Ho Soo Fong and another *v* Ho Pak Kim Realty Co Pte Ltd (in liquidation)

[2021] SGHC(A) 11

Case Number	: Originating Summons No 31 of 2021
Decision Date	: 07 September 2021
Tribunal/Court	: Appellate Division of the High Court
Coram	: Woo Bih Li JAD; Chua Lee Ming J
Counsel Name(s)	: Chen Sixue, Choh Thian Chee Irving and Kor Wan Wen Melissa (Optimus Chambers LLC) for the applicants; Lee Ming Hui Kelvin, Ong Xin Ying Samantha and Tan Zhi Yi Kikki (WNLEX LLC) for the respondent.
Parties	: Ho Soo Fong — Ho Soo Kheng — Ho Pak Kim Realty Co Pte Ltd — (in liquidation)

Civil Procedure – Appeals – Leave

7 September 2021

Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 Under a decision from the High Court on 15 September 2020, both applicants were adjudged to be jointly and severally liable to the respondent (which is a company in liquidation) for $3,590,587 ("the Judgment Debt"). The applicants filed an appeal against that decision and on 7 April 2021, the Court of Appeal heard and dismissed their appeal with costs.

2 The applicants then filed HC/SUM 1871/2021 on 22 April 2021 for a stay of execution ("the Application") of proceedings which had previously been commenced by the respondent by way of HC/WSS 47/2020 in September and October 2020 before the appeal was heard. As a consequence of the respondent's application, two properties at 150 and 150A Braddell Road, Singapore ("the Two Properties") were attached to pay whatever was owing to the respondent under the Judgment Debt. The applicants then obtained a stay of execution pending the outcome of their appeal.

3 After the unsuccessful outcome of their appeal, the applicants filed the Application to seek a further stay of the execution proceedings until 31 October 2021 pursuant to O 47 r 5(*c*) of the Rules of Court (2014 Rev Ed) ("ROC"). That Application was heard and dismissed by a judge of the General Division of the High Court ("the Judge") on 28 June 2021.

4 On 14 July 2021, the applicants filed the present application for leave to appeal against the Judge's decision to the Appellate Division of the High Court alleging that, first, there was a *prima facie* error of law made by the Judge and, second, there was a question of general principle decided for the first time.

5 This judgment is in respect of their application for leave to appeal.

6 On the first ground, the applicants say that the Judge erred in law because they had made a definite proposal to raise funds to pay the Judgment Debt and this should have sufficed to fulfil the requirements for the postponement of sale under O 47 r 5(*c*) ROC. They had outlined their proposal in an affidavit to support the Application. That proposal was to cause their company Invest-Ho Properties Pte Ltd ("the Invest Company") to mortgage 16 units at a project at 22 Hillside Drive, referred to as Bliss@Hillside, to obtain a loan from financial institutions. Based on the authority of a

Malaysian case, *Lim Joo Thong v Koperasi Serbaguna Taiping Barat Bhd* [1998] 1 MLJ 657 ("*LJT*"), they argue that the Judge was wrong to ask whether the applicants had applied for the loan as all that was required was a definite proposal to pay.

7 On the second ground, they argue that there is no reported Singapore case regarding an application for postponement of sale of real property under O 47 r 5(*c*) ROC. Hence, they seek a decision of a higher court to provide guidance.

8 We address both grounds together. Even if there is no reported Singapore case for an application under O 47 r 5(*c*) ROC, it does not follow that the intended appeal raises a question of general principle to be decided for the first time. We stress that an alleged question of general principle should arise from the decision and reasoning of a court below.

9 In our view, the Judge's decision was fact-specific. She did not decide that there must always be an application for a loan before a stay of execution application would be successful. In arriving at her decision, she took into account all the surrounding circumstances which included the following:

(a) The Invest Company that was developing the project did not belong entirely to the applicants as there was another shareholder. There was no evidence that approval from that shareholder had been obtained to apply for the proposed loan.

(b) While the applicants said they were in the process of obtaining a loan since the first supporting affidavit for the Application was filed on or about 28 April 2021, there was no evidence that the applicants had in fact applied for a loan to pay the Judgment Debt. While counsel for the applicants had said that the Covid-19 situation had made it harder to obtain a loan, there was no objective evidence of this.

(c) As counsel for the applicants said that the units at the project were currently being put on sale, then the units could equally be sold to pay the Judgment Debt since the applicants had said that the Invest Company was "their" company.

10 In other words, the Judge was not satisfied with the evidence of the applicants and her decision does not raise a question of general principle. We add that we agree with the respondent's arguments that *LJT* is not authority for the proposition that a definite proposal to raise money to pay is sufficient to obtain an order for a stay of execution. In that case, the main reason relied upon for an application to postpone a public auction of real property to pay a debt was that the debtor's counterclaim had not been dealt with in arbitration. The debtor in that case appeared to have relied on O 47 r 7(*c*) of the Malaysian Rules of the High Court 1980 (PU(A) 50/80 as amended by PU(A) 332/81) (M'sia), which is in *pari materia* with our O 47 r 5(*c*) ROC as a secondary reason for his application.

11 The Malaysian Court of Appeal in *LJT* merely said that it could not find any definite proposal by the debtor to raise money and that a general undertaking given by the debtor was insufficient to fulfil the specific statutory requirements under O 47 r 7(*c*) for the sale to be postponed. It did not say, as the applicants were suggesting, that a definite proposal *per se* was sufficient. Obviously, as the respondents countered, the court would have to consider whether any such proposal is supported by concrete evidence and the likelihood of the proposal succeeding in all the circumstances. The so-called general principle did not arise from the decision of the Judge but from the misguided interpretation of *LJT* by the applicants.

12 We add that the applicants already knew that the respondent was serious about enforcing its

rights. After judgment was rendered on 15 September 2020, the respondent had taken out execution proceedings, for which the applicants had already applied once before for a stay of execution. The stay was granted pending the outcome of their appeal to the Court of Appeal. If they were *bona fide* about paying the Judgment Debt, they ought to have made plans, before the appeal was heard, to obtain funds to pay the respondent in the event that their appeal was not successful, instead of simply waiting for the outcome before starting to make plans. There was no evidence of such prior plans having been made. Furthermore, the fact that they said they wanted to apply for a loan using the 16 units in the project as security but had still not done so by the time of the hearing of the Application on 28 June 2021 was further evidence that they were not acting *bona fide*. The reference to the Covid-19 situation was a poor excuse given orally from the bar. It was obvious that the applicants were simply delaying the payment of the Judgment Debt. There was clearly no error by the Judge, let alone an error of law.

13 We dismiss the application for leave to appeal. The applicants are to pay the respondent costs of the application fixed at $4,000 inclusive of disbursements. The usual consequential orders apply.