Cupid Jewels Pte Ltd *v* Orchard Central Pte Ltd
[2011] SGCA 15

Case Number : Suit No 182 of 2010

Decision Date : 11 April 2011

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : David Nayar (David Nayar and Vardan) for the appellant; Ling Tien Wah (Rodyk & Davidson LLP) for the respondent.

Parties : Cupid Jewels Pte Ltd — Orchard Central Pte Ltd

Landlord and tenant – Distress for Rent – Illegal distress

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 295.]

11 April 2011

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 The appellant, Cupid Jewels Pte Ltd ("Cupid Jewels") is a tenant of the respondent, Orchard Central Pte Ltd ("Orchard Central"). A writ of distress was obtained by Orchard Central, and all goods on the tenant's premises were seized to satisfy arrears in rent. Among the goods seized were 576 pieces of jewellery ("the seized jewellery"). Cupid Jewels applied to discharge the writ of distress and recover the seized jewellery. The trial judge ("the Judge") dismissed its application for seemingly lack of standing. On 28 February 2011 we heard the appeal and allowed the appeal to the extent that we ordered that Cupid Jewels' application be restored and heard on the merits. We now set out our reasons.

Facts

2 Cupid Jewels sold jewellery from premises which it had leased from Orchard Central by a lease dated 28 May 2008 ("the premises"). In April 2010, Cupid Jewels began to fall behind on rental payments. On 3 August 2010 Cupid Jewels owed S$891,501.09 in rent arrears. Three days later, on 6 August, Orchard Central applied for (by way of Originating Summons No 813 of 2010) and was granted a writ of distress against Cupid Jewels. There is some uncertainty as to the date on which the Sheriff made the seizure. This is because the parties agreed that the seizure took place on 6 August 2010, but the Sheriff's Notice of Seizure and Inventory is dated 10 August 2010. However, nothing turns on this discrepancy. What is not in dispute is that the Sheriff did seize the seized jewellery from the premises pursuant to the writ of distress.

3 On 16 August 2010, Cupid Jewels filed Summons 3835/2010 ("SUM 3835") seeking an order, pursuant to s.*16* of the Distress Act (Cap 84, 1996 Rev Ed) ("the Act"), for the discharge or suspension of the writ of distress, and for the release of the seized jewellery to Cupid Jewels. Three days later, on 19 August 2010, Forever Jewels Pte Ltd ("the Non-Party") filed Summons No 3916/2010 ("SUM 3916") seeking an order, pursuant to s.*10* of the Act, for the release of the seized jewellery to the Non-Party. It would be noted that both SUM 3835 and SUM 3916 sought the release of *the same*

articles – i.e. the seized jewellery.

4 At the hearing before the Judge on 7September 2010, both Cupid Jewels and the Non-Party contended that the seized jewellery was consigned by the Non-Party to Cupid Jewels for sale at the premises. They further argued that since the Non-Party was the owner of the seized jewellery, the seized jewellery should accordingly be released. The Judge held that as there were disputes of fact in relation to the *Non-Party's* application, he gave leave for cross-examination on the affidavits of the Non-Party at a future date.

5 However, the Judge dismissed Cupid Jewels' application. The reason for the dismissal is set out in the grounds of decision as follows:

> Curiously, [Cupid Jewels] applied in Summons No 3835 of 2010 for the release of the jewellery to them, even though on their own case, [Cupid Jewels] were not the owner of the jewellery. I had given the necessary directions in Sum 3916/2010 for the hearing to determine the Non-Party's claim to the jewellery. However in Sum 3835/2010, [Cupid Jewels] claimed to be entitled to an order for the jewellery be released to them *based on an argument which I would, out of respect, describe as beyond my comprehension*. (emphasis added)

Reference to the Notes of Argument shows that the Judge recorded:

> "As the goods in question are the same as in [the Non-Party's] application, their disposal will be determined under [that application]."

6 It seems reasonably clear that Cupid Jewels' application had been dismissed for lack of standing. It was Cupid Jewels's own case that the Non-Party was the owner of the seized jewellery. Since the Non-Party was already seeking the recovery of the exact same items, it was understandable that the Judge, as a matter of common sense, viewed Cupid Jewels' insistence, that its parallel application should also proceed to hearing, with some incredulity. The failure of the counsel for both parties to properly address the issue of standing undoubtedly added to the Judge's concern.

7 On appeal, Cupid Jewels submitted that it had the locus standi, pursuant to s 16 of the Act, to apply for the release of the seized jewellery and that its application in SUM 3835 should be heard together with the Non-Party's application in SUM 3916. Cupid Jewels also made the further argument that it would be unfairly prejudiced by the dismissal of its application if the Non-Party were to later unilaterally decide to discontinue SUM 3916 and choose instead to seek compensation from it. Moreover, it was also emphasised that there would be very little prejudice to Orchard Central if both the applications were allowed to proceed.

Standing

8 Thus the key question which this court had to answer was: should the Non-Party's and Cupid Jewels's parallel applications, which relate to the *same articles*, be allowed to proceed concurrently? Answering this question requires an understanding of the law of distress in Singapore. The standing to discharge or suspend the execution of a writ of distress, or to release any part of the property seized under a writ of distress is governed by the Act.

9 We will now refer to the relevant provisions in the Act which clearly accord to a tenant, as well as a non-tenant, a separate right, and under distinct grounds, to apply for the release of things seized pursuant to a writ of distress. In the case of the tenant, it is s 16 read with s 8 of the Act. Section 16 reads:

Application by tenant.

16. The *tenant* may apply to a Judge to discharge or suspend the execution of the writ, or to release any part of the property seized. (emphasis added)

Section 8 provides:

Property exempted from seizure.

8. Property seizable under a writ of duress shall not include –

(a) things in actual use in the hands of a person at the time of the seizure;

(b) tools or implements not in use where there is other movable property in or upon the house or premises sufficient to cover such amount and costs;

(c) the tenant's necessary wearing apparel and necessary bedding for himself and his family;

(d) goods in the possession of the tenant for the purpose of being carried, wrought, worked up, or otherwise dealt with in the course of his ordinary trade or business;

(e) goods belonging to guests at an inn; and

(f) goods in the custody of the law.

10 Section 8 is largely unchanged from its original incarnation as s 10(IIg) of Ordinance XIV of 1876. It *generally* mirrors privileges at *common law* under which certain goods were exempt from distress. For example, s 8(a) reflects *Bissett v Caldwell* (1791) Peake 35; s 8(b) reflects *Nargett v Nias* (1859) 1 E. & E. 439; s 8(d) reflects *Nathaniel Simpson v Chiverton Hartopp* (1744) Willes 512; and s 8(f) reflects *Eaton v Southby* (1738) Willes 131. Therefore, s 16, read together with s 8, substantially represents a codification of the *tenant*'s standing and substantive remedies *at common law*.

11 In the case of a non-tenant, he may seek relief under s 10, read with ss 12 and 13. Section 10 sets out the substantive grounds on which a non-tenant may apply for relief from distress subject to certain limitations laid down in ss 12 and 13. The relevant parts of ss 10, 12 and 13 read:

Application by under-tenant, lodger, etc., for discharge, suspension or release.

10. – (1) Where any movable property of –

(a) any under-tenant;

(b) any lodger; or

(c) any other person whatsoever *not being a tenant* of the premises or any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,

has been seized under a writ of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such under-tenant, lodger or other person may apply to a judge to discharge or suspend the writ, or to release a distrained article.

(2) No order shall be made unless such under-tenant, lodger or other person satisfies the court that the tenant has no right of property or beneficial interest in the furniture, goods or chattels and that such furniture, goods or chattels are the property or in the lawful possession of such under-tenant, lodger or other person; and also in the case of an under-tenant or a lodger unless such under-tenant or lodger pays to the landlord or into court an amount equal to the arrears of rent in respect of which distress has been levied and also undertakes to pay to the landlord future rent, if any, due from him to the tenant.

...

(emphasis added)

Exclusion of certain goods.

12. Section 10 shall not apply to –

(a) ... goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof;

(b) goods of a partner of the immediate tenant;

(c) goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the under-tenant have an interest;

...

Exclusion of certain under-tenants

13. Section 10 shall not apply to any under-tenant where the under-tenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant.

12 Sections 10, 12 and 13 of the Act were enacted for the first time in Distress Ordinance 1934. The 1934 Proceedings of the Legislative Council of the Straits Settlements clearly show that these sections were adopted substantially from ss 1, 4 and 5 of the United Kingdom Law of Distress Amendment Act 1908 ("1908 Act"). The 1908 Act was concerned with giving non-tenant owners greater protection against the distress of their articles than those available under the common law. Accordingly, it created a *statutory* privilege against distress, under which ownership was the essential criterion.

13 It is therefore clear that the remedies for a tenant and non-tenant proceed on fundamentally different footings. The former is derived primarily from the common law, and the latter originated from the 1908 Act.

Our determination

14 Before the Judge, Cupid Jewels advanced only one substantive argument for the recovery of the seized jewellery, viz, that the Non-Party was its owner. However, that is not a ground which is available to Cupid Jewels, it being not a ground prescribed in s 8. This ground is in fact set out in s 10 which is a ground available only to the non-tenant and not the tenant. In these circumstances, the

Judge was correct to dismiss Cupid Jewels' application. On appeal before us, however, Cupid Jewels advanced an additional argument – that the seized jewellery was exempt from distress under s 8(d). This in turn raised the question as to whether in a case like the present, where both applications claimed release of the same articles, they could proceed concurrently. In other words, is it wholly incompatible with the Act to have the two applications, both relating to the same articles, pending before the court? We do not think so.

15 As explained above (see [9] – [13]), the substantive grounds for the grant of a remedy to the tenant and non-tenant are distinct. For the Non-Party to succeed on the present case, it must show, *inter alia*, that it is the owner of the seized jewellery; that it has no beneficial interest in the tenancy (s 10(1)(a)); that Cupid Jewels has no right of property or beneficial interest in the seized jewellery (s 10(2)); and that Cupid Jewels was not the *reputed* owner of the seized jewellery (s 12(a)). The difficulty the Non-Party could face is demonstrated by the Court of Appeal decision of *Plaza Singapura Pte Ltd v Cosdel (S) Pte Ltd and another* [1990] 2 SLR(R) 22 where the non-tenant's s 10 application failed on the basis that the tenant was the reputed owner of the distressed goods.

16 In contrast, the issues of law and fact that can arise in relation to Cupid Jewels' application under s 16 and s 8(d) are quite different. Section 8(d) covers most of the ground of trade privilege at common law. The general principle appears to be that if goods are sent to a place to remain there, they are distrainable; but if sent for a particular object and the goods remaining at the place is necessary for the completion of that object, they are not: *Woodfall: Landlord and tenant* (Release 27) at paragraph 9.051. Trade privilege has been held to cover goods sent to an auctioneer for sale and goods sent to a commission agent for sale: *Adams v Grane and Osbourne* (1833) 1 Crompton & Meeson 380 and *Findon v M'laren* (1845) 6 Queen's Bench Reports 819 respectively. Since Cupid Jewels did not contend that the facts in the affidavits justified the application of s 8(d), no decision was made on whether the seized jewellery was exempt from distress under that sub-section. The key point to be underscored here is that recovery of the seized jewellery under s 10 and s 8(d) proceed on very distinct bases. Hence, it is completely in line with the scheme of the Act that a tenant can rely on a ground which is not available or declined by a non-tenant. The fact that, in the present case, the Non-Party's application is somehow "more direct" or "simpler" because it is the owner of the seized jewellery is wholly immaterial. Applications under s 10 and under ss 16 and 8 are not mutually exclusive.

17 In the circumstances, it makes sense for us to allow both applications to proceed to hearing. It would be premature at this time to speculate what would be the appropriate order to make in respect of the applications. In this regard the point made by Cupid Jewels, that the Non-Party is free to discontinue proceedings under s 10 and seek compensation from it, is not wholly without merit. If Cupid Jewels were prevented from pursuing its s 16 claim, it would be vulnerable to compensation proceedings brought by the Non-Party, even if the seized jewellery had been wrongfully distressed. Orchard Central contended before us that the possibility of compensation proceedings brought by the Non-Party against Cupid Jewels was remote, because the two companies were substantially controlled by the same people. The truth of that contention was an issue of fact that had yet to be established. In any event, even if that were true, we doubt that would be enough to deny Cupid Jewels the standing that it has in principle to make the application for the release of the seized jewellery.

18 Finally, it is noted that s 17 gives the court the discretion to order the release of the distressed items on such terms as it thinks fit. Thus, even if Cupid Jewels' application were to succeed, the court could still, if it thinks appropriate, order the release of the seized jewellery to its owner – the Non-Party.

Conclusion

Conclusion

19 For these reasons, we restored SUM 3835 to be heard together with SUM 3916. We would reiterate that the Judge had taken the stand which he did because counsel for Cupid Jewels did not address the court as to its independent standing to make an application for the release of the seized jewellery which is distinct from that of the Non-Party. The appeal was therefore allowed to that extent. Because Cupid Jewels had succeeded before us on an argument which was not placed before the Judge, we made no order on costs for this appeal. We also varied the costs order made below to be in the cause.