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Pereira, Dennis John Sunny

v

United Overseas Bank Ltd

[2017] SGCA 62

Court of Appeal — Civil Appeal No 29 of 2017
Sundares Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
23 October 2017

Credit and Security — Mortgage of real property — Mortgagee's rights

9 November 2017

Sundares Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court in respect of a mortgagee action brought by the respondent, United Overseas Bank Limited (“UOB”), seeking (among other reliefs) orders for the delivery of possession of two properties co-owned by the appellant, Mr Pereira, Dennis John Sunny (“the Appellant”), and his former wife (“W”). UOB had granted two housing loans to them, and had also granted two loan facilities to Offshore Logistics (Asia Pacific) Pte Ltd (“the Company”), a company which was majority-owned by the Appellant. The loan facilities to the Company were secured by personal guarantees provided by the Appellant. The Appellant's liability under those guarantees as well as under the housing loans were all secured by a mortgage over the two properties, as explained below. UOB's mortgagee action was first

heard more than a year ago by an assistant registrar (“the AR”), who granted an order for the delivery of possession of the properties (“the Order”), save that the execution of the Order with respect to one of the two properties was stayed on account of the fact that the Appellant’s daughter (“the Daughter”) was then residing there and was preparing for her school examinations. The Appellant subsequently sought a further stay, but this was dismissed by the AR, whose decision was upheld on appeal to the High Court: see *United Overseas Bank Ltd v Pereira, Dennis John Sunny and another* [2017] SGHC 66 (“the GD”). On further appeal to us, the Appellant sought an open-ended stay of execution of the Order until after the completion of an intended sale of the Company’s assets. We dismissed the appeal at the conclusion of the parties’ oral arguments and furnished our brief reasons. As this appeal raised a point of practical importance, we now set out our reasons in greater detail.

The material facts

2 The background facts relating to the present appeal have been detailed by the High Court judge (“the Judge”) in the GD. It is sufficient for us to briefly outline just the key points.

3 The Appellant was the majority shareholder of the Company, and was also one of its directors at the material time. On 1 July 2016, the Company was placed under judicial management upon UOB’s application. The Appellant also co-owned at least two properties with W. The first of these properties, 44 Toh Crescent (“the Property”), was the family home, and it was occupied by the Appellant, W, the Daughter and W’s son from a previous marriage. The other property was an apartment at Upper Changi Road (“the Changi Apartment”). Only the Property was in issue in this appeal.

4 As mentioned earlier, the Appellant and W mortgaged the two properties to UOB as security for monies due and owing to UOB pursuant to two housing loans granted to them by UOB, as well as to secure the Appellant's liability under the personal guarantees which he had furnished in respect of two loan facilities extended by UOB to the Company. Sometime around March 2015, the Company defaulted on the payment of the monthly instalments due to UOB under the two loan facilities. About a year later, in around March 2016, the Appellant and W also defaulted on the payment of the monthly instalments in respect of the two housing loans. Letters of demand were issued to them by UOB's solicitors, but these did not elicit the desired response. A notice pursuant to s 75(2) of the Land Titles Act (Cap 157, 2004 Rev Ed) was then served by UOB's solicitors on the Appellant and W requesting them to deliver possession of the two properties to UOB. When that went unanswered, UOB, by way of Originating Summons No 619 of 2016, applied to the court for (among other things) orders that the Appellant and W deliver possession of the two properties.

5 On 24 August 2016, UOB's application was heard by the AR, who granted the Order on the same day. However, the AR stayed the execution of the Order in respect of the Property for a period of about three months until 30 November 2016 so as not to disrupt the Daughter's preparations for her school examinations. It may be noted that UOB did not object to this arrangement. UOB subsequently took possession of and sold the Changi Apartment. As at 4 April 2017, the total amount owed to UOB was in excess of \$9m, of which approximately \$0.57m was owed by the Appellant and W under the housing loans, with the remainder owed by the Company under the loan facilities, in respect of which the Appellant was the guarantor.

6 On or around 30 November 2016, the Appellant's solicitors wrote to UOB's solicitors to request a one-month extension for the delivery of possession

of the Property to UOB. UOB did not accede to this request; however, it also did not take immediate measures to enforce the Order in respect of the Property. On 23 December 2016, the Appellant, through his solicitors, applied to the court by way of Summons No 6142 of 2016 for a stay of execution of the Order “until 31st March 2017 or such earlier time that the [Company’s shares] [are] sold or otherwise dealt with, with liberty to apply for an extension if an impending sale is in the midst of completion”. W was not a party to the summons. The Appellant’s case, essentially, was that subsequent to the hearing before the AR on 24 August 2016, the Company had received an offer from a prospective investor to acquire some of its shares. The details of the transaction were not available, such as from whom the shares would be acquired and whether the Company would be issuing fresh shares, but in essence, the Appellant’s point was that funds would be injected into the Company pursuant to the contemplated transaction, as a result of which there was a reasonable prospect that the Company would be rehabilitated and would also be able to repay the debt which it owed UOB. The Appellant’s contention was that since he expected that the Company’s indebtedness would imminently be repaid, UOB should not be allowed to take possession of the Property in the meantime.

7 As noted above, the Appellant’s application was heard and dismissed by the AR on 4 January 2017. The Appellant then filed an appeal to the High Court against that decision.

The decision below

8 At the oral hearing before the Judge, counsel for the Appellant sought a stay of execution of the Order until May 2017, which, according to the Appellant, was when the transaction with the prospective investor was expected to be finalised. It may be recalled that before the AR, the Appellant had sought

a stay only until 31 March 2017 “or such *earlier* time that the [Company’s shares] [are] sold or otherwise dealt with, with liberty to apply for an extension if an impending sale is in the midst of completion” [emphasis added]. Hence, the Appellant was in effect seeking a further extension of the stay on appeal to the High Court.

9 The Judge heard and dismissed the appeal on three main grounds.

10 First, the Judge noted that our decision in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 (“*Jannie Chan*”) had clearly established that a creditor was fully entitled to proceed against a guarantor regardless of whether or not the creditor had other remedies which it could also separately enforce against the principal debtor. Thus, as a matter of law, it was irrelevant whether or not there was a reasonable prospect that the Company, the principal debtor in this case, would be able to repay its debt to UOB because UOB was not required to enforce the debt against the Company *before* seeking remedies against the Appellant as the guarantor: see [25]–[26] of the GD.

11 Second, the Judge considered that our decision in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 (“*Hong Leong Finance*”), which was cited and relied on by the Appellant in support of his appeal, was distinguishable. That case stood for the principle that although the court had no jurisdiction to decline a mortgagee’s application for an order for possession, there was one exception to this, in that the court had the jurisdiction to order a short adjournment of the summons for possession or grant a short stay of execution of an order for possession in order “to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him, but not if there is no reasonable prospect of this occurring” (at [12]). The Judge held (at

[29] of the GD) that *Hong Leong Finance* was inapplicable in the present case because:

... [I]t dealt with the direct enforcement of the security between a mortgagor-borrower and a mortgagee-lender, with the mortgagor-borrower being given a short reprieve to satisfy the debt if there was a reasonable prospect of him doing so. In other words, the case did not provide any support for the contention that the guarantor may require the creditor to wait for repayment by the principal debtor before enforcing its rights and remedies against the guarantor because of a reasonable prospect of such repayment. The commercial value of a guarantee would be defeated if the creditor had to look to the principal debtor to discharge its obligations before proceeding against the guarantor.

12 Third, the Judge found that there was, in any event, no evidence that there was a reasonable prospect of the Company being able to satisfy its debt to UOB because although there had been some indications of interest on the part of some parties in acquiring the Company's shares and assets, no firm offer had been made.

Our decision

13 Before us, the Appellant accepted that the previous offers to purchase the Company's shares had fallen through. However, he persisted in contending that there nonetheless remained a reasonable prospect that the Company would be able to repay its debt to UOB because there had been new offers to purchase the Company's *assets*. He also sought leave to amend the relief prayed for in his appeal to a stay of execution of the Order until such time that the sale of the Company's assets was completed. In effect, this was the second extension that the Appellant was seeking, this time, on an open-ended basis. We granted the Appellant leave to make this amendment and also to adduce further evidence on offers said to have been received by the Company to purchase its assets, essentially because counsel for UOB did not object to this. However, even

without having to examine whether the further evidence so adduced indeed established that there was, at the time of the hearing before us, a reasonable prospect that the Company would be able to satisfy its debt to UOB in full if it were afforded an unspecified time to complete the sale of its assets, we were satisfied that the appeal *must* fail because, as a matter of law, the court had no jurisdiction to grant a further stay of execution of the Order. In short, we agreed with the Judge that the Appellant's case was not sustainable in law, although, with respect, we disagreed with certain parts of her reasons for so holding.

14 As noted by the Judge, two decisions of this court, namely, *Jannie Chan* and *Hong Leong Finance*, were relevant in this appeal. We examine each of them below.

15 In *Hong Leong Finance*, the respondents purchased from the Housing and Development Board the leasehold interest in a food stall at a food centre. The purchase was financed by a 15-year term loan of \$115,000 granted by Hong Leong Finance Ltd ("Hong Leong"), which was repayable in monthly instalments. The loan was secured by a mortgage of the leasehold interest in the food stall. Soon after the execution of the mortgage on 29 January 1997, Hong Leong disbursed the term loan, and the respondents began making the monthly instalment repayments from February 1997 onwards. The respondents were reasonably regular in paying the instalments in the earlier months, but from June 1997, they started to face difficulties, and for a time, they paid the instalments for only some months but not others. In January 1998, Hong Leong applied to the court to enforce its security.

16 By the time Hong Leong's application was heard in the High Court in May 1998, the respondents had paid approximately nine months' instalments and were seven months in arrears. The High Court accepted the respondents'

plea that the business at their food stall would improve and that they would then be able to service the monthly instalments under the term loan henceforth. The court accordingly dismissed Hong Leong's application to enforce its security, and instead ordered the respondents to satisfy their debt to Hong Leong on essentially the same terms as had originally been agreed.

17 On appeal, we held, after considering authorities such as *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, that where a mortgagee was entitled to possession under a mortgage, the court had no jurisdiction to refuse an order for possession, whether on terms that the mortgagor keep up with the payments or pay the arrears or otherwise, without the agreement of the mortgagee. We reasoned that the mortgagor had entered into a contract with the mortgagee, and upon the mortgagor defaulting on the terms of that contract, if the mortgagee sought to enforce its rights under the contract, the court had no power to refuse it such relief. The High Court judge had therefore erred in refusing to grant Hong Leong the order for possession. Indeed, in ordering the respondents to satisfy the debt by continuing with the monthly instalments, the judge had effectively taken it upon himself to forgive the respondents' default and deny Hong Leong its contractual rights: see *Hong Leong Finance* at [10] and [14].

18 However, we also noted in *Hong Leong Finance* that there was *one exception* to this general principle. Citing (at [11]) the decision in *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, we held that although, as a general rule, the court had no jurisdiction to refuse a mortgagee an order for possession, it did have the jurisdiction to adjourn a summons for possession or stay the execution of an order for possession for a short period of time in order to afford the mortgagor a chance to redeem the mortgage in full or otherwise satisfy the mortgagee, provided there was a reasonable prospect that

the mortgagor would be able to do so. The following portion of our decision bears reproducing in full, and we have italicised the pertinent parts for emphasis:

12 ... [T]he court only has the jurisdiction to adjourn a summons for possession to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him, but not if there is no reasonable prospect of this occurring. The court's jurisdiction to order a *short* adjournment was expressed to be an exception – indeed *the sole exception* – to the principle that the court has no jurisdiction to decline an order for possession or adjourn the hearing whether on terms of the mortgagor keeping up the payments or paying the arrears, if the mortgagee cannot be persuaded to agree to such a course.

19 It can be seen from the above extract that the court's power to adjourn a summons for possession or stay the execution of an order for possession for a short period of time in such circumstances, and thereby defer or even deny the mortgagee's right to seek *immediate* enforcement of its security, is a very *limited* one. It only arises when there is a reasonable prospect that the mortgagor would be able to *satisfy* its debt to the mortgagee in full, and even then, the court only has the jurisdiction to grant a *short* reprieve. By no means does *Hong Leong Finance* stand for the proposition that the court has a general jurisdiction to deny a mortgagee its right to enforce its security for a prolonged period, much less indefinitely. It is also clear from *Hong Leong Finance* that apart from this limited jurisdiction to grant a short adjournment of a summons for possession or a short stay of execution of an order for possession, *there is no other exception* to the principle that a court cannot refuse an order for possession when a mortgagee is entitled to such an order under the mortgage. On the facts of *Hong Leong Finance*, the respondents in that case had, following the hearing before the High Court, promptly kept to the instalment repayments ordered by the court. When the matter was heard in the Court of Appeal, they further undertook to pay an extra sum over and above each monthly instalment in order to satisfy the arrears. In the light of these circumstances, which we consider very

unusual, the Court of Appeal exercised the limited jurisdiction that we have just alluded to: it granted an order for possession in favour of Hong Leong, but stayed the execution of the order on terms that the respondents continue paying the monthly instalments.

20 We turn next to *Jannie Chan*, a more recent decision of this court. That case involved a company director who had issued a personal guarantee to secure all sums owed under certain loan facilities taken out by the company. When the company defaulted on the repayment of those facilities, the creditor served a statutory demand on the guarantor for the full sum owed by the company; and when she failed to pay, the creditor commenced bankruptcy proceedings against her. The guarantor argued that the creditor could not do so unless it first realised the security that had been provided by the company as the principal debtor. In rejecting this argument, we held (at [36]) as follows:

36 ... It has long been the position that a creditor with several remedies at his disposal can choose whether to enforce and, if so, which one to enforce, at what time, in which order, and in whatever way, subject only to the rule that he cannot recover more than [what] is due to him (see, for example, the decision of this court in *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2015] 5 SLR 1071 ... at [53]–[56]). The election is solely one for the creditor to make. A surety has no right as such to require the creditor to proceed against the principal (or any of the co-sureties), or against any security provided for the debt guaranteed before proceeding against himself (see the English decision of *Ewart v Latta* (1865) 4 Macq 983 (HL) at 987 and 989 *per* Lord Westbury LC).

21 The position at law is therefore clear. A major attraction of obtaining a guarantee is that it simplifies the process of enforcing the primary obligation owed by the principal debtor, and allows a creditor to proceed against the guarantor if it so wishes without first having to proceed against the principal debtor. If the law were that a creditor must first exhaust its remedies against the principal debtor before proceeding against the guarantor, then this would not

only entail rewriting the express terms of the parties' contract, but would also diminish the attractiveness of guarantees as a form of security. There is simply no basis in law for denying the creditor the right to proceed against the guarantor when the availability of multiple routes of recovery is the very contractual basis upon which it agreed to extend the loan facilities to the principal debtor: see *Jannie Chan* at [39]–[40].

22 In our judgment, although *Hong Leong Finance* and *Jannie Chan* addressed two distinct points, they are each conclusive against the Appellant in the present case. *Jannie Chan* is authority for the proposition that where a creditor has several remedies at its disposal, such as whether to realise the security provided by the mortgagor-borrower or that provided by a guarantor, it is free to determine how and in what sequence it will pursue those remedies. There is simply no legal ground for requiring the creditor to pursue one or other of those remedies in a particular sequence when this is not the basis on which the loans were extended to begin with. And *Hong Leong Finance* makes it clear that the court must allow a mortgagee to enforce its rights under a mortgage, subject only to a very limited jurisdiction to adjourn the summons for possession or grant a stay of execution of the order for possession for a *short* period of time if there is a reasonable prospect that the mortgagor would be able to satisfy the debt owed in full.

23 With respect, we think the Judge might have conflated these two distinct points at [29] of the GD, which we reproduced earlier at [11] above. The Judge seemed to have regarded the court's limited jurisdiction to adjourn a summons for possession or grant a stay of execution of an order for possession as being available only when a mortgagee was seeking to enforce security provided by the mortgagor-borrower, but not when the mortgagee was seeking to enforce security provided by a guarantor. In our judgment, there is no basis for such a

distinction. The question in both situations is whether the mortgagee was acting to enforce its rights under the mortgage, and if it was, the court would have no power to prevent the mortgagee from doing so, save for the limited power to adjourn the summons for possession or grant a stay of execution of the order for possession for a short period of time if there was a reasonable prospect that the debt would be satisfied in full.

24 In the present case, *Hong Leong Finance* offered no assistance to the Appellant, not because (as the Judge seemed to have thought) that case was distinguishable as dealing with a mortgagee's enforcement of security against a mortgagor-borrower whereas the present case concerned a mortgagee's enforcement of security against a guarantor, but rather, because whatever short reprieve that the court had the jurisdiction to grant had already been spent. On the authority of *Jannie Chan*, UOB was entitled, as the mortgagee, to elect to enforce the security provided by the Appellant as the guarantor without having to first proceed against the Company. And once UOB chose to proceed against the Appellant by enforcing the mortgage, the court, on the authority of *Hong Leong Finance*, had no jurisdiction to deny UOB from doing so, with the *sole* exception being that it could grant an adjournment of the summons for possession or grant a stay of execution of the order for possession for a *short* period of time if the Appellant could show that there was a reasonable prospect that the debt owed to UOB would be satisfied in full.

25 The present facts simply did not fall within the exception contemplated in *Hong Leong Finance*. The Order was granted more than a year ago on 24 August 2016, and at the time this appeal was heard, the full amount of the debt owed to UOB remained outstanding. No repayment had been made by the Company at all towards satisfaction of the debt. Given these circumstances, the court had no jurisdiction to adjourn the enforcement of the Order any further,

much less to grant the open-ended stay of execution sought by the Appellant in order to enable the completion of the sale of the Company's assets. In effect, if the open-ended stay prayed for by the Appellant were granted, it would result in UOB being prevented from enforcing its rights indefinitely. That would entail our rewriting the terms of the parties' contract, and we simply had no legal basis to do that. On the facts of this case, whether or not there was, at the time this appeal was heard before us, a reasonable prospect that the Company would be able to satisfy its debt to UOB in full had, in the circumstances, become legally irrelevant.

Conclusion

26 For these reasons, we dismissed the appeal and held that UOB was entitled to enforce the Order in respect of the Property without further delay. We awarded the costs of the appeal, fixed at \$20,000 (inclusive of disbursements), to UOB. We also made the usual consequential orders for the payment out of the security furnished for UOB's costs of the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Chong Xin Yi and Wong Jun Weng (Ignatius J & Associates) for
the appellant;
Seah Zhen Wei Paul, Kang Weisheng Geraint Edward and Aditi Ravi
(Tan Kok Quan Partnership) for the respondent.
