Velstra Pte Ltd v Mercator & Noordstar NV
[2003] SGHC 35

Case Number : OS 1179/2002; NAOS 567/2002; RA 9 & 16/2003

Decision Date : 24 February 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Vinodh Coomaraswamy and David Chan (Shook Lin & Bok) for the Plaintiffs; Koh Kok Wah and Dinesh Dhillon (Wong & Leow LLC) for the Defendants

Parties : Velstra Pte Ltd — Mercator & Noordstar NV

Insolvency Law – Avoidance of transactions – Transactions at an undervalue – Defences – Court's discretion to deny liquidators' application.

1. This originating summons was taken out by the plaintiffs for an order that the payment of US$5.08 million on 4 January 2000 by the plaintiffs to the defendants be declared null and void on the ground that it constituted a transaction at an undervalue within the meaning of s 98 of the Bankruptcy Act read with s 329 of the Companies Act. In the meantime, the defendants applied to convert the originating summons into a writ action but their application was dismissed by the assistant registrar and their appeal (RA 9 of 2003) against that dismissal was heard before me on 22 January 2003. That appeal was heard together with their appeal in RA 16 of 2003 in respect of their dismissed application for security for costs against the plaintiffs.

2. After hearing counsel I was minded to dismiss both appeals. However, Mr Koh, counsel for the defendants, made a strong plea for fuller submissions to be made. I then gave him time to make further arguments in respect of the appeal in RA 9 of 2003 but the appeal for security for costs was dismissed. I directed that submissions in respect of the originating summons itself be filed and exchanged and in the event that I am not persuaded by Mr Koh's further arguments in RA 9 of 2003 I shall proceed to consider the submissions in respect of the originating summons. I now set out my grounds in respect of RA 9 of 2003 and the originating summons. The facts and some of the arguments overlap.

3. The plaintiffs are a company incorporated in Singapore and are in liquidation. The defendants are an insurance company in Belgium who became involved in the present proceedings from its interest in investing in a Belgian company called Lernout & Hauspie Speech Products ("L&H"). The liquidators of the plaintiff company discovered a payment of US$5.08m made on 4 January 2000 by the plaintiffs to the defendants, in partial discharge of a debt of US$10m owed by a company called N.V. Language Development Fund ("LDF"), a company incorporated in Belgium about 31 March 1999. The plaintiff company was incorporated a few months later, on 19 June 1999. The directors of the plaintiffs were Tony Snauwert, a Belgian and Tan Lee Chin, a Singaporean. The former says that his instructions came from L&H. This company appears to be owned or controlled by the persons whose names appear as part of L&H's name, that is, Jo Lernout and Pol Hauspie both of whom are Belgians. L&H was supposed to be a company specialising in the development of speech recognition, dictation and translation software. It was extremely successful and became a listed company in the United States as well as Europe; and it rapidly became a favourite stock with a trading price of US$60 at its peak.

4. On 4 January 2000 a transfer of US$36m was made by a person called Khatchadourian, referred to by counsel as "K", of whom little is known save that he is a Lebanese of Armenian origin. He was desirous of promoting Armenian language and culture and, therefore, was prepared to lend US$30m to

L&H at the latter's request. However, in the event, and on his own accord, he offered to increase the loan by US$6m provided that L&H would agree to use that additional sum specifically for the development of a language translation software for the Armenian language.

5. A meeting took place in which it appeared that Snauwert, Lernout, Hauspie, Willaert (another founder member of L&H) and K met. The terms were agreed and Willaert, it appears, suggested that the loan be disbursed to the plaintiffs. A loan agreement was signed on 24 December 1999, and payable on 27 December 2001 for the sum of US$36m with interest fixed at US$41,990,400. The agreement was signed by K and by Snauert, on behalf of the plaintiffs. On 4 January 2000 K transferred US$36m to the plaintiffs' account with the Development Bank of Singapore. Thereafter, K continued to maintain contact with Lernout, Hauspie and Willaert concerning the development of the language translation software, but by September 2000 it became clear that L&H were no longer interested in that project.

6. On 23 November 2000 Lernout, Hauspie and Willaert resigned from L&H. About this time, L&H discovered a loss of US$100m from its Korean subsidiary. Only 1% was recovered through the sale of its receivables. This was one of the many financial problems surfacing from L&H and its related companies. The total claims made against it in Belgium alone stood at US$503m.

7. Lernout, Hauspie and Willaert were arrested on 27 April 2001 in Belgium in connection with a list of fraudulent activities that included forgery and the falsification of accounts. On 20 May 2001, Gaston Bastiens, a manager of L&H was arrested in Boston, USA and charged with insider trading and stock manipulations.

8. The plaintiffs were unable to repay the $36m loan on 27 December 2001. K sued in the High Court in Singapore and obtained a judgment in default of appearance. On 22 March 2002 K petitioned to wind up the plaintiffs. A winding up order was made on 12 April 2002 and Kou Yin Tong, Wong Kian Kok and William Hutchison were appointed liquidators of the plaintiffs.

9. In the course of their investigations, the liquidators learned that the plaintiffs had six subsidiaries in Belgium and three in Singapore. The Singapore subsidiaries had the same directors as the plaintiffs, namely Snauwert and Tan Lee Chin. No business activity was recorded by the plaintiffs and its subsidiaries. There were no staff on its payroll.

10. It also transpired that the plaintiffs had no association with L&H. It's only claim to any connection appears to be its purchase of software licences from L&H at inflated prices. It also transpired that Snauwert incorporated a company in Belgium, on 11 February 1999, called B.V.B.A. Language Development Service ("LDS"). On 31 March 1999 LDS and another Belgium company called N.V. Language Investment Company ("LIC"), whose directors were Willem Hardeman, Willy Everaert, Boes & Co, Harcom and Declerq, incorporated company LDF. The directors of LDF were Snauwert, LDS and LIC.

11. On the day of its incorporation i.e. 31 March 1999, LDF received a loan of US$10m from the defendants payable on 30 September 1999. In the meantime, on 24 June 1999, the plaintiffs were incorporated as a wholly owned subsidiary of LDF. LDF in turn, was 97% owned by the defendants.

12. Hence, on 4 January 2000 when K advanced his US$36m to the plaintiffs, LDF was already indebted to the defendants in the sum of US$10m. On the same day (4 January), Snauwert instructed the plaintiffs' bank to pay the US$36m as follows:

a. US$20m to Dexia Bank in Belgium;

b. US$5.08m to the defendants in Belgium;

c. US$6m to LIC in Belgium; and

d US$4m to Radial Belgium in Belgium.

The payment of the US$5.08m to the defendants was recorded as payment "on behalf of LDF", who was owing the defendants the sum of US$10m. There appears no evidence that LDF was able to discharge the debt. The liquidators of the plaintiffs wrote to the defendants on 8 May 2002 asking for details of the US$5.08m payment. On 14 June 2002 the defendants' solicitors in Belgium replied to say that it was made in part payment of the US$10m loan.

13. The plaintiffs' application is a straightforward one. It applies under ss 98, 101 and 102 of the Bankruptcy Act, Ch 20 read with reg 5 of the Companies (Application of Bankruptcy Act Provisions) Regulations 1995 to declare the payment of US$5.08m by the plaintiffs to the defendants null and void, and for an ancillary order to recover that sum from the defendants. I now set out below the relevant portions of ss 98, 101 and 102 of the Act and reg 5 for ease of reference:

> "98. – (1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.
>
> (2) …
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> (3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if –
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> (a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
>
> (b) …
>
> (c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual."
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> "101. – (1) For the purposes of sections 99 and 100, any question whether a person is an associate of another person shall be determined in accordance with this section.
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> …

(9) For the purposes of this section, an individual shall be taken to have control of a company if –

(a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions; or

(b) he is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company which has control of it,

and where 2 or more persons together satisfy paragraph (a) or (b), they shall be taken to have control of the company."

"102 – (3)(b) require a person who received a benefit from the transaction or unfair preference in good faith, for value and without notice of the relevant circumstances to pay a sum to the Official Assignee, except where he was a party to the transaction or the payment is to be in respect of an unfair preference given to that person at a time when he was a creditor of that individual."

14. Mr Koh's main argument resisting the plaintiffs' claim under the originating summons was that there was no gift or transaction between the plaintiffs and the defendants, and he relied on the undisputed fact that the payment of the US$5.08m by the plaintiffs to the defendants was recorded as being "made on behalf of LDF" in the plaintiffs' record. But I think that it is important that this assertion that there was no gift or transaction form or between the plaintiffs and defendants be considered in the circumstances of all the other relevant undisputed facts. First, the money was paid out from a sum of US$36m paid into the plaintiffs' account and, without any evidence otherwise, must be regarded as money belonging to the plaintiffs. Secondly, although the plaintiffs recorded the payment to the defendants as payment on behalf of LDF, there is no doubt that LDF was insolvent at the material time and the plaintiffs cannot be unaware of that. It is also a fact readily admitted by the defendants through William Hutchison's first affidavit. Thirdly, in such circumstances, it behoves the defendants in resisting the present claim to show that it has some credible claim against LDF for reimbursement or indemnity in respect of the US$5.08m. There was none whatsoever. Even the plaintiffs' audited accounts were qualified. In such circumstances no indemnity from LDF to the plaintiffs can be inferred. Finally, the defendants owned 97% of LDF although Mr Koh argued strenuously that the defendants were virtually misled into becoming the 97% shareholders of LDF. No convincing evidence was produced to persuade me that this assertion may possibly and reasonably be true. On the contrary, the evidence insofar as the parties are concerned in all the relevant entities indicates the opposite through their connection with each other. Furthermore, if the defendants were defrauded into investing in LDF it would have recourse against whoever it was that had so misled them. But that cannot be effected through this present application on tenuous grounds. It is wrong to convert a straightforward application under s 98 of the Bankruptcy Act into a major battle for what appears clearly to be a complex action for fraud; and it should certainly not be accomplished by way of discovery, as Mr Koh hopes to do, before any cogent statement of facts as to how fraud was perpetrated on the defendants has been settled. The defendants' application for conversion of this originating summons into a writ action cannot succeed and accordingly, their appeal on this issue in RA 9 of 2003 must fail. This by no means closes the door to the defendants should they desire to proceed against any party, including the plaintiffs, for fraud or any related action.

15. I now revert to the plaintiffs' claim under the originating summons itself. I can appreciate counsel's difficulty, but the defendants cannot deny or dispute the liquidators' findings unless they have grounds to do so, and evidence to challenge it. The evidential burden had clearly shifted to the defendants and it is of no assistance to them to say that they require discovery to show proof. They are no strangers to either the plaintiffs or LDF. It may appear at first glance that a remittance of money recorded as being made on behalf of a third party (in this case, LDF) cannot be regarded as a gift. But in the present case, there was no record or explanation as to why the remittance of US$5.08m was made on LDF's behalf, or any explanation that might suggest that the payment would be recoverable from LDF as a loan by the plaintiffs, or that it was given in circumstances that one can infer that an indemnity was thereby created. Evidence leading to either of these conclusions might perhaps be found in the communication between the plaintiffs and LDF, or from evidence of a release of debt from LDF to the defendants to the equivalent amount. But no such evidence was adduced. The remittance of money in the present circumstances may therefore reasonably be deemed as a gift by the payer to the payee. Even if it was not a gift, it was at least a transaction for no consideration, and, in any event certainly, a transaction at an undervalue.

16. Mr. Koh disputes that the plaintiffs were insolvent. Quite apart from the evidence by way of the liquidators' findings, the plaintiffs' record of inactivity, and the absence of any proof of income or asset other than what K had paid to it, s 100(2) of the Bankruptcy Act is presumed to be proved by virtue of s 100(3) in that the defendants were an associate of the plaintiffs. As Mr. Coomaraswamy, counsel for the plaintiffs, pointed out, whether a person or company is an associate of another depends on an entitlement to control and not on *de facto* control. The burden thus fell on the defendants to disprove the plaintiffs' insolvency but they were unable to discharge that burden.

17. Under s 102(3) of the Bankruptcy Act, the defendants were entitled to set up the defence on the ground that they received a benefit from the transaction in question in good faith and for value, without notice of the relevant circumstances. Mr Koh said that the defendants acted in good faith and gave value without notice of the relevant circumstances. He submitted that the defendants did not even know of the plaintiffs' existence prior to the payment; but given the close connection of all the key personalities in the corporate set-ups of the plaintiffs, the defendants and LDF, I am unable to accept Mr Koh's submission. It is a submission that is founded more in prayer than in proof. The defence under s 102(3) is also not available if the defendants were a party to the transaction. Section 102(3) reads as follows:

> "An order under section 98 or 99 shall not - (b) require a person who received a benefit from the transaction or unfair preference in good faith, for value and without notice of the relevant circumstances to pay to the Official Assignee, *except where he was a party to the transaction*...." (my emphasis).

Mr. Koh challenged the relevance of the Australian case of *Cashflow Finance v WestpacCOD Factors* [1999] NSW SC 671 although that authority accepts that a person may be a party to the transaction without being an active party, and accordingly, a recipient of a payment of money is regarded as a party to the transaction. Counsel submitted that the Australian legislation is different in that it expressly defines 'transaction' to include payment. I do not think that this is a case in which the maxim *expressio unius est exclusio alterius* applies. I regard the statutory definition as an endorsement of the ordinary and common understanding of the term "transaction". A person who receives money directly from an impugned payer is, in my view, a party to that transaction.

18. The other defence available to the defendants is set out in Reg 6 of the Companies (Application of Bankruptcy Act) Regulations which provides as follows:

> "6. The court shall not make an order referred to in section 98 of the Bankruptcy Act in respect of a transaction at an undervalue if it is satisfied –
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> > (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and
> >
> > (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

It is evident that the burden of proving these defences lie with the defendants, but as has been its case from the outset, the defendants have no substantial knowledge, information or any evidence of value that it could rely on in its bid to convince me that they were victims of a major fraud that involved the L&H group or even K himself. Mr Koh had to rely on inferences that he wishes me to draw, such as K's knowledge that the US$36m he paid into the plaintiffs' account would be remitted for L&H's purposes. Counsel submitted that as K is the obvious "true plaintiff" in this originating summons, an adverse inference ought to be drawn against him for his failure to provide discovery. I accept that it is likely that a great deal of information is not available to this court to enable me to distinguish the villain and the innocent, and it is very possible that the defendants were victims of a scam inasmuch as it is possible that they were victims of temptation, or even, privy to the plot. It is also possible that K may be part of the original or larger fraud – but, of course, he may also be another innocent. It seems to me that the dearth of information in this regard afflicted the plaintiffs and the defendants alike. The defendants, for example, have not on their part offered any explanation as to why and how it was able to persuade LDF or the plaintiffs to make the payment of US$5.08m to it? Nonetheless, for the purposes of recovery under the Bankruptcy rules, and for reasons I shall state shortly, the court need not wait for answers to such questions in order to make a determination of the liquidators' application.

19. In all the circumstances as I have outlined above, my first duty is to ascertain whether the provisions under which the liquidators are applying have been satisfied. If they have, then the enquiry must focus on whether the defendants have satisfactorily proved any of the defences available to them. I have found, and stated accordingly in the course of my judgement above that the answer to the first question is in the affirmative, and the second in the negative. Thus, the only point remaining is whether this court has any discretion to deny the liquidators the prayers they seek. I accept that the defendants have raised a number of important questions concerning the good faith and honesty of the various parties involved in the transactions leading to and including the payment to the defendants, but questions without answers are revered only in the realm of philosophy. For a court of law to act on those questions alone as Mr Koh suggests, is to act according to the dictates of that familiar phrase - 'palm tree justice' (in this instance referred to in the judgment of Einstein J in the *Cashflow* case at [569 (ii)]). It is unfortunate, however, that sometimes attempts by judges to do justice does not find common acceptance are thus labelled 'palm tree justice' as a prelude to the effort being ignominiously dismissed (though not so in *Cashflow*). For my part, I adhere to the belief that judges are bound to depart from the rigidity of normative law when they can in individual cases in order to do justice. They must, however, recognise the instances when they cannot do so. In the present case, I agree with the opinion of Einstein J that "there is no role for the general notions of unconscionability here" - not on the sparse evidence that Mr Koh, through no fault of his, had at his

disposal. The duty required of this court hence, is that which was expressed in *Pegulan Floor Coverings Pty Ltd v Carter* (1997) 15 ACLR 1293, namely to "ensure that a creditor did not receive a benefit over and above that received by other creditors". And again, I agree entirely with Einstein J that once payment is received by the defendants in an insolvent transaction "there is no room for any discretion in the court."

20. The statutory provisions having been satisfactorily proved by the liquidators, I, therefore, grant the plaintiffs an order in terms of prayers 1, 2, and 4 of the originating summons with liberty to apply. The defendants' appeal in RA 9 of 2003 is accordingly dismissed. I shall hear parties on the question of costs at a later date if they are unable to agree costs.