Re Loh Lee Keow and Another
[2000] SGHC 196

Case Number : B 314/2000, 315/2000

Decision Date : 26 September 2000

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Lisa Chong (Lisa Chong & Partners) for the debtors; Andrew Chan and Desmond Ho (Allen & Gledhill) for the creditors

Parties : —

Words and Phrases – "Security" – s 63(1), (2) Bankruptcy Act (Cap 20, 2000 Ed) – Bankruptcy Rules (Cap 20, R 1, 1996 Ed) r 94(5),r 98(2),r 101(2), Form 2

: In the appeals in the two bankruptcy proceedings before me, Keppel TatLee Bank Ltd (`the Bank`) granted a facility to Hanley Pte Ltd (`the Borrower`). The facility was secured by a mortgage over a property which was owned by the Borrower.

The debtors which are the subject of the bankruptcy proceedings were guarantors (`the Guarantors`) of the liability of the Borrower.

It was not in dispute that the Guarantors were owing moneys to the Bank.

However, the statutory demand issued against each of the Guarantors did not mention the mortgage and it appeared that the value of the mortgaged property which had still not been sold at the time of the hearing before me might be equivalent to or exceed the debt.

Accordingly two questions arose:

(a) Whether each of the statutory demands against the respective Guarantors ought to be set aside because it did not mention the mortgage or because the value of the mortgaged property might be equivalent to or exceed the debt.

(b) Whether, aside from the statutory demand, the court ought not to have made a bankruptcy order against each of the Guarantors in view of the mortgage.

The questions arose because of certain provisions in the Bankruptcy Rules (Cap 20, R 1, 1996 Ed) (`the Rules`) and Bankruptcy Act (Cap 20, 2000 Ed) (`the Act`).

Rule 94(5) states:

> *(5) 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. [Emphasis is added.]*

Rule 98(2)(c) states:

(2) The court shall set aside the statutory demand if -

*(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; [Emphasis is added.]*

These provisions gave rise to the first question since at first blush it appeared that the statutory demand should have stated the nature and value of the mortgaged property. Also, if its value might be equivalent to or exceed the debt, then it seemed that the court ought to set aside the statutory demand under r 98(2)(c).

Furthermore, s 65(1)(a) states:

*(1) The court hearing a **creditor`s** petition shall not make a bankruptcy order thereon unless it is satisfied that -*

*(a) the debt or any one of the debts in respect of which the petition is presented is a debt which, having been payable at the date of the petition, has neither been paid nor **secured** or compounded for; ... [Emphasis is added.]*

Again this appeared at first blush to suggest that since the debt was secured by the mortgage, then the court ought not to have made the bankruptcy orders. This gave rise to the second question.

In the interpretation provision of the Act, ie s 2, there is no definition of `security` or `security for the debt` or `security in respect of the debt` (which are found in rr 94(5) and 98(2)(c). There is also no definition of `secured` (which is found in s 65(1)(a)).

However, there is a definition of `secured creditor` in s 2. It states that:

*"Secured creditor", **in relation to a debtor**, means a person holding a mortgage, pledge, charge or lien **on or against the property of the debtor** or any part thereof as security for a debt due to him from the debtor. [Emphasis is added.]*

It was not disputed that as the definition of `secured creditor` vis-.-vis a debtor is restricted to a person holding security on or against the property of that debtor, it does not apply to the Bank vis-.-vis the Guarantors as the mortgage was not on or against the property of the Guarantors, but on the property of the Borrower.

However, the phrase `secured creditor` is not found in rr 94(5) and 98(2)(c) or s 65(1)(a).

Therefore I had to consider other provisions in the Act and the Rules for assistance.

Section 63(1) and (2) state:

(1) Where the petitioner is a secured creditor of the debtor, he shall in his petition -

(a) state that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of the other creditors of the bankrupt; or

(b) give an estimate of the value of his security, in which case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

*(2) Where a petitioner who is a secured creditor of the debtor fails to disclose his **security** in the petition, he shall be deemed to have given up his **security** for the benefit of the other creditors of the debtor and upon the making of a bankruptcy order -*

*(a) he shall not be entitled to enforce his **security** against the estate of the bankrupt or to retain any proceeds from the realisation of such **security** ; and*

*(b) he shall execute such document of release as is required by the Official Assignee or account and pay over to the Official Assignee all proceeds from any realisation of this **security** .` [Emphasis is added.]*

However r 101(2) which also pertains to a creditor`s petition states:

*(2) If the **creditor** holds any property of the debtor or any **security** for the debt, he must account for such assets or security in the petition and, in particular, provide the following information:*

*(a) a description of the assets or **security** held; and*

*(b) the value of the assets or **security** as at the date of the petition,*

*and the amount claimed in the petition shall take into account such assets or **security** . [Emphasis is added.]*

Therefore although s 63(1) and (2) and r 101(2) deal with the creditor`s petition, s 63(1) and (2) uses the words `secured creditor` and `security` whereas r 101(2) uses `creditor` and `security`.

The standard form of the creditor`s bankruptcy petition in Form 2 also does not use the phrase `secured creditor` but `security on the debtor`s estate` and `security`.

Paragraph 5 of Form 2 states:

*I/We do not, nor does any person on my/our behalf, hold any **security on the debtor`s estate**, or any part thereof, for the payment of the above-mentioned sum.*

OR

*I/We hold **security** for the payment of [part of] the above-mentioned sum. I/We will give up such security for the benefit of all the creditors in the event of a bankruptcy order being made.*

OR

*I/We hold **security** for the payment of part of the above-mentioned sum and I/we estimate the value of such **security** to be $. This petition is not made in respect of the secured part of my/our debt. [Emphasis is added.]*

I was and am of the view that s 63(1) and (2), r 101(2) and Form 2 must be interpreted as far as possible in a consistent manner. A similar approach was adopted in the case of **Re A Debtor (No 310 of 1988)** [1989] 2 All ER 42[1989] 1 WLR 452, although the provisions being considered there are not exactly the same as those before me.

Furthermore, I was and am of the view that if there is any inconsistency between s 63(1) and (2) on the one hand and r 101(2) and Form 2 on the other hand, then s 63(1) and (2) must prevail as it is part of primary legislation whereas r 101(2) and Form 2 are part of secondary legislation.

However, I concluded that there is no inconsistency.

Under s 63(1) and (2), it is clear that the creditor`s petition only needs to mention security on the property of the debtor who is the subject of the petition and, correspondingly, the petition does not have to mention security from a third party even if that third party is the principal debtor, as was the case before me.

Accordingly, the phrase `security` in r 101(2) does not mean any security whatsoever but means `security on the property of the debtor` (or `security of the debtor`).

As for para 5 of Form 2, the starting qualification to security `on the debtor`s estate` should also apply to the word `security` in the rest of para 5 of Form 2, ie `security` means `security on the property of the debtor`. This would reinforce the point that `security` in r 101(2) also means security on the property of the debtor.

Following from that, there is no reason why `security` in rr 94(5) and 98(2) should be construed inconsistently from the same word in r 101(2) and Form 2.

Furthermore, to construe `security` in rr 94(5) and 98(2) to be security on any person`s property would mean that the statutory demand must refer to a wider class of security than the creditor`s petition. This cannot be right.

Accordingly `security` in rr 94(5) and 98(2) should be construed to mean `security on the debtor`s property`.

This leaves s 65(1)(a) to be construed. This provision has been set out above.

I was and am of the view that as s 65 pertains to the hearing of a creditor`s petition and as there is no requirement to state any security in such a petition unless the security is on the property of the debtor who is the subject of the petition, then it is logical for `secured` in s 65(1)(a) to be construed accordingly, ie the court is not to make a bankruptcy order if it is satisfied, inter alia, that the debt is secured by security on the property of the debtor, but the court should disregard security provided by a third party.

It does not make sense that while the creditor`s petition does not have to mention a security on the property of a third party, the court should be obliged to take the third party`s security into account in deciding whether to make a bankruptcy order on hearing the petition.

Furthermore, if the court hearing a creditor`s petition is obliged to take into account security on the property of a third party, there is no provision in the Act or the Rules stipulating how the third party`s security is to be dealt with in the petition.

It may seem unfair that where the borrower (assuming an individual) has provided, say, a mortgage to secure the debt, the borrower cannot be made a bankrupt unless the creditor gives up the mortgage or claims the balance only of the debt after deducting the estimated value of the mortgage, whereas a guarantor of the borrower`s liability can still be made a bankrupt without requiring the creditor to take the same steps. However, that appears clearly to be the intention of the legislation.

There was one other provision which I considered. Section 64(1) and (2) state:

> *(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.*

I was and am of the view that the existence of security from a third party, ie the principal debtor, does not per se constitute `sufficient reason` to stay the proceedings on the petitions, otherwise that would negate the scheme of things I have outlined.

Accordingly I decided that the bankruptcy orders were validly made and, correspondingly, the statutory demands ought not to be set aside.

Outcome:

Appeals dismissed.