Goh Chin Soon and Another v Vickers Capital Ltd (fka St. Capital Ltd) [2000] SGHC 281

Case Number : OS 111/2000

Decision Date : 30 December 2000

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Anthony Netto and Ramesh Appoo (Netto & Netto) for the plaintiffs/appellants; Kenneth Tan SC (as counsel) and Julian Chang (Ang Tan & Chang) for the defendants/respondents.

Parties : Goh Chin Soon; Another — Vickers Capital Ltd (fka St. Capital Ltd)

Credit and Security – Mortgage of real property – Mortgagee's power of sale – Duty of care owed by mortgagee to mortgagor and guarantors – Duty to obtain best possible price – Mortage placing substantial advertisement for sale of property and accepting only offer at hand – Whether duty breached – Whether agent required to sell property

Insolvency Law – Bankruptcy – Statutory demand – Application to set aside – Cross-demand alleged – Amount of cross-demand less than debt claimed in statutory demand – No grounds for setting aside statutory demand – Bankruptcy Rules r 98(2)(a)

: An application was filed by the plaintiffs, Goh Chin Soon and Goh Teck Beng on 22 September 2000, seeking to set aside the statutory demands dated 28 August 2000 issued against them by the defendants, Vickers Capital Ltd. The statutory demands were in respect of an outstanding sum due and owing to the defendants by the plaintiffs following a judgment entered against the plaintiffs and one other party on 6 October 1998. The plaintiffs` application was based on a perceived cross-claim for negligence against the defendants. The deputy registrar who heard the application on 30 October 2000 refused it. The plaintiffs appealed against the decision and on 14 November 2000 after hearing arguments, I dismissed the appeal. Later, the plaintiffs wrote to me for further arguments which were heard by me on 29 November 2000. In the event, the plaintiffs` appeal remained dismissed with costs. The facts surrounding the events follow.

Background facts

The defendants, admittedly an institution authorised to extend loan and credit facilities to their customers in the course of their business, extended a loan facility of S$25m to one of their customers, Micasa Development Pte Ltd (Micasa). The loan facility was secured by the mortgage of a property belonging to Micasa (known as 61, 63, 65 and 67 Lorong G Telok Kurau, Singapore, containing a site area of about 4,332.3 sq m). The plaintiffs who were the directors of Micasa provided in this connection a joint and several guarantee to the defendants to underpin Micasa`s several obligations.

Following Micasa`s default, the defendants instituted proceedings against Micasa as well as the plaintiffs on 6 August 1998 in Suit 1333/98. Although at that stage, Micasa and the plaintiffs were legally represented by the same set of solicitors, Haridass Ho & Partners, they had, nonetheless, allowed judgment in default to be entered against them for a sum of $25,973,917.84 with interest thereon at 18% per annum from 6 August 1998 until full payment and costs on an indemnity basis.

The judgment debt, not having been satisfied, the defendants next moved to obtain vacant possession of the said property and in this connection commenced OS 1268/99. After an initial adjournment on 15 September 1999, the court finally ordered delivery of vacant possession of the

property but with a stay until 6 October 1999. Later, Micasa applied for and was granted an extension of the stay until 4 December 1999. This was the final stay. Thereafter, upon failure by Micasa to deliver vacant possession of the property by the stipulated deadline, a writ of possession was taken out by the defendants on 7 December 1999 and vacant possession of the property was then delivered to the defendants by the bailiff, Supreme Court on 21 December 1999.

All this while and for that matter even before the defendants obtained vacant possession of the property, there were attempts by Micasa to sell the property. In this regard, there was a tender exercise conducted through a well-known firm of real estate agents, Jones Lang Wooton in September 1998. The result was dismal. Jones Lang Wooton reported to Micasa in their letter dated 30 September 1998 that although they had reached out to more than 800 prospective buyers, and mounted an extensive advertising campaign, no bid was received. The feedback they obtained was that the value of the property was perceived to be only between $6.5 and $9m.

Sometime on or about 19 August 1999 - four months prior to the defendants obtaining vacant possession of the subject property - Micasa`s then solicitors Haridass Ho & Partners wrote to the defendants. They said in that letter that their clients were about to enter into an agreement to sell the property for S$24.5m. The sale, however, did not go through. On 31 August 1999, Haridass Ho & Partners again wrote to the defendants` solicitors, stating this time that the sale of the property for $24.5m had been aborted and their clients were actively negotiating with another party to sell the property for S$24m. The result was again cheerless.

It was around this time, the defendants commenced OS 1268/99 for delivery of vacant possession of the property. Micasa would not let the property go. They engaged a fresh set of solicitors, this time Engelin Teh & Partners and vigorously resisted the defendants` application. Their main contention in that proceedings was that the defendants were in breach of a verbal agreement with Micasa to allow the latter to develop the property, using a contractor approved by the defendants and in return Micasa would pay $100,000 per month to the defendants until such time when Micasa was in a position to repay all the outstanding loans. Micasa however, did not prevail in their arguments resulting in the final delivery of the property to the defendants on 21 December 1999. There was no appeal in this regard by Micasa.

Following delivery of vacant possession of the property, the defendants, noting that Micasa had not come up with anything concrete, proceeded to advertise the property for sale. In this connection, they inserted two large advertisements in The Straits Times of 23 December and 27 December 1999. The said advertisements stated that it was a mortgagee sale and invited tenders for a `freehold residential site of 4,332.3 square metres.` The closing date of the tender was 10 January 2000.

It would be relevant at this stage to add that a few days before the closing date of the tender, the defendants obtained a desktop valuation from a firm of international property consultants `FPD Savills` on 6 January 2000. The valuation report stated that the open market value of the property as of 6 January 2000 was S$23m and its forced sale value was S$20.5m.

The upshot was that there was only one tenderer, Deeptro Pte Ltd who made an offer to purchase the property for S$24.5m. The offer was accepted by the defendants and the sale of the property was eventually completed on 12 April 2000.

Following the sale and after taking into account the amounts realised, the defendants issued their statutory demands, pursuant to s 62 of the Bankruptcy Act, to each of the plaintiffs on 28 August 2000 and served them on 10 September 2000. Under the said statutory demands, a sum of S$6,919,544.68 was said to be outstanding.

On 22 September 2000, the plaintiffs through their present solicitors Netto & Netto applied to the court to set aside the statutory demands. In the result, the plaintiffs` application was dismissed by the learned deputy registrar. I upheld his decision on appeal for the reasons hereinafter appearing.

Plaintiffs` arguments

The thrust of the submission by the plaintiffs` counsel was that the plaintiffs had a valid cross-claim against the defendants for negligence. He argued that the defendants had been negligent in the way they caused the property to be sold. They argued that the defendants had failed in their duty to obtain the best possible price or market price for the plaintiffs. In particularizing the alleged negligence, plaintiffs` counsel stated that the defendants had (i) failed to appoint professional estate agents to undertake the sale; (ii) failed to consult those agents on how best to sell the property; (iii) failed to obtain proper valuation reports or consult professional valuers before putting the property up for sale; and (iv) finally failed to advertise and market the property professionally or properly. Reliance was based on **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949 and **Tse Kwang Lam v Wong Chit Sen** [1983] 3 All ER 54[1983] 1 WLR 1349.

Plaintiffs` counsel further submitted that as at April 2000 when the sale was completed, the outstanding debt owing to the defendants was less than $28m and the property could have been sold for $28m or more at the time the property was agreed to be sold. He submitted there was a `genuine triable` issue which merited the court to set aside the statutory demands pursuant to r 98 of the Bankruptcy Rules.

To give weight to his contention, counsel for the plaintiffs invited the court`s attention to a report dated 27 October 2000 from a firm of international property consultants, Henry Butcher Appraisal Group Pte Ltd, to persuade the court that the price of $24.5m obtained by the defendants for the subject property did not reflect the actual market value of the property as of the date of the sale of the property. Some of the criticisms contained in Henry Butcher`s report were best set out in their own words and read as follows:

> *(a) The advertisements*
>
> *The first advertisement was placed in **The Straits Times** on 23 December 1999 and the second, on 27 December 1999 for the Sale By Tender which closed on 10 January 2000. There was maximum of 19 days from the date of advertisement to the close of tender.*
>
> *In our opinion, the time given to publicise the sale was rather short for a transaction of more than $20m. The presentation of the advertisement and the section in which the advertisement was placed were also odd. Any marketeer will want to present the product in the best light, highlighting the salient points of the property and not that it is a mortgagee`s sale. It gives the targetted audience the impression that the owners are in trouble and the property can be bought at a substantial discount.*
>
> *The advertisement should also appear in the property pages where the targetted audience were expected to look for them and not in the notice page, next to the bankruptcy notices.*

(b) The timing of the marketing campaign

We are of the opinion that no marketeer can ever pick a worse time to market the property than from 23 December 1999 to 10 January 2000 because that period comes once in a thousand years.

...

(c) The valuation

To guide the mortgagee on the reasonable offer to accept, a desktop revaluation dated 6 January 2000 was requested from Ms First Pacific Davies (Singapore) Pte Ltd.

Having perused the said valuation report, we observed certain fundamental errors in facts communicated to the valuer as follows:

(1) the purpose of valuation should be for `sale` and not for `mortgage` purposes.

(2) the valuation was based on `details outlined in the report prepared by Knight Frank Pte Ltd dated 29 March 1996` furnished by Vickers Capital Limited and the mortgagee had apparently, not communicated to the valuer that since then the owners have obtained planning approval for the property with saleable areas. ...

...

In this instance, the manner of the sale of the property was poorly conducted. As such, we also have to conclude that the price of $24,5000,000 did not comply with the prerequisites of `Market Value`.

The court was also told that on 11 November 2000, just three days before the hearing of the appeal before me, the plaintiffs had commenced a fresh set of proceedings against the defendants. An affidavit deposed, this time by yet another solicitor - from one GKS Narayanan & Co - revealed that in the proposed action Micasa and the plaintiffs were alleging breach of contract as well as negligence on the part of the defendants in relation to the same subject property.

Defendants` arguments

The chief aspect in the reply by the defendants` counsel was that the plaintiffs` present arguments both on the grounds of alleged negligence and breach of an alleged verbal agreement were nothing more than a legal ploy to delay execution proceedings currently being pursued by the defendants. He submitted that the allegation concerning sale at an under value seemed to have surfaced only after the defendants had issued the statutory demands. Counsel for the defendants added that the timing

of yet another suit by the plaintiffs against the defendants was a blatant attempt by the plaintiffs to bolster an otherwise hollow argument. Counsel in this regard submitted that the issue concerning the so-called breach of agreement was raised and argued by the plaintiffs in OS 1268/99 and in the event rejected by the court and that no appeal was lodged in respect of that decision.

As regards the allegation concerning the sale at below market value, defendants` counsel highlighted the aspect that the property had in fact been in the market for a long time with no prospective buyers in sight and that it was finally sold by public tender, that too after obtaining a fresh valuation report from property consultants `FPD Savills` in whose opinion the value of the property was $24.5m at the upper end. Counsel contended that the present averments of the plaintiffs, given the context, were without substance and urged the court to dismiss the plaintiffs` appeal.

Conclusion

The main contention raised by plaintiffs` counsel was that the defendants did not obtain the best possible price for the property; there was no proper valuation report; and that the defendants had not consulted professional valuers before putting the property up for sale. The plaintiffs` counsel even flayed the not-so-insignificant advertisements put up by the defendants. He said that the defendants should not have mentioned in the advertisements that it was a mortgagee`s sale, for according to counsel, a mortgagee`s sale would always result in lower bids being received. This criticism, to say the least, was found by me to be somewhat disingenous for in my view there was nothing sinister or intrinsically injudicious in calling a spade a spade. After all, such an advertisement, on the contrary, might well have generated more interest amongst property developers.

Plaintiffs` counsel pinned his arguments to the principles enunciated by the English Court of Appeal in ***Cuckmere*** (supra). In that case, the Court of Appeal laid down the principle that a mortgagee, in exercising its power of sale, owed the mortgagor a duty to take reasonable care to obtain the true market value of the mortgaged property at the date on which it decided to sell it (per Salmon LJ at p 968H to 969A). The facts in ***Cuckmere*** were such that when the mortgagees embarked on their attempt to sell the mortgaged property by public auction, the firm of estate agents and auctioneers who advertised the land wrongly publicised the property as having had planning approval to build only 33 detached houses and in the event the property was sold for Â£44,000. But the fact was that the mortgaged property had also planning approval for constructing 100 flats/maisonettes and the evidence at the hearing established that if not for the error, the property would have fetched at least Â£65,000. In the circumstances, the Court of Appeal held that the mortgagee, through its agents was negligent.

The next case relied on by counsel for the plaintiffs was **Tse Kwong Lam v Wong Chit Sen** [1983] 3 All ER 54[1983] 1 WLR 1351 (PC). In that case, on the facts, the Privy Council held that the mortgagees had not shown that they had taken reasonable steps to obtain the true market value; sale by auction itself did not prove that the true market value had been obtained; the mortgagees had failed to consult estate agents about the method of sale; and the conditions of the sale by auction did not disclose sufficient details of the property (see **Tse Kwang Lam** [1983] 3 All ER 54[1983] 1 WLR 1351).

The primary issue to be decided in the case at hand was whether the defendants had been negligent vis a vis Micasa as well as the plaintiffs. As regards the duty of care, it was well-settled that a mortgagee owed a duty not only to himself but also to the mortgagor as well as to the guarantors involved. In this regard, reference need be made only to the decision in **Standard Chartered Bank v Walker** [1982] 3 All ER 938[1982] 1 WLR 1410 where Lord Denning MR at [1982] 3 All ER 938, 941;

[1982] 1 WLR 1410, 1415 after making reference to ***Cuckmere*** (supra) said that a mortgagee owed a duty not only to himself, to clear off as much of the debt as he could, but also to the mortgagor so as to reduce the balance owing as much as possible and also to the guarantor so that the latter would be held liable for as little as possible on the guarantee.

Now, as I traversed through the terrain of the dealings and inter-action between the defendants of the one part and Micasa as well as the plaintiffs of the other part, since about the time the defendants instituted proceedings on 6 August 1998 in Suit 1333/98, it was apparent that as late as 31 August 1999, Micasa themselves had not pitched the property for more than S$24.5m. This was evident from Micasa`s former solicitors` letter dated 31 August 1999 (see p 58 of Heng`s affidavit filed on 13 October 2000). In fact, in that letter Micasa`s solicitors were unequivocal in stating that their clients were then actively pursuing another purchaser to sell the property for only $24m.

Then came OS 1268/99. This was instituted by the defendants on 13 August 1999 for the delivery of vacant possession of the property. Even at this point of time, Mr Goh Chin Soon (the first plaintiff in the present proceedings) had seen right to refer in para 33 of his affidavit affirmed on 13 September 1999, to a valuation of the property provided by Knight Frank Pte Ltd to one Grandlink Pte Ltd, the holding company of Micasa and mention that the indicative value of the property was S$23 to S$24m only.

It was beyond dispute that as of 6 October 1999 when the court made an order for the delivery of vacant possession of the subject property to the defendants or for that matter as of 21 December 1999 when the bailiff served the writ of possession on Micasa and caused the defendants to be given vacant possession of the property, there was not a single offer to purchase the property even at $24m as stated by Micasa`s previous solicitors. If there was any offer in that region as of the dates mentioned, in all probabilities, neither Micasa nor the plaintiffs might have let the property be placed under mortgagee`s sale.

As the events wound their way up, the defendants in order to realise their security put the property up for sale by tender. The advertisements were by no means insubstantial. The size and the bold prints the advertisements carried would have attracted many a prospective developer`s attention - including the plaintiffs who were reportedly in the business of property development. Yet the court was informed that the plaintiffs who were admittedly in property development business to boot, curiously failed to notice this advertisement. Be that as it may, the sad fact was that the advertisements brought forth only one reply that was from the said `Deeptro` Pte Ltd. Their offer was $24.5m which was well above the valuation figure given to the defendants by FPD Savills, a firm of international property consultants. What then were the defendants supposed to do? Wait indefinitely for the market to reach greater heights or engage in further unprofitable legal wrangles with the plaintiffs? In my view, the defendants acted very properly in accepting the only offer at hand which was higher than the price the plaintiffs themselves were going to get only a few months ago.

Plaintiffs` counsel argued that the employment of an estate agent was an ought for such sale. However, he readily conceded, when pressed, that there was no authority for such a sweeping proposition, save for an observation in the judgment of the Privy Council in **Tse Kwong Lam** [1983] 1 WLR 1349(Unreported) , where the Board observed, in relation to the facts of the case, that the mortgagee in that case could have consulted estate agents about the method of sale and the method of knowing the best price. But in the case before us the property was earlier put up for sale through Jones Lang but no bid was received. Later, as late as 31 August 1999, the plaintiffs despite their vigorous efforts could not sell the property even for $24m. In the premises, the court could not agree that there was anything negligent, unreasonable or unseasonable in the defendants` endeavours to

sell the property by other means, without having to incur an extra one or one and a half per cent fee normally chargeable by the estate agents.

The next point canvassed by plaintiffs` counsel was that the defendants should have obtained a valuation before the advertisement was inserted on 23 January 2000 and that the valuation obtained three days before the closing date of tender was simply not good enough. I was amazed by this submission. Suffice it if I said that this submission owed nothing to reason or logic.

As regards the argument whether the property could have been sold for much more than $24.5m, the plaintiffs contended that the value of the property was $28m according to their valuers. In this respect, plaintiffs` counsel referred me to a desktop valuation report dated 23 October 2000 as well as another report dated 29 November 2000 from one CKS` Property Consultants who said that the value of the property as of 31 December 1999 was $28m. The said reports, however did not seem to provide any comparable sale prices. By contrast, Knight Frank in their detailed report on 10 November 2000 stated that the price of S$24.5m obtained in the sale by tender of the subject property in December 1999/2000 was a fair reflection of the open market value of the property at that time.

Reviewing all the facts, I came to conclude that there was very little to discern that the defendants had been precipitate or had acted unreasonably or without due regard to the interests of both the mortgagors as well as the guarantors in this case. The allegations of negligence, in my opinion, appeared to fly in the face of the plaintiffs` own solicitors` letter dated 31 August 1999 that the plaintiffs could not find a buyer as of that date and their further admission that the property was hovering between only $23 and $24m as of 13 September 1999 - as averred by the first plaintiff in para 33 of his affidavit in OS 1268/99.

The suggestion by plaintiffs` counsel that the property prices had skyrocketed between August 1999 and January 2000 was in my view not borne out by any satisfactory evidence. I found the reports submitted by the plaintiffs somewhat scanty, bereft of supporting factors and in a way angled. After review, I was persuaded to accept the figures provided by FPD Savills as well as the latest report dated 10 November 2000 from Knight Frank, the very people who gave an opinion to the plaintiffs` holding company Grandlink Pte Ltd on 20 August 1999 - which was ironically relied on as late as 13 September 1999 by the plaintiffs in OS 1268/99.

In my evaluation, the defendants had done all they could to obtain the best possible price and the price finally obtained could not, in the circumstances be regarded as not the best possible price obtainable at the relevant time. In the circumstances, I could not find any `genuine` triable issue - I underscore the word `genuine` - which would have justified my setting aside the statutory demands issued.

There was yet another aspect which seemed to tilt the balance in favour of the defendants. Rule 98 2(a) of the Bankruptcy Rules provides that the court shall set aside the statutory demand if the debtor appears to have a valid counterclaim, set-off or cross-demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demands.

Counsel for the defendants in this context, invited my attention to the aspect that as of 17 January 2000, the outstanding sum as reflected in the statutory demands (see p 172 of the plaintiffs` first affidavit) was $30,091,244.70. Counsel argued even if the property were to be sold for $28m as being alleged by the plaintiffs, there was still a shortfall of over $2m. In the premises, the defendants` counsel contended that the plaintiffs` so-called cross-demand would not have equaled or exceeded the amount stated in the statutory demands and therefore the application to set aside the statutory demands was flawed from the outset. My attention in this regard was invited to the case of **AIB**

Finance Ltd v Debtors (Unreported) . The facts of this case as set out in the headnotes of the report are as follows:

The defendants were the registered proprietors of premises which they ran as a post office, newsagent and off-licence. In October 1988 they entered into a mortgage with the plaintiff bank under the terms of which both the premises and the goodwill of the business were charged by way of security for a loan of Â£160,000. By 1994 they had ceased making payments and a restructuring of the loan was agreed. In September 1995, after further defaults in payments, the bank obtained an order for possession and judgment for arrears amounting to Â£212,806.72. The property was sold in April 1996 for Â£43,500 and statutory demands were served by the bank for the balance of the judgment debt which amounted to Â£143,951.42. The defendants applied to set aside the statutory demands on the grounds that if the premises had been sold as a going concern the proceeds of sale would have amounted to approximately Â£180,000. They did not however adduce any valuation evidence to support that assertion. The district judge allowed the application, holding that there was an arguable case that the bank had been negligent in failing to ensure that the business was preserved as a going concern and that the defendants had a substantial counterclaim. However, she failed to take account of whether the amount of the counterclaim equalled or exceeded the amount of the debt as required by r 6.5(4)(a) of the Insolvency Rules 1986, (which is similar to our r 982(a)). The bank appealed, contending that it had owed no duty in law to maintain the business because doing so involved taking some degree of risk. At the hearing of the appeal the defendants applied to place new valuation evidence before the court.

On the issue concerning the cross-claim, Carnwath J after noting that although the defendants had an arguable counterclaim, held that it was not one which had the prospect of being found to equal or exceed the amount of the statutory demand. Accordingly, Carnwath J allowed the appeal of the mortgagee/plaintiffs. The defendants appealed but their appeal failed and the Court of Appeal (see [1998] 2 All ER 929) affirmed Carnworth J`s decision except for the aspect that it did not support him as regards the finding that there was an arguable claim.

In another English case, **TSB Bank plc v Platts** [1998] 2 BCLC 1, the English Court of Appeal at p 10 approved the approach adopted by Carnwath J in ***AIB Finance*** (supra) and said:

> *... We cannot see why the bankruptcy court, if there was material before it enabling it to do so, should not evaluate the maximum which the debtor could recover under the cross-claim; and if the net sum after deducting that maximum value of the cross-claim from the debt was Â£750 or more we do not see why it should not be able to make a bankruptcy order. That, as we understand it, was the approach adopted by Carnwath J in* ***AIB Finance Ltd v Debtors*** *[1997] 2 BCLC 354[1997] 4 All ER 677*

My conclusion and determination after reviewing all the facts and the learning referred to me was that the defendants had not acted in derogation of their duties to obtain a best possible price for themselves, the mortgagors as well as the guarantors, ie the plaintiffs in this proceedings. The allegation of negligence against the defendants in my view seemed to be perched on quicksand. It was also my view that the present application was no more than an exercise to obfuscate the legitimate attempts by the defendants to recoup their outstandings. At any rate, insofar as the alleged cross-demand did not seem to equal or exceed the amounts stated in the statutory demands there was no justification for this the court to exercise its powers under r 98(2)(a) of the Bankruptcy Rules. In the circumstances, I dismissed the appeal with costs. I must however, hasten to add that my finding here in this case was not in any way intended to fetter the evaluation and determination

of the judge hearing the new suit instituted recently by the plaintiffs.

Outcome:

Appeal dismissed.