Giuffrida Luigi *v* Julius Baer (Singapore) Ltd (in members' voluntary liquidation) and another [2010] SGHC 96

Case Number : Originating Summons No 201 of 2009

Decision Date : 29 March 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Prakash Mulani (M & A Law Corporation) for the plaintiff; Hri Kumar Nair SC, Tham Feei Sy and Delphia Lim (Drew & Napier LLC) for the first and second defendants.

Parties : Giuffrida Luigi — Julius Baer (Singapore) Ltd (in members' voluntary liquidation) and another

Companies

29 March 2010

Woo Bih Li J:

Introduction

1 This was an action by the plaintiff, Giuffrida Luigi ("GL"), against the first defendant, Julius Baer (Singapore) Ltd ("JBS"), a company incorporated in Singapore, which is in members' voluntary liquidation. GL was seeking an order to reverse the rejection by the liquidators of JBS of his proof of debt dated 23 December 2008 and lodged on 30 December 2008, and for that proof of debt to be admitted by the liquidators. The second defendant, Bank Julius Baer & Co Ltd ("Bank Julius Baer"), which is incorporated in Switzerland, was added as a party to the action.

2 In essence, GL held an account with JBS which was in credit. However, JBS said that the account had been transferred to Bank Julius Baer and that any payment obligation rests with the latter. GL's position was that he did not consent to the transfer and he sought payment from JBS. Bank Julius Baer acknowledged GL as its customer but there was a Swiss order which had attached GL's account with it.

Background

3 The details of the background that led to this action is set out in the affidavit of Goh Thien Phong ("Goh") of Pricewaterhouse Coopers LLP filed on 13 March 2009. He is one of the liquidators of JBS appointed by a resolution passed at the Extraordinary General Meeting of JBS on 21 May 2008. He stated:

> 6. JBS was formerly known as BDL Banco Di Lugano (Singapore) Ltd ("BBDL"). It was incorporated on or about 18 March 2002. At all material times, it was operating as a merchant bank in Singapore.
>
> 7. On or about 3 January 2006, the name of BBDL was changed to Bank Julius Baer (Singapore) Ltd ("BJBS"). On or about 29 April 2008, the name of BJBS was changed to the present name. For convenience, I shall hereinafter refer to BBDL/BJBS as JBS.

8. The reason stated for the change of name from BJBS to JBS was due to the withdrawal of the banking licence by the Monetary Authority of Singapore ("MAS"). …

9. JBS is the wholly owned subsidiary of Bank Julius Baer.

10. On or about 21 May 2008, JBS went into members' voluntary liquidation. …

11. On or about 30 December 2008, the Plaintiff's solicitors, M & A Law Corporation, served on the Liquidators the POD [*ie*, GL's proof of debt].

12. In the POD, the Plaintiff claimed for the sums of US$3,000,000, Euro 3,000,000 and Swiss Franc 125,000, being sums deposited into his Bank Account No. 8500215 Golfclub ("Account") on or about 8 May 2003, together with accrued interest.

13. I examined the POD. The matters set out below reflect my findings.

14. Annexed hereto and collectively marked as "GTP-1" is a bundle of exhibits which are relevant to the present proceedings.

Account

15. By an Account Mandate dated 8 May 2003 ("Account Mandate") (exhibited at pages 15 to 22 herein), the Plaintiff applied to open the Account with JBS on the terms and conditions set out therein.

16. On or about 16 May 2003, the Account was opened. That day, the sums of US$3,126,400.00 and Euro 3,097,800.00 were deposited into the Account. On or about 28 May 2003, a sum of Swiss Franc 134,400.00 was deposited into the Account. Copies of the relevant statements of the Account dated 30 June 2003 are exhibited at pages 39 to 41 herein.

17. By a letter dated 15 March 2007 ("Letter"), JBS and Bank Julius Baer informed the Plaintiff, *inter alia*, that with effect from 1 July 2007, all of JBS's banking undertaking would be transferred to and vested in the Singapore branch of Bank Julius Baer.

18. A copy of the Letter, together with the English translation, is exhibited at pages 23 to 26 herein. I wish to highlight that the Account number is stated at the top right corner of the Letter.

19. The Letter further states, *inter alia*, that:

(a) as a result of the transfer, on or about 1 July 2007, the Account would be transferred to Bank Julius Baer. However, the Account number would remain the same and Marco, who is the relationship manager of the Plaintiff, would continue to assist him;

(b) with effect from 1 July 2007:

(i) all obligations, rights, titles and interests relating to and under, *inter alia*, any credit facilities, transactions, contracts and any other agreements or arrangements whatsoever (collectively "Agreements") entered into with or granted to JBS would be assigned and vested in Bank Julius Baer;

(ii) JBS would be released and discharged from further performance under the Agreements and all claims and liabilities thereof; and

(iii) Bank Julius Baer would assume further performance of all obligations under the Agreements and all claims and liabilities thereof;

(c) after 1 July 2007, the Plaintiff would continue to be served on the same terms and conditions on which he transacted with JBS;

(d) after the transfer, the operations of JBS would be wound down and closed, leaving Bank Julius Baer as the sole presence of the Julius Baer Group in Singapore;

(e) with effect from 1 July 2007, JBS would be released and discharged, and the obligations of BJBS under the Account would be performed by Bank Julius Baer; and

(f) Bank Julius Baer would assume further performance of all obligations under the Account and all claims and liabilities thereof.

20. The Letter also provides that if he was not agreeable to the transfer, the Plaintiff should notify his relationship manager, ie Marco, in writing by 15 April 2007, after which the Account would be transferred to Bank Julius Baer with effect from 1 July 2007.

21. The Plaintiff failed to notify JBS and/or Marco of his objection to the transfer by 15 April 2007 or at all.

Account transferred to Bank Julius Baer

22. On or about 1 July 2007, the business and operations of JBS were transferred to the Singapore branch of Bank Julius Baer.

23. As part of the above transfer, the Account was transferred to Bank Julius Baer.

24. When the Account was transferred from JBS to Bank Julius Baer on or about 1 July 2007, the credit balances in the Account were also transferred.

25. …

JBS's merchant licence withdrawn in March 2008

26. After the transfer, JBS became dormant. On or about 10 March 2008, JBS surrendered its merchant bank licence to MAS and ceased all merchant banking activities.

4 GL's position was that he did not receive the letter dated 15 March 2007 ("Letter") and that he did not consent to the transfer of his account from JBS to Bank Julius Baer. As mentioned, he wanted the former to be liable to him for his money and not the latter.

5 It was not disputed that Bank Julius Baer was in a financial position to pay GL and had accepted him as its customer. However, there were legal proceedings in Zurich, Switzerland, commenced by other parties, as a result of which an attachment order was made against assets of GL including, in particular, his account held with the branch of Bank Julius Baer in Singapore. Those proceedings are still continuing but GL's position was that the attachment order (even if it was still

valid) did not apply to JBS, which is a separate legal entity. If his account was still with JBS, as he contended, he was seeking payment from the liquidators of JBS.

The issues

6 There were two main issues before me:

(a) whether the defendants could rely on cl 11.2 of certain terms and conditions to establish that JBS could transfer its obligations to another party even without the consent of GL; and

(b) whether GL had impliedly consented or was estopped from denying the transfer.

Clause 11.2

7 It is undisputed that GL had signed an Account Mandate Master No 8500215 GOLFCLUB. There was a reference in the opening portion of the Account Mandate in cl 8.2 thereof to "Terms and Conditions".

8 The opening portion stated, "This Account Mandate, the Terms and Conditions, the Services Documents and the Security Documents (where applicable) shall apply to the Account and the Services and shall be binding on the client".

9 Clause 8.2 of the Account Mandate stated, *inter alia*:

> 8.2 … The Client agrees to be bound by the Terms and Conditions and acknowledges that it has received a copy of, read and fully understood the said Terms and Conditions and the Risk Disclosure Statement.

10 Initially, no set of Terms and Conditions was adduced in evidence. I was given the impression that there was none. However, on 24 August 2009 at the initial hearing of this action, counsel for the defendants said that he had just received a set of the terms and conditions referred to in the Account Mandate and produced it for consideration. In that set, cl 12.2 was relevant as it purported to allow JBS to transfer GL's account to another party without the need for GL's consent. Counsel for the defendants asked for and was granted leave to file an affidavit to exhibit that set of the terms and conditions. The date at the bottom of each page thereof was "09-2004".

11 The affidavit filed for the defendants to exhibit the terms and conditions was from Noah Kan Wai Yim, the executive director of Bank Julius Baer. However, he exhibited a different set of terms and conditions with the date "04.2002" printed at the bottom of each page and the relevant provision was cl 11.2. Clause 11.2 stated, *inter alia*:

> 11.2 … The Bank may assign or otherwise transfer all or any of its rights, interest, powers or obligations under these Terms and Conditions, the Account Mandate and any Services Documents or Security Documents and any Account or Services or transactions to which they relate and/or the Collateral and may deliver the same to the transferee(s), who shall thereupon become vested with all the rights, interests and powers in respect thereof which were formerly vested in the Bank. …

12 It was not in dispute that cl 11.2 was wide enough to allow JBS to transfer GL's account to Bank Julius Baer without the consent of GL but the question remained as to whether the set of the terms and conditions exhibited was the set referred to in GL's Account Mandate.

13 Firstly, Counsel for GL pointed out that GL had signed the Account Mandate and many other banking documents but not any set of terms and conditions. Secondly, the set exhibited appeared to contain 21 pages because at the bottom of each page, there was such a reference, eg, "Page 6/21". Yet, there were in fact 24 pages with, for example, the last two pages referring to "Page 23/21 and Page 24/21".

14 Thirdly, the contents page indicated that Product Conditions could be found at page 12 but was in fact starting from page 14.

15 I accepted that it was not necessary for GL to sign the set of terms and conditions. They could have been incorporated by reference. Also, although the discrepancies pointed out could have been innocuous if seen in isolation, I took into account the totality of the circumstances which eventually led to the disclosure of this set of terms and conditions. As I mentioned earlier, no set of terms and conditions was disclosed initially. There was no hint from either of the defendants that there were standard terms and conditions which included a term to allow JBS to transfer GL's account without the need for his consent but that the set had been misplaced. The burden was on the defendants to persuade the court that the set exhibited was the correct set and, in the circumstances, I was of the view that it had not discharged its burden.

Did GL impliedly consent or was he estopped from denying the transfer?

16 I come back to the Letter (of 15 March 2007) which purportedly informed the account holder of the matters stated in para 19 of Goh's affidavit which I have referred to.

17 GL did not dispute the contents of the Letter but, as mentioned above, he said that he did not receive it. It transpired that this was because he had given instructions for mail to be held by JBS. The operation of the "Hold Mail" service is governed by cl 3 of the Account Mandate which stated:

> 3.1 The Bank may, if so requested by the Client, and if the Bank in its sole discretion thinks fit, refrain from dispatching by mail or otherwise sending to the Client, any communications, notices, confirmations, advices, statements or any other form of correspondence (collectively "the Correspondence") relating to the Account, any of the Services and/or any transactions carried out by the Client and/or the Authorised Representative but instead place the said Correspondence in a folder ("Hold Mail folder") made out in the Client's name at the Bank for safe-keeping (such safekeeping service being the "Hold Mail Service"). Regardless of the nature of any Correspondence, the Bank shall not be required to give notice of the Correspondence to the Client or take any other action in relation to the Correspondence…
>
> 3.2 The Client acknowledges and authorizes the Bank to treat all Correspondence placed in the Hold Mail Folder as having been duly delivered to and received by the Client. The date of the relevant Correspondence shall be deemed to be the date of receipt of the same by the Client.
>
> 3.3 The Client shall at least once in every period of twelve (12) months either collect in person or give instructions for the collection or disposal of all Correspondence retained in the Hold Mail Folder…
>
> 3.4 The Client releases the Bank from all responsibility in respect of the Correspondence and waives any claim whatsoever which the Client may at any time have against the Bank arising out of the provision of the Hold Mail Service.
>
> 3.5 …

18 In these circumstances, I did not think it was open to GL to allege that he did not receive the Letter. Under the applicable terms, the Letter was deemed to have been duly delivered to and received by him. He must have known the risks associated with a "Hold Mail" service and he voluntarily accepted the risk.

19 The next question then was whether GL ought to have responded to the Letter and the effect of silence.

20 In my view, the circumstances were such that GL ought to have raised an objection if he was not agreeable to the transfer of his account. A customer should not be permitted to allow the bank to think that it has his consent when he could so easily have indicated otherwise. Of course the ideal situation would have been to obtain the written consent of each and every customer but the reality of the exercise was such that some might not bother to give the consent even though they did not object. The exercise to transfer all accounts should not have to be halted because of the lack of written consent of every customer but, having said that, the transferor and transferee also take the risk that in other circumstances, the court may conclude that silence is not enough to signify consent. In *Midlink Development Pte Ltd v Stansfield Group* [2004] 4 SLR(R) 258 at [51], the court expressed the view that there may be a duty to speak arising from the relationship of the parties. I agreed. In view of the relationship and the Letter, there was a duty on GL to speak out, based on his deemed knowledge, if he wanted to object.

21 However, that was not all. As I mentioned above, there were Swiss proceedings against GL. Apparently, on 1 July 2008, a Swiss attachment order was made against GL. Its terms applied to balances from account number 8500215 "which is administered at the branch in Singapore Julius Baer & Co AG (Julius Baer & Co Ltd) 1 George Street, #21-02, 049145 Singapore". This was not a reference to a Singapore company but a branch of Bank Julius Baer (the second defendant).

22 GL admitted that he received the Swiss attachment order on 4 August 2008. He instructed Swiss solicitors to assist him to oppose it. The opposition was contained in his letter of 7 August 2008. Para 5 and the relevant part of para 6 thereof states:

> 5 The office of forced prosecution in Zurich is not competent to execute the attachment. The creditors name only one account at the Singapore branch of the bank Julius Bar Co. AG. If there is a predominant connection of the claim with a specific branch the attachment must be levied at the seat if [*sic*] this branch according to Federal court decisions 107 III 147 et.seq. and 128 III 473 et.seq. The predominant connection with the branch in Singapore is stated since there is only one account named and since I have no relationship with the bank in Zurich.
>
> 6. …
>
> The Zurich authorities and courts lack jurisdiction to levy attachment on accounts with the Singapore branch of Bank Julius Bar Co. AG. Therefore the attachment must be discharged.

23 GL's solicitor, Dr Alberto Ferrari sought to explain GL's knowledge or rather, the lack thereof, in his second affidavit filed on 1 December 2009 which stated at paras 14 to 17 as follows:

> 14. Where a legal entity which has its seat in Switzerland holds assets abroad through a foreign branch, Swiss law deems such assets to be situated within the jurisdiction and may entertain an application for an order to prevent their dissipation. However, this is not the case where such foreign branch is in fact an independent legal entity under the law where it is incorporated. Here, the separate foreign legal personality of the entity must be respected. There

is no basis for a worldwide freezing order under Swiss law.

15. Hence at the time, the client made the preliminary challenge on the Attachment Order as against the Account that was held in the name of "Bank Julius Baer Co AG" as it was understood that "Bank Julius Baer Co AG" was a company incorporated in Singapore. It was presumed that this entity was the original entity the client contracted with, namely "BDL Banco di Lugano (Singapore) Ltd" which subsequently changed its name to "Bank Julius Baer (Singapore) Ltd".

16. As it has now been uncovered, "Bank Julius Baer Co AG" is in fact a foreign branch that does not have an independent legal personality. However, this does not detract from the "knowledge" or belief of the client at the material time.

17. I have also been asked to explain the use of the word "branch" as shown in the English translation of the letter of 7 August 2008 as well as in the Attachment Order and whether that shows that the client must have knowledge that the entity "Julius Baer Co AG" was a separate company from "Bank Julius Baer (Singapore) Limited". As explained above however, the use of the word "branch" will not necessarily explain whether the "branch" is an independent legal entity to the principal and is separately incorporated in the foreign jurisdiction or whether it has no separate personality to its principal. The question of the "branch"'s personality depends on the law of the jurisdiction in which it is registered or incorporated.

24 It seemed to me that whether a branch of Bank Julius Baer was a separate entity from the principal or not, the point was that it must have been clear to GL and his solicitor in early August 2008 that his account was no longer being held by a Singapore company but by a branch of Bank Julius Baer. This must have been all the more important to GL if, as he had asserted, he wanted to "transact with a Singapore incorporated entity under the laws of Singapore" (see para 5 of GL's first affidavit filed on 18 February 2009). Yet, there was no protest from him in August 2008 that the account had been transferred.

25 On the contrary, on 12 September 2008, GL and a solicitor from Rajah & Tann LLP (his Singapore solicitors) went to the office of the second defendant in Singapore to withdraw money held in the account. GL was unsuccessful. An affidavit from Thong Chee Kun ("Thong") of Rajah & Tann LLP was filed on 1 December 2009. He said at paras 3 to 7 as follows:

3. I attended with the client at the Julius Baer offices at 1 George Street, #21-04, Singapore 049145 on or about 12 September 2008. We were attended by one Mr Marco Diana and one Mr Victor Sim (Compliance & Legal). I informed Mr Victor Sim that we wish to check on the status of the account and obtain a statement, since the Order under section 68 of the Criminal Procedure Code (Cap. 68) had been lifted by the Corrupt Practices Investigating Bureau of Singapore ("CPIB").

4. An account statement was furnished to the client but Mr Victor Sim said that the account remains frozen, as directed by the bank in Lugano (Switzerland). I informed him that there was no legal basis for them to freeze the account in Singapore as the said Order was lifted.

5. Mr Victor Sim said that he could not do anything as directions came from the bank in Lugano (Switzerland). I replied that we may have to challenge this and raise the issue to the Monetary Authority of Singapore (the central bank of Singapore), if necessary, as the bank in Singapore was subject to local regulations and rules. He apologized again and said that there was nothing he could do without directions from Switzerland.

6. The Plaintiff then asked whether he could make specific requests to withdraw certain sums for specific purposes such as paying for his legal fees. I added that any such withdrawals would be small compared to the amount in the bank account. Mr Victor Sim said that he would check on this matter.

7. Mr Victor Sim also provided me with the contact details of his counterpart in Lugano (Switzerland) who told him to freeze the account. I was informed that his name is Mr Carlo Brochetta and was given his telephone number and email address.

26 I should mention that although a Swiss court had lifted the attachment order, there was apparently an appeal against the lifting order which is still in progress in Switzerland.

27 According to GL, it was only when he received the statement of account on 12 September 2008 that he realised that the account was held by "Bank Julius Baer & Co Ltd" but this name was similar to the name "Bank Julius Baer (Singapore) Ltd". He had thought that it was the same entity. However, there is a statement at the bottom of each page of the statement stipulating that Bank Julius Baer is "Incorporated in Switzerland".

28 Notwithstanding his knowledge of the terms of the Swiss attachment order and also of this statement of account, GL had proceeded to ask for withdrawal of funds but his request was not acceded to.

29 In the circumstances, I was of the view that GL was estopped from denying that his account had been validly transferred to and held by Bank Julius Baer. I reached this view even if he did not notice the reference to the place of incorporation in the statement of account because, in my view, he nevertheless had the knowledge from the Swiss attachment order.

30 Counsel for GL submitted that GL did not, by his request to withdraw money, acknowledge the relationship with Bank Julius Baer but that he was merely seeking to terminate that relationship. However, Thong's affidavit showed that GL was seeking to withdraw part, not all, of the money for specific purposes.

31 However, one other point was raised for GL. He said that he had thought all along that his account was still being held by JBS because of certain proceedings in Singapore and it was only in early November 2008 that he learned otherwise. By then, his Swiss solicitors informed him that they had received papers from the Swiss court which showed that the account had been transferred from JBS to Bank Julius Baer. Around the same time, his Singapore solicitors also advised that the two were different entities.

32 Some two years earlier, on 7 September 2006, the Corrupt Practices Investigation Bureau ("CPIB") in Singapore had sent a letter to "Bank Julius Baer (Singapore) Ltd" to seize GL's account under s 68 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). GL then sought to challenge the seizure order by filing Originating Summons No 1036 of 2008 on 6 August 2008 to ask for leave to apply for a judicial review of the seizure order. Eventually, CPIB agreed to lift the seizure order which was done on 8 September 2008.

33 According to GL, he had believed up till then that his account was with "Bank Julius Baer (Singapore) Ltd" as the seizure order was addressed to it and had not been varied. Even his application was made on that basis.

34 I noted that the Singapore seizure order preceded the Swiss attachment order. In my view,

when GL received the Swiss attachment order, he and his solicitors must have realised that the account was no longer held by a Singapore company but, apparently, it did not matter to them then. The application for judicial review in Singapore would have been made on the basis of the earlier seizure order but that did not take into account the information disclosed by the Swiss attachment order.

35 In my view, the CPIB proceedings did not show that by early August 2008, GL still had no knowledge that his account was being held by a different entity.

36 In the circumstances, I dismissed GL's action with half of the costs to be paid by him to be agreed or taxed.