



2 July 2014

PRESS SUMMARY

Henderson (Respondent) v Foxworth Investments Limited and another (Appellants) **[2014] UKSC 41**

On appeal from the Inner House of the Court of Session, [2013] CSIH 13

JUSTICES: Lord Kerr, Lord Sumption, Lord Reed, Lord Carnwath, Lord Toulson

BACKGROUND TO THE APPEAL

This case relates to the liquidation of Letham Grange Development Company Limited (“LGDC”) and the question whether its sale of a hotel and adjoining golf courses (“the subjects”) was a gratuitous alienation, ie. a property transaction conducted for significantly less than market value. Section 242 of the Insolvency Act 1986 provides that an alienation made by a company within two years of its winding up is challengeable by the liquidator. On such a challenge being brought, the court shall grant decree of reduction setting the alienation aside, unless, in particular, “*the alienation was made for adequate consideration*”. The section contains a proviso preserving “*any right or interest acquired in good faith and for value from or through the transferee in the alienation.*” [3]

The subjects were bought by LGDC in November 1994 for just over £2m. In February 2001, it sold them to the second appellant, NSL. The consideration recorded in the disposition was £248,100. LGDC went into liquidation in December 2002. The value of the subjects at the time was estimated at about £1.8m.

In January 2003, NSL granted a standard security (a charge) over the subjects in favour of Foxworth Investments Limited. Later that year, the liquidator of LGDC, Mr Henderson, began proceedings against NSL seeking the reduction of the 2001 disposition on the grounds that the sale was a gratuitous alienation, an unfair preference or a fraudulent preference. He obtained a decree by default in 2009 when NSL failed to be represented at the proof (trial) [2].

The liquidator then brought these proceedings, seeking reduction of Foxworth’s standard security. He argues that Foxworth cannot bring itself within the section 242 proviso since it knew at the time when it obtained the standard security that LGDC was in liquidation and that the sale by LGDC to NSL was open to challenge under section 242. The relevant decisions of all three companies were made by their common director and directing mind, Mr Liu [3]. The appellants claim that, in addition to the sale price recorded in the disposition, NSL had also assumed debts of £1.85m owed by LGDC to Mr Liu and his family, so that the sale was not a gratuitous alienation. This, they say, brought Foxworth within the scope of the proviso, having obtained the standard security in good faith and for value [4].

The Lord Ordinary, Lord Glennie, rejected the liquidator’s case that the sale was a gratuitous alienation. The liquidator sought to establish that the documentation relating to the assumption of the LGDC debts had not been prepared on the dates it bore, but had been produced subsequently to support a false case that the assumption formed part of the consideration for the sale of the subjects [22]. But Lord Glennie accepted Mr Liu’s evidence on the point [23].

Lord Glennie’s decision was reversed on appeal by an Extra Division of the Inner House of the Court of Session, which found that the judge had erred in law. In the absence of a finding that the assumption of any debts by NSL had occurred at the time of the sale and had therefore formed part of the consideration, he had not been entitled to hold that there had been adequate consideration or (given Mr Liu’s knowledge of the circumstances) that Foxworth had obtained the standard security in good faith [6].

The Extra Division also considered that Lord Glennie had failed to give satisfactory reasons for the factual conclusions he had reached on the evidence, particularly on whether there had, at the time of the sale, been an assumption by NSL of LGDC’s debts to Mr Liu. The Extra Division concluded that the sale *had* been a gratuitous alienation and that Foxworth had not obtained its rights under the standard security in good faith or for value [7].

JUDGMENT

The court unanimously allows the appeal by Foxworth and NSL. Lord Reed delivers the main judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

Lord Reed sets out the principles governing review of a trial court’s findings of fact [58-69]. The Extra Division was correct to identify that an appellate court can interfere where satisfied that the trial judge has gone “*plainly wrong*”, but it erred in concluding that this criterion was met in the present case [62]. “*Plainly*” does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. What matters is whether the decision under appeal is one that no reasonable judge could have reached [62]; that the decision cannot reasonably be explained or justified [66-68].

Lord Glennie did not err in law; he clearly understood the critical issue under section 242(4)(b) to be whether “the alienation was made for adequate consideration” [22]. He was aware that an obligation on the part of NSL could only constitute part of the consideration for the sale if it was undertaken as the counterpart of the obligations undertaken by LGDC [25]. His opinion had understandably focused on the question on which the parties had joined issue, namely whether – not when – any obligation was taken to assume the LGDC debts [26]. Lord Glennie was entitled to accept Mr Liu’s evidence on this point [27].

Lord Reed rejects the criticisms made of Lord Glennie’s treatment of the evidence [29-57]. The fact that Lord Glennie was less impressed by the liquidator’s case than the Extra Division reflected a careful and nuanced assessment of the evidence, and an understanding of the commercial realities [29]. He had taken into account the various criticisms of Mr Liu’s evidence before concluding that his evidence was credible and reliable. The weight given to the material evidence was pre-eminently a matter for the Lord Ordinary, subject only to the requirement that his findings be such as might reasonably be made [57].

Before the Supreme Court, the parties accepted that no prejudice would be occasioned by remitting the question of expenses in the Outer House to the Lord Ordinary [72]. They are invited to make submissions as to the appropriate form of order [73].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>