

DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and Another Appeal
[2009] SGCA 39

Case Number : CA 19/2009, 90/2009, OS 1044/2008, 800/2009
Decision Date : 06 August 2009
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : Sarjit Singh Gill SC and Koh Junxiang (Shook Lin & Bok LLP) for the appellant in CA No 19 of 2009/respondent in CA No 90 of 2009; Ernest Yogarajah Balasubramaniam (Arfat Selvam Alliance LLC) for the respondent in CA No 19 of 2009; Christopher Anand Daniel and Kenneth Jerald Pereira (Clifford Law LLC) for the appellant in CA No 90 of 2009
Parties : DB Trustees (Hong Kong) Ltd — Consult Asia Pte Ltd
Banking – Lending and security – Legal mortgages

6 August 2009

Judgment reserved.

V KRajah JA (delivering the judgment of the court):

1 These are our brief grounds of decision in relation to the appeals against the decisions of different High Court Judges in Originating Summons No 1044 of 2008 (“OS 1044/2008”) and Originating Summons No 800 of 2009 (“OS 800/2009”). Our grounds of decision are to be read with the decision of the High Court Judge who decided OS 1044/2008, *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2009] SGHC 62 (“the Enforcement Judgment”), where the facts have been fully stated.

2 OS 1044/2008 was an application by DB Trustees (Hong Kong) Limited (“DB Trustees”) against Consult Asia Pte Ltd (“Consult Asia”) for an order, *inter alia*, that DB Trustee’s appointment of receivers and managers over Consult Asia on 4 July 2008 was valid and enforceable. The appointment had been made in the context of existing security arrangements between the parties. Consult Asia had mortgaged two properties as security (“the Security”) for the redemption of Senior Secured Notes (“the Notes”) that it had issued pursuant to a Subscription Agreement, dated 28 December 2006. DB Trustees acted as trustee of the Security on behalf of the Note-holders. However, Consult Asia failed to redeem the Notes by 28 June 2008, the contractually stipulated redemption date. As a consequence, DB Trustees later appointed the receivers and managers to take control of Consult Asia and enforce the Security. Consult Asia argued that DB Trustees had no right to appoint the receivers and managers since DB Trustees had acted unreasonably in refusing to release the Security concurrently with the payment of the redemption monies.

3 The High Court Judge in OS 1044/2008 agreed with Consult Asia and dismissed the application. He found that Consult Asia had shown enough evidence to demonstrate that it had a real intention as well as the means to redeem the Notes. He accepted the bare evidence adduced by Consult Asia of an agreement entered into in early February 2008 (with a new placement agent to procure investors to participate in a fresh notes issuance facility in order to obtain sufficient funds to redeem the Security) as both “clear” and “concrete enough” evidence of the proposed refinancing, at [39] of the Enforcement Judgment. In his view, Consult Asia had been impeded in its attempt to secure redemption by DB Trustees’s refusal to release the Security concurrently with the proposed redemption payment by Consult Asia. This, he held, “effectively frustrated the defendant’s attempt to proceed with alternative financing in order to pay off the principal sum and interest due”, at [40] of

the Enforcement Judgment. Accordingly, the Judge discharged the appointment of the receivers and managers by DB Trustees and allowed Consult Asia up to 29 April 2009 to redeem the Notes.

4 In OS 800/2009, Consult Asia applied for the receivers and managers, appointed by DB Trustees on 30 April 2009, to be discharged. DB Trustees had again appointed the receivers and managers over all the assets and business of Consult Asia, following the expiry of the grace period allowed by the Judge in OS 1044/2008, since Consult Asia had not redeemed the Notes up to the expiry of the stipulated time. Consult Asia argued that since DB Trustees was only entitled to appoint receivers over the Security, the appointment was wrong in law. Furthermore, Consult Asia also claimed that the receivers and managers had acted improperly in the discharge of their duties as they had failed to provide relevant information to Consult Asia on the sale process and in attempting to sell the Security at a severe undervalue.

5 The High Court Judge who heard OS 800/2009 declined to grant Consult Asia's application, on the basis that there was insufficient evidence before him to indicate that there was any breach of duty on the part of the receivers and managers. The Judge did not address the issue as to whether DB Trustees were entitled to appoint the receivers and managers of Consult Asia's entire undertaking under the terms of the security arrangements.

6 In the course of the hearing, we requested Consult Asia to explain, by reference to objective documentary evidence, why it could not have redeemed the Security even without the title deeds, and why until today it was still unable to redeem the Security. After carefully considering the parties' submissions as well as the fresh evidence we allowed Consult Asia to adduce, it is plain to us that Consult Asia was not in a realistic position to obtain fresh financing during the material period to redeem the Notes. Its claim that DB Trustees had acted unreasonably in refusing to concurrently release the Security upon payment of the redemption monies was not the real reason why the refinancing failed. That allegation had no merit for the following reasons.

7 *First*, the documentary evidence produced by Consult Asia showed that it had been unable, even as late as mid-June 2008, to settle the terms of the refinancing arrangements with the new placement agent, Merrill Lynch (Singapore) Pte Ltd ("ML"). Consult Asia had about five months, between February 2008 (when the indicative term sheet with ML had been settled) and the end of June 2008 (when the Notes had to be redeemed), to finalise the private placement of the fresh secured notes to investors. Consult Asia attempted to attribute this failure solely to DB Trustees' refusal to allow the Security to be released concurrently with the payment of redemption monies. We found no evidence to substantiate this. Indeed, the correspondence showed that on 12 June 2008, M/s Lee & Lee, the solicitors acting for Consult Asia in the refinancing arrangements, had written to it stating that ML had instructed their solicitors "to put on hold further work in relation to this matter pending further discussions between ML and [Consult Asia]"[\[note: 1\]](#). Consult Asia has conspicuously failed to adduce any documentary evidence to explain why the work was put on hold or what happened thereafter. *Secondly*, Consult Asia also alleged that one of the reasons for the failure to redeem was that it disputed the amount claimed by DB Trustees in its notice of redemption. However, it conceded that it made no attempt whatsoever to inform DB Trustees of what it considered the correct redemption sum should be or to tender payment of such sum to DB Trustees. *Thirdly*, even though the Judge had found that Consult Asia was liable to pay the redemption amount of US\$42,080,000 that was properly due to the Note-holders, Consult Asia continued to refuse to repay the adjudged amount on the ground that the Security was worth more than \$90m and that it should be given reasonable time to procure the funds to redeem the Security. We find it troubling that there has been absolutely no objective evidence adduced by Consult Asia of any further attempts to refinance the Security between June 2008 and now.

8 Accordingly, we determine that an Event of Default, as defined in cl 10.1(a) of the Conditions of the Notes set out at Pt 2 of the Trust Deed, dated 28 December 2006, entered into between DB Trustees and Consult Asia, had occurred on 28 June 2008.

9 In our view, pursuant to cl 2.11 of the Security Deed, dated 28 December 2006, agreed between DB Trustees and Consult Asia, Consult Asia had granted DB Trustees a floating charge over all of Consult Asia's assets. Therefore, DB Trustees had the power to appoint receivers and managers over the undertaking and assets of Consult Asia, and its sequential appointments, first, of the second, third and fourth respondents in Civil Appeal No 90 of 2009, Mr Kon Yin Tong ("Mr Kon"), Mr Wong Kian Kok ("Mr Wong") and Mr Aw Eng Hai ("Mr Aw") respectively, as receivers and managers of Consult Asia on 4 July 2008 and, second, their re-appointment on 30 April 2009, after a further Event of Default had taken place, were lawful and proper.

10 Furthermore, on the evidence before the court, it is our view that Mr Kon, Mr Wong and Mr Aw had not breached any of the duties allegedly owed to Consult Asia as receivers and managers. The manner in which they had attempted to solicit offers for the Security was proper in the prevailing circumstances. They had obtained an independent valuation report of the Security before the tender exercise was carried out and had taken adequate steps to advertise the sale. We also find that the receivers and managers cannot be also faulted for refusing to reveal sensitive information to Consult Asia about the proposed sale as this could have been detrimental to the interests of the Noteholders. In any case, Consult Asia is not entitled, under the law, to any additional information from the mortgagees other than that already made available in the public tender. Indeed, we find it astonishing that Consult Asia has managed to delay the realisation of the Security for such an unduly long time, entirely on the basis of dubious grounds. We would only add that they are still entitled under the law to redeem the Security before the properties are sold, if they are really in a position to do so. All the evidence placed before us has, however, showed the contrary from the time when the purported notice of redemption dated 27 May 2008 was given by Consult Asia to DBS Trustees to totdate.

11 In the result, the appeal in Civil Appeal No 19 of 2009 by DB Trustees is allowed and the appeal in Civil Appeal No 90 of 2009 by Consult Asia is dismissed. Given the circumstances of this case, we award costs of both appeals as well as the costs below to DB Trustees, on an indemnity basis. The usual consequential orders are also to follow.

[\[note: 1\]](#) First Affidavit of Florence Koh Lee Kheng dated 2 August 2009 at p 222.