Goh Chin Soon v Oversea-Chinese Banking Corporation Limited
[2001] SGHC 17

Case Number : OSB 114/2000
Decision Date : 30 January 2001
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Anand Thiagarajan and Netto (Anand T & Co) for the appellant-plaintiff; Lee Eng Beng and Melissa Lee (Rajah & Tann) for the respondents-defendants
Parties : Goh Chin Soon — Oversea-Chinese Banking Corporation Limited

JUDGMENT:

Grounds of Decision

1 On 12 September 2000 the Defendants ("the Bank") issued a statutory demand ("SD") under section 62 of the Bankruptcy Act to the Plaintiff ("Goh") in respect of about S$3.5 million. The SD was served on 28 September and on 13 October Goh took out this summons to apply to set it aside. The Deputy Registrar dismissed the application and gave the Bank liberty to commence bankruptcy proceedings forthwith. Goh appealed against that decision and the matter came up before me on 7 November 2000. After hearing counsel for the parties, I dismissed the appeal with costs. Goh filed a Notice of Appeal on 17 November against my orders and I now give my written grounds of decision.

2 Goh controls a number of companies and among these are Galleries Development Pte Ltd ("Galleries") and Grandlink Group Pte Ltd ("Grandlink"). These 2 companies entered into various loan agreements with the Bank in which Goh acted as guarantor. He also executed third party mortgages of various properties, which he owned solely or jointly, as security for those facilities. The details of these facilities are as follows:

> (i) Banking facilities totalling about $11 million were granted to Galleries. Goh had executed a personal guarantee to secure these facilities. Upon Galleries default the Bank recalled the facilities and instituted legal action against Galleries, and against Goh under the guarantee, to recover the amount outstanding in Suit No. 600161/2000. Goh did not appeal against the judgment that was eventually entered against him for about $3.4 million which became the subject of the SD in the present summons.
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> (ii) Loan facilities totalling about $50 million were extended to Grandlink. These were secured by third party mortgages over 13 properties which were solely or jointly owned by Goh as well as by a personal guarantee executed by Goh for the sum of $43 million. Grandlink defaulted on the loans and the Bank obtained judgment for the $50 million against Grandlink and against Goh as guarantor. The Bank also obtained an order for possession of the 13 properties under the mortgages. 12 of these were eventually sold, or contracts entered into for their sale, and the total proceeds would be about $35.5 million. The last unsold property is valued at about $3 million with a forced sale value of $2.7 million. After deducting the higher value, there remained a shortfall in excess of $11.5 million which Grandlink and Goh are liable to pay the Bank.

3 Goh relied on 2 grounds for setting aside the SD:

> i. Goh had a valid counterclaim, set-off or cross demand which exceeds the amount of the debt; and

ii. The SD did not comply with rule 94(5) of the Bankruptcy Rules.

(i) Counterclaim, set-off or cross demand

4 Rule 98(2) of the Bankruptcy Rules sets out the grounds for setting aside a statutory demand and provides as follows:

> (2) The court shall set aside the statutory demand if --
>
> > (a) the debtor appears to have a valid counterclaim, set-off or cross demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand;
> >
> > (b) the debt is disputed on grounds which appear to the court to be substantial;
> >
> > (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;
> >
> > (d) rule 94 has not been complied with; or
> >
> > (e) the court is satisfied, on other grounds, that the demand ought to be set aside.

5 Goh relied on ground (a) of rule 98(2) and claimed that he had a counterclaim, set-off or cross demand against the Bank which is equivalent to or exceeds the sum in the SD. In his affidavit, Goh deposed that on 15 September 2000, Grandlink, Goh and one Sim Chui Chu commenced Suit No 740/2000 against the Bank for damages arising from the Banks breach of their duties as mortgagees in possession of 2 properties. The plaintiffs in that action alleged that the Bank had failed to sell those properties at their true market value. Three months after the Bank had become mortgagees in possession of the properties, their solicitors wrote to Grandlinks solicitors to advise that the Bank was considering an offer of $12.05 million. They gave Grandlink 6 days to revert should they be able to procure any higher offer. The deadline was subsequently extended to 1 September 2000 but Grandlink was unable to notify the Bank of any better offer by that date. However the following day, 2 September, Grandlinks solicitors faxed a letter to the Banks solicitors stating that they had procured an offer for $12.2 million. The Bank replied that they had already sold the properties to the purchaser who had offered the $12.05 million. Grandlink subsequently obtained a valuation report which stated that the properties were worth $17.2 million. In that action the plaintiffs ask for an injunction to restrain the Bank from completing the sale and damages in the alternative. The plaintiffs in that action also applied for an interim injunction against the sale pending trial but it was refused on the ground that damages would be an adequate remedy. Although the amount of damages claimed is not specified in the statement of claim, Goh contended that it would amount to $5.15 million (the difference between the valuation of $17.2 million and the sale price of $12.05 million) and therefore he had a counterclaim, set-off or cross demand that exceeded the amount specified in the SD.

6 The following are the features of Gohs counterclaim, set-off or cross demand:

> (a) It concerns 2 properties mortgaged to the Bank to secure the facilities granted to Grandlink and has no connection with the SD which relates to the debt owed by Galleries.

(b) Goh does not deny that after deducting the valuation amount of the 13th property which remains unsold, he still owes the Bank in excess of $11.5 million. Even if he succeeds in that action, he can only recover a maximum of $5.15 million which is less than half of the sum he still owes.

(c) It is not clear how he can claim damages on the basis of the valuation of $17.2 million when the offer he procured, one day after the extended deadline, was only $12.2 million. If it is assessed at the lower value, the damages would only amount to $150,000.

(c) Even the issue of liability is doubtful in the circumstances, given the law on the duties of a mortgagee in possession.

7 Although Gohs action in Suit No 740/2000 is clearly not a counterclaim in relation to the debt the subject of the SD, I shall assume it to be a set-off or cross demand for the purposes of my analysis. Rule 98(2)(a) provides that the court shall set aside the SD if the debtor appears to have a valid counterclaim, set-off or cross demand which exceeds the amount of the debts in the SD. The word "valid" is placed there for good reason. It requires the court to examine the alleged counterclaim, set-off or cross demand to see if the debtor has a *bona fide* claim against the creditor that, if successful, would enable him to pay the debt the subject of the statutory demand. If all that rule 98(2)(a) requires were the mere existence of such a claim, no matter how spurious, then it will be only too easy for a debtor to make such a claim in order to stave off bankruptcy proceedings. Indeed the Supreme Court Practice Directions (1997 Ed) No.66 provides that where this ground is raised, the court will normally set aside a statutory demand if satisfied that there is a genuine triable issue. *In re A Debtor, No.991 of 1962* [1963] 1 WLR 51 was a case decided under the English Bankruptcy Act, 1914, which provided that an act of bankruptcy would be committed if the debtor failed to satisfy a bankruptcy notice unless he could:

" satisfy the court that he has a counterclaim set-off or cross-demand which equals or exceeds the amount of the judgment debt "

The English Court of Appeal held that where the debtor claims that he has such a counterclaim, set-off or cross demand, the court ought to determine whether the claim is genuine in that there is a triable issue on the affidavits.

8 In view of the foregoing, I find that the mere existence of the action in Suit 740/2000 is not sufficient ground to set aside the SD. This is because even if Goh could succeed in that action, the maximum amount he could have recovered would have been $5.15 million. As the Bank is being sued for breach of duty as mortgagee-in-possession such a judgment would be set-off against the outstanding debt in that matter which is in excess of $11.5 million. There would therefore be nothing available to satisfy the debt in the SD. For these reasons, I would hold that that action does not constitute a valid counterclaim, set-off or cross demand under rule 98(2)(a).

(ii) Non-compliance with rule 94(5)

9 Gohs second ground is that the SD did not comply with rule 94(5) and therefore it must be set aside in accordance with rule 98(2)(d). Rule 94(5) provides as follows:

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.

Goh stated that the Bank were holding 4 of his properties and that they should have been specified in the SD. These 4 properties were among the 13 mortgaged to the Bank in respect of the loan facilities granted to Grandlink. At the time of the SD, they were not yet sold. The Bank admitted that these properties were not specified in the SD but contended that they need not be specified as they related to a different debt, i.e. the loan facilities granted to Grandlink, and not the debt the subject of the SD, i.e. the banking facilities granted to Galleries.

10 The question is whether rule 94(5) requires the Bank to specify property of the debtor held by the Bank as security for another debt which is not the subject matter of the SD. None of the parties could cite any authority dealing with this point and it is necessary to consider the construction of the provision to determine its scope. Rule 94(5) by itself appears to be wide enough to include all property of the creditor held by the Bank, including any property held as security in respect of another debt. This is because the term "any property of the debtor" is not qualified. And rule 98(2)(d) appears to make any non-compliance with rule 94 a ground for setting aside the SD. However in the present case the 4 properties were mortgaged to the Bank as security for an entirely separate loan to a different party. As the outstanding amount of that debt far exceeds the value of those properties there would not be any surplus left after realisation of those properties. Absolutely no purpose would be served by the inclusion of those properties in the present case. It is therefore necessary to divine the objective of the requirement in rule 94(5).

11 Rule 98(2)(c) provides some guidance. It prescribes a separate ground which pertains to rule 94(5) specifically. This provides that the court shall set aside the SD if either rule 94(5) is not 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. From this it can be seen that the intent of rule 94(5) is to make a creditor declare that he holds any asset of the debtor or any security in respect of the debt claimed so that the court may ascertain whether the creditor has sufficient security or assets of the debtor that will satisfy the debt in full. However in the present case, the assets held by the Bank are not available to satisfy the debt the subject of the SD. No purpose is served in requiring the Bank to specify the 4 properties as they were held as security in respect of a different debt and there is no surplus accruing to Goh.

12 In the circumstances I would hold that in the present case, where a creditor holds property of the debtor as security for another debt which is not the subject matter of the SD and such security is insufficient to satisfy that other debt, the creditor is not required under rule 94(5) to specify such property in the SD.

Conclusion

13 In the event, I dismissed Gohs appeal in respect of his application to set aside the SD. I should add that it appears to me that this action is one borne out of desperation rather than just cause. Goh is already heavily indebted in respect of the Grandlink facilities. Even if he succeeds in his action against the Bank for selling the properties at an undervalue and recovers in full the amount he claims, he would still be indebted to the Bank for more than $6 million. If he fails, it would balloon to $11.5 million. This is in addition to the $3.5 million in the SD in question. No purpose whatsoever is achieved in setting aside the SD on account of the failure to specify the properties held because it will be a simple matter for the Bank to serve another SD containing the information. As for the claim against the Bank in relation to the alleged sale at an undervalue, the circumstances in which this action arose draw me inexorably to the conclusion that it was commenced in order to generate a ground for setting aside the SD rather than on account of any *bona fide* belief in the probability of success. While it is understandable that Goh would clutch whatever straw he can, to prolong this matter further would only postpone the inevitable and incur greater cost to all concerned.

Lee Seiu Kin

Judicial Commissioner