Agrolex Private Limited v IFS Capital Limited
[2009] SGHC 268

Case Number : Suit 214/2008

Decision Date : 25 November 2009

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Navinder Singh and Peter Doraisamy (Navin & Co LLP) for the plaintiff; Sean Lim Thian Siong and Jason Aw Hai Ming (Hin Tat Augustine & Partners) for the defendant

Parties : Agrolex Private Limited — IFS Capital Limited

Contract

25 November 2009 Judgment reserved.

Tan Lee Meng J:

1 The plaintiff, Agrolex Private Limited ("APL"), is in the business of manufacturing, researching and developing specialized crop protection chemicals. The defendant, IFS Capital Limited ("IFS"), which is listed on the Singapore Stock Exchange, is a financial services group dealing with structured finance, private equity investments, credit insurance, bonds and guarantees.

2 APL sued IFS for consequential losses arising from an alleged failure by IFS to honour the terms of a cross border hire purchase facility ("the facility") that was intended to finance its purchase of research and development equipment ("the equipment") costing around $1.32m. IFS denied liability to APL on the ground that the question of disbursement of money under the facility did not arise as the latter had failed to comply with two conditions precedent in its offer of the facility.

Background

3 In August 2006, APL appointed one Mr Alvin Lai Woon Leung ("Alvin Lai"), a financial consultant, as its broker to obtain financing for its proposed purchase of the equipment, which was intended for its laboratory in Batam, Indonesia. Alvin Lai approached IFS which expressed an interest in financing the purchase of the equipment.

4 IFS's letter of offer ("LOO") to finance the purchase of the equipment, which was dated 23 March 2007, contained a number of terms which were described as "conditions precedent" in Clause 2. The two conditions precedent relied upon by IFS in these proceedings ("the two conditions precedent") concerned the carrying out of a preliminary audit with results that satisfy IFS ("the satisfactory audit condition") and the effecting by APL of an insurance policy on the equipment by an insurer ("the insurance condition") arranged by IFS's broker, Phillip Securities Pte Ltd ("Phillips Securities").

5 On 30 March 2007, APL accepted the LOO and returned the same to IFS. APL also paid a non-refundable facility fee of $5,000, which was payable upon acceptance of the LOO.

6 Without having complied with the two conditions precedent, APL ordered the equipment on 5 and 6 April 2007.

7 IFS arranged for the first audit of APL to be conducted on 25 May 2007 at APL's office. This audit was handled by Ms Lynn Chng Hwee Yen ("Lynn Chng"), who was IFS's audit assistant at the material time and is presently an assistant audit manager with the Hong Kong and Shanghai Bank. The results of this audit were unsatisfactory to IFS, which had concerns about APL's ability to pay the instalments due to it if funds were disbursed under the facility.

8 A second audit of APL was arranged for 31 August 2007. A day before the second audit, Lynn Chng sent an e-mail to Alvin Lai on 30 August 2007 to request that more documents be furnished for the purposes of the second audit.

9 On 31 August 2007, Alvin Lai replied to IFS. In his e-mail, he sought to address IFS's concerns about the financial viability of APL by giving what he termed a "clearer picture of how APL trades". Evidently, IFS was still not satisfied. On 3 September 2007, pending the results of the second audit, Cecilia Lee e-mailed Alvin Lai to reiterate why a satisfactory audit was required by IFS. In her e-mail, she stated as follows:

> In essence, the purpose of audit is to establish the repayment ability of APL and this has to be satisfied before disbursement is allowed for the HP facility *as this is a condition of the offer* granted to APL.
>
> [emphasis added]

10 IFS contended that as it was also not satisfied with the results of the second audit, it refused to proceed with the loan facility. IFS asserted that Alvin Lai was informed of its decision, albeit after a delay.

11 As for the insurance condition in the LOO, which required insurance on the equipment to be arranged by IFS's broker, Phillip Securities, APL initially wanted to insure the equipment with an Indonesian insurer, Tokio Marine Indonesia. As IFS had misgivings about this, APL insured the equipment with another insurer, First Capital Insurance Limited ("First Capital"). On 28 September 2007, Alvin Lai forwarded an e-mail to IFS, attaching an insurance cover note issued by First Capital. This insurance was not arranged by Phillip Securities and IFS relied on this fact to assert that APL had also breached the insurance condition.

12 On 23 October 2007, APL wrote to IFS to request that funds be disbursed under the facility and to inform IFS that the necessary GIRO form for the monthly repayment of the loan had already been executed.

13 On 19 November 2007, APL's solicitors, Navin & Co wrote to IFS to state that unless the disbursement of funds was made within 3 working days, an application will be made to the court to compel IFS to make the said payment. On 22 November 2007, IFS's solicitors, Hin Tat Augustine & Partners replied and stated that it was a condition precedent for the disbursement of funds that IFS be satisfied with the results of an audit and that since this condition precedent had not been complied with, the facility had been cancelled. IFS's solicitors also enclosed a cheque of $5,000 for the facility fee paid by APL.

14 In March 2008, APL, which had difficulty finding alternative financing for the purchase of the laboratory equipment, instituted the present proceedings against IFS.

Whether IFS is liable to APL

15 While IFS contended that APL had not complied with the two conditions precedent, the latter asserted that these conditions were a formality and were not really intended to be conditions precedent. APL also contended that it had in any case complied with the said conditions precedent and that IFS was in any case estopped from relying on any non-compliance to refuse to disburse funds under the facility.

The satisfactory audit condition

16 IFS asserted that a satisfactory audit of APL's finances was essential to determine APL's cash flow and whether or not APL could service the proposed loan for the purchase of the equipment. Ms Cecilia Lee Guat Pheng ("Cecilia Lee"), who was IFS's Vice-President (Team Head) Alternative Finance at the material time and is presently a senior relationship manager with Hong Leong Finance, explained in her affidavit of evidence-in-chief ("AEIC"), filed on 14 July 2009, at [27] as follows:

> The fact that the disbursement was always subject to the condition precedents set out in the Letter of Offer in particular the condition that the Defendants had to be satisfied with the results of a preliminary audit is self evident and indeed such a preliminary audit was carried out on 25 May 2007 at the Plaintiff's office. As the Plaintiffs have admitted, on 23 May 2007, the Defendants sent an email to Alvin requesting for a large number of accounting documents for the purpose of the preliminary audit. *This would have told the Plaintiffs that the Defendants treated the preliminary audit with utmost importance*.
>
> [emphasis added]

17 IFS rightly contended that if a satisfactory audit was not an important term of the LOO, a second audit would not have been conducted after the results of the first audit were found to be unsatisfactory.

18 As for why the preliminary audit was unsatisfactory. IFS's assistant general manager for credit risk management, Mdm Phyllis Chiu Yin Wah, explained in her AEIC, filed on 13 July 2009, at [7] – [9] as follows:

7 When I perused the audit report, I noticed that [APL's] trade debtors' ageing was not very satisfactory as a substantial part (64%) of the trade debts was overdue by more than 90 days while the portion of trade debts which were current stood at about 16% and those between 30 to 60 days stood at about 19%. From the information given … it was apparent that the ageing deteriorated over the 3 months under analysis – Oct, Nov and Dec 2006. From the ageing, the [over] 90 days over due debts was 68%, 50% and 64% respectively.

8 I also noticed in the audit report that Lynn Chng had indicated that [APL] had informed that 80% of their customers made payment through "LC" ie letters of credit and the rest through "TT" ie telegraphic transfers. I then posed the question whether the "LCs" were "Term LCs" or "Sight LCs" because unless they were "term LCs", this would seem to be incongruent with the high portion of aged trade debts. In respect of the payments through "TT", I posed the question whether this meant that cash payments were made ie in that no credit terms were given.

9 *The above audit findings were in my opinion not satisfactory as it would have an adverse implication on [APL's] cash flow and hence their ability to keep to the monthly instalment payments*.

[emphasis added]

19 As has been mentioned, a second audit was arranged for 31 August 2007. As IFS was still not satisfied with the results of the second audit, it refused to disburse funds under the facility. Cecilia Lee testified that she informed Alvin Lai about this development.

20 APL contended that a preliminary audit was unnecessary because it had given IFS enough information on its finances months before the LOO was issued. It added that as IFS had sufficient time to study APL's finances, a preliminary audit was absolutely unnecessary. APL's broker, Alvin Lai, who handled the negotiations with IFS on APL's behalf, claimed that the two conditions precedent were not to be taken seriously. In his view, awarding a LOO is as good as awarding the facility without pre-conditions. The simple answer to this line of argument is that it is not for the court to re-write the contractual terms agreed upon between the parties to a contract.

21 In any case, Alvin Lai contradicted himself when he conceded during cross-examination that the two conditions precedent are "really quite important" and must be complied with. Note must also be taken of the following part of the cross-examination of Alvin Lai:

Q So if [IFS] say they want an audit before disbursement, they are entitled to do that, correct?

A Yes.

Q And if the plaintiffs are not happy with this term, they don't have to sign the letter of offer, correct?

A Yes….

Q So let me just get it straight from you. *This clause, would you agree with me, entitled the defendants to have an audit before disbursing the facility?*

A *Yes, as stated in the LOO*.

Q *Right. And it entitled the defendants not to disburse this facility if they are not happy with the results, correct?*

A *Yes*.

[emphasis added]

22 Like Alvin Lai, APL's director, Mr Lee Hsiao Liang ("Lee"), also accepted that IFS had a right to a satisfactory audit before disbursing funds under the facility. The relevant part of the cross-examination of Lee is as follows:

Q [I] like to call it a condition precedent but you like to call it a formality, but nonetheless, you agree that this term must be complied with by you?

A Yes.

Q *And you agree that if this term is not complied with, the defendants have a right not to disburse the facility*.

A *Yes*.

[emphasis added]

23 In the face of IFS's assertion that it found the audit results to be unsatisfactory, APL also tried to undermine this assertion by pointing out that the then head of IFS's Credit Risk Department, Mr Ong Peng ("Ong"), had accepted that the audit results were satisfactory. APL's counsel, Mr Navinder Singh, informed the court that in the original copy of IFS's internal document in relation to the facility ("client's audit form"), some words next to Ong's name had been blotted out by an ink eradicator. However, Ong's subordinate, Phyllis Chiu, who appeared to me to be a quite truthful and reliable witness, categorically denied that Ong had accepted that the audit results were satisfactory although he had initially thought that a loan for a reduced period was possible. She testified that she was present when Ong had blotted out some words in the client's audit form after she had raised certain queries and that Ong had agreed that funds under the facility should not be disbursed. During re-examination, she explained as follows:

Mr Ong asked me what were my concerns or whether I was satisfied with the preliminary audit. I told him "No, I'm not satisfied" and he asked me why. So I explained to him that I wasn't comfortable with the debtors' position and because the debtors are not paying; with the long overdue stuck in 90 days, there is no cash flow for … the company to pay this loan … and the loan amount is really large.

Then he looked at me, he agreed with me so he blanked out his signature and the date.

24 In any case, Ong's superior, the deputy chief executive officer of IFS, Mr Lee Soon Kee, whose approval was required before any disbursement can be made under the facility, did not give the green light for any disbursement of the facility in the face of the unsatisfactory audit results of both the first and second audits.

25 For the reasons stated, IFS was, without more, entitled to refuse to disburse any funds to APL under the facility because *it genuinely believed, and not without acceptable reasons*, that it was not in its interest to lend money to APL because the audit revealed to IFS that APL had a cash flow problem.

The insurance condition

26 As for the insurance condition, APL's director, Lee, acknowledged that when his company signed the LOO, he knew that the insurance of the equipment had to be arranged by Phillip Securities.

27 The insurance condition need not be discussed in detail as I have already held that IFS was, without more, entitled to rely on the satisfactory audit condition to refuse to disburse money under the facility. IFS's Cecilia Lee, to whom Alvin Lai's e-mail of 28 September 2007 was addressed, stated in her AEIC at [48] that she did not reply to Alvin Lai's e-mail because she had already told him that IFS would not be proceeding to disburse the facility. I accept Cecilia Lee's evidence as I found her to be a truthful and reliable witness. All that needs to be noted here is that there was no satisfactory proof that IFS had, by the time it decided not to disburse any funds pursuant to the facility, waived the requirement that the insurance be arranged by Phillip Securities. It follows that APL also breached the insurance condition.

Estoppel

28 What needed to be considered next was whether or not IFS was, as claimed by APL, estopped from relying on the breach of the two conditions precedent to refuse to disburse funds to APL. In regard to the question of estoppel, it is worth noting that in *Tacplas Property Services Pte Ltd v Lee Peter Michael* [2000] 1 SLR 637 ("*Tacplas Property*"), Chao Hick Tin JA, who delivered the judgment of the Court of Appeal, stated at [62] as follows:

> In order for the appellants to succeed in their claim in estoppel, there must be a clear and unequivocal representation on the part of the respondent that he did not dispute the effect of the agreement…. Although a representation giving rise to such an estoppel need not be express and may be implied, it must, nonetheless be clear and unequivocal.

29 APL's broker, Alvin Lai, claimed in his AEIC, which was filed on 26 August 2009, at [18] that IFS "had very clearly led the Plaintiffs to believe that the financing would be provided, and on the strength of that representation proceeded to order the equipment". However, this assertion was not supported by the evidence before the court. Apart from the fact that there was no evidence of any representation from IFS that the two conditions precedent would not be relied on, APL did not explain how it had altered its position in reliance on the alleged representation.

30 It is important to note that APL had ordered the equipment in haste just 4 or 5 days after receiving the LOO without bothering to wait for the preliminary audit to be conducted. It was thus not surprising that IFS's counsel, Mr Lim, suggested that APL had itself to blame for ordering the laboratory equipment before it had received word from IFS that the two conditions precedent had been complied with. The response of APL's director, Lee, merits attention. It is as follows:

> Q So if you had … ensured that the audit had taken place and the defendants were satisfied, then there wouldn't be this problem. Correct?

A Yes.

31 When cross-examined further, Lee's answers did not help his company's case. The relevant part of the proceedings is as follows:

Q [I]f you knew this term had to be complied with and you knew that the defendant have a right to refuse to disburse facility if it is not complied with, and you knew it when the letter of offer was signed and you knew it when you ordered the equipment, so going back to that question, isn't it true that it was your own fault for having ordered the equipment before this so-called formality was complied with?

A No.

Q But why not?

A Because we complied.

Q Yes, but you ordered the equipment before you complied with it, correct?

A Yes.

Q Right …. But you could have waited for this term to be complied with before you ordered. You could have waited.

A I could have but we … *know we will comply* to the audit.

[emphasis added]

32 APL may have believed in its own financial viability but under the LOO, it was not for APL to decide whether it had satisfied the audit with respect to its financial position.

33 APL's broker, Alvin Lai, also accepted that APL was at fault for having ordered the equipment before ensuring that it had complied with the conditions precedent in the LOO. The relevant part of the proceedings is as follows:

Q Although you called them formalities, [the conditions precedent] are important and have to be complied with

A Yes.

Q So if these are terms which have to be complied with and the plaintiffs know that there are these terms in the letter of offer, so *they ought to have waited for the audit before ordering the goods*.

A *Yes*.

Q *And it was their own fault for not doing so, correct*.

A *Yes*.

[emphasis added]

34 Alvin Lai next claimed that the fact that IFS had remained silent for two months after the second audit meant that there were no problems with the audit. In his AEIC he stated at [18] as follows:

> It is important for me to stress that [IFS] did not communicate the findings of the audit, neither did they subsequently write to the Plaintiffs or to me to voice any negative or other findings…. If [IFS] had any issue with the audit or the validity of the financing, they would not have remained silent in the two month period in June – July 2000 ….

35 It is rather disturbing that IFS took so much time to deal with the audit issue. However, APL was equally tardy in checking on what was happening to its proposed loan. APL's broker, Alvin Lai, testified rather astoundingly that he was "not interested" in the results of the audit although he was the person who had liaised with IFS on APL's behalf with respect to the audit. Although the first audit was conducted on 25 May 2007, it was not until August 2007 that he finally became "interested" in the results of that audit. The relevant part of the proceedings is as follows:

Q I notice that you did not chase for the results of the audit until August. Correct?

A Yes.

Q So you also did nothing in these 2 months?

A Yes….

Q *But you agree with me that the audit is important, right?*

A *Yes*.

Q *But yet you were not interested to know how it went*.

A *Yes, I'm not interested*.

Q Wasn't it a concern to you that if the audit is not satisfactory, disbursement would not take place?

A It's not a concern to me because … once they sign, it's not my concern….The result is not my …

Q Responsibility?

A Yes.

[emphasis added]

36 In *Tacplas Property* (*supra*, at [28]*)*, Chao Hick Tin JA, who considered the relationship between silence and estoppel, stated at [62] as follows:

> Mere silence and inactivity will not normally suffice, and in the words of Robert Goff LJ in *The Leonidas D; Allied Marine Transport Ltd v Cale do Rio Doce Navegacao SA* [1985] 1 WLR 925 at p 937 'it is difficult to imagine how silence and inaction can be anything but equivocal' (endorsed by this court in *Fook Gee Finance Co Ltd v Liu Cho Chit and another action* [1998] 2 SLR 121).

37 The position is of course different where there is a duty to disclose. In *Greenwood v Martins Bank Ltd* [1933] AC 51, an account holder, who sued his bank to recover sums paid on cheques forged by his late wife, knew but did not inform his bank that his wife had been forging his signature for 18 months. As a bank customer had a duty to disclose to the bank forgeries which were known to him, it was not surprising that it was held that the account holder was estopped from recovering from the bank the money paid out under the forged cheques. The circumstances in the present case, where there was an on-going attempt to have a satisfactory audit of APL, were very different and no attempt was made by APL to suggest IFS had a duty to disclose.

38 APL also pointed out that IFS had led it to believe that the money would be disbursed because of a number of letters written by IFS's staff. For instance, on 7 August 2007, Ms April Chan Su-Wen ("April Chan") wrote to Alvin Lai as follows:

> As spoken yesterday, we will require the following documents in order to process the disbursement …. :
>
> 1 Original Insurance cover note stated IFS interest in the financed equipment.
>
> 2 Copy of your IC as witness
>
> 3 Original Delivery receipt (IFA specimen)
>
> …. [I]n view of the *targeted disbursement … by this week*, kindly arrange for the immediate execution of the delivery receipt for return to IFS as soon as possible.
>
> [emphasis added]

39 April Chan said that Alvin Lai knew that everything was subject to a satisfactory audit and that all she was doing was to complete the paper work so that money can be disbursed as soon as a satisfactory audit has been completed. Although her language could have been clearer, I believed her evidence that she had also made it clear to Alvin Lai orally at the material time that she had concerns about the audit. April Chan explained in her AEIC, which was filed on 14 July 2009, at [10] as follows:

> I understand that the Plaintiffs are in this action relying on my aforesaid email to show that the loan disbursement was a formality or that the Defendants had approved the disbursement of the facility. This cannot be so. I had sent the email to Alvin Lai on 7 August 2007 only because he had requested that I let him know what other formalities and documents had to be prepared as he was very concerned that the availability of the facility would lapse soon. I had very clearly told Alvin Lai and he knew that the preliminary audit was not satisfactory and that the facility could not be disbursed because of that.

40 APL also pointed out that IFS must have agreed to disburse the facility because Cecilia Lee had

informed Alvin Lai in an e-mail on 7 August 2007 that IPL would require an inspection of the equipment "financed by us" and he had replied on the same day to ask whether the inspection should be done after the final equipment has been installed. Cecilia Lee refuted this assertion in her AEIC at [39] as follows:

> The Plaintiffs are using the aforesaid e-mails exchanged between myself and Alvin Lai to allege that the disbursement was a formality. This is untrue. It can be clearly seen that I was only reminding Alvin Lai that the Defendants would have to inspect the equipment if the facility was disbursed and we knew that the preliminary audit was still an outstanding issue and our discussions were subject to all [conditions precedent] being fulfilled …

41 I accept the evidence of IFS's witnesses that they were trying to get the paper work in place so that disbursement can be made the moment a satisfactory audit had been done and the fact that the paper work was being finalised did not mean that the requirement of a satisfactory audit has been waived.

42 I thus find that APL has not established that IFS is estopped from relying on the two conditions precedent.

No Proof of Loss

43 Although IFS was entitled to refuse to disburse funds under the facility, it is worth pointing out that even if APL had a case against IFS, it failed to prove its loss. Realising that there was insufficient evidence to prove its alleged losses, APL applied to bifurcate the trial after it had started. The application was dismissed and APL has not appealed against the dismissal of its application within the time permitted for such an appeal.

44 Although APL claimed to have suffered more than around USD10m in damages, APL's counsel stated as follows in his closing submissions at [151]:

> While the Plaintiffs accept they *may not be entitled to large sums of damages given the nature of the industry*, they should still be compensated for the delays and losses they were put to by the act of the Defendants.

45 APL relied on *Chaplin v Hicks* [1911] 2 KB 787, where the English Court of Appeal held it does not follow that a plaintiff is not entitled to damages merely because it is difficult to assess damages. However, *Chaplin v Hicks* concerns the loss of a chance and it is not the law that a plaintiff who can and should present evidence of his loss need not do so.

46 To begin with, APL sought to recover from IFS the cost of rejection of the equipment estimated at $132,000. However, this claim should not have been made because the equipment was not rejected and had in fact been installed at its factory at Batam. When queried during the trial about this head of claim, APL promptly withdrew it.

47 Secondly, APL sought to recover the cost of renovating its Batam laboratory, which was estimated at $647,325,00. Although the renovations were intended to accommodate the equipment, the amount claimed by APL for renovation work also concerned the purchase of a minibar, a marble-topped dining table and a marble-topped meeting desk, the construction of an ornamental indoor pool for fish and the cladding of the main entrance of the laboratory with granite. There was no attempt to explain how this claim for renovation costs was within the reasonable contemplation of the parties to a contract for the provision of financing to purchase laboratory equipment. The equipment has

been installed in the factory and APL's officers continue to enjoy the benefit of the ornamental indoor pool, the marble-topped furniture and the granite cladding of its laboratory entrance. Not unsurprisingly, APL also withdrew its claim regarding the renovation costs during the trial.

48 Thirdly, APL claimed that an alternative basis for calculating its loss was the interest IFS would have earned from it had the facility been disbursed. When cross-examined, APL's director, Lee admitted that his company had no basis for computing damages in this way.

49 Finally, in relation to the claim that APL had suffered loss of profits estimated at around USD10m, APL's director, Lee stated as follows in his AEIC, which was filed on 26 August 2009, at [49]:

> There is also loss of sales of products developed by us. Due to the delay, it meant we could not get our product registration early (because the evaluation usually takes 1 – 3 years of assessment, meaning that the entry barrier is high and very time consuming), therefore we could have at least obtained one product registration in Europe, and to start sales and distribution by 2009, and the yearly sales would have been around USD10 million for just one product for us.

50 However, when cross-examined, Lee readily admitted that he had no evidence to substantiate his assertions in his AEIC regarding APL's loss of profits. The relevant part of the proceedings is as follows:

> Q Paragraph 49, here you say there is a loss of sales by you, right?
>
> A Yes.
>
> Q Now there is no evidence in Court to show that you … have sales anyway. Correct?
>
> A Yes….
>
> Q And no evidence to support … how you could have obtained registration from one product, correct?
>
> A Yes.
>
> Q And how … your sales would have been yearly around US 10 million for just one product, not a single piece of document, correct?
>
> A Yes.
>
> Q *So, in effect, Mr Lee, you have no documents and nothing to substantiate your claim for damages, correct?....*
>
> A *Yes*.
>
> [emphasis added]

51 Evidently, the manner in which APL advanced its claim for damages cannot but fail to advance

the credibility of its claim against IFS.

Conclusion

52 APL's claim against IFS is dismissed with costs.