security as they were not Sias property.

9 Mr Intekhab sought to persuade me that *Re Loh Lee Keows case* was wrongly decided. He submitted that the clear words of rule 94(5), viz. *"any security for the debt"* and rule 98(2), viz. *"security in respect of the debt claimed"* meant that the club memberships were included notwithstanding that they were not issued by Sia. However in a very tightly argued judgment, the judge had demonstrated that the construction he held was the only one possible. Mr Intekhab was not able to say in what manner the judge had erred. Indeed I would respectfully agree with the reasons given by the judge, the details of which he has, with respect, ably set out in the judgment and I need not repeat them here.

10 Mr Intekhab argued that this would put the principal debtor in a better position than the guarantor in that the former has the benefit of the security but not the latter. Woo JC had recognised this and said as follows at 35:

> 35 It may seem unfair that where the borrower (assuming an individual) has provided, say, a mortgage to secure the debt, the borrower cannot be made a bankrupt unless the creditor gives up the mortgage or claims the balance only of the debt after deducting the estimated value of the mortgage, whereas a guarantor of the borrowers liability can still be made a bankrupt without requiring the creditor to take the same steps. However, that appears clearly to be the intention of the legislation.

11 In the premises, the statutory demand was regular and the Assistant Registrar was correct in refusing to set it aside. Accordingly I dismissed the appeal with costs fixed at $1,200.

Sgd:

LEE SEIU KIN
JUDICIAL COMMISSIONER