Agus Anwar *v* Gainsford Capital Ltd
[2010] SGHC 5

Case Number : Originating Summons Bankruptcy No 27 of 2009 (Registrar's Appeal No 300 of 2009)

Decision Date : 06 January 2010

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Ng Soon Kai and Mario Tjong (Ng Chong & Hue LLC) for the plaintiff; Kelvin Tan Teck San and Natasha Nur Bte Sulaiman (Drew & Napier LLC) for the defendant.

Parties : Agus Anwar — Gainsford Capital Ltd

Insolvency Law – bankruptcy – statutory demand

6 January 2010

Lee Seiu Kin J:

1 In this action, the plaintiff applied to set aside the statutory demand served on him by the defendant ("Gainsford") on 17 April 2009. After hearing counsel for the parties on 7 August 2009, the assistant registrar granted the application and set aside the statutory demand on the ground that the debt was disputed on substantial grounds. Gainsford appealed before me in Registrar's Appeal No 300 of 2009 and on 25 August 2009, I upheld the assistant registrar's decision and dismissed the appeal. Gainsford has since filed an appeal to the Court of Appeal and I now give the grounds for my decision.

2 The basis for the statutory demand is two debts totalling US$29.84m that Gainsford alleges is owed to it by the plaintiff. Of these, US$15m is owed pursuant to an agreement dated 9 June 2008 entitled "Heads of Agreement" ("First Agreement") and US$14.84m is owed pursuant to an agreement dated 16 July 2008 entitled "Cooperation Agreement and Acknowledgment of Indebtedness" ("Second Agreement").

3 The First Agreement was drafted in a rather convoluted manner but it was essentially one in which the plaintiff, who owned all the shares in a company called Shining Hope Pte Ltd ("Shining Hope"), would transfer 70% of the shares in Shining Hope to Gainsford. Shining Hope is the owner, through other companies, of all the shares in an Indonesian company called PT Riau Bara Harum ("PT RBH"). PT RBH owns and operates a coal concession in Indonesia. The consideration for this transfer is rather complex. Gainsford was required to first make two payments to the plaintiff: US$6m on 9 June 2008 and US$9m before 10am on 20 June 2008 (collectively, "Initial Payments"). On top of that, the plaintiff and Gainsford were required to use their best endeavour to obtain a "Non Recourse loan" for PT RBH in the sum of US$200m which "shall be paid to the [plaintiff] less the Initial Payments". Upon receipt of such payment, Gainsford would become owner of 70% of the shares in Shining Hope. Apparently Shining Hope had obtained loans totalling US$105m to acquire control of PT RBH and part of the US$200m was to be used towards their repayment.

4 The Initial Payments were paid to the plaintiff on 9 and 19 June 2008. Then on 16 July 2008, the parties entered into the Second Agreement under which Gainsford was to make a further payment of US$15m to the plaintiff, which sum would also be deducted from the US$200m that would be paid

to the plaintiff when the US$200m loan is obtained. Pursuant to the Second Agreement, Gainsford made a payment of US$14.84m to the plaintiff. The plaintiff did not dispute that this sum was paid pursuant to the obligation in the Second Agreement to pay him US$15m.

5 In the event, the US$200m loan was not obtained. Gainsford claimed for repayment of the US$29.84m under the First Agreement and Second Agreement, as it is entitled to in such event. However the plaintiff claimed that he had managed to procure a US$180m loan facility from Deutsche Bank and had even made payment of US$700,000 to the bank in relation to the loan offer. But this was not taken up as Gainsford did not agree to the terms of the loan. The plaintiff claimed that Gainsford had not thereafter reverted with any financing package.

6 Article 1 of the First Agreement contains the obligations of the parties in relation to the US$200m loan and the relevant provisions are as follows:

> 1. The Parties shall use their best endeavor to obtain a Non Recourse loan for PT RBH in the amount of [US$200m] from any bank or financial institution … which shall be paid to [the plaintiff] less the Initial Payments as stipulated hereunder. The Parties shall not be liable to repay the said [US$200m] to PT RBH.
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> 2. The Finance Facilities should have prior written approval by both Parties which shall not be unreasonable [*sic*] withheld. The said approval should be based on the best commercial terms available to the Parties.
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> 3. The [plaintiff] shall render all reasonable assistance to effect such loan from [*sic*] as may be required by the bank or financial institution that is providing the said loan.
>
> 4. …

7 Clearly there is an issue whether Gainsford is in breach of its obligations under Art 1 of the First Agreement. I was of the view that the circumstances would justify granting the plaintiff leave to defend had Gainsford commenced a suit and applied for summary judgment and therefore the statutory demand ought to be set aside. In the circumstances, I fixed the costs of this appeal at $1,200 to be paid by the defendant to the plaintiff.