

HSBC Institutional Trust Services (Singapore) Ltd (trustee of Suntec Real Estate Investment Trust) v Picket & Rail Asia Pacific Pte Ltd
[2010] SGHC 184

Case Number : Suit No 193 of 2009 (Summons No 2162 of 2010)
Decision Date : 30 June 2010
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Thio Ying Ying and Tan Yeow Hiang (Kelvin Chia Partnership) for the plaintiff;
Navinder Singh (Navin & Co LLP) for the defendant.
Parties : HSBC Institutional Trust Services (Singapore) Ltd (trustee of Suntec Real Estate Investment Trust) — Picket & Rail Asia Pacific Pte Ltd

Civil Procedure – Judgments and Orders

30 June 2010

Tan Lee Meng J:

1 The plaintiff, HSBC Institutional Trust Services (Singapore) Limited as Trustee of Suntec Real Estate Investment Trust ("HSBCIT"), is the proprietor of Suntec City Shopping Mall ("the Mall"). The defendant, Picket & Rail Asia Pacific Pte Ltd ("PRAP"), is in the business of home furnishing and was a former tenant of 3 Temasek Boulevard, #02-106, a shop unit ("the shop unit") in the Mall.

2 PRAP leased the shop unit for 38 months from 1 December 2007 to 31 January 2011. However, on or around 3 December 2008, it abandoned the said shop unit in breach of the lease agreement and ceased its business operations at the Mall. Summary judgment for \$233,232.06 was entered against PRAP for its breach of contract on 8 September 2009 ("the summary judgment") by the Assistant Registrar ("AR"), whose decision was affirmed by the High Court on 16 November 2009. The judgment sum was in respect of arrears in rent, service charge and contributions towards the promotion fund of the Mall. PRAP was also ordered to pay interest on the sum of \$214,005.19 from 15 January 2009 to the date of payment at the rate of four per cent over the prime lending rate of United Overseas Bank Limited, calculated on a daily basis.

3 PRAP filed an appeal against the decision of the judge who affirmed the AR's decision. It did not file an application for a stay of the judgment. In the meantime, as PRAP had not paid the judgment sum, HSBCIT served a statutory demand on PRAP on 4 February 2010. When it received no response from PRAP, HSBCIT filed an application to wind up PRAP on 27 April 2010. Four days before the hearing of the winding-up petition on 21 May 2010, PRAP sought a stay of execution of the summary judgment. I dismissed PRAP's application and now give the reasons for my decision.

4 At the outset, it ought to be noted that although summary judgment was entered against PRAP several months ago, it made no attempt to apply for a stay of the execution of the judgment even when the statutory demand was issued to it on 4 February 2010 and the winding up application was on 27 April 2010. PRAP finally sought a stay of execution of the summary judgment on 17 May 2010, just four days before the date fixed for hearing of HSBCIT's winding up application on 21 May 2010.

5 An appeal against summary judgment does not operate as a stay of execution. O 56 r 1(4) of

the Rules of Court provides as follows:

Except so far as the Court may otherwise direct, an appeal under this Rule shall not operate as a stay of proceedings in which the appeal is brought.

6 Furthermore, s 41 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) provides as follows:

- (1) An appeal shall not operate as a stay of execution of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders.
- (2) No intermediate act or proceedings shall be invalidated except so far as the Court of Appeal may direct.

7 The approach which a court should take with respect to a stay of execution of a judgement was outlined in *Lee Sian Hee (trading as Lee Sian Hee Pork Trader) v Oh Kheng Soon (trading as Ban Hon Trading Enterprise)* [1991] 2 SLR(R) 869 ("*Lee Sian Hee*") by the Court of Appeal, which stated at [5]:

While the court has power to grant a stay, and this is entirely in the discretion of the court, the discretion must be exercised in accordance with well-established principles (*Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 1 SLR(R) 772). First, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which prima face he is entitled pending an appeal (*The Annot Lyle* (1886) 1 PD 114 at 116). However, when a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory (*Wilson v Church (No 2)* (1879) 12 Ch D 454 at 458-459). Thus, a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable prospect of getting them back, if the appeal succeeds (*Atkins v The Great Western Railway Co* (1886) 2 TLR 400).

This approach was reiterated by the Court of Appeal in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053.

8 PRAP did not give a satisfactory explanation as to why it took more than 7 months to apply for a stay of execution of the summary judgment. In support of PRAP's application for a stay of execution, its director, Mr Faisal Alsagoff, filed an affidavit on 17 May 2010 stating (at para 4) that his company believed that there was a good chance that its appeal against the summary judgment would succeed. He added at para 5 that it would be "irreversible and grossly unfair to the Defendants" should HSBCIT be allowed to proceed with the winding up and PRAP succeed in its appeal.

9 In regard to PRAP's claim that it has a good chance of success in its appeal, the decision of the Court of Appeal in *Lee Sian Hee* is instructive. In that case, the respondent obtained summary judgment for the price of live pigs sold and delivered to the appellants. It amounted to \$240,403.00. The appellant sought a stay of execution of the summary judgment on the ground that there was a probability of success in the appeal. The Court of Appeal, which refused to order a stay, explained at [9]:

... [T]he likelihood of success is not by itself sufficient, *even in the context of an appeal against a summary judgment* If a bald assertion of the likelihood of success is adequate, then a stay would be granted in every case, for every appellant must expect that his appeal will succeed....

This is quite contrary to the Supreme Court of Judicature Act, the Rules of the Supreme Court and to established case law.

[emphasis added]

10 As for PRAP's argument that a winding up order would be "irreversible and grossly unfair" should it succeed in its appeal, there is no allegation – and understandably so – that HSBCIT would not be able to repay the summary judgment amount should PRAP succeed in its appeal.

11 HSBCIT feared that if it did not take steps to wind up PRAP, the latter's creditors would soon be left with nothing. Apparently, PRAP is no longer a going concern and HSBCIT alleged that PRAP has been taking steps to divest its assets to its related companies to avoid having to satisfy the claims of its creditors. HSBCIT discovered during the course of conducting writ of seizure and sale proceedings that in February 2010, PRAP novated its lease at City Square Mall to its related company, Picket & Rail Holdings Pte Ltd. HSBCIT therefore argued that the execution of the summary judgment should not be stayed as it was necessary for liquidators to be appointed to safeguard PRAP's assets for the benefit of the latter's creditors.

12 I agreed with HSBCIT that the filing of the stay application by PRAP so late in the day was a deliberate move intended to delay the winding up proceedings. As such, I dismissed PRAP's application for a stay of execution of the summary judgment with costs.

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