Societe Generale v Tai Kee Sing @ Tai Hean Sing
[2003] SGHC 296

Case Number : Suit 666/2002

Decision Date : 26 November 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Eddie Ng and Angel Lum (Tan Kok Quan Partnership) for plaintiff/respondent; Sheela Lopez (Sheela Lopez and Company) for defendant/appellant

Parties : Societe Generale — Tai Kee Sing @ Tai Hean Sing

Civil Procedure – Summary judgment – Rules of Court O 14 – Whether the plaintiff was entitled to summary judgment for monies disbursed to the defendant under credit facilities – Whether there was an issue to be tried or some other reason for a trial.

1 This was an appeal by the defendant against the decision of Assistant Registrar Teo Hsiao-Huey ordering that summary judgment be entered against the defendant under Order 14 of the Rules of Court for:

(a) US$4,845,066.92 being the sum due and owing by the defendant to the plaintiff as at 23 April 2002;

(b) Interest at the rate of 3.25% above the plaintiff's cost of funds from 24 April 2002 until payment; and

(c) Costs on the indemnity basis (including disbursements) fixed at $11,600.

2 I dismissed the defendant's appeal with costs of the appeal on the indemnity basis fixed at $10,000, inclusive of disbursements.

The Plaintiff's Case

3 The plaintiff's claim was for monies disbursed to the defendant under credit facilities to finance the defendant's share trading activities. There was no dispute that the defendant did enjoy the use of such monies.

4 The credit facilities were granted to the defendant by way of the plaintiff's letters of 23 June 1995 and 24 January 1997. Under the first letter, credit facilities of up to US$5 million were made available to the defendant. Under the second letter, the limit was increased to US$7 million. The interest rate applicable to the credit facilities was varied by the plaintiff's letter of 13 April 1998.

5 The plaintiff claimed that its Standard Conditions Governing Share Financing/Trading Facility ('SCSFT'), its 'Societe Generale Standard Terms' ('the first standard terms') and its 'SG Standard Terms' ('the second standard terms') were respectively annexed to the credit facility letters of 23 June 1995, 24 January 1997 and 13 April 1998 and that all these documents constituted the agreement in question between the plaintiff and the defendant.

6 Pursuant to the agreement, the defendant opened account number 43885 and entered into a number of other agreements with the plaintiff. The defendant executed a memorandum of charge, a letter of set-off and a charge over deposit(s) all dated 30 June 1995. He also executed a memorandum of deposit dated 2 July 1996, a mandate for personal accounts (by an individual), an

indemnity for telephone/facsimile/telex and a 'hold mail agreement' by which the defendant instructed the plaintiff not to despatch correspondence of the bank to him by mail but to place it in a folder for safe keeping.

7 The defendant agreed that he had accepted the first standard terms but denied having accepted the SCSFT or the second standard terms. However, the plaintiff's documentation checklist made it clear that the SCSFT was part of the loan documentation accompanying the credit facility letter of 23 June 1995. The salient terms in the first and the second standard terms were nearly identical in any event. The defendant also claimed that he executed the memorandum of deposit in contemplation of a further and different credit facility which did not materialise. This was contrary to the language used in the said memorandum.

8 Despite the plaintiff's contention that these disputed documents were part of the agreement between the parties, the plaintiff was prepared not to rely on them at the appeal just as it did not rely on them before the Assistant Registrar.

9 The defendant defaulted in repaying the amounts due and owing under the credit facilities. The plaintiff issued to him a certificate dated 23 April 2002 showing that the amount of his indebtedness as at that date was US$4,845,066.92. This was a certificate issued pursuant to a conclusive evidence clause between the parties and no allegation of fraud or obvious error in respect of it had been raised by the defendant. As the plaintiff's claim was based on this certificate, the defendant could therefore have no defence in respect of liability or the amount of the debt.

The Defendant's Case

10 The relevant terms of the contract relied on by the defendant were:

'COLLATERAL VALUE AND LOAN-TO-SECURITY RATIO

a) The collateral value of the cash deposit(s) of such currencies acceptable to the Bank shall be determined at 90% of the face value of the deposit(s) where the loan is in the same currency as the collateral providing a loan-to-security ratio of 1:1.11, and at 80% where the loan and collateral are in different currencies providing a loan-to-security ratio of 1:1.25;

b) The collateral value of shares (readily marketable shares of public listed companies which are component stocks of indices, or other stocks expressly approved by the Bank, registered with the Bank's custodian under lien to us) shall be determined at 50% of the current market value of the shares providing a loan-to-security ratio of 1:2.0.

We will determine the collateral value of the various securities at our discretion based on prices, information and rates of exchange provided by our dealers.

MINIMUM COLLATERAL VALUE

The minimum aggregate collateral value to be maintained at all times must be at least 100 percent of the outstanding loan amount(s).

CONDITIONS

a) Should the minimum aggregate collateral value and/or the loan-to-security ratio be breached, the borrower is required within 7 business days to:

i) restore the original minimum aggregate collateral value and/or the loan-to-security ratio by furnishing additional collateral acceptable to the Bank; or

ii) repay the loan and any outstanding fees and penalties and any other expenses owed to or incurred by the Bank.

b) Should the minimum aggregate collateral value and/or the loan-to-security ratio deteriorate by more than 10% the Bank may at its sole discretion immediately dispose of any and all collateral held by the Bank without further notice.'

11 The defendant raised three defences and a counterclaim against the plaintiff. The defendant alleged that the plaintiff failed (save for the two instances below) to notify him of any breach in the minimum aggregate collateral value and/or the loan to security ratio and thereby failed to allow him a reasonable opportunity of restoring the original minimum aggregate collateral value or the loan to security ratio by furnishing additional security within the stipulated period. He also had the option to repay the loan and all outstanding amounts. There were only two occasions in late 1997 and in early 1998 when the plaintiff's general manager informed him verbally that he was required to top up his security without specifying the precise deficiency. The fact that the plaintiff had the discretion to determine the collateral value of the securities implied that the defendant must be notified of changes in the value of the collateral and of any breach so that the stipulated period for compliance could start to run.

12 The plaintiff also failed to dispose of the securities expeditiously or to request a top up of the securities by at least March 1997. The margin was breached in February 1997. The defendant denied that there were ongoing negotiations between the parties which resulted in the securities not being sold at the material time. By the time he was informed of the breach in December 1997, there was almost nothing he could have done to remedy the loan-to-collateral value percentage which stood then at 296%.

13 In any event, even when the defendant was asked to top up the security, he was not given the actual percentage of the breach and was unaware of the full extent of the problem. On 23 December 1997, his solicitors offered the plaintiff additional security by way of the assignment of ten bungalows in Kuala Lumpur valued at RM12,550,800. There were meetings after that but they were not to negotiate on the default. There was nothing in writing to show any proposals or counter-proposals or any request from the defendant that the plaintiff refrain from selling the securities. The defendant was next informed of another breach in April 1998 and asked to top up his security. Through his solicitors, he offered additional security by way of the assignment of the sale and purchase agreements of a further ten lots of bungalows. There was again no response from the plaintiff. By August 1998, the minimum collateral value had been exceeded by a staggering 1,453%. No affidavit was filed by the plaintiff's general manager, the person involved in all the meetings with the defendant.

14 The plaintiff's failure to realise the securities led to a massive accumulation of debt and at that point, the securities appeared to be almost worthless. The plaintiff had therefore failed in its duty to exercise reasonable care and skill in operations carried out on the defendant's behalf in respect of his account, a duty admitted by the plaintiff in its pleadings. The defendant was entitled to set off against the plaintiff's claim an amount of US$5,087,349.56 as a result and an equitable set off would constitute a substantive defence to the claim.

15 The agreement between the parties was void and unenforceable as a result of illegality at any rate. The defendant contended that the transactions under the agreement were governed by

Malaysian law. While the loan was disbursed in Malaysian Ringgit, the plaintiff was compelled to convert the currency of the loan from Malaysian Ringgit to US Dollars as a result of changes to Malaysia law in 1998. The plaintiff was also obliged to make disclosure of its beneficial ownership of the shares held as security as a result of changes in the rules of the Malaysian Central Depository in 1998. The provisions of the Malaysian Exchange Control Act and Banking and Financial Services Act had to be examined and it was the opinion of the defendant's Malaysian solicitors that there were issues of illegality involved in the transactions. Although not pleaded, the directives of the Malaysian central bank, Bank Negara, introduced as a result of the Asian financial crisis must also be examined at trial.

16 It was further argued that 'there ought for some other reason to be a trial' [see Order 14 rule 3 (1)] in the hotly disputed factual circumstances of this case. The defendant admitted the first standard terms formed part of the agreement but denied having received the second standard terms or that they were part of the agreement. The second standard terms were, on the face of the document at the bottom left hand corner, generated only in 1998 and therefore could not have been annexed to the plaintiff's letter of 24 January 1997. The defendant did not recall having received the plaintiff's letter of 13 April 1998 or any other standard terms. When the credit facilities were first offered in 1995, the plaintiff's general manager took pains to highlight the terms of the facilities and to procure the defendant's initial on each page of the letter of offer and next to amendments made as a result of negotiations. It was therefore improbable that the second standard terms were introduced or forwarded to the defendant or that variations to the first standard terms were brought to the defendant's attention. The plaintiff maintained in its third affidavit that both sets of standard terms were similar anyway but, in its earlier affidavit, relied on the provisions of the second standard terms.

17 The defendant also did not receive the SCSFT. The SCSFT provided that any advance to the defendant was subject to him first furnishing a risk disclosure statement. He did no such thing and yet the advances were made. He also did not comply with other requirements in the SCSFT and the plaintiff made no assertion that those requirements had been waived or postponed. The checklist for loan documentation only had 'SCSFT' inserted in handwriting and the tick beside it was different from the ticks for the other documents.

18 While the plaintiff had asserted earlier that the facilities were subject to a memorandum of charge dated 30 June 1995 and to a memorandum of deposit dated 2 July 1996, it contradicted itself in its third affidavit by stating that the memorandum of deposit had replaced the memorandum of charge. The defendant's consistent position was that the memorandum of deposit had been executed in contemplation of a new line of credit which did not materialise and was therefore not applicable to the facilities in question. It was filled in by hand and executed more than a year later whereas the memorandum of charge was typed out. If the two documents contained almost identical terms and related to the same subject matter, why was the earlier document replaced?

19 The other issue in contention concerned the delivery of information by the plaintiff to the defendant. Despite the plaintiff stating that it was not obliged to forward information or statements on the status of the defendant's account to him by virtue of the hold mail agreement, the facts showed clearly that the plaintiff hand-delivered documents to the defendant fairly frequently but stopped doing so from late 1998/1999. The plaintiff was also in the habit of corresponding with the defendant by fax and there was therefore no reason why it could not have informed him by fax about the breach of the loan-to-security margin. The faxed correspondence also showed that the plaintiff made frequent mistakes which the defendant discovered only by random checking or after being informed by brokers. It would therefore not be possible for the defendant to ascertain himself whether there was a breach of the margin at any given time and it demonstrated the truth of his allegation that the plaintiff's general manager could not even pin point the exact extent of the breach when he

informed the defendant verbally of the breaches in 1997 and 1998.

The Decision of the Court

20 The alleged defence of illegality raised in this action was not alluded to by the defendant when the plaintiff's solicitors made a demand on him for the amount due and owing by their letter of 26 April 2002 prior to the commencement of this action. The defendant's Malaysian solicitors' response then was that the defendant had never received any statements or information pertaining to the credit facilities from the plaintiff and that he was not aware of how the alleged outstanding sum was derived.

21 It was evident that the contractual documents, in particular, the letters of offer of 23 June 1995 and 24 January 1997 and the first standard terms, expressly provided that the governing law of the agreement was Singapore law. Despite the clear contractual provisions, the defendant took the position that Malaysian law applied by pointing out the connecting factors favouring the application of Malaysian law to the agreement. Where parties have expressed an intention as to the law governing their contract, their expressed intention generally determines the proper law of the contract unless the sole purpose of such choice was to evade the operation of the applicable law, thus rendering the choice non *bona fide* (*Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148). In the present case, the plaintiff's loan correspondence and documentation were issued from the Singapore branch, the account was opened with the Singapore branch and the securities were also held by that branch. The defendant wanted the Singapore branch to be declared as the beneficial owner of the shares. It could not be suggested that the choice of law was anything other than one made in good faith.

22 The credit facilities were extended in US Dollars to the defendant subject to any request by him that they be denominated in other major currencies except Singapore Dollars and subject to the availability of funds. The currency by default would have been US Dollars but for the defendant's request that the disbursement to him be made in Malaysian Ringgit. Following the decision of the Court of Appeal in *Peh Teck Quee* cited above, where the facts are indistinguishable from the present case, the disbursement of the credit facilities in Malaysian Ringgit would not render the contract illegal. Similarly, even if the Malaysian Exchange Control Act rendered the mortgage of shares by the borrower void, that would not affect the loan for which those shares were mortgaged. *Peh Teck Quee's* case effectively destroys the defendant's arguments as to illegality.

23 The evidence showed that the defendant was kept apprised of his indebtedness and the value of his shares furnished as security for the credit facilities by way of the plaintiff's position statements and portfolio valuation statements, receipt of some of which was acknowledged by the defendant. Despite the hold mail agreement, the plaintiff did deliver documents to him at his request.

24 The plaintiff held numerous meetings with the defendant or his representative, Ms Lee Moey Chin, to discuss the issue of the minimum aggregate collateral value of the securities having fallen below the level stipulated in their agreement. There were call memoranda and correspondence received by the defendant relating to such meetings which took place between September 1997 and April 2001. During such meetings, the defendant made many proposals which were unsuccessful. Eventually, the securities had to be sold. Contrary to the defendant's assertions that the plaintiff verbally rejected his offer to assign his interest in the bungalows to the plaintiff as additional security, it was the defendant who had not been sincere in his proposal to assign such interest. The plaintiff's call memorandum showed that, on or about 15 June 1999, on the brink of signing the deed of assignment in respect of the bungalows, the defendant informed the plaintiff he did not wish to execute the same. The defendant even sought to deny that the said Ms Lee was his personal

assistant or financial advisor when he had written on earlier occasions asking the plaintiff to liaise with the said Ms Lee in his absence.

25 There was no requirement in the agreement that a notice or margin call must be rendered to the defendant. He was aware of the breaches in the loan-to-security ratio anyway. There were at least two occasions of notification of such breaches admitted by him.

26 The provisions in the credit facilities and the memorandum of charge stipulated that the plaintiff was at liberty to dispose of the securities at such times and at such prices as it deemed fit in its absolute discretion. The plaintiff, as a mortgagee, after the power of sale had arisen, was entitled to sell the shares at such time as it thought fit and in selling the shares was under a duty to act in good faith and to obtain the true market value at the date or dates when they were sold (*Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof* [1989] SLR 290). If a creditor chooses to exercise his power of sale over the mortgaged security, he must sell for the current market value but he must decide in his own interest if and when he should sell. The creditor is not under a duty to exercise his power of sale over the mortgaged security at any particular time or at all (*China & South Sea Bank Ltd v Tan Soon Gin George* [1989] 1 HKC 155, a decision of the Judicial Committee of the Privy Council in an appeal from the Hong Kong Court of Appeal. A mortgagee is entitled to exercise a power of sale at such time as he deems fit and is not obliged to act immediately (*Teo Siew Har v Oversea-Chinese Banking Corporation Ltd* [1999] 3 SLR 129). In any event, the defendant here did not allege that the securities in question, quoted on the Kuala Lumpur Stock Exchange, were sold at less than their true market value at the time of sale.

27 The plaintiff's claim was based on the certificate issued to the defendant. Such certificate was not impugned and was therefore conclusive as to the amount owing. In the light of this and the matters discussed above, the 'some other reasons' cited by the defendant to support his contention that there ought to be a trial would add nothing of consequence to the proceedings.

28 I therefore agreed with the Assistant Registrar that there were no issues of law or of fact meriting a trial in this action. Accordingly, I dismissed the defendant's appeal against the summary judgment ordered.

Defendant's appeal against summary judgment dismissed with costs.