Deutsche Bank AG *v* Lam Chi Kin David
[2010] SGHC 209

Case Number : Bankruptcy OS No. B503 of 2010/J; RA No. 220 of 2010

Decision Date : 28 July 2010

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Paul Ong Min-Tse (Allen & Gledhill LLP) for plaintiff/respondent; Christopher Chong Chi Chuin and Jasmine Kok Pinn Xin (MPillay) for defendant/appellant.

Parties : Deutsche Bank AG — Lam Chi Kin David

Insolvency Law

28 July 2010

Tay Yong Kwang J:

Background Facts

1 On 10 February 2010, Steven Chong JC (as he then was) dismissed the claim made by David Lam Chi Kin ("the appellant") against Deutsche Bank Aktiengesellschaft's ("the bank") in Suit No. 834 of 2008 and granted judgment for some US$1.135 million ("the High Court judgment") in respect of the bank's counterclaim against the appellant. The appellant has appealed to the Court of Appeal against the High Court judgment (in Civil Appeal no. 41 of 2010). The appeal is scheduled to be heard in the week commencing 16 August 2010.

2 In execution of the High Court judgment, the bank commenced these bankruptcy proceedings against the appellant on 29 March 2010 for his failure to comply with the bank's statutory demand for payment of the judgment debt. On 17 April 2010, the appellant applied before an AR for the bankruptcy application to be set aside or for an unconditional stay of the bankruptcy proceedings pending his appeal against the High Court judgment. On 14 May 2010, the AR granted the appellant a stay on condition that he provide security for $500,000 either by payment into court or by any other agreed means by 4 June 2010. The appellant appealed against the AR's decision on the ground that he did not have the financial means to provide the security ordered.

The appeal against the AR's decision

The appellant's submissions

3 The appellant stated that the parties have filed their respective Cases already and the appeal before the Court of Appeal was less than two months away. Although the bank argued before the AR that a conditional stay of the bankruptcy proceedings was appropriate because there was a risk that the appellant was dissipating his assets by selling his apartment in Singapore, the appellant pointed out that his previous two affidavits had disclosed that he needed to liquidate his assets in order to pay for the legal fees for the action and he argued that the sale of his apartment was towards this end. For instance, in his affidavit of 5 November 2009 (filed for another hearing), the appellant said (at [4] to [6] thereof) that he did not have sufficient funds at that point in time to appoint new lawyers to represent him in this action due to some liquidity issues and that he decided to liquidate

some of his assets and, if the need arose, would approach his relatives for financial assistance. The AR was of the view that the said affidavits were not clear enough to address the concern of dissipation of assets and therefore ordered a conditional stay of the bankruptcy proceedings.

4 In his notice of appeal, the appellant sought to admit further evidence before me by way of his affidavit affirmed in Hong Kong SAR and filed on 31 May 2010 ("the new affidavit"), which is after the hearing before the AR. He also asked that the bankruptcy proceedings be set aside or, alternatively, that they be stayed unconditionally pending the appeal against the High Court judgment.

5 The new affidavit dealt with two main matters. The first was that the sale of his apartment in Singapore was not for the purpose of dissipating his assets here. The second matter concerned his inability to put up the security of $500,000 ordered as well as to pay the judgment debt. The appellant submitted that his property at 180A Bencoolen Street #12-07 Singapore 189647 ("the Bencoolen property") was sold to finance the legal costs of the action and that there was no intention to dissipate assets. He thought this was clear enough from [6] of the affidavit of 5 November 2009 (see [3] above). He granted an option to purchase on 26 November 2009 and therefore did not file an affidavit on this issue.

6 In the new affidavit, the appellant confirmed that the Bencoolen property was sold to finance the fees payable to his previous lawyers, M/s Lee & Lee, the fees payable to M/s M Pillay for the trial and the appeal therefrom and the security for costs of the appeal. Besides these, he also had to sell the Bencoolen property as he could no longer afford to pay the monthly mortgage payments of about $13,000 to the United Overseas Bank. The net sale proceeds, after repaying the mortgage, amounted to about $400,000, most of which were used to provide for the said legal fees and security for costs of the appeal. In respect of security for costs of the appeal, he provided the prescribed amount of $20,000 and when further security was requested by the bank, he provided another $10,000 in security to obviate further legal costs in unnecessary interlocutory applications and appeals.

7 The appellant's agreement with the purchasers of the Bencoolen property was for him to rent it for three months from the date of completion of the sale and purchase (in February 2010) at a monthly rent of $4,150. Unfortunately, he could not afford to continue renting it after about one month and had to surrender the tenancy prematurely on 14 March 2010. He could no longer afford to live in Singapore and therefore left for Hong Kong that day to try to seek assistance from relatives and friends. He came here from Hong Kong in 1996. He separated from his wife in April 2003 and was ordered to pay $4,000 a month as maintenance for her and their daughter. He could not afford to make this monthly payment any more.

8 Save for the Bencoolen property, almost all of the appellant's assets were in foreign currency deposits with financial institutions such as the bank. As a result of the financial turmoil in September and October 2008, most of these deposits were wiped out. He lost all his foreign currency deposits of NZD30 m with the bank alone. All he has now is an amount of about $9,000 which he needs for living and medical expenses (for his diabetes and hypertension).

9 The appellant also has an outstanding judgment for JPY 29,062,179.35 (or about USD323,000) entered against him by BNP Paribas Wealth Management ("BNP") in Suit No. 375 of 2008. He paid BNP $30,000 upfront and agreed to pay $5,000 monthly (up to July 2010) and thereafter $10,000 monthly. He paid up to April 2010 but could not make the instalment payments after that.

10 The appellant affirmed that he does not have the means to provide the $500,000 security ordered by the AR or to pay the judgment sum owing to the bank.

11 Before the AR and before me, the appellant relied on section 65(4)(b) of the Bankruptcy Act (Cap 20). Section 65(4) is in the following terms:

> When a bankruptcy application has been made against a debtor on the ground that the debtor –
>
> > (a) has failed to pay a judgment debt, and there is pending an appeal from or an application to set aside, the judgment or order by virtue of which the judgment debt is payable; or
> >
> > (b) has failed to comply with a statutory demand, and there is pending an application to set aside the statutory demand,
>
> the court may, if it thinks fit, stay or dismiss the application.

12 The appellant submitted that the legislative intent of section 65(4)(b) is clear. It is to prevent a party from suffering the prejudice associated with bankruptcy before his appeal against a judgment debt (which forms the basis of the bankruptcy application) is heard. This rationale, it was argued, applies fully to the facts here especially since the appellant has affirmed on affidavit that he is unable to pay the judgment debt and the security ordered and that all he has is about $9,000 for his living and medical expenses. As the Court of Appeal will be hearing the appeal against the High Court judgment in less than two months and the respective Cases have already been filed, the bank would suffer no prejudice from an unconditional stay of the bankruptcy proceedings.

The bank's submissions

13 The bank objected to the admission of the new affidavit as it was made after the hearing before the AR. Even if the new affidavit was admitted by the court, the bank argued that it would not provide a basis for the court to reverse the AR's decision.

14 At the hearing before the AR, the bank relied on section 64(1) of the Bankruptcy Act which states:

> The court may at any time, for sufficient reason, make an order staying the proceedings on a bankruptcy application, either altogether or for a limited time, on such terms and conditions as the court may think just.

The bank relied on *Lee Kiang Leng Stanley v Lee Han Chew (trading as Joe Li Electrical Supplies)* [2004] SGHC 151 for the proposition that section 64(1) allows the court to order security for the full amount or part of the judgment debt as a condition for staying bankruptcy proceedings.

15 It was just for the AR to order the appellant to furnish security for part of the judgment debt as there was solid evidence of a real risk of dissipation of assets by the appellant. The appellant sold the Bencoolen property on 9 December 2009 for $1.05 million. This took place during the course of the trial. The trial was heard on 30 November, 1, 2 and 23 December 2009. The appellant claimed that he sold the Bencoolen property to help pay his legal fees. In support of this, he relied solely on a single sentence at [6] of his affidavit of 5 November 2009 which was filed for his application to vacate the trial dates. That sentence was:

> I came out from this PTC even more convinced that I will require representation by a lawyer, and I decided that I would liquidate some of my assets and if the need arose, approach my relatives for financial assistance.

16 The AR felt that the above statement did not refer to the sale of the Bencoolen property and was therefore insufficient to address the concern of dissipation of assets. He was satisfied that the pending appeal before the Court of Appeal was a *bona fide* one but did not see any grounds to set aside the bankruptcy proceedings.

17 The appellant, it was submitted, was hoping to repair his position at the eleventh hour by seeking the court's leave to adduce the new affidavit. The appellant had enough time, between 21 April 2010 when the bank filed its affidavit to 14 May 2010 when the AR heard the application for a stay, to file an affidavit which would fully explain his decision to sell the Bencoolen property during the trial. However, the appellant chose not to do so.

18 Even if the new affidavit was admitted on appeal and accepted at face value, it would not provide any basis to reverse the AR's decision. Firstly, impecuniosity would not operate as a bar to an order for security. Rather, it is a factor which the court may take into account in deciding whether it is just to order the provision of security. Secondly, it is not sufficient to complain that the security order is difficult to meet. The court has to be satisfied that it would be impossible to comply with the security order. The fact that a man has no capital of his own does not mean that he cannot raise any capital from friends, business associates and relatives (*M V Yorke Motors (A firm) v Edwards* [1982] 1 WLR 444). Although these observations were made in the context of an application for summary judgment, the bank argued that they were equally applicable to any situation where the court has discretionary power whether to impose a financial condition on a party.

19 The bank pointed out that in the new affidavit, the appellant said "most" of the net sale proceeds of $400,000 were used to pay legal fees and to provide security for costs of the appeal before the Court of Appeal and not that "all" were used for those purposes. This was on the assumption that he received no more than $400,000 out of the sale price of $1.05 million. He also claimed that he left for Hong Kong to try to seek assistance from relatives and friends. It was therefore within his means to raise capital. He was silent on whether he was successful in that objective.

The decision of the court

20 It seems to me that the more appropriate provision for the appellant to rely on in section 65(4)(a) rather than section 65(4)(b) of the Bankruptcy Act.

21 I decided to admit the new affidavit as it merely elaborates on the appellant's alleged financial woes, something that was already in contention. What I found sorely lacking in the new affidavit was documentary proof of how the sale proceeds from the Bencoolen property were utilized for each stated purpose.

22 The sale was completed only in February this year and the appellant would surely still have the completion account from his conveyancing lawyer. This would have shown the amount actually paid to the mortgagee bank and whether he truly received only "about $400,000".

23 It was easily within the appellant's ability to produce receipts from his former and his present solicitors on the amount of legal fees paid by him thus far but the appellant appears to expect everyone to simply accept what he has stated in his new affidavit. He did not even mention how much he paid his solicitors except that the amount of legal fees and security for costs took up "most" of the $400,000. The trial was not a long one in any event.

24 There is also no document to back up his statements about the rental agreement with the

purchasers of the Bencoolen property. He left Hong Kong for Singapore 14 years ago and has now returned to Hong Kong. The new affidavit states a "care of" residential address in Hong Kong with no explanation as to whose flat he is presently staying in.

25 The appellant was also completely silent on his efforts to seek financial assistance from his relatives and friends in Hong Kong since his departure from Singapore on 14 March 2010 although that was one of his professed objectives in leaving.

26 The appellant's unsatisfactory account of how the sale proceeds of the Bencoolen property were utilized coupled with the lack of documentary proof leaves one with serious doubts about the truth of his assertions of impecuniosity. An applicant against whom judgment has been entered after a trial and who is seeking the court's protection from bankruptcy proceedings should be candid and forthcoming.

27 Even if we assume that he received only $400,000 out of the sale proceeds of the Bencoolen property, he has not properly accounted for this amount. I decided to proceed on this assumption and made a generous allowance of three-quarters of that amount for his alleged payments. After deducting $30,000 for the security for costs of the appeal against the High Court judgment, he would have $270,000 to pay his former and his current solicitors. That leaves the appellant with at least $100,000 and it is this amount that I ordered him to provide security for by 1 July 2010. The amount in the AR's order on security is therefore varied from $500,000 to $100,000. The costs of this Registrar's Appeal are to abide by the costs of the appeal before the Court of Appeal.

28 The appellant has appealed against the order for security in [27] above (in Civil Appeal No. 115 of 2010) and has applied for the appeal to be heard on an expedited basis. A Judge has dispensed with the filing of the Record of Appeal and the Appellant's Case. The Court of Appeal will hear the appeal on Friday, 6 August 2010.