Australia and New Zealand Banking Group Ltd *v* Bombay Talkies (S) Pte Ltd and another [2015] SGHC 112

Case Number	: Suit No 512 of 2013 (Registrar's Appeal No 183 of 2014)
Decision Date	: 24 April 2015
Tribunal/Court	: High Court
Coram	: Edmund Leow JC
Counsel Name(s)	: Lim Wei Lee and Liang Hanting (WongPartnership LLP) for the plaintiff/respondent; Assomull Madan DT (Assomull & Partners) for the defendants/appellants.
Parties	: Australia and New Zealand Banking Group Ltd — Bombay Talkies (S) Pte Ltd and another

Civil Procedure – Summary Judgment

24 April 2015

Edmund Leow JC:

Introduction

1 Australia and New Zealand Banking Group Limited ("the Plaintiff") claimed against three corporate clients and their guarantor, who was the director and shareholder of all three companies. The Plaintiff claimed for payments of debts that were due and owing under banking facilities that it had extended to the companies. On 6 May 2014, it received summary judgments for all three suits, which were heard together (Suit Nos 511-513 of 2013). It was also awarded contractual interest and indemnity costs. Dissatisfied with the assistant registrar's decision, the defendants appealed. On 12 January 2015, I heard Registrar's Appeal Nos 182-184 of 2014 and dismissed the appeals, varying only the assistant registrar's costs order. As the defendants in Suit No 512 (Registrar's Appeal No 183) filed a notice of appeal, I lay out my grounds of decision. Since the appeal was filed only in respect of one suit, that will be the focal point of my decision. However, the facts and arguments were largely similar in all three cases.

Background

2 The first and second defendants in Suit No 512 are Bombay Talkies (S) Pte Ltd and its director and shareholder, Mr Ramesh Mohandas Nagrani ("the Defendants"). On 10 July 2007, banking facilities were extended to the first defendant, with the second defendant standing in as the guarantor. [note: 1] The banking facilities were amended by four supplemental letters in 23 July 2008, 30 January 2009, 24 November 2010 and 9 November 2011. [note: 2]

3 When the banking relationship began, the bank that granted the facility letter was not the Plaintiff but ABN AMRO Bank NV ("ABN Amro"). [note: 3] In late 2007, the Royal Bank of Scotland ("RBS") acquired ABN Amro and its related businesses. This was reflected in the second supplemental letter which ABN Amro sent to the Defendants on 30 January 2009. This letter was sent by ABN Amro but carried RBS' logo on the letterhead. [note: 4] In May 2010, RBS' business was in turn acquired by the Plaintiff, which issued the supplemental letters dated 24 November 2010 and 9 November 2011 to

the Defendants. Both supplemental letters were clearly accepted by the Defendants, as evidenced by the signature of the second defendant on his and his company's behalf. [note: 5]

4 In this context, the relevant provisions that governed the banking facilities were RBS' General Facility Provisions. Briefly, cl 7 states that the default interest rate shall be 3% above the interest rate charged on the facilities. [note: 6] Clause 11 provides for the bank's legal fees to be paid on a full indemnity basis. [note: 7] Further, cl 13 allowed the bank to assign, transfer or novate its rights to any other person. [note: 8] The use of the word "bank" in the facility provisions referred to RBS, its successors and assigns. [note: 9] The guarantee entered into by the second defendant also states, *inter alia*, that he is not released from the guarantee by "the transfer or assignment of the benefit of these presents to any person or corporation" and it continues to be "valid and binding for all purposes". [note: 10]

5 After the Plaintiff's acquisition of RBS, the Defendants applied to the Plaintiff for trade finance loans pursuant to the banking facility on at least two occasions, on 2 August 2011 and 28 December 2011. [note: 11] On 18 January 2012, the Plaintiff sent a notice of payment default to the Defendants for an overdue amount of $84,880.43 and accrued interest. [note: 12] This was followed by two letters of demand on 11 April 2012 and 31 January 2013. [note: 13] The Defendants made partial payments in the form of cash deposits totalling $8,000 on 11 June 2012 and 25 January 2013. [note: 14] On 31 July 2012, the first defendant instructed the Plaintiff to transfer $156,497.80 from its fixed deposit account to its current account associated with the facilities "to offset our overdraft account with immediate effect". [note: 15] Following further letters of demand, the Plaintiff commenced Suit No 512 in the courts for the sum of $363,761.54 (as at 27 May 2013), interest on all outstanding sums at the rate of 9% per annum accruing until the date of full payment and costs on an indemnity basis. [note: 16]

The proceedings below

6 Before the assistant registrar, the Plaintiff submitted that it had established a *prima facie* case on the basis of the documents. [note: 17] It highlighted the "course of conduct over a period of years" showing that the Defendants had accepted the various facilities (including the subject of Suits No 511 and 513) and took the benefit of them without protest until it filed the lawsuits. [note: 18]

7 The Defendants argued, *inter alia*, that the Plaintiff was not entitled to enforce its rights under the banking facilities because of issues related to the assignment from ABN Amro to RBS and subsequently, the Plaintiff. They also pointed to issues related to missing documents. For example, the facility letter from ABN Amro to the Defendants in July 2007 referenced ABN Amro's General Facility Provisions and Trade Finance Supplement, [note: 19] but these were not displayed in the affidavits. The Defendants further argued that the RBS' General Facility Provisions (see [4] above) that the Plaintiff relied on were irrelevant [note: 20] and that even RBS' General Facility Provisions had an express prohibition that barred a third party from enforcing any term of the contract. [note: 21]

8 The Defendants also asserted that the claimed amount was inaccurate. [note: 22] The partial payments totalling $8,000 (see [5] above) were not reflected in the spreadsheet exhibited in the Plaintiff's affidavit, which showed the breakdown and calculation of the claimed amount. [note: 23] The interest computed also failed to factor in the partial payments and a sum of $16,829 (the $16,829

was an instance of the Plaintiff setting off the credit balance in the first defendant's account against the money owed to it under the banking facilities). [note: 24] The Defendants also took issue with the inconsistent interest rates – either 9% or 10% – that had been used by the Plaintiff. [note: 25]

9 Besides ABN Amro's General Facility Provisions and Trade Finance Supplement, the Defendants also alleged that other necessary documents were missing, including some statements of accounts and the Plaintiff's trade financing terms for the trade finance loan applications. [note: 26]

10 The learned assistant registrar found that the Plaintiff had established a *prima facie* case for all three suits, including Suit No 512. She found that the missing documents were not necessary for the Plaintiff to establish its claim, which was based on the assignment of the banking facilities from ABN Amro to RBS and then to ANZ. Neither did those documents go towards any disputed issue between the parties. [note: 27] She then turned to whether there were any triable issues or *bona fide* defences raised by the Defendants and found none. First, the contractual exclusion of the Contracts (Rights of Third Parties) Act (Cap 53B, Rev Ed 2002) did not prevent rights under a contract from being assigned to other parties. Second, she found that any allegations of invalid assignment of the banking facilities from ABN Amro to RBS and subsequently, to the Plaintiff, had "no solid footing". [note: 28] It could not be seriously disputed that ANZ had acquired RBS and its related businesses, and that RBS had previously acquired ABN Amro and its related businesses. Nothing suggested that the banking facilities had been excluded during the process of acquisitions. In fact, the documentary evidence, in particular the various supplemental letters, showed the opposite. There was also no legal authority that required the consent of a bank's customer to be obtained before an assignment of contractual rights could be valid, where there was no contractual term that prohibited assignment. Third, she found that there was no vitiating factor such that the second defendant was not bound by the guarantees he had signed. Lastly, she noted that the defendants had taken issue with the inconsistencies in the Plaintiff's position in regard to the applicable interest rate on the facilities and the calculation of the amounts owing. However, she considered, *inter alia*, that the defendants took no position on what the interest rate or correct amounts should be. Neither had they made any contemporaneous objections when they received their statements of account. On the other hand, the Plaintiff had explained its calculations on affidavit and its basis for relying on an interest rate of 9%. In the premises, she found that the Plaintiff had made out its case on the amounts owing and applicable interest rates on a balance of probabilities.

11 Therefore, she gave summary judgment on all three suits, pursuant to O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In relation to Suit No 512, she ordered that the Defendants pay the Plaintiff $363,761.54 being the sum due under the banking facilities as at 27 May 2013 and interest on all outstanding sums at the rate of 9% per annum accruing until full date of payment.

12 The assistant registrar also awarded a total of $39,000 in indemnity costs, of which $12,000 was for Suit No 512. She rejected the contention that the Plaintiff could not rely on the indemnity costs clause. The Defendants had argued that the indemnity costs clause in the RBS' General Facility Provisions (see [4] above) did not apply as this was not the document that was referenced in ABN Amro's facility letter in 2007 (see [7] above). She also rejected the Defendants' argument that the Plaintiff could not claim indemnity costs as it had included an endorsement for fixed costs of $2,000 in its writ of summons. [note: 29] She accepted, *inter alia*, the Plaintiff's submission that in its reply to the defence, [note: 30] the Plaintiff had clarified that the fixed costs endorsements pertained only to a situation where the Defendants satisfied the claim within eight days of the service of the writ.

The Registrar's appeals

The relevant law

13 I first lay out the relevant law before proceeding to consider the evidence and arguments that the parties had placed before me, which were largely a repeat of their arguments below. Under O 14 r 3(1) of the Rules of Court, the court may give summary judgment for the plaintiff in relation to its claim unless it dismisses its application or the defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought, for some other reasons, to be a trial. To obtain summary judgment, the plaintiff first shows that it has a *prima facie* case for judgment. Once it has done that, the burden shifts to the defendant, who must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence, in order to obtain leave to defend: see, *eg*, *Associated Development Pte Ltd v Loong Sie Kiong Gerald (administrator of the estate of Chow Cho Poon, deceased) and other suits* [2009] 4 SLR(R) 389 at [22].

14 The following extract from *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] 2 SLR 601 at [11], which was recently cited in *Oversea-Chinese Banking Corp Ltd v Ravichandran s/o Suppiah* [2015] SGHC 1 at [23], was also relevant:

> Indeed, while the summary jurisdiction of the court is to be exercised with great circumspection, the court must also be wary of defendants who seek to evade summary liability by throwing out spurious allegations, assertions and afterthoughts as convenient smoke screens, which they neatly label as *bona fide* defences raising triable issues. …

My decision

15 I agreed that the Plaintiff had shown a *prima facie* case based on the documents that supported its affidavits. This was obvious from the factual background that I had laid out above. To recap, the Plaintiff, after acquiring RBS (which had previously acquired ABN Amro), sent supplemental letters to the Defendants in November 2010 and November 2011. Except to the extent that those letters revised the original facility letter issued by ABN Amro in July 2007, the terms of the facility letter and related security documents were to continue "in full force and effect". [note: 31] The guarantee provided by the second defendant to ABN Amro was also to remain valid and binding in favour of any successor and assign; it was not discharged by the transfer of the benefits of the guarantee to another entity. [note: 32]

16 The Defendants did not merely sign their acceptance to the Plaintiff's letters. [note: 33] They conducted themselves in a way that unequivocally showed that they had a banking relationship with the Plaintiff, pursuant to the banking facilities (see [5] above). There was no evidence that the Defendants ever disputed their liabilities under the banking facilities, whether in principle or quantum, until the start of the court proceedings. In other words, the Defendants knew they were dealing with the Plaintiff but never objected. Rather, their response to the outstanding amount demanded was a proposal to seek refinancing with another bank. [note: 34] As the Plaintiff summarised, "such conduct was inconsistent with there being any *bona fide* defence to the Plaintiff's claim". [note: 35]

17 I thus turned to the Defendants to consider if there was a reasonable probability that they had any real or *bona fide* defences raising triable issues, instead of just mere assertions.

18 The Defendants' arguments on appeal could be broadly divided into three grounds for all three suits, including Suit No 512. First, there was invalid assignment between the banks, which meant that the Plaintiff had no right to sue the Defendants. Second, there were missing documents in the

Plaintiff's case, which contravened O 14 r 2(8) of the Rules of Court that affidavits must contain "all necessary evidence in support of" the claim. Third, the Defendants contended that there was a discrepancy in the numbers. While the assistant registrar had adequately – and correctly, in my view – addressed these arguments, I deal with them in turn.

19 On the issue of invalid assignment, the Defendants essentially made the point that the Plaintiff had wrongfully based its claim on ABN Amro's original facility letter, as the letter specified that the entity with the right to declare outstanding amounts due and payable was ABN Amro. [note: 36] The Defendants also referred me to provisions that prohibited a third party from having rights of enforcement under the Contracts (Rights of Third Parties) Act (Cap 53B, Rev 2002) ("CRTPA"). [note: 37]

20 I did not agree that any issue of invalid assignment existed. In my view, it was sufficient for the Plaintiff to include RBS' General Facility Provisions in its affidavits, notwithstanding that ABN Amro's facility letter referenced ABN Amro's General Facility Provisions. As between ABN Amro and RBS, the second supplemental letter to the Defendants on 30 January 2009 was sent by ABN Amro but carried RBS' logo on the letterhead (see [3] above). [note: 38] This must mean that no real assignment of the banking facilities had to take place – they were the same entity. Even if they were different entities and an assignment was necessary, there was no suggestion that ABN Amro's General Facility Provisions included non-standard terms that prohibited a right to assignment. And in the absence of any objection from the Defendants at the time, RBS' General Facility Provisions must be taken to have been accepted by them. As between RBS and ANZ, RBS' General Facility Provisions conferred on it a right of assignment (see [4] above). [note: 39]

21 Any provision that excluded the rights of third parties to enforce the terms of the banking facilities was of no relevance. The CRTPA makes provision for the enforcement of contractual terms by third parties. It follows that the exclusion of the CRTPA means that third parties cannot enforce the terms of the banking facilities. But the Plaintiff was not a third party – by virtue of its acquisition of RBS, it had become a party to the contract.

22 The Defendants provided a list of missing documents. [note: 40] They asserted that these constituted evidence that was "necessary as it is part and parcel of the claim". [note: 41] Otherwise, the Plaintiff would not have pleaded and affirmed affidavits making reference to the documents. The documents included ABN Amro's General Facility Provisions and Trade Finance Supplement, which I did not consider necessary (see [20] above). Other missing documents included the ANZ Trade Terms booklet and any other applicable trade agreements. These documents were again, unnecessary for the Plaintiff to establish its claim. The Plaintiff had already produced copies of a sample Trade Finance Application form and two completed application forms. [note: 42] These fulfilled the purpose of showing that the first Defendant had applied to the Plaintiff to draw down on its banking facilities in August and December 2011, long after the Plaintiff had acquired RBS' business in May 2010. Lastly, the Defendants also pointed out that the statements of accounts – for Singapore and United States currency denominations – were incomplete. [note: 43] The first defendant received monthly account statements. Their contents were not hitherto objected to. The Defendants pointed out that the Singapore denomination statements of accounts displayed by the Plaintiff did not include the July 2011 statement. But statements were displayed for August 2011 all the way until May 2013. The displayed statements fulfilled their purpose in showing me when the relevant loans were drawn, and that the Defendants' had acknowledged their debts without dispute at all material times, by making partial payments in the form of cash deposits totalling $8,000 on 11 June 2012 and 25 January 2013,

[note: 44] and by transferring $156,497.80 into its current account associated with the facilities "to offset our overdraft account with immediate effect". [note: 45] As for the missing statements of account (USD Denominations), they were not necessary as there was no activity in that account. The balance remained at zero up till May 2013.

23 The last issue concerned the calculation of the amounts claimed by the Plaintiff. The Defendants contended that the Plaintiff's interest rate was inconsistent. [note: 46] Essentially, the letters of demand sent by the Plaintiff on 21 February 2013 had computed the outstanding amount based on an erroneous default interest rate of 10%. [note: 47] In RBS' General Facility Provisions, cl 7 states that the default interest rate shall be 3% above the interest rate charged on the facilities. [note: 48] The Plaintiff had arrived at 10% because it had erroneously stated in its letters of demand that the default interest rate was 4% above the applicable interest rate specified in the facility. [note: 49] This resulted in an accrued interest of $31,200.60 on the amount due of $344,192.79 on 21 February 2013. However, this mistake had clearly been rectified by the Plaintiff. In the conclusion to its statement of claim, it prayed for interest at 9%. [note: 50] This was repeated in its reply to the defence, [note: 51] and in its affidavits. [note: 52] Specifically, the Plaintiff's spreadsheet in its second affidavit used 9% in showing the breakdown and calculation of the claimed amount. [note: 53] As such, it was clear the Plaintiff based its claim on a 9% interest rate.

24 The Defendants also brought up various discrepancies in the calculations from which the amount claimed was derived. [note: 54] The Plaintiff had on 21 March 2014 generated computation tables for reference at the hearing below. [note: 55] These tables showed, in some detail, the sums claimed, the interest calculations and amounts set off by the Defendants' part-payments for Suit No 512 as well as the other two suits. The Defendants on 31 March 2014 responded to the computation tables, and alleged that the Plaintiff had changed its pleaded position by submitting the tables. [note: 56] The Plaintiff addressed the Defendants' concerns on 7 April 2014. [note: 57] I disagreed with the Defendants that the Plaintiff had departed from its pleaded position simply by submitting tables that explained how they arrived at their final calculations. Before me, the Defendants repeated their assertions that the Plaintiff's figures were clearly wrong, but they could not explain the basis of their assertions or state what the correct figures, in their view, should be. Their claims remained mere assertions.

Conclusion

25 I therefore concluded that the Defendants had not crossed the threshold of raising a triable issue – there was no *bona fide* defence to the claim on the merits: *Habibullah Mohamed Yousuff v. Indian Bank* [1999] 2 SLR(R) 880 at [21].

26 On costs, I agreed with the Plaintiff that they should be ordered on an indemnity basis. This was provided for in the agreement between the parties (see [4] and [12] above) and there was no evidence that the Plaintiff had acted in an improper manner: see *eg* , *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] 3 SLR 909 at [93]-[95]. However, as the assistant registrar had ordered $15,000 in costs for Suit No 511, I was of the view that her costs orders of $12,000 each for Suit Nos 512 and 513 were excessive as the work was largely repetitive. Hence, I revised her costs orders for Suit Nos 512 and 513 to $5,000 each. For the Registrar's appeals before me, I awarded $15,000 for Suit 511 and $2,500 each for Suit Nos 512 and 513. In each case, disbursements would be additional.

[note: 1] Bundle of Cause Papers (Suit No 512 of 2013; Registrar's Appeal in RA No. 183 of 2014) at Tab 5, pp3 and p6 ("BCP").

[note: 2] BCP at Tab 5, p3.

[note: 3] BCP at Tab 5, p20.

[note: 4] BCP at Tab 5, p30.

[note: 5] BCP Tab 5 at p32 and p37.

[note: 6] BCP Tab 5 at p40.

[note: 7] BCP Tab 5 at p20 and p41.

[note: 8] BCP Tab 5 at p41.

[note: 9] BCP Tab 5 at p39 and pp140-152.

[note: 10] BCP Tab 5 at p50. See clauses 12 and 14.

[note: 11] BCP Tab 5 at p15.

[note: 12] BCP Tab 5 at p54.

[note: 13] BCP Tab 5 at p7.

[note: 14] BCP Tab 5 at p7, p70 and p77.

[note: 15] BCP Tab 5 at p8, p72 and p103.

[note: 16] BCP Tab 1 at p6-7.

[note: 17] Plaintiff's Bundle of Documents Tab 2 at p5 ("PBOD").

[note: 18] PBOD Tab 2 at p5.

[note: 19] BCP Tab 5 at p20.

[note: 20] PBOD at Tab 4 p8 at line 11.

[note: 21] PBOD at Tab 4 p8 at lines 13-14.

[note: 22] PBOD at Tab 4 p8 at lines 28-31 and p9 at lines 1-2.

[note: 23] BCP at Tab 7 p19.

[note: 24] BCP at Tab 7 p10 at [29].

[note: 25] PBOD at Tab 4 p9.

[note: 26] PBOD Tab 4 at p9 lines 7-13.

[note: 27] Defendants/Appellants' Bundle of Documents/Authorities Tab 1 at p1.

[note: 28] Defendants/Appellants' Bundle of Documents/Authorities Tab 1 at p1.

[note: 29] BCP Tab 1.

[note: 30] BCP Tab 3 p 9.

[note: 31] BCP Tab 5 at p31 and p35.

[note: 32] BCP Tab 5 at p50.

[note: 33] BCP Tab 5 at p32 and p37.

[note: 34] BCP Tab 5 at p59.

[note: 35] Plaintiff's skeletal submissions at [19].

[note: 36] BCP Tab 5 at para 4.

[note: 37] BCP Tab 5 p42.

[note: 38] BCP at Tab 5, p30.

[note: 39] BCP at Tab 5 p39.

[note: 40] Defendants/Appellants' Bundle of Documents/Authorities at Tab 8.

[note: 41] Defendants/Appellants' Bundle of Documents/Authorities at Tab 8 p2.

[note: 42] BCP Tab 5 at pp141-152.

[note: 43] BCP Tab 5 at pp62-101.

[note: 44] BCP Tab 5 at p7, p70 and p77.

[note: 45] BCP Tab 5 at p8, p72 and p103.

[note: 46] Defendants/Appellants' Bundle of Documents/Authorities at Tab 14.

[note: 47] See Statement of Claim (Amendment No. 1) at [14].

[note: 48] BCP Tab 5 at p40.

[note: 49] BCP pp 105, 108 and 110.

[note: 50] Statement of Claim (Amendment No. 1) at [17ii].

[note: 51] Reply at [17].

[note: 52] BCP Tab 5 at [24] and Tab 7 at p19.

[note: 53] BCP Tab 7 at p19.

[note: 54] Defendants/Appellants' Bundle of Documents/ Authorities at Tab 5.

[note: 55] Defendants/Appellants' Bundle of Documents/ Authorities at Tab 4, p1 and pp7-9.

[note: 56] Defendants/Appellants' Bundle of Documents/ Authorities at Tab 5.

[note: 57] Defendants/Appellants' Bundle of Documents/ Authorities at Tab 6.