

Ho Soo Fong and Another v Standard Chartered Bank and Other Applications
[2004] SGHC 258

Case Number : OS 257/2004, 258/2004, 259/2004

Decision Date : 18 November 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Molly Lim SC and Rokiah Pillay (Wong Tan and Molly Lim LLC) for the plaintiffs;
Quek Mong Hua, Michael Kuah, Gan Theng Chong and Mervyn Foo (Lee and Lee)
for the defendant

Parties : Ho Soo Fong; Ho Soo Kheng — Standard Chartered Bank

Banking – Lending and security – Equitable mortgages – Loan facility agreement – Whether equitable mortgage over property in favour of defendant bank created upon acceptance of facility letter by plaintiffs – Intention of parties objectively ascertained

Land – Caveats – Whether defendant bank having caveatable interest in property – Whether caveat lodged with reasonable cause

Land – Caveats – Wrongful lodgment – Compensation payable – Defendant bank failing to remove caveat despite repeated requests to do so – Application by plaintiffs for inquiry as to damages and pecuniary loss recoverable – Whether court should grant application – Section 128 Land Titles Act (Cap 157, 2004 Rev Ed)

18 November 2004

Belinda Ang Saw Ean J:

1 The three applications before me were each made by originating summons and brought against the Standard Chartered Bank ("the bank"). The plaintiffs in Originating Summonses Nos 257 of 2004 and 258 of 2004 are Ho Soo Fong ("HSF") and Ho Soo Kheng. They are brothers and the joint owners of two properties known as 77 Syed Alwi Road, Singapore 207656 and 150 Braddell Road, Singapore 359933. They are also directors of Ho Pak Kim Realty Co Pte Ltd. The plaintiffs in the third originating summons, No 259 of 2004, are HSF and his wife, Lin Siew Khim. Both are the joint owners of the property known as 26F Poh Huat Road, Singapore 545074.

2 I heard all three applications together. The proceedings overlapped in that the issues raised were identical and the facts in evidence relating thereto were common. Apart from the type and quantum of the respective loans, rate of interest and the properties to be secured, the relevant terms of the three facility letters under review were essentially the same. In addition, the facility letters incorporated by reference the bank's Standard Terms and Conditions Governing Mortgage Related Banking Facilities no 738-09/99 ("the STC").

3 By three separate loan facility letters, which were dated 11 May 2001, 1 August 2001, and 24 August 2001, the bank offered to make available three separate loans to the plaintiffs. The respective plaintiffs accepted the offers on 29 May 2001, 3 August 2001 and 1 September 2001 respectively.

4 For convenience, I shall refer to the facility letter dated 1 August 2001 for some of the relevant terms, which are common to all three loans. The facility of 1 August 2001 was to be used to assist the plaintiffs to re-finance the indebtedness (*ie* take over the overdraft) owed by the two brothers to the Oversea-Chinese Banking Corporation: see cl 1 of the facility letter.

5 By cl 2, the plaintiffs were to deliver a first legal (all moneys) mortgage on 77 Syed Alwi Road, Singapore. Under cl 6(iii), prior to disbursement of the loans, the various actions commenced in the subordinate courts against Ho Pak Kim Realty Co Pte Ltd had to be fully settled. That was the first of the conditions precedent to draw down the facility.

6 By cl 7(i) of the facility letter, the bank agreed to bear legal costs relating to the mortgage of the property. There would be no contribution by the bank towards legal costs if the facility were, for whatever reason, aborted. In the event, the plaintiffs were required to pay all abortive legal costs and expenses. Additionally, by cl 8.1 of the STC, the plaintiffs were required to pay a cancellation fee of 1% of the loan cancelled by them after acceptance of the facility letter. By cl 17.1 of the STC, the "Events of Default" included:

- (a) if the Borrower fails or omits to perform and comply with any of the terms and conditions in any of the Security Document;
- (b) if the Borrower defaults in the payment to the Bank of any moneys due on the banking facilities or part thereof or any interests accrued thereon or any other moneys payable under the Security Document or otherwise; ...

7 Clause 17.2 of the STC provided:

Upon the occurrence of any of said Events of Default and/or any other events deemed as an event of default by the Bank on the part of the Borrower in any of the Security Document:-

....

- (c) the Bank shall in addition to the rights set out herein, be entitled (as equitable chargee) to attach the liabilities to any of the Borrower's the Mortgagor's ... property or security (whether real or personal) and to lodge a caveat against any real property that may now or hereafter be registered against the Borrower's the Mortgagor's ... name whether singly or jointly.

8 None of the three loans were disbursed even after a year. On the bank's part, the reason for that was because the plaintiffs had not settled all the legal actions referred to in the facility letters. The plaintiffs, however, maintained that they had complied with the bank's condition. Yet, the bank found their efforts wanting. As a result, the plaintiffs, who were by then frustrated and disgruntled with the bank, wrote to the bank on 7 October 2002 to terminate the banking facilities. Nothing turned on the rival views as to whether or not the condition to draw down was complied with. With the termination of the banking facilities, the bank claimed from the plaintiffs two different sets of fees. The first was for a total sum of \$21,380.00 being the 1% cancellation fees. The second was for abortive legal fees totalling \$4,476.05. The plaintiffs denied that they were liable to the bank for the fees as claimed. Between 21 October 2001 and early 2004, the plaintiffs repeatedly requested the bank to remove the caveats lodged, but the bank steadfastly refused to do so. The bank was told that the presence of the caveats prevented the plaintiffs from successfully securing alternative financing from other financial institutions. The bank maintained that it was compelled to leave the caveats on the land register to protect its interest in the properties pending payment of the cancellation and legal fees.

9 On 27 February 2004, the plaintiffs issued these proceedings. On 6 July 2004, the bank's lawyers notified their counterparts that the caveats were withdrawn on 30 June 2004. However, the

withdrawal was without prejudice to the bank's position that it was right in the first place to lodge the caveats. By the time the applications came on for hearing before me, it was no longer necessary for the plaintiffs to seek an order that the caveats be removed. Pursuant to s 128 of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the Act"), the plaintiffs duly sought an order that there be an inquiry as to the damages suffered by them for the period 21 October 2002 to 30 June 2004. It was still necessary to determine whether the caveats lodged against the three properties described above were wrongful or without reasonable cause as the bank at all material times had no caveatable interest in the three properties for cancellation and legal fees. It was argued that neither cancellation fee nor abortive legal fee was due and payable at the time of lodgment of the caveats, namely CV/27166J on 29 May 2001, CV/42696J on 14 September 2001 and CV/053540J on 10 December 2001. Before 7 October 2002, the plaintiffs did not object to the caveats as they anticipated disbursements of the loans. That acquiescence would have a bearing on the pecuniary loss recoverable, but not the specific argument relating to the bank's caveatable interest. The pecuniary loss the plaintiffs sought was confined to the period of the bank's refusal or failure to remove the caveats. It was common ground that by s 127(1) of the Act, the burden was on the bank as caveator to show why the bank was right not to have withdrawn the caveats between 21 October 2002 and 30 June 2004.

10 According to the first affidavit of Ho Yee Foong, the product manager of the bank, the interest in land claimed by the bank stemmed from the plaintiffs' failure to pay the cancellation and legal fees as that event of default triggered the provisions of cl 17.2(c) of the STC. The same position was maintained in his second affidavit where he again asserted that the defendant had a caveatable interest under cl 17 of the STC by reason of the plaintiffs' failure to pay the cancellation fees and legal fees. Notably, nothing was said in his affidavits about the bank's intention to immediately obtain an equitable mortgage over the respective properties upon the plaintiffs' acceptance of the facility letters. I shall come back to this point later on.

11 Ms Molly Lim SC for the plaintiffs submitted that the claim made by the bank to a caveatable interest in the respective properties by virtue of cl 17 of the STC was baseless. She referred me to the decision of the Court of Appeal in *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [2000] 1 SLR 300 ("*The Asiatic Enterprises*"). She argued that on the authority of that case, neither the bank's facility letters nor cl 17.2(c) of the STC conferred on the bank any caveatable interest in the properties. The plaintiffs' acceptance of the bank's offer did not immediately create or give to the bank any claim to an interest in the properties. If anything, it only had an *in personam* claim for moneys for cancellation fees and legal fees against the plaintiffs but not against the properties. Thus, the bank was not entitled to lodge the caveats or to have the caveats remain on the land register. Besides, cl 17.2(c) of the STC was triggered after the occurrence of the event of default. However, the caveats were lodged prior to the occurrence of the event of default. At any rate, the wording of cl 17.2(c) did not create or confer on the bank any interest in the properties capable of being protected by a caveat.

12 The facts of *The Asiatic Enterprises* are that the appellant failed to pay United Overseas Bank ("UOB") some sums due under several trust receipts. By a letter dated 16 June 1998, UOB informed the appellant that its failure to pay the sums due constituted an event of default under cl 10 of UOB's standard terms and requested payment of outstanding sums due under the banking facility. When the appellant again failed to make payment, UOB lodged a caveat against each of the appellant's properties claiming "an estate or interest" in the properties as an "equitable chargee" by virtue of the facility letter. On 15 July 1998, UOB duly registered a charge under s 131(1) of the Companies Act (Cap 50, 1994 Rev Ed). On 29 July 1998, UOB applied to court for an order that its equitable charge over the properties be enforced by sale.

13 The appellate court in *The Asiatic Enterprises* considered the facility letter issued by the UOB and, in particular, cl 10 of UOB's standard terms. Counsel for the defendant in the present case, Mr Quek Mong Hua, rightly conceded that the text of cl 10 was very similar to cl 17.2(c) of the STC currently under review. Clause 10 read:

On the occurrence of any of the following events of default (i) ... all outstandings under the entire credit line ("the Outstandings") shall become due and payable immediately; (ii) [UOB] shall, in addition to the rights set out herein, be entitled (as equitable chargee) to attach the Outstandings to any property of yours (whether real or personal) and to lodge a caveat against any real property that may now or hereafter be registered in your name whether singly or jointly ...

14 L P Thean JA (delivering the judgment of the appellate court), in construing the clause, held that the wording of cl 10 did not, without more, create any equitable charge outright over the appellant's properties on either 8 December 1997, the date the facility letter was accepted, or after the event of default. The clause simply permitted UOB certain rights on default, including the right to take a charge over the appellant's property. Clause 10 itself was insufficient to create an equitable charge on property for the payment of a debt nor did it confer upon the equitable chargee "a right of realisation by judicial process, that is to say, by the appointment of a receiver or an order for sale": see generally the *dictum* of Buckley LJ in *Swiss Bank Corporation v Lloyd's Bank Ltd* [1982] AC 584 at 595. Accordingly, UOB had no pre-existing claim to an interest in land needed to support the caveat. The caveat itself did not create the interest. The certificate of registration of charge dated 16 July 1998, which was only conclusive evidence that the requirements of registration had been complied with, did not operate to confer validity on UOB's purported charge, which was invalid for reasons other than non-compliance with the statutory registration requirements.

15 Contrary to the approach taken in the bank's affidavits, Mr Quek argued that the bank was not relying solely on the default clause (cl 17.2(c) of the STC) to attach the outstanding fees to the plaintiffs' other properties as equitable chargee. He argued that the bank at the outset had a caveatable interest in the properties as equitable mortgagee. The bank's interest as equitable mortgagee was independent of cl 17.2(c). An equitable mortgage over the respective properties was created upon acceptance of the facility letters. In support of his contention, Mr Quek referred to a passage at p 431 in *Principles of Singapore Land Law* by Tan Sook Yee (Butterworth Asia, 2nd Ed, 2001). It reads:

A method whereby an equitable mortgage is created by a mortgagor having the legal title is where the parties merely sign an agreement to mortgage the land. The formality required is that either the agreement must be in writing, or there must be a memorandum in writing signed by the party to be charged. Even if there is no writing, so long as there has been part performance, the agreement can be enforced.

16 Counsel further argued that as the properties were already subject to an equitable mortgage under each of the facility letters, cl 17.2(c) of the STC did not create a separate and distinct interest but reinforced and preserved the bank's equitable interest in the properties as security for the unpaid fees. In any event, he said that the case of *The Asiatic Enterprises* was distinguishable on the facts. In that case, the Court of Appeal found that no floating charge was created at the time of the facility letter. The properties in that case had not been offered as security at the time of the facility letter. It was only upon default that UOB relied on the default clause to attach as equitable chargee the outstanding liabilities to three of the appellant's properties and lodged the caveats.

17 Counsel also referred to *Mahadevan v Patel* [1975] 2 MLJ 207. That decision adds nothing more to the bank's argument except that the outcome of the case turned on the intention of the parties, which is an important consideration. As alluded to earlier, that was a point not addressed in the affidavits and in submissions before me.

18 As a statement of general principle, the passage in *Principles of Singapore Land Law* reproduced in [15] above is straightforward. The author at 432 adopted Buckley LJ's *dictum* at 594 in *Swiss Bank Corporation v Lloyd's Bank Ltd* where his lordship cited with approval a passage from *Fisher and Lightwood's Law of Mortgage* (9th Ed, 1977). The same passage is found at para 1.20 in the 11th edition (Butterworths, 2002) and it reads:

Equitable mortgages of the property of legal owners are created by some instrument or act which is insufficient to confer a legal estate or title, but which, being founded on valuable consideration, shows the intention of the parties to create a present security, or evidences a contract to do so.

19 I pause here to mention that in the written submissions tendered, the interest claimed by the bank was that of an "equitable chargee/mortgagee". In some other paragraphs of the written submissions, the bank had frequently used singly the expression "equitable chargee". During oral submissions, Mr Quek put the bank's case on the footing of an equitable mortgage. I did not think that counsel was making a distinction between the two types of charges that Buckley LJ helpfully distinguished at 594. An equitable charge, according to Buckley LJ, may take the form either of an equitable mortgage or of an equitable charge not by way of a mortgage. As the oral arguments before me proceeded upon the bank's interest as equitable mortgagee, I accordingly addressed my mind to the question whether the circumstances of the present case gave rise to an equitable mortgage.

20 As to whether a particular transaction would give rise to an equitable mortgage, Buckley LJ at 595-596 said:

[It] must depend upon the intention of the parties ascertained from what they have done in the then existing circumstances. The intention may be expressed or it may be inferred. ... But notwithstanding that the matter depends upon the intention of the parties, if upon the true construction of the relevant documents in the light of any admissible evidence as to surrounding circumstances the parties have entered into a transaction the legal effect of which is to give rise to an equitable charge [by way of mortgage] in favour of one of them over property of the other, the fact that they may not have realised this consequence will not mean that there is no charge. They must be presumed to intend the consequence of their acts.

21 In the present case, what was the intention evinced by the facility letters? For an answer to this question, which is to be objectively determined, the court would have to ask: What was the relevant background in this case? The facts and circumstances giving rise to the right to lodge the caveat are important. I already pointed out that the bank's affidavits did not actually address the surrounding circumstances or situation in which the parties were in at the time of the transactions so as to assist in determining how a reasonable man would have understood the language of the document and for the court to conclude as a matter of law that the document created immediately an equitable mortgage over the properties as argued for by the defendant. Notwithstanding this, I shall have to determine the legal effect of what the parties have agreed.

22 The "security" the bank wanted for the loan was stated in cl 2 of the facility letter as a "First

legal all moneys mortgage ... on the Property as defined in the Standard Terms and Conditions". By cl 2.1.1 of the STC, the "security" required by the bank for

[t]he banking facilities and all other moneys and liabilities which may be or become owing to the Bank from time to time shall be inter-alia fully secured by:-

(a) A registered first all moneys legal mortgage of the Property ...

The word "Property" is defined in cl 29 of the STC as "the Property referred to in the Facility Letter and where the context so admits [to] include any other property(s) which is made the Security for the banking facilities". Significantly, what is clear from the facility letters is that the properties identified in the facility letters were already mortgaged to other financial institutions. In the context of this case and in the light of the evidence before me, I was of the view that no security interest ranking after the existing mortgages was intended to be conferred by the acceptance of the facility letters. Equally, the mere identification of each of the properties in the respective facility letters was insufficient to create an immediate security interest by agreement, especially where the properties were not available and hence not intended as security until the existing mortgages were discharged.

23 The conclusion reached is supported by cl 28.1 of the STC which provides that:

The grant of the banking facilities are subject to final documentation and such further legal or other requirements as may be deemed necessary by the Bank.

The words "subject to final documentation" evinced a situation in futurity which is something quite different from a security interest in relation to future property. The words also did not indicate as an interim measure the immediate creation of an equitable mortgage by the acceptance of the offer contained in the facility letter.

24 In my judgment, the existence of the facility letters with their express reference to a first legal mortgage left no room for any implication that the bank intended to create (let alone effectively create) an immediately enforceable equitable mortgage over the properties. The facility letters did not purport to create an immediate equitable mortgage on anything. In my view, if the parties to the facility letters had intended to create an immediate equitable mortgage in respect of the cancellation fees and abortive legal fees, it would have been easy for the bank to have said so. In fact, as indicated, what was written was to the contrary. Accordingly, the caveats were at the outset lodged without reasonable cause.

25 I now turn to consider whether the bank had a caveatable interest after 7 October 2001. It was argued that the non-payment of the cancellation and legal fees constituted an event of default under cl 17.1. Clause 17.2(c) provides that upon the occurrence of an event of default the bank is entitled as equitable chargee to attach the liabilities to any of the plaintiffs' property and to lodge a caveat against any real property that may be registered in the name of the plaintiffs. Adopting L P Thean JA's construction of a similar clause in *The Asiatic Enterprises*, the bank had no interest in land by virtue of cl 17.2(c). It is unarguable from the words used that cl 17.2(c) is an additional right and that the sub-clause refers to other property besides the three properties identified in the facility letters. On the facts, the caveat was lodged on the identified properties and not any other property contemplated by the clause. To that extent, cl 17.2(c) would not aid the bank.

26 Finally, the plaintiffs sought an order for an inquiry as to the damages recoverable under s 128 of the Act. The plaintiffs claimed that they had suffered pecuniary loss as a result of the bank's refusal or failure to remove the caveats. Their pecuniary losses included the loss on another property

known as 179 Syed Alwi Road, Singapore.

27 HSF in his affidavit deposed that the plaintiffs wrote to the bank on 21 October 2002, 5 November 2002 and 17 December 2002 requesting the removal of the caveats. The plaintiffs were then seeking alternative facilities from other financial institutions. M/s Lim Joo Toon & Co, who represented the plaintiffs at that time, also wrote to the bank on 8 May 2003 to remove the caveats. The bank was put on notice that the plaintiffs had obtained refinancing from another bank and the refinancing would be stalled and affected by the continued presence of the caveats. The plaintiffs relied, *inter alia*, on their letter dated 13 July 2001 to support their claim for substantial damages. In that letter, the bank was told that the purpose of the banking facilities was to service the plaintiffs' loan on 179 Syed Alwi Road.

28 Mr Quek argued that an inquiry would be inappropriate, as the claim for damages would not succeed. Counsel referred me to *McDonald's Hamburgers Limited v Burgerking (UK) Limited* [1987] FSR 112, a decision of the English Court of Appeal, which was followed in *Fraser & Neave Ltd v Yeo Hiap Seng Ltd* [1988] SLR 96, for the proposition that if a claimant has an arguable case for claiming damages, the court will make an order for an inquiry to enable him to pursue it. The court nonetheless retains a degree of discretion to refuse an inquiry if it is satisfied that such an inquiry, for instance, will prove to be fruitless. Ms Lim attempted to distinguish *McDonald's Hamburgers Limited v Burgerking (UK) Limited* and *Fraser & Neave Ltd v Yeo Hiap Seng Ltd* as passing off cases whereas in the present case compensation is allowed by statute. In my view, there is no merit in the distinction drawn by Ms Lim. In *Fraser & Neave Ltd v Yeo Hiap Seng Ltd*, the court decided to enforce the undertaking in damages, necessitating, *inter alia*, a consideration of whether the defendant had suffered damage, if any, from the granting of the interlocutory injunction. Likewise, the reference and considerations here are no different. An inquiry as to damages is an inquiry as to whether any and, if so, what damages by way of pecuniary loss the plaintiffs had sustained that was attributable to the lodgment of the caveats or due to the bank's refusal or failure to withdraw the caveats when requested to do so. At the inquiry, the existence and extent of any such loss or damage will be determined: see *Fraser & Neave Ltd v Yeo Hiap Seng Ltd*. At the inquiry it may be found that on the facts there is no valid claim for damages; it may also be found that as a matter of law some heads of claim are not recoverable.

29 The bank disputed the plaintiffs' letter dated 13 July 2001, arguing, amongst other things, that it did not receive it, and at the same time questioning its genuineness. The alleged pecuniary loss was not attributable to the caveats being lodged against the properties or the bank's refusal or failure to withdraw the caveats when requested to do so. For instance, the foreclosure of 179 Syed Alwi Road by a different financial institution was due to the plaintiffs' failure or inability to make repayment to their mortgagee, and the bank cannot be held responsible for that. On the alleged inability to obtain a loan from the Central Provident Fund and the alleged loss on interest, the bank said they were equally fanciful. The bank concluded that the plaintiffs were unable to show that they had, at least, some evidential basis for an arguable case for substantial damages.

30 I was of the view that I need not delve into the bank's arguments. The court was dealing with caveats that were left on the land register for an appreciable period of time. The bank let the caveats remain on the land register despite calls to remove them since 21 October 2002. The caveats were withdrawn on 30 June 2004. In addition, no proceedings for outstanding fees were instituted. In that way the bank obtained a considerable advantage, and an unfair advantage as well, given the conclusions reached. By sitting tight the bank was securing for itself all the advantages that it might have gained by bringing an action were the claims good ones.

31 I already found that the presence of the caveats on the land register could not be justified. The plaintiffs had arguably shown some losses. An inquiry would determine if such losses were attributable to the bank's refusal or failure to remove the caveats. As to whether the true cause for the loss on 179 Syed Alwi Road was due to the plaintiffs' financial straits or the presence of the caveats, this was to be determined at the inquiry. Whilst in some circumstances the court has a discretion to refuse an inquiry as to damages, this was not a case in which the plaintiffs should properly be deprived of the opportunity to prove damages on inquiry. Theirs may well be a weak case, but at the same time it was quite impossible to say that there was indeed no arguable case for claiming damages. The inquiry as to pecuniary loss, if any, pursuant to s 128 of the Act would be at the plaintiffs' risk of costs: see *Fraser & Neave Ltd v Yeo Hiap Seng Ltd*.

32 In the circumstances, having concluded that the bank had no caveatable interest in the properties for the cancellation and legal fees, I allowed the three applications. I directed an inquiry by the Registrar as to whether any and, if so, what damages were sustained that were attributable to the refusal or failure to withdraw the caveats when requested to do so between 21 October 2002 and 30 June 2004. I also reserved the question of costs of the applications to the Registrar.

Applications allowed.

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