The Development Bank of Singapore Ltd v Heng Holdings SEA (Pte) Ltd and Others [2000] SGHC 7

Case Number : Suit 2311/1998

Decision Date : 14 January 2000

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Lionel Tay and Genevieve Sim (Khattar Wong & Partners) for the plaintiffs; Zaheer Merchant and David Alfred (Madhavan Partnership) for the defendants

Parties : The Development Bank of Singapore Ltd — Heng Holdings SEA (Pte) Ltd

Contract – Discharge – Oral agreement – Whether sufficient evidence of oral agreement existing – Whether oral agreement binding on plaintiffs if not in writing – Whether consideration supports oral agreement

Equity – Defences – Promissory estoppel – Whether defendants relying upon representation

: This is an appeal by the defendants against the decision of the learned Deputy Registrar on 16 April 1999 giving judgment to the plaintiffs for the following sums in respect of various banking facilities granted by them to the first defendants:

(i) an amount totalling $5,339,129.62 comprising the principal sum, accrued and overdue interest in respect of certain long term facilities, together with further interest from 7 December 1998 up to date of payment;

(ii) $6,930,876.52 in respect of a revolving credit facility, together with further interest from 2 December 1998 to date of payment;

(iii) $640,091.62 being the amount overdrawn in the first defendants` current account as at 11 December 1998, together with interest from 1 December 1998 to date of payment;

(iv) US$31,797.19 being the sum paid by the plaintiffs to the beneficiary of a banker`s guarantee indemnified by the first defendants, together with interest and expenses from 7 December 1998 to date of payment; and

(v) US$258,202.81 being the remaining contingent liability in respect of that bankers` guarantee, together with any interest or expenses that may be chargeable or incurred.

However when the order was extracted on 5 May 1999, the amount in item (iii) was reduced and the terms amended to the following:

> *(iii) $584,570.94 being the amount overdrawn in the first defendants` current account as at 16 April 1999, together with interest from 17 April 1999 to date of payment;*

The plaintiffs explained by affidavit that the change was due to the fact that the overdrawn amount fluctuated from time to time. It must be noted that the date stated in the order extracted is about four months after that in the original order. I proceeded on the basis of the extracted order.

At the outset, the plaintiffs advised that they were abandoning their claim on items (iv) and (v) of

the claim. In respect of item (iv), the plaintiffs subsequently discovered that the first defendants had in effect reimbursed them for that sum. As for item (v), after the judgment was obtained the bankers` guarantee was returned for cancellation and accordingly no contingent liability remained at the time of appeal. After hearing submissions by counsel for the parties, I dismissed the appeal in respect of the remaining items, ie (i), (ii) and (iii), with costs. The defendants have appealed against my decision and I now give my grounds of decision. [The appeal was withdrawn - Ed.]

The plaintiffs are a bank. The first defendants are and were at all material times customers of the plaintiffs. The second, third, fourth and fifth defendants executed a guarantee dated 3 July 1996 (`the guarantee`) in respect of banking facilities granted by the plaintiffs to the first defendants. Pursuant to this, the plaintiffs entered into two facility agreements with the first defendants and granted various facilities to them. The first defendants made use of those facilities from about mid-1996.

On 26 June 1998, a certain amount of interest fell due on the facilities which the first defendants failed to pay. In addition, one of the facilities, a current account, was overdrawn and the plaintiffs issued a letter of demand on 20 June 1998 for the sum overdrawn. The first defendants failed to pay this and the plaintiffs` solicitors, M/s Khattar Wong & Partners (`KWP`), issued two letters to the first defendants, dated 2 and 6 July 1998, giving them notice of those events of default and terminating the facility agreements. The letters also demanded immediate repayment of all money owed by the first defendants to the plaintiffs under the facilities.

Over the next three months there was a series of negotiations and an exchange of letters between the parties. The first defendants asked for an extension of time to enable them to sell their property, Tong Nam Building, an office building at Bukit Timah Road to raise funds to repay the plaintiffs. The plaintiffs agreed to hold their hands until 5 October 1998, but subject to certain conditions. The first defendants requested modifications of those conditions for various reasons. Some modifications appeared to be agreed to by the plaintiffs, but for one reason or another these conditions were not fully complied with. In any event, representatives of the plaintiffs and the first defendants met on 30 September at the plaintiffs` offices. The first defendants claim that the plaintiffs agreed at this meeting that they would not call upon the facilities. This is how it is described in their defence filed on 21 January 1999:

> *7 On 30 September 1998 the plaintiffs` representatives met the first defendants` representatives at the plaintiffs` office. The plaintiffs were advised on the sale of the building among other matters. At the meeting the first defendants also advised the plaintiffs that they would forward them payments of rent made to the first defendants by their tenants, and in consideration of this and the negotiations with potential buyers of the building, the plaintiffs were requested to forbear from making any demands and/or commencing any action against the first defendants which would damage the same. The first defendants also requested that in view of the payments to be made, the plaintiffs do not cancel the facility. The first defendants emphasised that there were no other creditors who were taking any action against them, and there was accordingly no risk or concern to the plaintiffs therefor.*
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> *8 The plaintiffs` Mark Tay orally undertook, agreed and confirmed at the meeting, in consideration of the matters discussed and the payments to be made, that the plaintiffs would not call upon the banking facilities granted nor make any demands and/or commence any action against the first defendants. The defendants aver that the facilities were materially varied and/or extended*

thereby by the terms of the agreement arrived upon by the plaintiffs and the first defendants in the circumstances.`

Oral agreement

The first defendants therefore claim that the plaintiffs were in breach of this oral agreement in seeking to recover the outstanding amounts under the facilities in this action. Accordingly they had made a counterclaim against the plaintiffs for breach of this oral agreement. The defendants also claim that the plaintiffs are not entitled to summary judgment in view of certain technicalities which I will deal with later. But their main defence hinges on this oral agreement which they say amounts to a triable issue and therefore they are entitled to unconditional leave to defend. The plaintiffs on the other hand contend that this was a sham defence because there was no such oral agreement. But even if Tay had given the undertaking as alleged by the first defendants, it was not binding on the plaintiffs because cll 29(B) and 21(B) of the respective facilities agreements provide that any amendment or waiver had to be in writing. The third ground of the plaintiffs is that the first defendants had not given good consideration for this amendment/waiver. I shall examine each of these points in turn.

Sham defence

The plaintiffs` position is that there was no such oral agreement. The only evidence of this oral agreement is found in the affidavit of the first defendants` accountant, Ang Cher Hoon, filed on 24 March 1999. He described how the oral agreement was reached in the following manner:

> *22 ... On 30 September 1998, the plaintiffs` representatives, namely, Tay and another person met with the first defendants` representatives, namely, Mr Heng and myself at the plaintiffs` office. During this meeting, Mr Heng, on behalf of the first defendants, advised the plaintiffs on the progress of the sale of Tong Nam Building among other matters. Mr Heng also advised the plaintiffs that the first defendants would forward them payments of rent made to the first defendants by their tenants, and in consideration of this and in view of the negotiations with potential buyers of Tong Nam Building, requested that the plaintiffs forbear from making any demands and/or commencing ... any legal proceedings against the first defendants which would damage the negotiations. Mr Heng also requested that in view of the payments to be made, the plaintiffs do not cancel the facility. Mr Heng emphasised that there were no other creditors who were taking any action against the first defendants, and there was accordingly no risk or concern to the plaintiffs.*
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> *23 Upon hearing this, Tay orally undertook, agreed and confirmed at the meeting, in consideration of the matters discussed and the payments to be made, that the plaintiffs would not call upon the banking facilities granted nor make any demands and/or commence any action against the first defendants pending completion of the sale of Tong Nam Building. Based on this, an oral agreement (`the oral agreement`) arose between the plaintiffs and the first defendants on the terms stated above. The oral agreement therefore materially varied and/or extended the terms of the agreement(s) between the plaintiffs and the first defendants.*

The first defendants did not produce any document that evidenced such an agreement. One would have thought that such an important agreement would have been recorded by the first defendants and sent to the plaintiffs for confirmation. But this was not done. After the meeting the first defendants` Edgar Wong sent a letter dated 30 September to the plaintiffs. This letter recorded various points discussed at the meeting. Firstly, this letter states that Ang and Wong attended the meeting on behalf of the first defendants. It makes no mention of Heng having attended the meeting. Be that as it may, there is nothing in this letter that even hints at Tay having agreed not to call on the facilities or commence any action pending the sale of the building. It is surprising that such an important event could have been left out of the first defendants` letter recording the points made at the meeting.

Furthermore, on 6 April 1999 the first defendants filed an affidavit sworn by Heng. In it he referred to Ang`s affidavit filed on 24 March and said that he, Heng, had made his affidavit to set out his knowledge of certain events described in Ang`s affidavit which were within his (Heng`s) personal knowledge. The affidavit made mention of several telephone conversations between Heng and Tay between 30 October and early November 1998. But Heng did not confirm Ang`s allegations in relation to the meeting of 30 September 1998. There was an opportunity here for Heng to confirm on oath Ang`s allegations about the oral agreement. Indeed he had stated at the outset that he had made the affidavit to confirm events described in Ang`s affidavit that were within his knowledge. Yet he had let pass the opportunity to confirm the most crucial event in the Defence.

I do not discount the possibility that Tay might have said something at the 30 September meeting that could have given the impression that the plaintiffs were prepared to hold their hands on the matter for a while. But the question is whether it was communicated in such a manner as to give the impression that it was a binding commitment. If it were, then this impression would surely have operated on the minds of the first defendants` representatives at the time. And when the plaintiffs manifested any sign of reneging on this agreement, one would have expected that the first defendants would complain about it in writing as they had every right to be indignant. Yet there was no such allegation in the contemporary correspondence. Ang and Heng in their affidavits had given evidence that Heng orally complained to Tay about such an event. On 22 October 1998 KWP wrote two letters to the first defendants threatening to commence legal proceedings unless the first defendants made full payment within seven days. Ang and Heng said in their affidavits that Heng telephoned Tay to complain that the latter had acted wrongfully and prematurely. They said that Tay apologised and explained that it was due to a miscommunication with KWP. He told them to ignore the letter. But in the first defendants` letter dated 30 October, there was no mention of the oral agreement or any breach of good faith on the part of the plaintiffs. I accept that the first defendants might not want to step on any toes at this stage. But the problem is that at every stage after this, they still refused to make reference to the oral agreement. On 13 November 1998, there is again no mention of the oral agreement, only this hopeful sentence:

> *We trust that you will advise your lawyers to hold their hands and that the interest element of our account be reduced where possible.*

On 20 November 1998, KWP wrote to the first defendants to deny allegations made in their letter of 10 November which is not exhibited. At the last paragraph of KWP`s letter, they state:

> *In any event, please be informed that with respect to your letter of 13 November 1998, our clients will be proceeding with legal action against you, and*

all our clients` rights against you are reserved.

Again there was no mention of the oral agreement. The first time that the first defendants made any allegation in writing of the oral agreement was when they filed their defence on 21 January 1999. In my view, the total lack mention of the oral agreement in the contemporary records further corroborates the plaintiffs` contention that there was no such undertaking given by Tay.

In the circumstances, I had no doubt that the evidence clearly showed that the oral agreement as alleged by Ang was a sham defence and designed to delay judgment.

Any oral agreement not binding on plaintiffs

Clause 29(B) and 21(B) of the respective facilities agreements contain the same terms and they provide as follows:

> *(B) Amendment, Waivers and Consents: Any provision of this Agreement may be amended or supplemented only if the Borrower and the Bank so agree in writing and any Event of Default, Potential Event of Default, provision or breach of any provision of this Agreement may be waived before or after it occurs only if the Bank so agrees in writing. Any such waiver, and any consent by the Bank under any provision of this Agreement may be given subject to any conditions thought fit by the Bank. Any waiver or consent shall be effective only in the instance and for the purpose for which it was given.*

The first defendants agree that the event of default had occurred. The plaintiffs were entitled to payment of the amounts outstanding. The alleged oral agreement would amount to a waiver by the plaintiffs of their rights under the agreements. Or it could amount to an amendment of the agreements. Clearly cl 21(B) requires such waiver or amendment to be made in writing in order for it to be binding on the plaintiffs. Since there was no such letter, it follows that even if Tay had made the oral communication alleged, it is not binding on the plaintiffs.

No consideration for the amendment/waiver

The alleged oral agreement was also given without consideration flowing from the first defendants to the plaintiffs. According to para 7 of the defence, the consideration for the forbearance is said to be the rental proceeds which the first defendants would pay to the plaintiffs. However under the terms of the mortgage, the plaintiffs were already entitled to these rental proceeds. In fact the first defendants had already assigned them to the plaintiffs. It was just that the assignment had not been perfected by giving notice to the tenants. Therefore no consideration flowed from the first defendants to the plaintiffs in order to make Tay`s promise to forbear binding on the plaintiffs.

Other grounds of defence

The first defendants also relied on other grounds in their opposition to the plaintiffs` application for summary judgment. These are (a) estoppel and (b) defect in the certificate of conclusive evidence.

(a) Estoppel

This point can be easily disposed of. Counsel for the first defendants submitted that even if the oral agreement was not binding, at the very least it constituted a representation made by Tay on behalf of the plaintiffs. Counsel argued that the first defendants had acted upon this representation to their detriment because at the time they had an offer for $19.6m for the building. But they felt that they could obtain a higher price. Because of Tay`s promise, they thought that they had more time to market the building and had held out for a higher price. Had Tay not promised, so counsel submitted, the first defendants would have sold it for $19.6m. Unfortunately that offer had since lapsed.

Although this argument sounded convincing, it lacked the most important element, ie evidence. Counsel could only show me a letter from the first defendants to the plaintiffs which showed that there was an offer for $19.6m. But there was no evidence, whether in a document or a statement on affidavit, that the first defendants had held out for a higher offer because of Tay`s promise. Counsel pointed to paras 31 and 35 of Ang`s affidavit but these do not say that the first defendants had not accepted the $19.6m offer because they thought that they had more time. I should add that this fact was not even pleaded in the defence.

(b) Defect in certificate

Clauses 27(C) and 19(C) of the respective agreements (both contain the same terms) provide as follows:

> *(C) Certificates Conclusive: A certificate by the Bank as to any sum payable to it under this Agreement and the Security Documents, and any other certificate, determination, notification or opinion of the Bank provided for in this Agreement, shall be conclusive and binding on the Borrower.*

In Tay`s affidavit filed on 4 February 1999 in support of the plaintiffs` application for summary judgment, he had exhibited a certificate pursuant to this provision stating the sums owed by the plaintiffs under the various facilities. However after they obtained judgment below, the plaintiffs issued a second certificate on 6 May 1999 in which various figures were altered. The plaintiffs claimed that the changes were made to reflect additional interest incurred as well as payments that had been made by the first defendants subsequently. However the defendants submitted that the judgment was obtained on the basis of the first certificate and the second certificate showed that the first was in manifest error. Therefore, they reasoned, the judgment was wrong and ought to be overturned. The defendants cited **Bangkok Bank Ltd v Cheng Lip Kwong** [1989] SLR 1154 [1990] 2 MLJ 5 for the proposition that an obvious error on the face of the certificate would bring it out of the conclusive evidence provision.

I do not need to consider whether, in the circumstances of this case, there is such manifest error as would render the conclusive evidence clause inapplicable. This is because the plaintiffs did not rely solely on the certificate. It is after all a device put in by the plaintiffs to expedite the procuring of a judgment. If they are able to rely on it, they save the time and expense of proving the quantum of their claim. If not, then they will have to produce the necessary evidence. The plaintiffs had in fact produced evidence on affidavit of the amounts owed by the first defendants under the various facilities. The defendants had not challenged such evidence, being content to rely on the defence of the oral agreement, estoppel and defect in the certificates. So even if the certificates were defective, it is no defence to the claim as the plaintiffs have proven the quantum by other means.

Accordingly, I dismissed the appeal in respect of items (i), (ii) and (iii) of the judgment below.

Outcome:

Appeal dismissed.