Lee Kiang Leng Stanley v Lee Han Chew (trading as Joe Li Electrical Supplies) [2004] SGHC 151

Case Number : Bankruptcy 1155/2004, RA 164/2004

Decision Date : 19 July 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Michael Por (Tan Lee and Partners) for debtor; Tan Bar Tien (B T Tan and Co) for petitioner

Parties : Lee Kiang Leng Stanley — Lee Han Chew (trading as Joe Li Electrical Supplies)

Insolvency Law – Avoidance of transactions – Unfair preferences – Stay of bankruptcy proceedings on condition of security being furnished – Whether order for security constituted unfair preference – Section 99 Bankruptcy Act (Cap 20, 2000 Rev Ed)

Insolvency Law – Bankruptcy – Petition – Stay of proceedings on condition of security being furnished – Whether order made under correct provision of Bankruptcy Act – Sections 64(1), 65(5) Bankruptcy Act (Cap 20, 2000 Rev Ed)

Insolvency Law – Bankruptcy – Petition – Stay of proceedings on condition of security for costs being furnished – Whether order for security excessive – The Schedule of the Bankruptcy (Costs) Rules (Cap 20, R 2, 2000 Rev Ed)

19 July 2004

Woo Bih Li J:

Introduction

1 This was an appeal by a debtor against a decision of an assistant registrar ordering a stay of bankruptcy proceedings on the condition that the debtor provide security for the full amount of the debt and security for costs for proceedings he had commenced to seek a discharge from his guarantee of a debt. After hearing arguments, I varied the order below slightly. The main terms regarding provision of security were retained.

Background

2 The petitioner who had filed bankruptcy proceedings was one Lee Han Chew trading as Joe Li Electrical Supplies ("the Petitioner"). The debtor was Lee Kiang Leng Stanley ("the Debtor").

3 The Petitioner had commenced proceedings against a company by the name of R & N Engineering Construction Pte Ltd ("the Company") and against the Debtor as guarantor. The Petitioner then applied for summary judgment. On the eve of the hearing of the application for summary judgment, a settlement was reached with the Company and the Debtor. However, there was a default on the first payment under the settlement agreement and the default clause therein kicked in. Under the terms of the settlement agreement, both the Company and the Debtor were liable to the Petitioner, the Debtor being liable still as guarantor.

4 As a result of the default, the Petitioner commenced winding up proceedings against the Company and bankruptcy proceedings against the Debtor. The former was to be heard in the morning of 30 April 2004 and the latter in the afternoon of 30 April 2004. In anticipation of an order being

made to wind up the Company, the Debtor filed an application and an affidavit on 29 April 2004 seeking a stay of the bankruptcy petition ("the Petition").

5 On 30 April 2004, an order was made to wind up the Company. On the hearing of the Debtor's application for a stay, an assistant registrar made the following orders on 3 June 2004:

(a) that the Petition be stayed pending the outcome of Originating Summons No 251 of 2004 ("the OS") filed in the subordinate courts;

(b) that the Debtor furnish security in the amount of $171,797.36 and $15,000 in costs in cash or through a banker's guarantee, on terms to be agreed upon;

(c) that the security be furnished by 17 June 2004, failing which the parties were to appear again before the assistant registrar.

6 The $171,797.36 was the debt claimed by the Petitioner and the $15,000 was the amount to be provided as security for the Petitioner's costs in the OS. The OS had been filed by the Debtor to seek a declaration that the Debtor's obligation as a guarantor had been discharged.

7 The Debtor appealed against that part of the order of 3 June 2004 which required him to furnish security. His appeal was heard together with a minor appeal by the Petitioner regarding a costs order made on another application. I do not need to say any more about the Petitioner's appeal.

The Debtor's arguments

8 The Debtor was represented by Mr Michael Por. The Debtor alleged that he would be relying on certain acts of the Petitioner which caused the Debtor to lose his right of recourse against the Company and thus prejudiced his position as guarantor. For this general proposition, Mr Por relied on *Watts v Shuttleworth* (1860) 5 H&N 234; 157 ER 1711.

9 As regards the facts, Mr Por relied on *Bank of Montreal v Wilder* [1987] 1 WWR 289, a decision of the Supreme Court of Canada, in which guarantors were released from their liability as a result of certain acts of the creditor. I will elaborate on this case later.

10 Mr Por also argued that requiring the Debtor to provide security for the full sum of the debt was unreasonable in view of the OS and the fact that the Petitioner had no judgment against the Debtor, although a statutory demand had been sent. He urged me to revise the amount of the security downwards to 10% of the debt but only if I was satisfied that such security would not constitute an unfair preference under s 99 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Act").

11 On the point about unfair preference, Mr Por argued that an order requiring security for the debt would result in an unfair preference. He relied on two cases: *Commercial Banking Company of Sydney Limited v Colonial Financiers of Australia Pty Ltd* [1972] VR 702 and *Re Australian Co-Operative Development Society Limited* [1977] Qd R 66 for this proposition. He further argued that even if a payment under the security were to be set aside eventually for unfair preference, and therefore would not prejudice other unsecured creditors, the court should not make an order knowing that it would result in an unfair preference.

12 As for the amount of $15,000 to be provided as security for the Petitioner's costs in the OS, Mr Por argued that this amount was excessive as the Schedule to the Bankruptcy (Costs) Rules

(Cap 20, R 2, 2002 Rev Ed) provides for costs of $700 plus disbursements when a bankruptcy order is made. He also submitted that it was wrong to order security of $15,000 as that would be an amount which the Debtor would not be able to provide. He relied on *MV Yorke Motors v Edwards* [1982] 1 All ER 1024 in which it was decided that it would be a wrongful exercise of discretion to order a defendant to pay a sum which he would never be able to pay as a condition of granting leave to defend in an application for summary judgment "because it would be tantamount to giving judgment for the plaintiff notwithstanding the court's opinion that there was an issue or question in dispute which ought to be tried" (at 1027).

13 Mr Por also argued that it was incorrect that the order below was made pursuant to s 65(5) of the Act, as the order was made not at the hearing of the petition itself but at the hearing of the Debtor's application. It should therefore have been made under s 64 of the Act.

Sections 64(1), 64(2), 65(5) and s 99 of the Act

14 Sections 64(1), 64(2) and 65(5) of the Act state:

> 64.—(1) The court may at any time, for sufficient reason, make an order staying the proceedings on a bankruptcy petition, either altogether or for a limited time, on such terms and conditions as the court may think just.
>
> (2) Without prejudice to subsection (1), where it appears to the court that the person presenting a bankruptcy petition has contravened any of the provisions of this Act or any rules in relation to proceedings on a bankruptcy petition, the court may, in its discretion, dismiss the petition in lieu of staying any proceedings thereon under that subsection.
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> …
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> 65(5) Where the debtor appears at the hearing of the petition and denies that he is —
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> (a) indebted to the petitioner; or
>
> (b) indebted to such an amount as would justify the petitioner presenting a bankruptcy petition against him,
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> the court may, on condition that the debtor furnishes such security as the court may order for payment to the petitioner of —
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> (i) any debt which may be established against the debtor in due course of law; and
>
> (ii) the costs of establishing the debt,
>
> stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

15 Section 99(1), (3), (4) and (6) states:

> 99.—(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.
>
> …

(3) For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if —

(a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and

(b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b).

…

(6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of an unfair preference.

16 As can be seen, the terms of s 65(5) suggest that the provision applies when a debtor appears at the hearing of the petition. Section 64(1) appears to be wider. It may be that s 64 is meant to apply to cases where there is a default by the petitioner, especially when one considers s 64(2). However, the terms of s 64(1) are wide and not limited only to defaults by a petitioner. It also seemed to me that if s 64 is restricted to defaults by a petitioner, then there is a lacuna since s 65(5) seems to apply only at the hearing of the petition and not to any application made and heard before the hearing of the petition.

17 Accordingly, I was of the view that s 64(1) is not limited to instances of defaults by a petitioner. If I am right, then s 65(5) is superfluous unless it is used as an illustration of what the court may do under s 64(1). Also the following words in s 65(5) are unnecessary: "appears at the hearing of the petition and".

18 As for the amount of the security, I was of the view that s 65(5) allowed the court to order security for the full amount of the debt. There is no mention in s 65(5) of security for part of the debt although it is arguable that this could also be ordered. However, under s 64(1), the court's discretion is couched in such wide terms as would allow the court to order security for part or all of the debt.

19 Although Mr Por did not argue that provision of security for the full amount of the debt, as opposed to security for the full costs of the OS, was contrary to the principle enunciated in *MV Yorke Motors*, I took that principle into account in respect of security for the debt.

20 However, it seemed to me that the OS was without basis. The facts in *Bank of Montreal v Wilder,* which Mr Por relied on, were different from those before me. I set out part of the headnote there, as follows:

The plaintiff then entered into an agreement with the company and the defendants whereby it agreed to continue to finance the company at least until the completion of the road projects. In return, the defendants agreed to inject money into the company and give

a further guarantee. Although the defendants complied with the agreement, the plaintiff began to dishonour the company's cheques almost immediately. It subsequently demanded payment to be made within two hours of the demand and on the same day appointed a receiver-manager under the debenture. The receiver-manager refused to complete the road projects, which were then completed at a loss by the company's bonding company.

The bank commenced an action against the defendants on their guarantees. The trial judge held that the plaintiff was not entitled to judgment on the first and last guarantees but was entitled to recover on the other guarantees. The plaintiff appealed and the defendants cross-appealed. The Court of Appeal held that the plaintiff was not entitled to judgment on any of the guarantees. The plaintiff further appealed.

Held — Appeal dismissed.

The defendants were not liable to the plaintiff on any of the guarantees. Just as any material variation of the terms of the contract between the creditor and the principal debtor to the prejudice of the guarantor made without guarantor's consent will discharge the guarantor, so a breach of a variation of the loan agreement made with the guarantor's consent which materially increases the risk and impairs the security of the guarantor will also discharge the guarantor. In this case the breach of the agreement to continue to finance the company until completion of the road projects materially impaired the value of the security held by the defendants by preventing the company from continuing as a viable commercial operation. All of the defendants' guarantees attached to the final loan agreement between the parties …

21 In the case before me, the Petitioner was entitled to wind up the Company just like any other creditor could have done. I did not see how that step would discharge the Debtor from his guarantee. However, there was no appeal by the Petitioner against the order granting a stay of the bankruptcy proceedings pending the outcome of the OS. Therefore, I was minded to allow the condition for providing security to remain with minor variations as I shall elaborate on below. Accordingly, the view I have expressed on the Debtor's action for a discharge of his guarantee is tentative and not meant to bind the court hearing the OS.

22 As for the amount of security for costs of the OS, I reduced it to $5,000 from $15,000 as the issue did not appear to me to be difficult. The costs under the Bankruptcy (Costs) Rules were not useful as a comparison of what costs under the OS might amount to.

23 In view of ss 64(1) and 65(5) of the Act, I did not agree that it was for the District Court only to make an order for security for costs of the OS.

24 As for the question of unfair preference, I should say at the outset that Mr Por had proceeded on the basis that if security for the full debt was provided, the Petitioner would still have to obtain a bankruptcy order if the Debtor were to fail in his OS, before calling on the security. However, in my view, the reverse was true. If security for the full sum was provided, the Petitioner would look to the security and not the Petition. Indeed, if the Petitioner chose to continue with the Petition in the face of the security, the Debtor would be justified in seeking the dismissal of the Petition.

25 As for the two cases which Mr Por had relied on, they dealt with s 122(1) of the Australian Bankruptcy Act 1966. Under this provision, a charge on property or a payment made in favour of a creditor "having the effect of giving that creditor a preference" is void against the trustee in

bankruptcy. Those cases were cited to illustrate that a charge or payment made pursuant to an order of court could still constitute an unfair preference. However, in those cases, the effect of a preference *per se* was sufficient to avoid the charge or payment. As can be seen, our provisions are different. Indeed s 99(4) suggests that the debtor must intend to prefer the creditor concerned. This in turn, suggests that a payment pursuant to an order of court is not necessarily an unfair preference as the debtor would be compelled to pay. However, it is still possible to argue that such a payment is an unfair preference, for example, where a defendant does not resist a claim in circumstances where he should have done so. Thus, s 99(6) of the Act stipulates that the fact that something is done pursuant to an order of court "does not, without more, prevent the doing … of that thing from constituting the giving of an unfair preference".

26 Furthermore, ss 64(1) and 65(5) of the Act allow the court to order a debtor who resists a bankruptcy petition to provide security. It seemed to me that where a debtor has resisted having to provide security, and then is ordered to do so whereupon he provides the security, this would not constitute an unfair preference. Otherwise, it would be inconsistent with the scheme in the Act of allowing the court to make such an order in the first place.

27 In the circumstances, I decided to vary the order on security to make it an order under s 64(1) instead of s 65(5) for the reasons I have stated. The security for the debt would still be for its full amount and the security for the Petitioner's costs would be for $5,000. I also made consequential orders.

Appeal allowed in part and dismissed in part.