

The "Banga Borat"
[2009] SGHC 10

Case Number : Adm in Rem 142/2007, RA 100/2008, 106/2008
Decision Date : 09 January 2009
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Magdalene Chew (AsiaLegal LLC) for the plaintiff; Anna Oei and Chen Weiling (Tan, Oei & Oei) for the defendant
Parties : —

Res Judicata – Abuse of process – Mortgagor pleading waiver and estoppel against mortgagee's claim it admitted in earlier proceedings – Whether raising defence of waiver and estoppel amounted to abuse of process – Whether resjudicata arose

9 January 2009

Kan Ting Chiu J:

1 The plaintiff, the National Credit And Commerce Bank Ltd, applied to enter summary judgment against the defendant, HRC Shipping Limited and to strike out its counterclaim. The Assistant Registrar who heard the application gave the defendant conditional leave to defend upon the provision of security. Both parties appealed against the Assistant Registrar's order.

2 The parties are Bangladeshi entities. The plaintiff was the mortgagee of the defendant's vessel, "Banga Borat". The mortgage was executed to secure bank facilities granted by the plaintiff to the defendant.

3 The plaintiff's action was precipitated by the seizure of the vessel under a writ of seizure and sale on 13 July 2007 by Sea Consortium Pte Ltd, the interveners in these proceedings. The plaintiff learnt of the seizure on 3 August 2007, and wrote to the defendant on 4 August 2007 to recall the loans.

4 The plaintiff's action was filed on 27 August 2007. On the same day, a warrant of arrest was issued, and the vessel was arrested. In the writ of summons, the plaintiff claimed from the defendant "TK12,82,37,657.00 (equivalent to about US\$1.84 million)" as at 19 August 2007 and interest.

5 The defendant acknowledged that this sum was owing to the plaintiff. In an affidavit filed on 24 September 2007 in OS No 546/2007 relating to the intervener's claim against the defendant, the defendant's company secretary, Md Mizanur Rahman admitted that:

11. The amount owing to the mortgagee of the vessel "Banga Borat" is only TK12,82,37,657.00 (equivalent to about 1.84 million), as can be seen in paragraph 7 of the affidavit filed on 27 August 2007 by the mortgagee in Admiralty in Rem No. 142 of 2007Y ...

6 After the vessel was arrested, the plaintiff applied for the vessel to be appraised and sold by the Sheriff. The application was granted by Choo Han Teck J on 17 October 2007 after three hearings. Throughout that time, the defendant did not deny that it was indebted to the plaintiff, or dispute the legality of the arrest of the vessel.

7 After the order of sale was made, the defendant applied for the vessel to be sold to Hao Yun

Ltd ("Hao Yun"), a company with a P O Box address in Dubai, UAE. This application was dismissed by Choo J on 14 November 2007, and the vessel was sold by the Sheriff on 16 November 2007.

8 On 21 November 2007, the defendant made another application (SUM No 5182 of 2007) to, *inter alia*, set aside the sale, and for the vessel to be sold to Hao Yun. In support of this application, Md Midaznur Rahman stated in an affidavit affirmed on 1 November 2007:

3. I am duly advised by M/s Tan, Oei & Oei LLC [the defendant's solicitors], that

(i) there was an application for the appraisalment and sale of "Banga Borat" in Summons No. 4290 of 2007R.

(ii) during the hearing of the application of sale on 17 October 2007, the following information was presented to Court:-

(a) the amount allegedly owing to the Intervener USD 2,556,516.91 as at 17 October 2007, including the amount of SGD174,565.67 recovered in the latest Garnishee Application in Summons No. 4009 of 2007 ...;

(b) that the Defendant had secured a purchaser, Hao Yun Limited, for "Banga Borat" in excess of \$2,500,000.00 after deducting amounts owing by the Defendant to the Plaintiff. A copy of a letter from Hao Yun Limited dated 12 October 2007 appears from Page 9;

(c) that there is a difference of about \$300,000.00 (\$286,344.91) between the Defendant's calculation and the Intervener's calculation of the amounts allegedly owing to the Intervener. A copy of a letter from M/s Tan, Oei & Oei dated 16 October 2007 to M/s Rajah & Tann indicating the Defendant's calculation of the amounts appears at Page 10;

The application was dismissed by Belinda Ang Saw Ean J on 23 November 2007.

9 In this affidavit and counsel's submissions before Ang J, there was no denial that the defendant was indebted to the plaintiff and no issue was raised over the quantification of the debt. The dispute over the quantification of the interveners' claim had no reference to the plaintiff's claim.

10 The exhibits to the affidavit quoted in [8] hereof showed that the defendant had accepted the debt to the plaintiff, and was prepared to pay it off. In the letter dated 12 October 2007, referred to in para 3(ii)(b), Hao Yun informed the defendant's solicitors that:

We have been in discussion with HRC Shipping Limited over the possible sale of the "Banga Borat". We believe that the vessel is mortgaged to National Credit and Commerce Bank Ltd, who has applied to sell the vessel.

As we wish to purchase the vessel, we are writing to inform you that we are making a firm offer to buy the vessel at the price of USD2.5 million, subject to the existing mortgage in favour of National Credit and Commerce Bank Ltd.

11 Para 3(ii)(c) of the affidavit referred to a letter dated 16 October 2007 from the defendant's solicitors Tan, Oei & Oei LLC to the interveners' solicitors informing them that:

Our client has procured a purchaser for the vessel. After settling the mortgagee claim, a further

USD2.5 million will be available for payment of the judgment sum.

When this letter is read with Md Mizanur Rahman's affidavit of 24 September 2007 referred to in [5] hereof, it can be seen that the settlement contemplated was in the sum set out in the affidavit.

12 On 14 November 2007 (before SUM No 5182 of 2007 was filed), the plaintiff filed its statement of claim, where the amount was stated to be "TK12,80,91,195.29 (equivalent to about USD1,870,000)" as at 4 November 2007.

13 On 3 December 2007 (after SUM No 5182 of 2007 was dismissed), the defendant filed its defence and counterclaim, paras 4 and 6 of which stated:

4) The Defendant says the said Term Loan and Overdraft Facility was to be secured, inter alia, by a floating charge over the Vessel as evidenced by an undated Hypothecation of Goods made between the Plaintiff and the Defendant. In addition, the Vessel was to be jointly registered in the names of the Plaintiff and the Defendant. Upon the request of the Plaintiff, the Defendant instead executed a Mortgage over the Vessel, which mortgage was registered at Mercantile Marine Department of Chittagong, which Mortgage was in place of the said Hypothecation of Goods, which request was a departure from the terms of the facility letter dated 19 November 2003.

...

6) Further or alternatively, the Defendant says payment has been made by the Defendant to the Plaintiff in accordance with the terms on which the Term Loan and Overdraft Facility were granted and in accordance with prior course of dealings as between the Plaintiff and the Defendant. The Defendant says that the Plaintiff's conduct, in accepting payment from the Defendant and in continuing to accept payment from the Defendant, had waived any default by the Defendant on their payment obligations.

Effectively, the defendant was relying on the plaintiff's acceptance of late payments referred to in para 6 as its defence. Nothing turned on the matters brought up in para 4 relating to the execution of the mortgage as the defendant did not dispute the validity of the mortgage, or contend that it was unenforceable. The counterclaim was for the loss in the sale value of the vessel and bunkers, and the loss of profits that would have been derived from the operation of the vessel if it was not sold.

14 The plaintiff then filed an application to enter summary judgment in the action for "SD1,870,000 (equivalent to about TK2,80,91,195.29)" as at 4 November 2007 and interest, and to strike out the defendant's counterclaim.

15 The defendant filed another affidavit through Abdul Hasan Md. Al Faruq, its Controller (Accounts & Finance), to oppose the plaintiff's applications. In this affidavit, no mention was made of the earlier proposal to sell the vessel and settle the plaintiff's claim. The deponent referred to the plaintiff's acceptance of late payments and contended that the plaintiff waived its rights against the defendant and was estopped from insisting on strict compliance by the defendant, [\[note: 1\]](#) and that the plaintiff had wrongly arrested and sold the vessel [\[note: 2\]](#).

16 The plaintiff acknowledged that it had accepted late payments from the defendant but it pointed out that it did not recall the loans because the defendant was late in its payment, and that it took action because the vessel was seized by the interveners. The reason for the recall of the loans was set out in its letter of 4 August 2007. The plaintiff had informed the defendant that:

It is learnt from the letter dated 3rd August 2007 of M/s. Sea Consortium that the vessel M.V. "Banga Borat" owned by you and mortgaged to us against credit facilities to the tune of TK.23.50 Crore has been arrested and will be put under sale by auction in Singapore as on 28.08.2007 due to default on your part. Now Present outstanding of your 'SOD (6)' i.e. Overdraft account stands at Tk.6,12,06,030.00 (Taka Six Crore Twelve Lac Six Thousand Thirty) only and 'Term Loan' account stands at Tk. 6,70,31,627.00 (Taka Six Crore Seventy Lac Thirty One Thousand Six Hundred Twenty Seven) only with upto date interest. Thus the total liability of both accounts stands at Tk. 12,82,37,657.00 (Taka Twelve Crore Eighty Two Lac Thirty Seven Thousand Six Hundred Fifty Seven) only equivalent to USD.1.84 Million.

Please note that as M.V. "Banga Borat" was a security for the entire outstanding and as the said vessel is under order of arrest and to be sold by auction. In our view, this constitutes an event of default since the security of the bank for the said loan surely jeopardized. As such we are recalling the entire loan and request you immediately settle the amount within 07 (seven) days from the date of receipt of this letter. Failing which we shall be constrained to enforce our mortgage on the vessel.

The defendant's conduct in these proceedings

17 The defendant had, until it filed its defence and counterclaim, admitted that it was indebted to the plaintiff. In the pre-defence stages, its primary interest was to obtain court approval for the vessel to be sold to Hao Yun.

18 To this end, its solicitors wrote to the plaintiff's solicitors to state that the plaintiff's mortgage claim would be settled. The defendant went further and exhibited an executed deed of agreement between itself and Hao Yun, whereby subject to the approval of the court, Hao Yun was to buy the vessel by paying "all monies owing by [the defendant] to the Plaintiff in Admiralty in Rem No. 412 of 2007" and making a further payment to the defendant.

19 These were representations to the plaintiff and the court that the plaintiff's claim would be paid upon the sale of the vessel to Hao Yun. There was no qualification over the amount to be paid. Although the final amount was not fixed because of accumulating interest charges payable, it was disclosed in the claim indorsed in the writ of summons that the sum was TK. 12,82,37,657.00 as at 19 August 2007.

20 In the event, the sale to Hao Yun was not approved, and the plaintiff continued with its claim. At that stage, the defendant changed course and contended that it was not indebted to the plaintiff at all because the plaintiff had allegedly waived its rights or is estopped from exercising them.

21 The matters on which the defences of waiver and estoppel were based were within the defendant's knowledge at all times. Why were they not raised earlier, and why were representations made to the plaintiff and the court that the plaintiff's claim would be settled and paid if the sale to Hao Yun was approved? No reason was offered by the defendant. These representations made to the plaintiff would have raised serious questions over the merits of the defence. When those representations were made to the court to seek approval for the sale of the vessel, and an inconsistent and contradictory position was taken in the defence and counterclaim, the defendant's conduct may amount to an abuse of process.

Abuse of process

22 In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, a decision of the House of Lords, Lord

Bingham of Cornhill held at 31:

The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.

and he went on to elaborate that in deciding whether there is abuse, the judgment made should be:

a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

This was endorsed by the other Law Lords in that case, and applied in Singapore by the Court of Appeal in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR 563.

23 In *Goh Nellie v Goh Lian Teck and Others* [2007] 1 SLR 453 ("*Nellie Goh*"), Sundaresh Menon JC aptly stated at [53], the position to be that:

a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant.

24 In the present case, the defendant did not raise the defences of waiver and estoppel which should have been raised before Choo J and Ang J, and went further to admit the plaintiff's claim and negotiate a sale of the vessel to Hao Yun which ensured that the plaintiff's claim was satisfied.

25 The law is not so rigid and absolute as to deny the defendant any opportunity to raise those defences now, if there are valid reasons for not raising them earlier. But the defendant had not brought out any reasons for reversing its position. Any circumstances and evidence that support the defences of waiver and estoppel would have existed before the plaintiff filed this action. The forced sale of a vessel is a catastrophic prospect to confront a shipowner. A reasonable shipowner would consider the validity of the arrest. Here, the defendant did not raise any issue against the arrest, and sought to arrange for the plaintiff's claim to be paid out of the sale proceeds.

26 Against this backdrop, was the raising of waiver and estoppel an abuse of process? The principal factors to be considered are:

- (i) they were matters that could have been brought up at the outset of the proceedings, but were not;
- (ii) the defendant had not only kept silent on waiver and estoppel, but had admitted to be

indebted to the plaintiff;

(iii) the defendant's reliance on the plaintiff's acceptance of late payments to raise the defences of waiver and estoppel ignored the fact that the plaintiff did not recall the loans because the defendant was late in payment, but because the vessel was arrested by the interveners; and

(iv) the defendant had offered no explanation for the change from unqualified admission to total denial.

27 In the absence of any valid reasons, I found that the defendant's plea of waiver and estoppel was an abuse of process.

28 What is the effect of a defence pleaded in abuse of process? Abuse of process of this magnitude comes within the doctrine of *res judicata*. As Menon JC highlighted in *Nellie Goh* at [17]–[19], *res judicata* takes the form of cause of action estoppel, issue estoppel and abuse of process.

29 In the present case, the legality of the arrest was not the issue before Choo J and Ang J, nor was waiver and estoppel brought up as issues before them. The first two forms of *res judicata* did not apply on these facts. However, the circumstances in which the defendant's raising of the defences of waiver and estoppel were so unsatisfactory that they came within the third form of *res judicata*.

30 It followed that the defendant's pleas of waiver and estoppel cannot be maintained as these matters are *res judicata*. The counterclaim founded on unlawful arrest because of the alleged waiver and estoppel was similarly defective. Consequently, summary judgment was entered in favour of the plaintiff, and the counterclaim was struck out.

[\[note: 1\]](#) Affidavit of evidence-in-chief of Abdul Hasan Md. Al Faruq paras 10, 11 and 19

[\[note: 2\]](#) Affidavit of evidence-in-chief of Abdul Hasan Md. Al Faruq para 22

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