

Lim Andy v Tea Yeok Kian Terence
[2015] SGHC 92

Case Number : Suit No 336 of 2014
Decision Date : 07 April 2015
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Satwant Singh s/o Sarban Singh (Satwant & Associates) for the plaintiff; Lee Ming Hui Kelvin and Wilson Tan (WNLEX LLC) for the defendant.
Parties : Andy Lim — Tea Yeok Kian Terence

Contract – Contractual terms

Evidence – Proof of Evidence

[LawNet Editorial Note: The defendant's appeal to this decision in Civil Appeal No 86 of 2015 was allowed by the Court of Appeal on 5 November 2015 with no written grounds of decision rendered.]

7 April 2015

Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This action is to recover an outstanding sum of money said to be due under a loan agreement dated 17 March 2008 and made between the plaintiff, Andy Lim ("AL"), and the defendant, Tea Yeok Kian Terence ("TT"), ("the Loan Agreement"). The quantum of the loan was stated to be \$2,633,590 ("Loan Amount"). The Statement of Claim seeks a money judgment against TT for the sum \$213,276 being the balance sum due and owing under the Loan Agreement.

2 TT's defence is one of payment. In addition, TT claims to have overpaid AL and his counterclaim is to recover the overpayment in the sum of \$1,586,724. [\[note: 1\]](#)

Preliminary points

3 It is not disputed that the Defence and Counterclaim filed on 25 July 2013 went through two rounds of amendments in the course of the proceedings. The last amendment was on the first day of trial on 4 February 2015. With the final amendments to his Defence and Counterclaim, the matters put before this court by TT at the trial were: (a) the defence of payment; and (b) a sum of \$150,000 that was purportedly paid to AL in partial satisfaction of the Loan Amount. On formal proof, TT has put AL to strict proof of the Loan Agreement, the Loan Amount, the various partial repayments and the outstanding sum of \$213,276.

4 Notably, there were admissions and concessions made by TT. The upshot of the admissions and concessions collectively served to establish the facts that constituted the plaintiff's cause of action. In short, the balance loan amount of \$213,276 is unpaid unless TT proves that it has been repaid. Thus, TT has the legal burden of showing that the obligation has been discharged by payment. I will elaborate on the interplay between TT's pleaded case and the Evidence Act (Cap 97, Rev Ed 1997) in

due course.

5 The starting point here, it seems to me, is to detail TT's admissions and concessions. First, TT admits to signing the Loan Agreement. This admission has important implications. As a matter of law, a signatory is *prima facie* intended to be bound by the terms of the document he signed when his signature is not in dispute (see *Bank of China Limited (Singapore Branch) v Huang Ziqiang and another* [2014] SGHC 245 at [46]). Hence, the Loan Agreement must *prima facie* be taken to have the binding intended effect on the signatory.

6 Second, there were partial repayments of the Loan Amount. The Loan Agreement contemplated that there would be partial repayment of the Loan Amount by transfer of shares in certain entities. Clauses 3 and 4 of the Loan Agreement read as follows:

3. PARTIAL REPAYMENT

To offset a portion of the loan, the Borrower agrees to transfer to the Lender, as partial repayment of the loan, the following:

- (i) 5 million shares in **Lasseters International Holdings** Ltd with a total value of **S\$1,475,000**;
- (ii) 10.2 shares in **Gulf Asia Pacific Equity Fund** with a total value of **S\$140,748**;
- (iii) investment in **Aton Water Pte Ltd** worth **S\$250,000**.

4. TERM OF LOAN

The loan shall be for the sum of up to one year from the date of this Agreement, and the outstanding amount of **S\$767,842** shall be repaid in full at any time on or before 16 March 2009 (the Repayment Date").

7 I noted that there was a handwritten amendment to the Repayment Date on the Loan Agreement that altered the date to 16 March 2010. Nothing turned on this except that AL explained in his testimony that TT had asked for more time to make payment.

8 TT made partial repayments of the Loan Amount in two ways: (a) he transferred his shares in Lasseters International Holdings (five million shares valued at \$1,475,000 at the time of transfer) and Gulf Asia Pacific Equity Fund (10.2 shares valued at \$140,784 at the time of transfer) and investment in Aton Water Private Ltd (valued at \$250,000 at the time of transfer) to the plaintiff (collectively, "the Repayment Share Transfers"); and (b) he made money payments between January 2009 and May 2010.

9 TT accepted that the Repayment Share Transfers on 17 March 2008 were made pursuant to the Loan Agreement. As for the money payments made between January 2009 and May 2010, the dispute was over the quantum of the money payments. AL said that the money payments totalled \$554,566. In contrast, TT argued that his money payments were more than \$554,566 because AL had not accounted for a further sum of \$150,000. In cross-examination, TT accepted that his cheque for an alleged sum of \$150,000 was never presented as he had taken it back. In short, there was no payment of \$150,000 to AL. Hence, the money payments from TT were \$554,566 in total.

10 In summary, I am satisfied on the evidence that AL has proved the following: (a) the validity

and existence of the Loan Agreement that recorded the liability of TT to AL; (b) partial repayments of the Loan Amount; and (c) the unpaid balance of \$213,276. Thus, the precise issue that the court is left to focus on at the trial is the defence of payment. If payment is established, it would constitute a good (and total) defence to AL's claim. It bears noting that TT's counterclaim for overpayment is dependent on TT's evidence of payment to discharge the obligation under the Loan Agreement.

Who has the legal burden of proving payment?

11 It is appropriate to refer to the relevant paragraphs of TT's amended Defence which read as follows:

6. Subsequently, upon the request of the Plaintiff, the Defendant had transferred the Investment [his shares in Tembusu Growth Fund] to the Plaintiff pursuant to an agreement and/or mutual understanding that there would be no more monies owing under the personal loan agreement dated 17th [sic] March 2008.

7. The Investment was transferred for the purpose set out in paragraph 6. The Defendant is therefore liable to account for the amount in the Investment which exceeded the amount owing under the personal loan.

8. ...

9. Paragraph 5 of the Statement of Claim is denied. The Defendant avers that he has more than repaid the sum of S\$213,276.00 by transferring the Investment to the Plaintiff with no consideration when the Investment is and was worth much more than the outstanding loan of S\$213,276.00. The Defendant is therefore entitled to set off against the entire outstanding loan amount in extinction of the Plaintiff's claim.

12 As a rule of evidence, the party who pleads payment has the legal burden of proving that the obligation has been discharged by payment rather than on the other party who alleges non-payment. This rule is neatly encapsulated in ss 103-105 of the Evidence Act. The Court of Appeal in *Cooperatieve Centrale Raiffeisen-BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30] confirmed that ss 103-105 of the Evidence Act are provisions on the legal rather than the evidential burden of proof. In *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR (R) 855, the Court of Appeal explained the function and application of the evidential burden of proof at [58]:

The term "burden of proof" is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. This obligation never shifts in respect of any fact, and only "shifts" in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

13 In *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212, the plaintiff was claiming for unpaid amounts in relation to a share transfer. The defendant argued, *inter alia*, in her defence that she had paid for the shares by way of her remittance of the contract price to the plaintiff's order. As regards

the burden of proof, the defendant argued that the legal burden was on the plaintiff to prove non-payment. The court there held (at [7]) – as a proposition of law – that if the allegation in a defendant’s defence was not a denial of an essential ingredient in the cause of action, but was one which, if established, would constitute a good defence then the legal burden of proving that positive case is on the defendant.

14 The observations in the decision of the High Court of Australia in *Young v Queensland Trustees Limited* (1956) 99 CLR 560 are also apposite. In that case, the court had to decide who bore the legal burden of proving that a loan had been repaid. The court observed (at 569-570):

The law was and is that, speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration.

15 Suffice to say for now, the legal burden is on TT to prove payment and overpayment. Based on TT’s argument (and if well-founded), the overpayment would have arisen out of the same sequence of events as his defence of payment.

Evidence to prove payment

16 It is not controversial that a payment may be proved by any evidence. In this case, TT is relying on the transfer of his shares in a private equity fund known as Tembusu Growth Fund Ltd as proof of payment.

17 TT had subscribed for shares in Tembusu Growth Fund Ltd on 14 December 2007 (“the Tembusu Shares”). His contention is that he signed a transfer form on 2 April 2008 to transfer the Tembusu Shares to AL (“the Tembusu Share Transfer”). A figure of \$1,800,000 was stated on the signed transfer form as the consideration for the transfer of the Tembusu Shares. According to TT, the purpose of the Tembusu Share Transfer was to completely off-set his liability under the Loan Agreement. That must have been the intent and effect, so the argument developed, since the Tembusu Share Transfer was dated 2 April 2008 which was well after the date of the Loan Agreement, and tellingly, the share transfer consideration of \$1,800,000 was more than enough to extinguish the outstanding balance of \$213,276. Consequently, TT’s overpayment of \$1,586,724 is made out.

18 Counsel for TT, Mr Kelvin Lee (“Mr Lee”), contended that the burden of proof is on AL to prove that the Tembusu Share Transfer was executed in relation to AL’s losses from his investment in Advance SCT Ltd (“ASCT”), a company listed on the second board of the Singapore Stock Exchange. These losses were said to be in the sum of \$4,433,590 (“the ASCT Investment Losses”). AL had pleaded how the Tembusu Share Transfer related to the ASCT Investment Losses in his amended Reply and Defence to the Counterclaim. [\[note: 2\]](#) TT argued that it was for AL to prove the loss of \$4,433,590 and to explain how the Loan Amount was derived. Having not done so, the court should *ipso facto* enter judgment for TT on his Counterclaim as the Tembusu Share Transfer (which occurred after the date of the Loan Agreement) must have had the effect of extinguishing TT’s liability in relation to the Loan Agreement and entitling TT to a refund if AL did not prove otherwise.

19 By way of background information, AL is the founder and Chairman of a local private equity firm, Tembusu Partners Pte Ltd (“Tembusu Partners”). TT is the founder and, at the time of the Loan Agreement, was the chief executive officer of ASCT. TT invited AL to be the non-executive chairman of ASCT sometime in 2006, and AL was appointed non-executive chairman of ASCT on 1 March 2007.

20 AL invested in the shares of ASCT. Subsequently, the value of the shares fell considerably and AL lost money. TT accepts that even though he was not aware of the actual quantum of AL's losses, he agreed sometime in March 2008 to compensate AL for the losses he suffered from the steep fall in the share price of ASCT. However, TT's principal argument is that the Tembusu Share Transfer was not to off-set his liability for the ASCT Investment Losses in order to arrive at the Loan Amount in the Loan Agreement, but to discharge his liability under the Loan Agreement and had even overpaid AL.

21 AL's position is completely the opposite. His counsel, Mr Satwant Singh ("Mr Singh"), argued that TT had agreed to compensate AL for the ASCT Investment Losses, and it was then agreed by the parties to use the Tembusu Share Transfer with a stipulated consideration of \$1,800,000 to off-set in part the ASCT Investment Losses thereby leaving an amount of \$2,633,590 to be paid by TT.

22 Mr Singh pointed out that AL pleaded in his Amended Reply and Defence to Counterclaim that the Tembusu Share Transfer was intended to and did have the effect of reducing the amount owed by TT to AL in relation to the ASCT Investment Losses. Simply put, the Loan Amount was derived from the aforementioned deduction (at [21] above). Significantly, TT's liability to AL for the sum of \$2,633,590 was recorded in the Loan Agreement, and TT signed the Loan Agreement.

23 Mr Lee's *characterisation* of the issue (at [18] above), and in turn his submission that the burden of proving the terms of the Tembusu Share Transfer was on AL is misconceived. According to Mr Lee, AL has to prove that the Tembusu Share Transfer was to discharge TT's liability as regards the ASCT Investment Losses because AL had so pleaded it in his Amended Reply and Defence to the Counterclaim. [\[note: 3\]](#)

24 As stated, TT relies on the Tembusu Share Transfer on 2 April 2008 as evidence of payment. I already explained that the legal burden of proving the positive case that the Tembusu Share Transfer was intended to discharge TT's liability under the Loan Agreement is on TT. The starting point is to analyse whether the Tembusu Share Transfer of itself or TT's allegations in relation to the Tembusu Share Transfer is sufficient proof of payment and enough to shift the evidential burden to AL. Conversely, AL would succeed if no or insufficient evidence is given on the terms of the Tembusu Share Transfer or if TT's allegations in relation to the Tembusu Share Transfer are not made out.

25 In my view, the Tembusu Share Transfer of itself is not *prima facie* evidence that the outstanding sum of \$213,276 has been paid thus discharging TT's liability under the Loan Agreement. TT has not given a clear, consistent and coherent account of the circumstances of the Tembusu Share Transfer. TT's allegations in relation to the Tembusu Share Transfer are based on *ex post facto* reasoning. Let me elaborate.

26 First, no satisfactory evidence was adduced by TT to show the intention with which the signed Tembusu Share Transfer was handed over and of those circumstances generally. This was due primarily to his inability to recollect most events as his answers during cross-examination showed. His testimony was based entirely on what he saw written on the Tembusu Share Transfer and the inference he drew from that document. An illustration of this observation is TT's contention that he was not able to remember the terms of the Tembusu Share Transfer, but working with the numbers provided by AL, [\[note: 4\]](#) the Tembusu Share Transfer was intended to off-set his outstanding liability under the Loan Agreement.

27 Second, TT used the date written on the Tembusu Share Transfer for his next argument. In this connection, TT argued that the very fact that the Tembusu Share Transfer came into existence after the execution of the Loan Agreement supported his case that the said transfer was to off-set his

liability under the Loan Agreement. Plainly, there is no objective evidence showing the circumstances and intention of handing over the signed Tembusu Share Transfer. Instead, TT's relies on *ex post facto* reasoning deduced from the date on the Tembusu Share Transfer form (*ie*, 2 April 2008).

28 Third, TT's explanation for the Tembusu Share Transfer to off-set his liability on 2 April 2008 does not get him very far. The language of the Loan Agreement clearly provided and identified certain shares to be given up towards partial payment of the Loan Amount. In this regard, I note from clauses 3 and 4 of the Loan Agreement (reproduced at [6] above) that the parties clearly intended that the partial repayments by way of certain share transfers (*ie*, Repayment Share Transfers) would be effected to reduce the Loan Amount to \$767,842 as of the date of the Loan Agreement. The Tembusu Shares were not on the list. It would have been quite easy to have provided for the Tembusu Shares along with the others in the Loan Agreement since the parties had quite clearly directed their minds to the idea of partial repayments by way of share transfers at the time when they executed the Loan Agreement. TT did not provide a proper explanation as to why the Tembusu Shares were not among the Repayment Share Transfers. His explanation that the Tembusu Shares could not be taken into account in the Loan Agreement because it was discussed after the Loan Agreement was based on *ex post facto* reasoning deduced from the date on the Tembusu Share Transfer form (*ie*, 2 April 2008).

29 Fourth, the Repayment Share Transfers were executed on 17 March 2008 and the transfers were for a total value of \$1,865,748. In addition, the Tembusu Share Transfer's stated consideration was \$1,800,000. Interestingly, after adding up all the numbers on the transfers, the picture that emerged showed that by 2 April 2008, AL would have been paid a total sum of \$3,665,748, which sum obviously exceeded the Loan Amount by \$1,032,158. Yet, AL continued to demand payment and, curiously, TT continued to make periodic money payments in the total sum of \$554,566 between January 2009 and May 2010. TT's explanation for his money payments was that he was not certain of the value of the Tembusu Shares (contending that its value would be less than the stated consideration of \$1,800,000), and that he trusted AL immensely. [\[note: 5\]](#) In essence, he continued to make periodic payments because he thought that the debt was unpaid. His explanation is riddled with inconsistencies and controvertible bearing in mind his pleaded case, admissions and concessions. Crucially, as noted at [26] above, TT conceded that he had "constructed" his counterclaim based on the numbers provided by AL in these proceedings. As regards his excuse that the value of the shares may be lower than the figure stated on the transfers, the excuse again contradicted his pleaded case. His defence of payment and counterclaim for overpayment are premised on the stated consideration of \$1,800,000.

30 Notably, TT's sole explanation for any and every inconsistency in his evidence was that he trusted AL because "he was [his] Chairman at that point" [\[note: 6\]](#) and because "[AL] got [*sic*] all the numbers ... he is a good --- good [book] keeper ...". [\[note: 7\]](#) TT is an experienced business man. He is currently running three listed companies. [\[note: 8\]](#) It seems far-fetched that TT as an experienced businessman would continue to pay *any amount* that was demanded of him solely because he trusted the party demanding the said amount. In my view, he has only himself to blame for the casual manner in which he handled a matter as serious as indemnifying AL for not an insignificant amount of his investment losses in ASCT.

31 Mr Lee complained that AL did not disclose documents referred to in his testimony in recounting the timing of the Tembusu Share Transfer. AL explained that the Tembusu Share Transfer took place after the execution of the Loan Agreement due to the need to obtain a board resolution to authorise the transfer and that he and TT had communicated their intention to proceed with the said transfer to the company secretary as early as 14 March 2008. [\[note: 9\]](#) Mr Lee's criticisms focused on the

absence of documentary evidence like the board resolution. It seems to me that the omission of any documentary evidence would not castaway the obstacles that TT faced (at [26] to [29] above).

32 In light of the reasons above, TT's reliance on the Tembusu Share Transfer is not sufficient proof of payment and the evidential burden has not shifted to AL. For this reason the defence of payment fails. TT's counterclaim also fails for the same reason.

Conclusion

33 For the reasons stated, judgment is entered for AL in the sum of \$213,276 with interest thereon at the rate of 5.33% per annum from the date of the Writ of Summons to payment. As for costs, TT is to pay AL the costs of the action and counterclaim to be taxed if not agreed.

[\[note: 1\]](#) Defendant's closing submissions dated 13 March 2015, para 7.

[\[note: 2\]](#) Defendant's Closing Submissions dated 13 March 2015, p 4, 10-11.

[\[note: 3\]](#) Defendant's Closing Submissions dated 13 March 2015, p 4, 10-11.

[\[note: 4\]](#) Notes of Evidence Dated 5 February 2015 at p 84.

[\[note: 5\]](#) Notes of Evidence Dated 5 February 2015 at pp 72-73.

[\[note: 6\]](#) Notes of Evidence Dated 5 February 2015 at p 71.

[\[note: 7\]](#) Notes of Evidence Dated 5 February 2015 at p 73.

[\[note: 8\]](#) Notes of Evidence Dated 5 February 2015 at p 35.

[\[note: 9\]](#) Notes of Evidence Dated 5 February 2015 at p 9.

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