Overseas-Chinese Bank Corporation Ltd v Tan Geok Ser and Another [2000] SGHC 263

Case Number	: Suit 86/2000/Z, RA 31/2000
Decision Date	: 02 December 2000
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Davinder Singh SC, Hri Kumar and Sameer Advani (Drew & Napier) for the plaintiffs; Soh Gim Chuan (Soh Wong & Yap) for the first defendant; N Sreenivasan and Ramalingam Kasi (Derrick Ravi Partnership) for the second defendant
Parties	: Overseas-Chinese Bank Corporation Ltd — Tan Geok Ser; Kon Hong Shin

JUDGMENT:

Grounds of Decision

Background

1. Overseas Chinese Banking Corporation Ltd (the plaintiffs) are a bank carrying on business at No. 65 Chulia Street, OCBC Centre, Singapore 049513 and elsewhere. Kon Hong Shin (the second defendant) is an accountant by profession. He was a director of a Singapore company known as Top Test International Pte Ltd (Top Test) from March 1995 to 17 September 1996. Tan Geok Ser (the first defendant) was at the material time, an advocate and solicitor and a director of Top Test.

2. In February 1995, the defendants approached the plaintiffs with a view to obtaining a loan to acquire shares in a company called Credit Development Pte Ltd (CDPL). The defendants represented to the plaintiffs that an arrangement had been reached between the first defendant and a Hong Kong company trading under the name Great World Investment Ltd (Great World) whereby the purchase of the CDPL shares was to be completed by Top Test. The defendants also represented that they would be appointed directors of Top Test prior to the execution of the share purchase.

3. On 30 March 1995, a loan agreement was concluded whereby the plaintiffs agreed to grant credit facilities to Top Test to purchase 27,187,498 shares in CDPL. The credit facilities were in the form of an overdraft facility of $35m and a term loan of $45.8m. The credit facilities were secured by a joint and several deed of guarantee executed by the defendants in favour of the plaintiffs and a charge over the CDPL shares. In addition, the parties agreed that the loan would also be secured through a mortgage over the properties of CDPL pursuant to a financial assistance scheme made under s 76(10) of the Companies Act Cap 50 (the Scheme). The giving of financial assistance pursuant to the Scheme was approved by Top Test in an Extraordinary General Meeting held on 18 August 1995. The loan of $80.8m to Top Test was expected to be repaid within 3 years.

4. After the plaintiffs had disbursed the loan monies, the defendants refused to provide security in accordance with the Scheme. In fact, they tried to convince the plaintiffs to agree to abandon the Scheme altogether. The plaintiffs subsequently realised that the defendants never intended to proceed with the Scheme at all.

5. In October 1995, CDPL was voluntarily wound-up. On 4 and 15 December 1995, the plaintiffs' solicitors wrote to the defendants reminding them that under the terms of the loan agreement, Top Test was obliged to repay a sum of S$17.5m with accrued interest by 30 December 1995. The plaintiffs also insisted that the winding up of CDPL (part of the Scheme) be concluded by 28 February 1996.

6. On 16 December 1995, the defendants gave 2 cheques for S$12m and S$8m to the plaintiffs. They stated that the S$12m originated from a joint account which they maintained at the plaintiffs' High Street branch. At a meeting between the plaintiffs and the defendants held on 18 December 1995, one Loo Choon Beng (Loo), a consultant of Top Test, handed 2 cheques totalling S$20m to the plaintiffs. Loo informed the plaintiffs that the said cheques could be utilised to reduce Top Test's

outstanding debts under the loan agreement in the event the plaintiffs did not want to use the cheques issued by the defendants.

7. Ultimately, the plaintiffs only cashed the cheque for S$12m that had been issued by the defendants. The cheques that were given by Loo were not presented for payment as the plaintiffs were rather wary of their origins. The cheque for S$8m was also not cashed as it represented CDPL's monies.

8. On 20 December 1995, the plaintiffs reminded the defendants that S$8m was still due and owing to them. However, the defendants failed to make full payment by 30 December 1995.

9. On 3 January 1996, the plaintiffs sent the defendants a letter of demand in respect of the remaining sums due and gave Top Test 14 days to pay the outstanding amounts. On 15 January 1996, Top Test wrote to the plaintiffs giving notice of their intention to repay the outstanding loan. However, Top Test failed to make any payments to the plaintiffs within the deadline stipulated.

10. After the expiry of the 14-day deadline, it was revealed that the S$12m cheque that was presented to the plaintiffs had been drawn on funds that belonged to CDPL. At this point in time, the plaintiffs had already received the proceeds of the cheque. They immediately placed the proceeds into a suspense account pending further investigations.

11. On 23 January 1996, the plaintiffs wrote to Top Test informing the latter that their notice to redeem was ineffective. On 29 January 1996, the plaintiffs' solicitors wrote a letter of demand to Top Test to pay $80.8m with accrued interest.

12. On 31 January 1996, a winding-up petition was filed by Overseas-Chinese Bank Nominees (OCBN) against CDPL on the grounds that the directors of CDPL had acted in the affairs of CDPL in their own interests rather than in the interests of CDPL members as a whole. On the same day, the defendants resigned as directors of CDPL.

13. On 5 February 1996, the plaintiffs wrote to the second defendant demanding payment under the guarantee.

14. On 9 February 1996, CDPL commenced Suit No 268 of 1996 against OCBC seeking the return of the S$12m. CDPL claimed that the defendants acted in breach of their fiduciary duties to CDPL by paying the plaintiffs the said S$12m. On 11 July 1996, Top Test commenced Suit No 1256 of 1996 against the plaintiffs, OCBN and OCBC Nominees. In this particular action, Top Test sought a declaration that they were not in default of the repayment terms under the loan agreement and they were entitled to redeem the existing mortgage over the CDPL shares. From August 1996 onwards, the parties to the various legal actions commenced negotiations with a view to a settlement. Eventually, a settlement agreement was concluded between the plaintiffs, OCBN, OCBC Nominees, Top Test, CDPL and one Keen Land Limited on 12 November 1997.

15. The plaintiffs sent another letter of demand to the second defendant sometime in February 2000. On 30 March 2000, the plaintiffs made an application for summary judgment against the defendants. In view of Top Test's failure to repay the loan of S$80.8m, the plaintiffs argued that they had an undisputed claim against the defendants under the terms of the guarantee. They stated that the defendants' defence did not raise any triable issues. The assistant registrar dismissed the plaintiffs' application with costs and gave the defendants leave to defend.

The appeal

16. On appeal, the plaintiffs reiterated their position that the defences to their claim did not raise any triable issues. They further stated that even if the allegations of fact against the plaintiffs were true, the remaining questions of law could be determined summarily. Accordingly, they submitted that the learned assistant registrar erred in granting the defendants leave to defend.

17. In substance, the defences that were raised by the second defendant were, that he was discharged from his obligations under the guarantee as a result of:-

(a) material variations to the loan agreement that were executed by the plaintiffs without his prior consent;

(b) the conclusion of a settlement agreement dated 11 November 1997 which superseded the loan agreement and the guarantee;

(c) bad faith and unconscionable conduct on the part of the plaintiffs, in particular, their failure to sell the CDPL shares to recover part of the loan; and

(d) wrongful declaration of event of default by the plaintiffs.

Material variation of the loan agreement

18. The second defendant argued that it was an implied term of the guarantee that the terms and performance of the loan agreement would not be materially altered without his prior consent. He claimed that the terms of the settlement agreement of 12 November 1997 varied the performance of the loan agreement by providing for the sale of the shares in CDPL to Network Entertainment Group Limited of Australia. Further, the payment terms of the loan agreement were altered as Top Test was given time to pay the amounts owing to the plaintiffs under the settlement agreement. In view of such variations, the second defendant submitted that he was discharged from his obligations under the guarantee.

19. The plaintiffs argued that even if the second defendant's allegations in this respect were true, there was no basis to imply a term in the guarantee in the manner contemplated by the second defendant. Such an implied term would be inconsistent with the express terms of the guarantee, in particular cl 8 which provides:

This guarantee shall not be prejudiced, diminished or affected in any way nor shall we nor any of us be released or exonerated by any of the matters following:

(a) any increase, decrease, extension, renewal or restructure of all or any of the loans…given to the customer from time to time whether solely or jointly with any person or persons…and whether beyond the said limit or otherwise or any variation of any terms and conditions thereof with or without notice to us;

…

(d) any time forbearance, concession or other indulgence given or extended to the customer and/or to any party to any guarantee, indemnity, security or other instrument in respect of any monies hereby guaranteed all of which you are at liberty to give whether with or without our consent or notice to us;

(e) any compromise, composition or arrangement made with the customer and/or any other person or persons all of which you are at liberty to make whether with or without our consent or notice to us.

20. In my view, it is clear that the terms of the guarantee expressly permitted the creditor to vary the terms of the loan agreement without first notifying or obtaining the consent of the guarantor. It is also clear that such variation can be carried out without affecting the guarantor's obligations under the guarantee in any way.

21. Further, I did not think that the decision in *Dunlop New Zealand Limited v Dumbleton* [1968] NZLR 1092 (*Dunlop*), upon which the second defendant placed heavy reliance, was useful. In *Dunlop*, the Supreme Court of New Zealand held that the guarantor was discharged from his obligations under the guarantee as a result of a substantial variation to the loan agreement without the knowledge of the guarantor. I noted that the facts in *Dunlop* differed from that of the present case. In *Dunlop*, the guarantee did not contain an express reservation of the creditor's rights. In contrast, cl 8 of the guarantee in this case clearly preserved the plaintiffs' rights against the defendants in the event of a unilateral variation to the loan agreement. In the circumstances, I did not think that *Dunlop* assisted the second defendant in any way.

22. For the above reasons, I saw no merit in this particular defence.

The settlement agreement

23. The second defendant further argued that the settlement agreement was a new contract which effectively superseded the loan agreement and the guarantee. The plaintiffs countered that the terms of the settlement agreement were not inconsistent with the loan agreement or the guarantee. In fact, the settlement agreement was premised upon the continued operation of the loan agreement and the guarantee and merely provided the mechanism whereby the plaintiffs were to be repaid. In any case the plaintiffs submitted, cl 14 of the settlement agreement expressly made it clear that the parties never intended to rescind the loan agreement and/or the guarantee. Clause 14 of the settlement agreement provides:

> For avoidance of doubt, Top Test and OCBC agree that the terms of the Loan Agreement, Mortgage and the Guarantee shall continue to remain in full force and effect until the said Sums are paid in full.

24. In my opinion, the second defendant's contention in this regard is untenable. An earlier agreement is only rescinded where the parties enter into a new agreement which is entirely inconsistent with the old, or inconsistent with it to such an extent that goes to the very root of it (see *Chitty on Contracts* 27th ed Vol 1 para 22-025 at p 1081). The variations effected by the settlement agreement did not fundamentally alter the obligations of the various parties under the loan agreement and the guarantee. In any case, cl 8(3) of the guarantee unambiguously provided that the defendants' obligation under the guarantee would remain intact in the face of any '*compromise, composition or arrangement*' amongst the plaintiffs and other parties.

25. For the above reasons, I concluded that the second defendant's defence in this regard was unsustainable.

Bad faith

26. The second defendant further submitted that the plaintiffs had lost their rights under the guarantee as they had acted in bad faith. In support of this argument, his counsel cited the following passage from *Snell's Principles of Equity* (28 ed at p 471):-

> Although surety is not in its inception a contract *uberrimae fidei*, yet once the contract has been entered into the creditor must observe the utmost good faith towards the surety. If there are any dealings behind the surety's back, either between the creditor and principal debtor or between the creditor and a co-surety or of prejudicing the exercise of his rights, this will not only discharge him personally from liability, either wholly or partly, but also free any property which

> he has mortgaged or pledged as security for the debt.

27. The second defendant alleged that the plaintiffs acted in bad faith by:

> (a) enforcing the guarantee even though the second defendant only agreed to be a guarantor out of 'moral support';
>
> (b) failing to inform the defendants that they did not intend to use the cheques provided by Loo;
>
> (c) failing to inform the defendants that they did not intend to use the cheque for S$8m that was issued by the defendants;
>
> (d) wrongfully rejecting Top Test's offer to redeem the loan;
>
> (e) failing to inform the second defendant of the settlement negotiations and proceeding to enter into the settlement agreement even though the defendants were not a party to it; and
>
> (f) failing to sell the CDPL shares to recover part of the loan.

28. In my opinion, the instances of bad faith that were alleged by the second defendant were not supported by any cogent evidence. Even if the various allegations were substantiated, I did not think that any of them afforded the second defendant a valid defence to the plaintiffs' claim.

29. To begin with, the allegation in (a) above was raised only once since the guarantee was signed some five (5) years ago. Further, the allegation that he was a mere moral supporter was raised by the second defendant only at the very last minute. Accordingly, I was of the view that the allegation was dubious at best.

30. In relation to the allegations in (b) and (c), I did not see any merit in them. Common sense dictated that the defendants must have known that the plaintiffs did not intend to use Loo's cheques and their cheque for S$8m when the plaintiffs issued their letter of demand on 3 January 1996 demanding the remaining sums due to them as at 31 December 1995.

31. Further, I did not see the plaintiffs' rejection of Top Test's offer to redeem the loan to be indicative of bad faith as alleged in (d) above. Top Test was clearly in default of its obligations to repay the loan. Top Test failed to make any repayment even after the plaintiffs had afforded them a 14-day grace-period to do so. In the circumstances, I did not think that Top Test's offer to redeem the loan was anything other than a futile attempt on their part to buy more time.

32. In relation to (e) above, I did not think there was any evidence to support the allegation that the second defendant was not informed of the settlement negotiations. In fact, the second defendant was asked to be a party to it (which he refused) and was ultimately told about the settlement agreement

33. Finally, I did not think that the plaintiffs' failure to sell the CDPL shares to recover part of the loan amounted to bad faith on their part. It is trite law that a creditor does not owe a surety a duty to realise a security before it became worthless (see *Industrial & Commercial Bank v Li Soon Development Pte Ltd* [1994] 1 SLR 471 and *Hong Kong, China and South Seas Bank v Tan Goon Sin* [1990] 1 Lloyd's Rep 113). As stated in *Hong Kong, China and South Seas Bank v Tan Goon Sin* [1990] 1 Lloyd's Rep 113:

> If the surety…is worried that the mortgaged securities may decline in value, then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he

> could become liable to a mortgagor and to a surety or to either of them for a decline in the value of mortgaged property, unless the creditor was personally responsible for the decline...The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.

In the premises, the second defendant's allegation that the plaintiffs acted in bad faith by not selling the CDPL shares cannot be sustained.

34. Having examined the evidence and considered the submissions of both parties, I do not think that the plaintiffs acted in bad faith in their dealings with the defendants.

Wrongful declaration of event of default

35. The second defendant further argued that the plaintiffs had, by virtue of the settlement agreement, agreed to settle all existing disputes and consequently waived their right to rely on previous events of default. Consequently, the plaintiffs' declaration of events of default in the circumstances was wrongful.

36. In my opinion, there was nothing in the settlement agreement which supported the second defendant's view. As stated above (para 23), cl 14 of the settlement agreement expressly preserved the validity of the loan agreement and the guarantee until a time when the loan is fully repaid. Accordingly, the plaintiffs' rights under the loan agreement and the guarantee remained intact. The settlement agreement merely served as a mechanism through which the plaintiffs afforded Top Test additional time to repay the outstanding sums due under the loan, failing which they would take steps to wind-up CDPL and recover the loan through the liquidation. For the above reasons, it cannot be said that the plaintiffs had waived their right to issue declarations of events of default.

37. I was of the further opinion that the plaintiffs were clearly entitled to call an event of default under cl 19(1)(k) of the loan agreement. That clause provided that an event of default would occur if Top Test:

> begins negotiations or takes any proceeding or other step with a view to readjustment, rescheduling or deferral of all of its/his indebtedness (or of any part of its/his indebtedness which it/he will or might otherwise be unable to pay when due) or proposes or makes a general assignment or arrangement or composition with or for the benefit of its/his creditors or a moratorium is agreed or declared in respect of or affecting all or a material part of its/his indebtedness.

38. The second defendant did not dispute that Top Test had, by a letter to the plaintiffs dated 15 January 1996, made a proposal to restructure the loan. In my view, Top Test's actions clearly fell within cl 19(1)(k) of the loan agreement. Accordingly, the plaintiffs were perfectly entitled to declare an event of default under the loan agreement.

Conclusion

39. For the foregoing reasons, I was of the view that the second defendant had failed to raise any triable issues that warranted this claim proceeding to trial. Accordingly, I allowed the plaintiffs' appeal, reversed the decision made below and awarded final judgment to the plaintiffs with costs against both defendants on an indemnity basis. The second defendant has now appealed against my decision (in Civil Appeal No. 123 of 2000). The first defendant did not file any substantive affidavit in his own right to resist the plaintiffs' application for summary judgment. Rather, his affidavit filed on 26 July 2000 referred to and relied on the

second defendant's affidavit and in particular, on the allegations concerning the conduct of the plaintiffs. According to the first defendant's affidavit, he was recovering from a stroke suffered in November 1999 and was thereby unable to instruct his solicitors properly and sufficiently. However, the first defendant has now filed a separate appeal against my decision in Civil Appeal No. 132 of 2000.

Lai Siu Chiu

Judge