Re Sogo Department Stores (S) Pte Ltd
[2001] SGHC 70

Case Number : OP 14/2000

Decision Date : 09 April 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Chan Hian Young and Adrian Wong (Allen & Gledhill) for Hinckley Singapore Trading Pte Ltd; Lee Eng Beng and Melissa Lee (Rajah & Tann) for the Judicial Managers

Parties : —

Agency – Agency of necessity – Whether moneys from third parties held on trust by agent for principal- Whether circumstances gave rise to trust relationship – Intention of parties and arrangements made with regard to moneys so received

Companies – Judicial management – Leave to commence proceedings against company in judicial management – Whether applicant able to establish proprietary right to moneys claimed

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Background

I had before me an application by Hinckley Singapore Trading Pte Ltd (`Hinckley`) for leave from the court under s 227C(c) or s 227D(4)(c) of the Companies Act (Cap 50, 1994 Ed) (`the Act`) to determine the following issue between Hinckley and Sogo Department Stores (S) Pte Ltd (`Sogo`), a company under judicial management, namely: whether moneys collected by Sogo, on behalf of Hinckley, pursuant to the concessionaire agreement dated 1 June 1990 between Sogo and Hinckley, were held on trust by Sogo for Hinckley.

As is commonly known, Sogo operated a department store in the Raffles City Complex for many years. In June 1990, Sogo agreed to grant Hinckley, a company which dealt in the import and sale of Polo Ralph Lauren goods (basically clothing and accessories)(`the goods`), a concession to carry on the retail sale of these goods in an area of 72m2 or thereabouts in the department store. This concession commenced on 1 June 1990 and continued until 31 July 2000.

The relationship between the parties was governed by the written agreement dated 1 June 1990. This provided that Hinckley was to use the appropriated area of 72m2 for the sole purpose of exhibiting and selling the goods. In respect of goods sold by Hinckley, the agreement was that the customers would pay the purchase price directly to Sogo`s cashiers stationed within the department store. The agreement also provided that Hinckley would pay Sogo as commission a sum equivalent to 20% of the total net monthly sales of Hinckley`s goods. The monthly commission was to be deducted by Sogo from the moneys which it collected on behalf of Hinckley in respect of the sale of Hinckley`s goods. The balance was to be paid over to Hinckley within 15 days of the end of each calendar month.

For the period between May 2000 and July 2000, Sogo collected more than $200,000 on behalf of Hinckley from the sale of the goods. After its commission was deducted, the total amount payable to Hinckley was $212,212.99.

On 19 July 2000, interim judicial managers were appointed in respect of Sogo. On 18 August 2000, an order was made by the High Court placing Sogo under the judicial management of a judicial manager and the interim judicial managers were appointed, jointly and severally, the judicial managers of Sogo.

On 27 September 2000, Hinckley`s lawyers wrote to the judicial managers of Sogo asking for payment of the sum of $212,212.99 on the basis that the sum was held on trust by Sogo for Hinckley. On 3 October 2000, Hinckley`s claim that the moneys were trust moneys was rejected. Hinckley therefore filed this application for the court`s determination of the issue.

Legal arguments

This application was necessitated as under s 227C(c) and s 227D(4)(c), leave of the court has to be obtained before any proceedings may be commenced against a company which is in judicial management. Counsel for Hinckley recognised that, as established by **Re Atlantic Computer Systems plc (No 1)** [1991] BCLC 606, in order to obtain such leave, the applicant must show that the application discloses a seriously arguable case against the company in administration (or judicial management).

In the ***Atlantic Computer*** case, the English Court of Appeal, in laying down the general guidelines for leave applications under s 11(3) of the UK Insolvency Act 1986 (which the material sections of the Act are in pari materia with), held:

(a) the purpose of the power to give leave is to enable the court to relax the prohibition against the commencement of proceedings where it would be inequitable for the prohibition to apply;

(b) administration is for the benefit of unsecured creditors and should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise;

(c) in a proprietary claim, if the grant of leave will not impede the purpose of judicial management, then leave should normally be granted;

(d) it will normally be a sufficient ground for a grant of leave if significant loss would be suffered by the applicant by a refusal; and

(e) the court need not adjudicate on the merits of the case - it should only be satisfied that the applicant has a seriously arguable case.

From the above, it can be seen that it was important to Hinckley to be able to establish that it had a proprietary right to the moneys it claimed and that it was not merely a creditor of Sogo for the same. In the latter case, it would have been an unsecured creditor and as such would have had no basis to ask the court to lift the statutory moratorium on actions against Sogo.

It was not seriously disputed by Sogo that, as Hinckley contended, it had acted as agent for Hinckley in collecting the moneys paid by Hinckley`s customers for goods sold by Hinckley. On the basis of this agency relationship, Hinckley argued that the sum claimed was clearly trust money because, first, it was well established that certain relationships are always classed as fiduciary and among these are the relationship of agent and principal. Secondly, it asserted that an agent being in a fiduciary capacity held all money which he had collected on behalf of his principal on trust for the principal.

In response to the above, Sogo`s position was that while it was an agent of Hinckley, this did not make the sums collected trust moneys. Instead, as regards the moneys which were payable to Hinckley, the relationship between Hinckley and Sogo was that of creditor and debtor. I accepted this submission. I held that the moneys were not trust moneys and that accordingly, there was no seriously arguable case that Hinckley had a proprietary claim which it should be given leave to pursue despite the judicial management order. I therefore dismissed Hinckley`s application.

I came to my decision largely on the basis of the authority of **Henry v Hammond** [1913] 2 KB 515 and **Nesty Oy v Lloyd`s Bank plc** (Unreported) I also found the decision in **Re Fleet Disposal Services Ltd** [1995] 1 BCLC 345 to be helpful.

Henry v Hammond arose out of the wreck of a vessel called the `International` in 1883. The vessel and cargo was subsequently salved, and the plaintiff, acting on behalf of foreign insurers of the cargo, instructed the defendant, an English shipping agent, to sell the cargo and out of the proceeds of sale to pay all claims and expenses in connection with the cargo. After carrying out these instructions, the defendant had a sum of o96 in hand. This money was not paid over to the plaintiff and the plaintiff did not find out about it until 20 years later. When he then sued for the sum, he was met by a claim of time bar. The plaintiff, in answer to this plea, contended that the defendant had made himself an express trustee of the sum and therefore the statute did not apply. It was held that the transaction which the defendant was employed by the plaintiff to carry out was an ordinary commercial transaction in the way of the defendant`s business as a shipping agent, that the defendant was not bound to keep the moneys coming to his hands in the course of carrying out the transaction separate from his other moneys, and that therefore he was not in the position of an express trustee of the sum and he could claim the protection of the Statute of Limitations.

The judgment was delivered by Channell J. In the course of his judgment, the judge clearly distinguished between the situation in which a recipient of money for a third party is bound to keep that money separate from all other funds and the situation where he is entitled to intermix it with his own funds and pay over an equivalent amount to the third party subsequently. He said at p 521:

> *It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law. I agree with the observation of Bramwell LJ in* ***New Zealand and Australian Land Co v Watson*** *(Unreported) at 382 when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions. A shipping agent carries on a well understood business, and it cannot possibly be said that he is bound to keep the money of each of the persons by whom he is employed in the course of that business separate. There is not in this case the element that there was in* ***Lyell v Kennedy*** *(Unreported) of the moneys being in fact kept separate. I am aware that, if the defendant was bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognised his obligations, the obligation itself being the essential thing. This principle seems to me to reconcile all the cases.*

Henry v Hammond is a fairly old authority. It was, however, followed not too long ago by Bingham J (as he then was) in ***Nesty Oy*** (supra). In that case, the plaintiffs were owners of three vessels and from time to time they would transfer funds to a shipping agent in the United Kingdom for the purpose of enabling the agent to discharge liabilities incurred by their vessels. In the action, they sought to recover certain advances made to the agent which it had banked into its bank account and which the bank had set off against moneys owing to it by the agent. The argument was that the agent was a constructive trustee for the plaintiffs and therefore the bank had no right to exercise a right of set off against trust funds. In respect of five of the advances, this argument was rejected by Bingham J on the basis that there was no evidence that these were trust funds or in particular that the plaintiffs had intended them to be kept separate from the agent`s other moneys.

In the course of his judgment, Bingham J cited the passage from ***Henry v Hammond*** which I have quoted above and continued (at p 664):

> *The case was important not because it happened to concern shipping agents but because it showed the proper approach to be followed by the Court in a commercial context such as this. The importance of a separate account as reflecting the terms upon which money was paid was underlined further in such cases as **In re Nanwa Gold Mines Ltd** [1955] 1 WLR 1080; **Quistclose**, sup; and **In re Kayford Ltd** [1975] 1 WLR 279. **The Wilsons and Furness-Leyland Line Ltd. v The British and Continental Shipping Co Ltd And others** [1907] 23 TLR 397, showed that where money was with the consent of the principal paid by agents into a general account containing their own funds the proper inference was that the relationship was one of debtor and creditor, not trustee and beneficiary. Reliance was placed on the proposition formulated by Mr Justice Slade in **In re Bond Worth Ltd** [1980] Ch 228, at p 26B that -*
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> *`... where an alleged trustee has the right to mix tangible assets or moneys with his own other assets or moneys and to deal with them as he pleases, this is incompatible with the existence of a presently subsisting fiduciary relationship in regard to such particular assets or moneys ...`*

The next case, ***Re Fleet Disposal Services Ltd*** (supra), involved facts which were similar to those in the present case. There, Fleet Disposal Services Ltd (`the company`) acted as a selling agent for major car leasing companies. The arrangement between the company and the claimant Nortel provided that the company would pay the proceeds of any sale into a designated bank account (`the agency account`) and remit the proceeds less commission and cost within five days of receipt, all repayments to be by separate cheques. The company went into creditor`s voluntary liquidation at a time when there was a credit balance in the agency account. The question which the court had to determine was whether Nortel had a proprietary claim to the sum. It was held that the credit balance in the agency account was held on trust for Nortel. Whether or not a trust of the proceeds of the account had been created depended on the intention of the parties and the proper construction of the agency agreement between the parties. On the facts, given that the company was to act as Nortel`s agent for sale, that the credit period allowed for the company before it had to handle the proceeds of sale was relatively short, and payment for each transaction had to be made by separate cheques, a trust relationship had been created between the parties.

It was clear from the above authorities that a trust situation in respect of moneys did not arise simply because an agency and principal relationship existed. In order to import a trust in respect of moneys collected by an agent for a principal, the intention of the parties and the arrangements they had made with regard to the monies so received had to be carefully analysed. Whilst as Lightman J in the ***Fleet Disposal*** case observed, the court is particularly ready to infer of the principal`s property, there must be factual circumstances that support such an inference. It is not made automatically.

In the present case, the agency agreement specified that the moneys payable for Hinckley`s goods should be paid by the customers to Sogo`s cashiers. No particular cashier was designated to receive these funds. Any of the cashiers located throughout the store could do so. Further, there is nothing in the agreement requiring Sogo to deposit the moneys so received in any particular account or to keep them apart from its own moneys. It was free to intermingle the moneys with its own and to put the moneys into a current account or savings account or even a current account in overdraft. Thirdly, unlike in the ***Fleet Disposal*** case, there was no requirement that the money to be paid over to Hinckley should be by separate cheque for each transaction. This would have been very inconvenient bearing in mind the large number of transactions and the relatively small dollar tag each transaction would have borne. Fourthly, Sogo was allowed a commission which was equivalent to 20% of the sales. It was not to take that 20% immediately out of the funds received. The funds paid over would also be equivalent to 80% of the funds received and not the 80% of the money received. Finally, the accounting between Sogo and Hinckley did not take place soon after each transaction. Instead it took place 15 days after the end of each calendar month. That would mean that in respect of transactions effected in the first half of the calendar month, Hinckley would receive its money till a month later at the earliest. In the meantime, the sales proceeds would remain with Sogo, intermixed with its own funds.

The circumstances of these transactions also militated against the existence of a trust relationship in that the sales took place in a large department store where there were many different types of merchandise on sale and where the value of each transaction could range from a few dollars to several hundred dollars or more. Each day there would be a constant flow of customers and a great number of transactions. This was very different from the ***Fleet Disposal*** situation where the items sold were motor vehicles and each transaction would have to be documented quite substantially and would involve the receipt of a large payment. It would not have been convenient from Sogo`s point of view to create a trust relationship between itself and each concessionaire whom it allowed to carry on business in its store since this would have imposed a duty on Sogo to separate the payments received on behalf of such concessionaires from the payments it received for direct sales. This would have meant establishing a separate cashier for each concessionaire. This Sogo was patently unwilling to do. It should be noted that the agreement bears all the signs of being a standard form agreement which Sogo required would-be concessionaires to sign and one of the standard form clauses is that all payments made by the customers in respect of goods sold by the concessionaire are to be made directly to Sogo`s cashiers (cl 6(c)).

Having regard to the circumstances and the agreement as a whole, it appeared to me that it was not Sogo`s intention to create such a trust relationship. If Hinckley had that intention, it certainly did not appear on the face of the document.

Outcome:

Application dismissed.