Wee Soon Kim Anthony v UBS AG and Another Case
[2003] SGCA 5

Case Number : CA 75/2002, Suit 834/2001R

Decision Date : 10 February 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Goh Aik Leng (Goh Aik Leng & Partners) for the Appellant; Davinder Singh, Hri Kumar (Drew & Napier LLC) for the Respondents

Parties : Wee Soon Kim Anthony — UBS AG

Banking – Banker's books – Discovery – Relevancy – Evidence Act (Cap 97, 1997 Rev Ed) Part IV

Banking – Banker's books – Scope of expression "other books" under definition of bankersÂ' books – Evidence Act (Cap 97, 1997 Rev Ed) s 170

Banking – Banker's books – When requirement of "special cause" applies – Evidence Act (Cap 97, 1997 Rev Ed) s 174

Civil Procedure – Affidavits – Averment on affidavit that document irrelevant to action – Whether to be accepted on its face value

Civil Procedure – Costs – Costs of the banks in application under Part IV of the Evidence Act – Evidence Act (Cap 97, 1997 Rev Ed) s 176(1)

Delivered by Chao Hick Tin JA

1 This is an appeal against an interlocutory decision of the High Court granting the defendant's application that orders be given under s 175 of the Evidence Act authorising four banks, namely, Bangkok Bank, ABN Amro Bank, Citibank NA and the Development Bank of Singapore, to allow the defendant to inspect and take copies of certain documents relating to the plaintiff's accounts with those banks.

Background

2 The plaintiff, Mr Anthony Wee Soon Kim ("Wee"), was at all material times a customer of the defendant ("UBS"). He engaged, through UBS, in various foreign exchange transactions and incurred substantial losses. He instituted the present action against UBS claiming for losses suffered on account of, inter alia, fraudulent or negligent misrepresentation, breach of contractual duty of care and breach of fiduciary duty on the part of UBS.

3 The substance of Wee's complaint is that UBS' officers had failed to give him proper advice on the transactions, and in particular, that they did not advise him on "swap points" that might be imposed. In its defence UBS avers that Wee is an experienced and/or sophisticated investor in the foreign exchange market who understood the concept of "swap points" as reflecting "the interest rates differential between US$ and MYR for a given period" and would have been aware that the trading of the 12-month forward hedge was affected by "swap points". In reply, Wee says that his experience was limited to trading in shares.

4 On 8 February 2002, UBS filed summons-in-chambers No. 429/2002 (SIC 429) seeking the discovery of certain documents, relating to accounts maintained by Wee at six banks, to show his experience in

foreign exchange transactions. At the hearing of SIC 429, arguments on relevancy were advanced. Eventually, the Assistant Registrar narrowed down the discovery order to:-

> (i) All correspondence, statements, confirmation notes, confirmation advice and facility letters showing the date, nature and value of all transactions effected by or on behalf of the Appellant through the following entities for the period 1987 to December 1997:-
>
> > (a) Bangkok Bank;
> >
> > (b) ABN Amro Bank;
> >
> > (c) Citibank N.A.;
> >
> > (d) Lehman Brothers, formerly known as Shearson Lehman Hutton;
> >
> > (e) Sassoon Securities Ltd;
> >
> > (f) UOB-Kay Hian Pte Ltd; and
> >
> > (g) any other bank and/or financial institution and/or financial intermediary and/or brokerage and/or any similar entity, whether situate in Singapore or elsewhere in the world;
>
> (ii) All statements of account from The Central Depository (Pte) Limited ("CDP") relating to the Appellant's account(s) maintained with the CDP."

She deleted the general words "and documents of any other description whatsoever" from the order.

5 This discovery order was upheld on appeal by the judge in chambers. One of the objections raised and rejected by the judge was that the order given was oppressive as the documents sought to be produced were voluminous.

6 Later Wee said he could not comply with the discovery order because he "had misplaced his bank records on account of the shifting of his office premises on four occasions."

7 Trial of the action proper commenced before Kan J on 26 February 2002. On 6 March 2002, Wee objected to the production of the documents ordered in SIC 429. The next day, UBS sought unsuccessfully to have Bangkok Bank, DBS and ABN Amro produce the documents through the issue of writs of *Subpoena Ad Testificantum* and *Duces Tecum* due again to the objection of Wee.

8 On 23 May 2002, UBS, at the suggestion of the trial judge, made an application by Summons-in-Chambers No. 1595/2002 (SIC 1595) asking that, pursuant to s 175 of the Evidence Act ("the Act'), Bangkok Bank, ABN Amro, Citibank and DBS should within 14 days,

> "disclose to the Respondent and/or their solicitors and allow the Respondent's solicitors to inspect and take copies of any and all documents, including without limitation, any and all statements, correspondence, confirmation notes, confirmation advice, facility letters and documents of any other description whatsoever showing the date, nature and value of all Transactions effected on behalf of the Appellant for the period January 1987 to December 1997."

9 The application also defined the word "transactions" to mean –

> "all investments in and/or purchase and/or sale of listed and unlisted securities, bonds, mutual funds, unit trusts, options, futures contracts, currencies, commodities, derivatives and/or investments and financial instruments of any other description whatsoever."

10 The trial judge granted the application without the general words "and documents of any other description whatsoever." The scope of this order is identical to that made in SIC 429. What is now before this court is the appeal of Wee against the order made in SIC 1595.

Issues

Before us, counsel for Wee raised the following issues:-

> (i) whether the application in SIC 1595 is in compliance with Part IV of the Act;
>
> (ii) whether the application is made in bad faith and is a fishing expedition;
>
> (iii) whether the documents asked for in the application are bankers' books within the meaning of s 175.

Non compliance with Part IV

12 On this issue, what counsel contended is that the fact that the application in SIC 1595 asked for an order in terms similar to those in SIC 429, it does not mean that an order must be granted. He also asserted that he was entitled to re-argue the issue of relevancy because, before an order is made under s 175, "special cause" must be shown as required under s 174.

13 It will be recalled that in SIC 429, Wee had argued that the documents sought to be discovered in that application were not relevant to the issues in the action. However, notwithstanding his objection, the Assistant Registrar granted the order, having narrowed down its scope by deleting certain open-ended words. Wee's appeal against that discovery order was dismissed by the judge-in-chambers. He did not pursue the matter any further. Wee could not comply with the discovery order because he had misplaced the documents, having moved office four times during the relevant period. It was on account of this reason that UBS applied for an order under s 175 to authorise the banks to release the requested documents to UBS.

14 In our judgment, the question of relevancy is no longer an argument which is available to Wee. The doctrine of *issue estoppel* is applicable here. The application in SIC 1595 was consequential upon Wee's inability to comply with the discovery order. Accordingly, we would uphold the decision of Kan J that this issue cannot be re-litigated.

15 The next argument of Wee concerns s 174 of the Act which reads:-

> "An officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Part, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause."

In particular, emphasis was placed by Wee on the last two words "special cause".

16 With respect, it seems to us that Wee has misread s 174. We do not see how that section is applicable to the fact situation here. What it provides is that an officer of a bank shall not, in any proceedings to which the bank is not a party –

> (a) be compellable to produce any banker's book the contents of which can be proved under this Part; or
>
> (b) to appear as a witness to prove the matters, transactions and accounts therein recorded,

unless it is pursuant to an order of a judge made for special cause. UBS was not, in SIC 1595, seeking to require any bank officer to do any of the things prescribed in the two limbs of the section.

17 It is clear that Part IV of the Act, in particular s 174, was enacted for the benefit of bankers and its object is to relieve bankers of the necessity of actually attending court with their books under a

subpoena as that would unduly interfere with the business of the banker. Special cause must be shown to exist before the court would inconvenience a bank by granting an order requiring the attendance of a bank officer in any legal proceedings to which the bank is not a party.

18 This point was clearly elucidated by the Privy Council in *Sir William Randolph Douglas v Sir Lynden Oscar Pindling* [1996] AC 890 where the Board said -

> The judges of the Court of Appeal took the view that the effect of section 6 was that no evidence about the contents of a banker's books could be given otherwise than in pursuance of an order of a judge made for "special cause". This was erroneous. The purpose of sections 3, 4, 5 and 6 was to enable attested copies of entries in a banker's books to be made available in evidence without the necessity of the books themselves being produced in court together with an officer of the bank to speak for them. In relation to the United Kingdom Bankers' Books Evidence Act 1879 (42 & 43 Vict. C. 11) which is in substantially identical terms to the Bahamian Act, Lindley M.R. said in *Pollock v Garle* [1898] 1 CH 1, 4:
>
> > "the Bankers' Books Evidence Acts were passed for the obvious purpose of getting over a difficulty and hardship as to the production of bankers' books. If such books contain anything which could be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a *subpoena duces tecum*, which was an intolerable inconvenience to bankers when the books were in daily use. The leading object of the Acts was to protect bankers from that inconvenience. This is accompanied by the first six sections of the Act of 1879, which enable bankers to send attested copies of entries in their books instead of producing the books."
>
> Since attested copies of entries in the books were by the Act made capable of being given in evidence it would be only in exceptional cases that the books themselves could be required to be produced in court, together with an officer of the bank to speak to them. That is the significance to the reference of "special cause' in section 6.

19 We must also stress that Part IV does not expand a party's right of discovery. Whether a party may inspect the bank account of another person is subject to his right to discovery. In *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, the Court of Appeal, in considering the equivalent provisions in the English *Bankers' Book Evidence Act 1879,* held that an order for inspection would only be made if the litigant was entitled to the information under his right to discovery. Similarly, in *R v Bono* [1913] 29 TLR 635, the court refused to grant to a defendant in a libel action an order to inspect the plaintiff's bank account on the ground that the 1879 Act was not intended to

accord to a litigant greater facilities for discovery than what would be allowed under normal discovery principles.

20 The application in SIC 1595 did not seek the production of bank documents which UBS was not entitled to on the basis of discovery principles. It merely sought to obtain copies of the bank documents which the court in SIC 429 had held to be discoverable. In arguing that he should be entitled to re-litigate the point on relevancy, Wee relied on ss 5, 172 and 174 of the Act. We have discussed above why s 174 is of no relevance. As for ss 5 and 172, we fail to see any connection between what is provided in those sections and the question of inspection of bankers' books. In his Case, Wee also did not explain what the connection was. Section 5 prescribes that only evidence relevant to the action may be given at a trial. UBS does not dispute that. As for s 172, it comes into play only if a copy of an entry in a banker's book is to be received as evidence in legal proceedings. This was not what UBS intended to do in SIC 1595.

21 There is one other argument which Wee has raised. He said that his averment on affidavit that the documents are not relevant should be accepted and not be open to challenge. It must be borne in mind that at the time the order for inspection was granted in SIC 1595, the trial of the action was well underway. While ordinarily, before trial, a party's averment in affidavit that a particular document is not relevant should be accepted on its face value, this rule does not necessarily apply to the situation where the trial has already commenced. Otherwise, it would mean that the party, whose documents are sought, could withhold them for the entire duration of the trial and undermine the course of justice. The trial judge has the power to make any order as he may think fit with regard to the production of documents which he considers to be relevant.

22 Therefore, there is no merit in the first issue raised.

Bad faith/fishing expedition

23 Under this issue, the assertion of Wee is that the application in SIC 1595 was made in bad faith and was a fishing expedition as it was "cast in the widest sense possible". He contends that only the bank documents which have a bearing on the pleaded defence, that Wee is a "sophisticated investor in the foreign exchange market", should be made available for inspection by UBS under s 175. UBS should not be allowed to inspect all documents kept by the banks in relation to all the accounts maintained by Wee with each of those banks.

24 He relies on the case of *Parnell v Wood & Anor* [1892] 17 PD 137, a probate action, where, however, the circumstances were quite different. There, the plaintiff was required to produce the pass books of her banking account. She produced the books but sealed up parts of them which were, as she deposed, irrelevant to the matters in issue. The opponents then applied to inspect the banker's books in order to see the portion sealed up by the plaintiff. The application was refused. In our case here, Wee was saying that he could not comply with the order for discovery made in SIC

429 because he had misplaced the documents. It was on account of that that UBS applied to inspect pursuant to s 175.

25 We entirely agree that, in principle, discovery should be restricted to those documents which are relevant to the issues in the action. In so far as the present application is concerned, the court had already in SIC 429 determined which of the bank documents are relevant. As stated above in connection with the first issue, this point is closed. Wee is precluded from re-opening it.

26 Again, we are unable to see how it can be argued that the application was made in bad faith. There is hardly any elaboration of this argument. As the court had already given an order for discovery, a request to the banks to produce those documents cannot be considered to be made in bad faith. As the judge below observed (at ¶30):-

> "30. The issue of relevance of the documents to the proceedings was determined in that application. The defendant then sought from the banks the same documents that the plaintiff should have supplied. There is no basis for impugning bad faith on the application."

Banker's books

27 We now turn to the third issue. Wee contends that the documents requested for in SIC 1595 fall outside the scope of "bankers' books" as defined in s 170 and, therefore, the court below was in error when it granted the application.

28 Section 175(1) provides that, on the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding. This provision is an exception to the requirement that banks maintain secrecy of customer information prescribed under s 47 of the Banking Act.

29 The expression "bankers' books" is defined to include "ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank". It is clear that none of the classes of documents which UBS wanted to be produced in this case include entries in ledgers, day books, cash books or account books. We are only concerned with the last limb of the definition "all other books used in the ordinary business of the bank." Wee argues that "all other books" must be construed *ejusdem generis* with those books which are specifically identified earlier in the definition.

30 The definition of "bankers' books" laid down in s 170 of the Act had its origin in the English *Bankers' Books Evidence Act 1879* where there was a similar definition. In 1982, the definition of "bankers' books" in the English Act was amended in two respects. The first was the insertion of the following

additional phrase at the end thereof:-

> "whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism."

The second was to substitute the phrase "all other books", with "all other records". It seems to us clear that this amendment was made to take into account the additional phrase added at the end of the definition.

31 Although we have not made a similar addition to our definition, and neither have we changed the phrase "all other books" to "all other records", the courts have always given a purposive interpretation to the original definition. In *Barker v Wilson* [1980] 1 WLR 884, which was decided before the English amendment, Bridge LJ, speaking in the Queen's Bench Divisional Court, was of the view that the term "bankers' books" should be construed in relation to the practice of bankers as then understood and it was apt "to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm." There, the defendant was charged with misappropriating a substantial amount of money from his employers. The Police were provided by the defendant with bank statements relating to his bank account but those statements did not show the names of the person to whom payments had been made. The Police wanted these particulars and applied to inspect the microfilm which recorded the transactions. It was granted.

32 In *Williams v Williams* [1988] 1 QB 161, it was contended that unsorted cheques and paying-in slips did not come within the meaning of "bankers' books". There was evidence in the case that what the bank did was that all such documents received in a particular day, which numbered 2,000 – 2,500 pieces, were simply bundled together in no particular order. The Court of Appeal came to the conclusion that unsorted bundles of cheques and paying-in slips were not "other records" within the meaning of the definition. Sir John Donaldson MR said at 168:-

> "Whilst I would be prepared to accept that the cheques constitute part of the bank's records used in the ordinary business of the bank (*Reg v Jones (Benjamin)* [1978] 1 WLR 195, a case concerned with a bill of lading put in evidence under the Criminal Evidence Act 1965), I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an "entry" in those records. Putting the matter in another way, "other records" in the new definition has, I think, to be construed ejusdem generis with "ledgers, day books, cash books and account books" and unsorted bundles of cheques and paying-in slips are not "other records" within the meaning of the Act."

33 In other words, to constitute "record" or "books" (which is the word used in our Act) within the meaning of "banker's books", the documents must be properly sorted and filed. No such issue arose in the present case because there is nothing to suggest that the documents of the four banks

requested for inspection by UBS are not properly sorted and filed.

34 Relying on *R v Peter Dadson* [1983] 77 Cr App Rep 91*,* counsel for Wee argued that correspondence and facility letters are not bankers' books. In that case *Dadson* was charged with various offences arising out of misusing his cheque card. At his trial, *copies* of letters from the bank's correspondence file, written to him by the bank were admitted in evidence under the *Bankers' Books Evidence Act 1879* and he was convicted. On appeal, the Court of Appeal held that while the 1879 Act enabled evidence to be admissible in a court by the production of copies, rather than originals, such documents must be "bankers' books" as defined. However, the correspondence produced were not bankers' books. The court did not clearly elaborate why that was so other than stating (at 93):-

> "While the … Act enables evidence to be admissible in a court by the production of copies, rather than the originals, it does so provided only that the book, one of the types referred to in that section, is one of the ordinary books of the bank, and the entry was made in the ordinary course of banking business."

35 It is not clear whether the earlier case of *Barker v Wilson* was brought to the attention of the court in *Dadson*. It is also not clear whether the correspondence sought to be produced were properly sorted and filed or were they just placed unsorted in a bundle, as was the position relating to the unsorted cheques and paying-in slips in *Williams v Williams*.

36 In any event, we are of the opinion that in interpreting the expression "other books" in the definition we should take a purposive approach and recognise the changes effected in the practices of bankers. Any form of permanent record maintained by a bank in relation to the *transactions* of a customer should be viewed as falling within the scope of that expression. Correspondence between a bank and a customer which records a transaction clearly formed an integral part of the account of that customer and there is no good reason why it should be excluded. Otherwise, the object behind the enactment of Part IV of the Act would be undermined and banks would be troubled to have to come to court with the documents, including correspondence, relating to the account(s) of each customer. Thus, we agree with the approach taken in *Williams v Williams*. However, such records should be contrasted with notes taken by bank officers of meetings with customers and such notes cannot be regarded as entries in books kept by the bank for the purpose of its ordinary business within the meaning of "bankers' books": see *Re Howglen Ltd* [2001] 1 All ER 376.

37 One final word before we conclude this issue. The judge below gave liberty to apply to all parties concerned. In our opinion, this is appropriate, in case the banks concerned have any difficulties or uncertainties in complying with the order or if the parties to the action require any clarification.

Question of Costs

38 Finally, there is a point on costs which Wee has raised. The relevant order is in these terms:-

> "5. The costs of the banks, including the costs of complying with this order, shall be paid by (UBS) to the banks and shall be costs in the cause as between the parties."

39 Wee said that as the banks were not parties to SIC 1595, they should not be entitled to party/party costs or solicitor/client costs but only the costs of complying with the inspection order made.

40 The question of costs of an application made under Part IV of the Act is expressly provided for in s 176(1), which reads -

> "The costs of any application to the court or a Judge under this Part, and the costs of anything done or to be done under an order of the court or a Judge made under this Part, shall be in the discretion of the court or Judge, who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any fault or delay on the part of the bank."

41 The only argument advanced by Wee to say that the banks should not be paid their costs is the fact that the banks were not parties to SIC 1595. That is hardly a sufficient ground. The banks were served with the application. All reasonable costs incurred by them on account of the application, or in order to comply with the order made pursuant thereof, may be awarded to them. In this case the court below, in the exercise of its discretion, did make such an order. UBS is required to pay out first to the banks in respect of the costs incurred by them. Eventually, the party losing the action will have to bear all the costs. In all the circumstances, this is an eminently reasonable order.

Judgment

42 In the result, the appeal of Wee is dismissed with costs. The security for costs, together with any accrued interest, shall be released to the respondent UBS to account of its costs of the appeal.