Societe Generale Bank & Trust, Singapore Branch v Anwar Agus and Others [2009] SGHC 271

Case Number : Suit 365/2009, RA 316/2009

Decision Date : 26 November 2009

Tribunal/Court : High Court

Coram : Steven Chong JC

Counsel Name(s) : Nair Suresh Sukumaran/Murali Rajaram (Allen & Gledhill LLP) for the plaintiff; Eddee Ng/Emmeline Lim (Tan Kok Quan Partnership) for the defendants

Parties : Societe Generale Bank & Trust, Singapore Branch — Anwar Agus; Patrick Adrian Anwar; Andrew Francis Anwar; Scotts Skyline Trust Pte Ltd; Scotts Island Trust Pte Ltd

Contract – Mistake

26 November 2009

Steven Chong JC:

Introduction

1 This is a claim by a bank against two sons who agreed to execute various documents in order to give their father time to settle his outstanding debts. Amongst the documents which they had signed in the presence of their solicitor were two mortgages over properties which their father had purchased in their names. However, the mortgages also included provisions under which they agreed to pay on demand all sums due and owing by their father to the bank. When the bank demanded payment under the guarantee provisions, the sons and their father kept completely silent. When the bank commenced proceedings against them, various defences were pleaded. After two rounds of amendments, the defence of mistake eventually emerged. Just to be safe, they pleaded all three variants of mistake, unilateral, common and mutual mistake relying on the same set of facts. At the end of the hearing, I allowed the appeal and granted final judgment in favour of the bank. I found that the defence of mistake was neither borne out by the objective evidence nor even by their own affidavits. The only "mistake" I found was the sons' "mistaken" belief that they are entitled to rely on the defence of mistake to deny their clear liability to the bank.

Summary of material facts

2 The plaintiff is a private bank. The first defendant is a customer of the plaintiff. The first defendant's investment account with the plaintiff was opened on 27 May 2008. By way of a letter dated 23 June 2008, the plaintiff extended credit facilities to the first defendant. The first defendant is the father of the second and third defendants. The fourth and fifth defendants were investment holding companies. The second defendant is the sole shareholder of the fifth defendant and the third defendant is the sole shareholder of the fourth defendant. The first defendant is a director of both the fourth and fifth defendants.

3 The first defendant defaulted on payments and on 16 October 2008, the plaintiff terminated the credit facilities. The plaintiff agreed to forbear from immediately commencing legal proceedings against the first defendant on terms and conditions set out in a Forbearance Agreement dated 22 October 2008. Under the Forbearance Agreement, the plaintiff was to procure a mortgage by the

second defendant over 57A Devonshire Road #21-03 Singapore 339897 and another mortgage by the third defendant over 57A Devonshire Road #18-03 Singapore 239897. The second and third defendants subsequently signed the Forbearance Agreement and executed mortgages of the said properties. Deeds of Assignment were also executed by the second and third defendants assigning their interest in the properties to the plaintiff.

4 Clause 1(i) of the Covenants and Conditions in Attachment A[note: 1] of each of the Mortgages (every page of Attachment A was signed by the respective Mortgagors) provided that the second and third defendants covenanted to *inter alia* "pay to the [plaintiff] on demand such sums of money now due and owing under the Facilities and such sums of money which are now or shall from time to time hereafter be owing or remain unpaid to the [plaintiff] by the Borrower in any manner whatsoever". Clause 1.1 of the Deeds of Assignment[note: 2] provided, *inter alia*:

> In pursuance to the said agreement and in consideration of the premises the Mortgagor and the Borrower hereby jointly and severally covenant with the Mortgagee as follows:
>
> 1.1.1 To pay the Mortgagee on demand all sums of money now due and owing under the Facilities and all such sums of money which are now or shall from time to time or at any time hereafter be owing or remain unpaid to the Mortgagee by the Borrower in any manner whatsoever".

5 The first defendant defaulted on his obligations under the Forbearance Agreement. The plaintiff demanded payment of the sum due from the second and third defendants. No payment was made and the plaintiff brought the present proceedings to enforce payment. As at 20 July 2009, the sum due from the defendants was $17,232,552.56.

6 The first, fourth and fifth defendants did not file a Defence and judgment in default of defence was entered against them on 3 June 2009. The second and third defendants were given unconditional leave to defend by the Assistant Registrar ("the AR") on 28 August 2009 and the application before me is an appeal from the AR's decision. I allowed the appeal and I now give my reasons for doing so.

The defences raised by the second and third defendants

7 The plaintiff's claim against the second and third defendants is straightforward. Under the terms of the mortgages and the Deeds of Assignment, the second and third defendants covenanted to, *inter alia*, pay the plaintiff on demand all sums of money due and owing under credit facilities extended by the plaintiff to the first defendant. Initially, the second and third defendants pleaded the following defences:

> (a) By reason of an exchange of correspondence between the plaintiff's solicitors and the solicitors for the second and third defendants, the plaintiff agreed that the second and third defendants will not be required to guarantee the liabilities of the first defendant under the credit facilities.
>
> (b) At the date when the mortgages were executed, the credit facilities granted by the plaintiff to the first defendant had already been terminated.
>
> (c) The plaintiff had perpetrated a fraud on the second and third defendants in the preparation of the mortgages. The second and third defendants essentially repeat the same exchange of correspondence referred to sub-para (a) above in support of this defence.

(d) By reason of the same exchange of correspondence, the plaintiff is estopped from relying on the provisions in the mortgages and the Deeds of Assignment which imposed personal liability on the second and third defendants for the outstanding amounts owing by the first defendant.

8 Interestingly, the defence then underwent two changes. The first change occurred three months later, in August 2009, just before the hearing of the plaintiff's application for summary judgment. For the first time, the second and third defendants pleaded unilateral mistake. The same exchange of correspondence was relied on to prove that the plaintiff was aware of the mistake. Two months later, after unconditional leave to defend was granted and prior to the hearing of the appeal, two additional defences were pleaded. The second and third defendants introduced both common mistake and mutual mistake.

9 Before me, counsel for the second and third defendants (a new firm of solicitors took over conduct for the appeal) only focused on the defences of unilateral mistake and mutual mistake. All other pleaded defences including estoppel were not pursued during the appeal. In this connection, it is relevant to highlight that in the court below, unconditional leave was granted to the second and third defendants on the basis that there were triable issues relating to the defence of promissory estoppel. It is noteworthy that the AR found the defendants' case on mistake to be unmeritorious.

The second and third defendants' pleaded case on mistake

10 Whether it is unilateral, common or mutual mistake, the starting point is to examine the operative mistake allegedly made by the second and third defendants when they executed the mortgages. Their pleaded case on mistake is as follows[note: 4]:

8. … the 2nd and 3rd Defendants aver that there was a mistake on their part as to the term of the Mortgage Agreements and the Deeds of Assignment, in particular the term that they be personally liable for the monies owing by the 1st Defendant to the Plaintiff. *The 2nd and 3rd Defendants aver that the aforesaid letters show that the Plaintiff had known that the 2nd and 3rd Defendants did not agree or intend to be personally liable*. The Plaintiff thus knew that the Mortgage Agreements were executed in mistake and did not express the true intentions of the parties and are void and unenforceable.

9. .... *the 2nd and 3rd Defendants aver that they did not agree to be personally liable for the 1st Defendant's debts and would not have agreed to mortgage their said properties if such a requirement was imposed on them*, and that the Plaintiff had agreed to drop the requirement that personal liability be imposed on the 2nd and 3rd Defendants, leading the 2nd and 3rd Defendants to execute the letter dated 22 October 2008 and pursuant to that, the Mortgage Agreements and the Deeds of Assignment. *The 2nd and 3rd Defendants aver that as a result of a mistake common to the 2nd and 3rd Defendants and the Plaintiff, the Mortgage Agreements do not embody the actual agreement concluded between the 2nd and 3rd Defendants and the Plaintiff* or does not embody or give effect to the concurrent intention of the parties at the moment of the execution of the Mortgage Agreements.

1 0 . *The 2nd and 3rd Defendants aver that the Mortgage Agreements were signed by them in the belief that the Mortgage Agreements embodied the agreement with the Plaintiff that no personal liability would be imposed on them for the debts of the 1st Defendant, but the Mortgage Agreements do not in fact embody the said agreement with the Plaintiff*. In the premises the Mortgage Agreements were made under a mutual mistake of fact, namely, in the belief held by both the Plaintiff and the 2nd and 3rd Defendants that the Mortgage Agreements expressed the common intention or agreement made between the parties that the term imposing personal liability would not be imposed. [emphasis added]

11 Paragraphs 8, 9 and 10 of their defence refer to unilateral, common and mutual mistake respectively. They essentially cover the same ground with different permutations. Central to the defence of mistake is the same exchange of correspondence between the solicitors of the respective parties.

Exchange of correspondence which formed the alleged platform for the mistake

12 The issue of whether a party had signed a contract under a mistaken belief is to be construed objectively. Generally if a reasonable man would have understood the terms of the contract, then, despite his mistake, the court will hold that the mistaken party is bound: see *Chitty on Contracts* Vol 1, Beale general editor (Sweet & Maxwell, 30th Ed, 2008) at para 5-067:

> [T]he language used by one party, whatever his real intention may be, is to be construed in the sense in which it would be reasonably understood by the other.

And para 5-071:

> In most cases the application of the objective test will preclude a party who has entered into a contract under a mistake from setting up his mistake as a defence to an action against him for breach of contract. If a reasonable person would have understood the contract in a certain sense but a party "mistakenly" understood it in another, then, despite his mistake, the court will hold that the mistaken party is bound by the meaning that the reasonable person would have understood. But where parties are genuinely at cross-purposes as to the subject-matter of the contract, the result may be that there is no offer and acceptance of the same terms because neither party can show that the other party should reasonably have understood his version. Alternatively, the terms of the offer and acceptance may be so ambiguous that it is not possible to point to one or other of the interpretations as the more probable, and the court must necessarily hold that no contract exists.

Accordingly, it is apposite to embark on the analysis by first examining the exchange of correspondence to determine objectively whether there was any hint of an operative mistake.

13 The first defendant defaulted on the credit facilities. Thereafter, he requested for time to settle the outstanding sums and made a proposal through his solicitors by letter dated 9 October 2008. The plaintiff, through their solicitors by letter dated 10 October 2008, rejected the proposal and made a counter-proposal which included a term that the mortgagors of the properties provide personal and corporate guarantees to secure the first defendant's liabilities.

14 The response from the solicitors for the second and third defendants dated 14 October 2008 forms the heart of their case on mistake. The relevant paragraph is reproduced below:

> Whilst our client is agreeable to procuring (1) and (3) above, he urge your clients to re-consider asking for (2) above. The 2 young boys are hardly able to provide any real security to your clients. In particular, Mr Francis Andrew is still pursuing his degree in the United States of America. For all practical purposes, the guarantees from the 2 boys are not going to be worth anything. In the circumstances, our client will be grateful if your clients can agree to accept (1) and (3) above and drop (2).

15 On the strength of this response, it is alleged by the second and third defendants that the first defendant had requested the plaintiff to drop the requirement for personal guarantees from the second and third defendants because they would not agree to assume any such personal liability.

16 However, the letter does not bear out their case. First, there was no hint that the second and third defendants were not agreeable to provide personal guarantees to secure the first defendant's liabilities. Equally, there was no suggestion that insistence by the plaintiff for the personal guarantees would have been a deal breaker. In this connection, it is relevant to understand the context under which this issue arose:

(a) The first defendant was seeking more time from the plaintiff to settle the outstanding debts. The plaintiff was only agreeable subject to its terms.

(b) At best, the letter was merely a request by the first defendant (not even the second and third defendants) for the plaintiff to reconsider the need for personal guarantees from the second and third defendants.

(c) The reason for the request to reconsider was not because the second and third

defendants were not agreeable to provide the personal guarantees but rather because (according to the first defendant) "the guarantees from the 2 boys are not going to be worth anything".

17 In response, the plaintiff by their solicitor's letter dated 22 October 2008 stated that "our client has taken into account your client's comments and on that basis, the enclosed Forbearance Agreement has been prepared." While I agree that the response could have been clearer, it did not state that the plaintiff was agreeable to the first defendant's request to dispense with personal guarantees from the second and third defendants. Ultimately, whether the guarantees from the second and third defendants were going "to be worth anything" was for the plaintiff to decide. Evidently, the plaintiff thought they were worth having.

18 The Forbearance Agreement required the first defendant to procure the delivery of two mortgages over two properties owned by the second and third defendants. Under the terms of the mortgages, it is clearly stated that the second and third defendants were liable to pay on demand all sums due to be paid by the first defendant to the plaintiff under the credit facilities. These provisions are conspicuously stated in the pages signed by the second and third defendants.

19 It is correct that the plaintiff did dispense with the need for the second and third defendants to sign stand-alone personal guarantees. However, that is not to say that the plaintiff agreed that the second and third defendants need not assume personal liabilities for the debts of the first defendant. The requirement for the second and third defendants to assume personal liability for the first defendant's debts is clear from the mortgages itself.

Do the affidavits by the second and third defendants bear out the mistake

20 It is well established that affidavits filed by the defendants to resist an application for summary judgment must "condescend upon particulars" and should as far as possible address the plaintiff's claim and state the facts in support of the defence: see *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2007) at para 14/2/12, p 135.

21 The second and third defendants filed identical affidavits. The only two relevant paragraphs in the affidavits read as follows:-

> 3. I crave leave to refer to the affidavit of Mr Yvan Ferron dated 22 June 2009 and filed on behalf of the Plaintiffs and to the affidavit of my father Mr Agus Anwar filed in these proceedings and dated 22 July 2009 ("the1st Defendant's affidavit").
>
> 4. I have read the said affidavit and insofar as the matters stated in the said affidavit relate to events where I have personal knowledge of, I confirm the accuracy of the same and I confirm the contents of the said affidavit insofar as it involved me.

22 The affidavits filed by the second and third defendants are highly unsatisfactory and in my view do not even *prima facie* support the pleaded case of mistake:

> (a) Mistake is a state of mind to be inferred from all the relevant circumstances. It is for the party asserting mistake to explain in his own affidavit how that mistake, if any, came about. Three affidavits were filed to resist the application for summary judgment. The main affidavit was filed by the first defendant who failed to file his defence and default judgment has been entered against him. The first defendant is not alleging mistake in his own right. It is not for the first defendant to allege mistake on behalf of the second and third defendants even though "the father may know best".

(b) The affidavits filed by both defendants were quite bare. They merely made cross-references to the affidavit filed by the first defendant and confirmed the accuracy of the contents of the first defendant's affidavit insofar as it relates to events where they have personal knowledge without ever identifying the paragraphs concerned.

(c) While the first defendant has alleged that he did request the plaintiff to drop the requirement for the second and third defendants to provide personal guarantees for the outstanding under the credit facilities, there is no suggestion that the plaintiff's alleged agreement was ever communicated to the second and third defendants. Accordingly, there is absolutely no suggestion in the affidavits of the second and third defendants that they executed the two mortgages in the belief that they have no personal liability for the amounts owing by the first defendant. This omission is very significant because the plaintiff did not deal directly with the second and third defendants at any time. Similarly, there is no suggestion that the second and third defendants would not have executed the mortgages if they had been made aware that the terms of the mortgages imposed personal liability on them.

(d) In the first defendant's affidavit, much reliance was placed on the exchange of correspondence in support of the defence of mistake. There is again no suggestion in any of the affidavits that the second and third defendants had even read the correspondence, much less relied on them.

(e) The affidavit of the first defendant, at best, expressed a desire or hope for the second and third defendant to be spared from personal liability for the outstanding sums owed by the first defendant. But it is a quantum leap in logic for the second and third defendants to allege that they signed the mortgages under a mistaken belief that they do not bear any personal liability for the first defendant's debts when the terms clearly provide otherwise.

(f) It is also not disputed that the second and third defendants did execute the mortgages in the presence of their solicitors. Every page of the mortgage including the pages which imposed personal liability for the outstanding amount owing by the first defendant under the credit facilities was initialled by both the second and third defendants separately and countersigned by their solicitors. Clause 1(i) of the Covenants and Conditions in Attachment A of both mortgages specifically provided that the second and third defendants covenanted, *inter alia*, to:

> pay to the [Plaintiff] on demand all sums of money now due and owing under the Facilities and such sums of money which are now or shall from time to time hereafter be owing or remain unpaid to the [Plaintiff] by the Borrower in any manner whatsoever…

(g) There is also no suggestion whatsoever in the affidavits of the second and third defendants that they did not read or understand the terms of the mortgages when they signed them.

23 It is alleged by the first defendant that prior to the execution of the mortgages, the plaintiff had represented to him, through the exchange of correspondence as well as the discussion with two officers from the plaintiff, that the second and third defendants would not be required to guarantee the liabilities of the first defendant. The second and third defendants duly executed the mortgages under which they agreed to pay on demand all sums due and owing by the first defendant to the plaintiff. They now seek to deny their liability by pleading the defence of mistake even though liability is clear and manifest on the face of the mortgages which they had signed. Whatever the first, second and third defendants may have believed prior to the execution of the mortgages, it is clear on a plain reading of the mortgages that the second and third defendants are liable for the first defendant's

debts.

24 I have already observed earlier that the second and third defendants have not denied in their affidavits that they had read and understood the terms of the mortgages. Counsel for the plaintiff drew my attention to *Peekay Intermark Ltd* v *Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Report 511. Although the claim in that case was for misrepresentation, it is nonetheless instructive because it concerned a case where a bank customer signed a document to purchase an investment product which was fundamentally different from the description which was provided by the bank's officer. Even though the court found that there was a prior misrepresentation, the English Court of Appeal reversed the decision of the trial judge and found that the bank customer was not induced to sign the documents by the misrepresentation but "by his own assumption that the investment product to which they related corresponded to the description he had previously been given": see 522. In arriving at the decision, the Court of Appeal took into account the fact that "the terms of the FTCs were sufficient to make it clear to Mr Pawani, if he had read them that the nature of the investment was fundamentally different from that which he had been given to understand.": see 521.

25 In the present case, even assuming that the second and third defendants were under the mistaken impression that the plaintiff had agreed to drop the requirement for them to guarantee the first defendant's debts (which I have found is not borne out by the objective evidence or the defendants' affidavits), it is still incumbent on them to explain how they could have continued to be under the same mistaken belief when they signed the mortgages which clearly provided otherwise.

26 Not having denied reading the terms of the mortgages, it is difficult to understand how the second and third defendants could possibly allege that they signed the mortgages in the mistaken belief that the terms do not impose liability on them for the first defendant's debts. In this case, the guarantee provisions were not obscured by a mass of small print. Neither were they merely incorporated by reference to standard terms of the plaintiff which were not annexed to the mortgages. The very pages which set out the guarantee provisions were actually signed by the second and third defendants in their solicitor's presence.

27 This may therefore explain why the defence of mistake was only raised belatedly in August 2009, some four months after the commencement of the action and by way of amendments to the original defence. It is also worth noting that prior to the institution of actions, a letter of demand was sent by the plaintiff's solicitors to the solicitors for the second and third defendants on 2 April 2009. The letter of demand clearly stated that they have personal liability under the terms of the mortgage for the credit facilities extended to the first defendant. If the second and third defendants genuinely and legitimately believed that they signed the mortgages in the mistaken belief that they have no personal liability, one would have expected an emphatic denial in response to the plaintiff's letter of demand. Instead, they remained silent. It would appear that the defence of mistake was raised later only as an "afterthought".

Unilateral mistake

28 Generally, a party is bound by the terms of the contract which he signs and cannot avoid the contractual obligations by claiming that he did not read or understand it: see *L'Estrange v F. Graucob, Limited* [1934] 2 KB 394. This is an important rule of commercial law which is concerned with the content of the contract rather than its validity.

29 The second and third defendants are seeking to avoid their liabilities under the terms of the mortgages and the Deeds of Assignment by alleging mistake in three different species.

30 For the reasons set out above, I have found that there was no operative mistake to begin with. This is clear from the objective evidence i.e. the exchange of correspondence which ironically has been relied on by the second and third defendants as the underlying foundation of their defence of mistake. The two affidavits filed by the second and third defendants are completely bereft of any relevant evidence to remotely support their pleaded defence of mistake.

31 However, even if the second and third defendants had signed the mortgages in the mistaken belief that they did not have any personal liability for the liabilities of the first defendant, for the defence to succeed, it is incumbent on them to show that the plaintiff had actual or "Nelsonian" knowledge of their mistake: see *Chwee Chin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 ("*Chwee Chin Keong*") The rationale behind this defence is the absence of consensus *ad idem* if the plaintiff was aware of the error.

32 The second and third defendants rely on the above exchange of correspondence to support their case that the plaintiff knew that they had signed the mortgages in the mistaken belief that they have no personal liability for the first defendant's debts. In my view, the exchange of correspondence, objectively speaking, do not bear out even a *prima facie* case that the plaintiff had actual knowledge of the mistake:

(a) The fact of actual knowledge would reasonably have to be inferred from the correspondence. It cannot seriously be disputed that in none of the correspondence from the plaintiff or their solicitors was there any clear or unequivocal representation that the requirement for the second and third defendants to guarantee the first defendant's debts had been dispensed with.

(b) Pursuant to the correspondence, the mortgages were prepared and sent to the second and third defendants for their execution. The very mortgages which the plaintiff required the first defendant to deliver required the second and third defendants to undertake personal liability for the first defendant's debts.

(c) To prove actual knowledge on the part of the plaintiff, it follows that the second and third defendants had to show that the mortgages (which contained the guarantee provisions) were prepared by the plaintiff's solicitors in breach of or in ignorance of the plaintiff's instructions and that the plaintiff knew that they were so mistakenly prepared.

(d) Each page of the mortgage was signed by the second and third defendants and countersigned by their solicitors. How would the plaintiff have known that the second and third defendants did not understand what they had signed or that their solicitors did not properly advise them of the effect of the mortgages. This is even more compelling in the present case since the second and third defendants have not even alleged that they did not understand the terms of the mortgages.

33 Counsel for the second and third defendants submitted that the plaintiff was aware that the second and third defendants did not have "separate legal representation" from the first defendant. Relying on *Royal Bank of Scotland plc v Etridge* [2001] 3 WLR 1021 ("Etridge"), it was submitted that given the special relationship of father and children between the first defendant and the second and third defendants, a rebuttable presumption of undue influence arises. It is not entirely clear how undue influence, even if present, could translate into a defence of mistake. These are two distinct defences. Mistake seeks to invalidate the transaction due to absence of consensus *ad idem* while undue influence if proved vitiates the consent. This submission has no merit:

(a) First, *Etridge* was a case where the wife sought to impugn a transaction on the basis that it was procured through undue influence by the husband. In this case, undue influence was neither pleaded nor asserted by the second and third defendants in their affidavits. This alone should be sufficient to dispose of this point.

(b) Secondly, it is incorrect that the presumption arises upon mere proof of the special relationship. The complainant would need to show a disadvantage sufficiently serious to reverse the burden of proof.

(c) Thirdly, in examining whether any element of undue influence was present, the court takes into account whether the complainant received legal advice from a third party. There is no strict requirement that they should be separately represented. In any event, in the case before me, it has not even been alleged by the second and third defendants that they were not properly advised by their solicitor on the effect of the mortgages. This provoked a bold submission from counsel for the second and third defendants that the plaintiff owed a duty to ensure that the terms of the mortgages had been adequately explained by their own solicitors to them. The second and third defendants were independently and separately represented from the plaintiff. It is untenable to suggest that banks owe a duty to ensure that their customer's lawyers have sufficiently explained the terms of the documents signed by them. In any event, "breach" of any such duty, even if it exists, does not prove that the plaintiff somehow became infected with actual knowledge of the mistake.

34 Even if the plaintiff did not have actual knowledge of mistake, counsel for the second and third defendants submitted that the plaintiff, at the very least, had constructive notice of the mistake. This point was carefully considered by the Court of Appeal in *Chwee Chin Keong*. My findings that the plaintiff did not have actual knowledge of the mistake are equally apt to displace constructive notice. Constructive notice would typically apply if the non-mistaken party had suspicion of a possible mistake by the other party. In the present case, I see no reason why the plaintiff would have any "suspicion" that the second and third defendants were not aware of the full effect of the terms of the mortgages and had instead signed them under a mistaken belief. In any event, constructive notice is a doctrine of equity. Proof of constructive knowledge alone would not be sufficient to invoke equity. There must be a further element of unconscionability or impropriety. This exception is designed to prevent "sharp practices". There is nothing sharp in the plaintiff requiring the second and third defendants to guarantee the liabilities of the first defendant in consideration of the plaintiff forbearing to enforce the claims against the first defendant. It should not be overlooked that it was the first defendant who approached the plaintiff for more time. The plaintiff was entitled to impose terms as they deemed fit as a condition for granting indulgence to the first defendant. The "impropriety" alleged against the plaintiff is that it took advantage of the mistake of the second and third defendants. However, it begs the question whether the plaintiff had actual knowledge of the mistake which I have already found not to be the case.

Mutual mistake

35 Mutual mistake occurs when the two parties misunderstand each other and are at cross-purposes. The classic case is when A offers his Jaguar for sale and B accepts the offer thinking that he was buying A's other car, the Mercedes Benz. In this example, the intention is to buy and sell a car but both parties are at cross-purposes because they had different cars in mind. In such a situation, there is no contract simply because the parties were not *ad idem*.

36 I have considerable difficulty comprehending the defendants' pleaded case on mutual mistake. It is alleged that both the plaintiff and the second and third defendants held the belief that the

mortgages expressed the common intention of the parties that personal liability would not be imposed. Such a plea is more akin to common mistake rather than mutual mistake. By their own pleaded case, the parties were not at cross-purposes. They both allegedly held the common mistaken belief that the mortgages did not impose personal liability on the second and third defendants.

37 The particulars in support of the defence of "mutual mistake" essentially repeat the same exchange of correspondence with an additional allegation that two of the plaintiff's employees had orally agreed with the first defendant to drop the requirement for personal guarantees from the second and third defendants. This additional allegation does not assist the second and third defendants to prove the alleged "mutual mistake":

(a) The pleadings are silent as to the date of this alleged oral agreement. During the hearing of this appeal, counsel for the second and third defendants candidly acknowledged that the oral agreement would have preceded the execution of the mortgages.

(b) The fact that the mortgages were prepared and signed after the alleged oral agreement in itself proved that the plaintiff could not have been mistaken that the second and third defendants were required to undertake personal liability for the first defendant's debts.

(c) If the second and third defendants wrongly assumed that the mortgages did not impose personal liability on them inspite of the wording to the contrary, then they only have themselves to blame. Making a wrong assumption, even if that was the case, does not amount to a mistake in law in whatever form.

Other defences

38 For completeness, I should briefly deal with the other pleaded defences even though they were not pursued at the appeal.

Breach of agreement

39 The second and third defendants relied on the same exchange of correspondence to show that the plaintiff had agreed that they would not be required to guarantee the liabilities of the first defendant. However, the correspondence does not bear out any such agreement. The last letter in the chain of correspondence was a letter dated 22 October 2009 from Allen & Gledhill. The Forbearance Agreement was enclosed for execution. Not only were the mortgages to be signed by the second and third defendants referred to in the Forbearance Agreement, the letter also specifically mentioned that the mortgages would be forwarded under cover of a separate letter for their execution. It is incongruous for the second and third defendants to allege that the exchange of correspondence evidenced any such agreement that when the mortgages which they agreed to sign, and in fact signed pursuant to the correspondence, clearly stipulated otherwise.

Termination of credit facilities

40 Such a defence may merit some consideration if the outstanding debts owing by the first defendant were incurred after the termination of the credit facilities by the plaintiff. However, that is not the case here. The outstanding debts arose prior to the termination and were in fact the very debts which the two mortgages were intended to secure.

Fraud

41 Initially the particulars in support of fraud were the particulars which were eventually supplanted by the defence of mistake. After mistake was introduced by way of amendment, it adopted the particulars which were previously pleaded in support of fraud. As a result of the amendment, the defence of fraud was thereby "orphaned" and became devoid of any particulars. It is trite that fraud must be particularised. In any event, fraud was not even alleged by any of the defendants in their affidavits to resist the summary judgment application.

Promissory estoppel

42 This defence was also abandoned at the appeal hearing even though that was the only defence for which the AR granted unconditional leave to defend. It was not pursued, rightly so, because it is a non-starter:

(a) In order for the defence to succeed, it is necessary for the second and third defendants to show that the plaintiff had legal rights against them but made an unequivocal representation that it would not enforce those rights: see *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 at 399. Prior to the execution of the mortgages, the plaintiff did not have any rights against the second and third defendants. Their rights were then only against the first defendant.

(b) The alleged representation was made prior to the execution of the mortgages. This was clarified during the appeal hearing. Such a representation could not conceivably be clear or unequivocal since the documents which were prepared and signed by the second and third defendants clearly provided otherwise.

(c) There is no evidence that the second and third defendants had relied on the alleged representation when they signed the mortgages.

43 In the light of the above brief observations, it is perhaps quite understandable why these other defences were dropped during the hearing of this appeal.

Conclusion

44 As I have determined that there is no merit in any of the pleaded defences, I granted summary judgment in favour of the plaintiff. The claim indorsed on the writ was for $17,252,583.72. Some recovery was made subsequent to the commencement of the proceedings. I directed the plaintiff to file a further affidavit to quantify the sums recovered and the balance outstanding amount. The further affidavit confirmed that a sum of $2,293,864.73 was recovered from the sale of shares, payment of dividends and the sale proceeds from two of the mortgages. This sum was also confirmed by counsel for the second and third defendants.

45 Accordingly, I granted final judgment in the sum of $14,958,718.99 together with contractual interest pursuant to cl. 9 of the Facility Terms and Conditions on the principal sum from 2 April 2009 to the date of full payment and costs on an indemnity basis for the appeal, the hearing below and the action.

[note: 1]Affidavit of Yvon Ferron filed on 22.6.09, p 137

[note: 2]Affidavit of Yvon Ferron filed on 22.6.09, p 207

[note: 3]Defence and Counterclaim (Amendment No 2) filed on 7.10.2009 by the second and third defendants at paras 8–10