Metro Alliance Holdings & Equities Corp v WestLB AG
[2007] SGHC 175

Case Number : Suit 446/2006, RA 15/2007, 16/2007

Decision Date : 15 October 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Timothy Kho (Tan Peng Chin LLC) for the plaintiff; Harish Kumar (Engelin Teh Practice LLC) for the defendant

Parties : Metro Alliance Holdings & Equities Corp — WestLB AG

Contract – Contractual terms – Conditions – Whether full assignment and transfer of legal and beneficial title condition precedent to payment of balance purchase price

Contract – Discharge – Breach – Whether failure to pay balance purchase price discharging contract and resulting in forfeiture of deposit

Equity – Relief – Against forfeiture – Whether equitable relief could be granted to contracts unconnected with any interests in land – Whether forfeiture of deposit unconscionable

15 October 2007

Lee Seiu Kin J

1 The plaintiff is a company incorporated in the Philippines. The defendant is a German bank with a branch in Singapore. In this suit, the plaintiff claims against the defendant the sum of US$1,635,000.00, alternatively damages, for repudiatory breach of a written agreement dated 2 June 2003. The facts of the matter are as follows.

2 Sometime in early 2003, the plaintiff was interested to purchase a sub-participation interest in the debt owed by a Philippines company, Bataan Polyethylene Corporation ("BPC"), to an international consortium, International Finance Corporation ("IFC"). Initially, the plaintiff was referred to Citigroup Financial Products Inc ("Citigroup") as a bank from whom they could buy such an interest. Citigroup advised that there were restrictions in the master participation agreement preventing the plaintiff from taking a direct assignment of a sub-participation interest from Citigroup. However, Citigroup recommended the defendant as a party that could purchase the sub-participation interest from Citigroup and thereafter sell and transfer this interest to the plaintiff.

3 Following discussions between the plaintiff and defendant, the plaintiff agreed to purchase from the defendant a sub-participation interest in the debt of BPC in respect of the principal amount of US$29,198,650. To this end, the parties signed an option agreement and a trade confirmation agreement, both dated 2 June 2003. Under the option agreement, with the defendant as vendor and the plaintiff as purchaser, the plaintiff was granted a call option over the "option participation assets" which comprised the sub-participation interest in question of the debt of BPC. Pursuant to the call option, the plaintiff has the right to require the defendant to sell to the plaintiff the option participation assets (or part thereof) subject to the terms specified. The consideration for this is a "premium" which is the price at which the defendant purchased the option participation assets plus transaction costs. The plaintiff may exercise the call option by serving a written notice to the defendant whereupon the defendant is obliged to sell the option participation assets for the sum of US$1.00.

4 Clause 3.2 of the option agreement required the plaintiff to deposit the sum of US$1,632,242 ("the Deposit") into a New York bank account ("the Account") within three days of the date of the agreement, and to deposit additional sums from time to time as requested by the defendant. Clause 3.3 authorised the defendant to transfer from the Account into its own account an amount equal to the premium that the defendant estimates to be payable by the plaintiff. In clause 3.4, the plaintiff authorised the defendant to purchase the option participation assets at any price below or equal to the "mandate price" (defined as 35% of the par value of each of the option participation assets, or such other price as the parties may agree in writing) and in accordance with the trade confirmation agreement issued by the defendant in the form specified in Schedule 2 to the option agreement. Clause 3.5 provided that the defendant shall not be obliged to purchase option participation assets if the Account did not contain sufficient funds for the defendant to withdraw and transfer an amount equal to the premium.

5 The trade confirmation agreement (referred to in the option agreement as the confirmation notice), also dated 2 June 2003, provides the following additional terms:

(a) under the title "Other Terms of Trade":

(i) There will be full assignment and transfer of legal and beneficial title to the Asset from the Vendor to Purchaser as soon as all necessary consents are obtained under Loan documentations and at law,

(ii) Purchaser shall pay Vendor a non-refundable deposit of US$1,459,932.50 (the "Deposit") three business days before the Signing Date,

(iii) Purchaser shall pay Vendor the remaining balance of US$8,759,595.00 (the "Purchase Price Balance") on Settlement Date.

(b) under the title "Termination Clause":

The Purchaser's rights to the Assets, the Deposit, the PDI and Other Distributions shall be forfeited if the Purchaser fails to pay (a) the Deposit three business days before the Signing Date or (b) the Purchase Price Balance on Settlement Date, unless the Vendor, in its sole discretion, agrees to extend the Signing Date or the Settlement Date, as applicable.

It is common ground that the signing date is 2 June 2003 and the settlement date is 31 October 2003.

6 The plaintiff duly paid to the defendant US$1,635,509.73 comprising the deposit of US$1,459,932.50 specified in term (ii) of "Other Terms of Trade" plus interest and fees. The transaction broke down thereafter and the plaintiff's case is set out in paragraphs 4.6 to 4.8 of their Statement of Claim as follows:

4.6 The Plaintiffs were to deposit with the Defendants part payment of the Purchase Price of US$1,459,932.50 three business days before the signing date of the Trade Confirmation Agreement.

4.7 In consideration, the Defendants were to immediately effect a "full assignment and transfer of the legal and beneficial title to the Asset from the Defendants to the Plaintiffs as soon as all necessary consents were obtained under the Loan documentation and at law".

4.8 There was provision for the Plaintiffs to pay the balance Purchase Price of US$8,759,595 no later than 31 October 2003. The Plaintiffs say that the full assignment and transfer of the legal and beneficial title to the Asset referred to at paragraph 4.7 above was a condition precedent to the payment of such balance Purchase Price. Otherwise, there would have been no consideration or reason for the balance Purchase Price to be payable.

7 The defendant's position is the direct opposite of that of the plaintiff's in paragraph 4.8. The defendant's case is that it was a condition precedent that the plaintiff placed the defendant in sufficient funds so that the defendant could in turn pay the balance of the purchase price to Citigroup to complete the purchase of the sub-participation interest. The entire dispute hinges on the interpretation of the option agreement and the trade confirmation agreement on this issue. The defendant also claims that the contract between them was discharged by reason of the plaintiff's failure to pay the balance purchase price by the settlement date and that pursuant to the termination clause in the trade confirmation agreement, the defendant was entitled to forfeit the deposit. The plaintiff's position, in the event that it is found to be in breach, is that it is entitled to equitable relief from forfeiture.

8 In Summons No 4576 of 2006 the plaintiff applied for summary judgment for the sum of US$1,635,000. This application was dismissed by the assistant registrar on 4 January 2007. The plaintiff appealed against this dismissal in Registrar's Appeal No 15 of 2007.

9 In Summons No 4587 of 2006, the defendant applied under O 14 r 12 of the Rules of Court (Cap 322, R5, 2006 Edition) for a determination of the following questions of law or construction:

(1) Whether the full assignment and transfer of the legal and beneficial title to the Asset was a condition precedent to payment by the plaintiff of the balance purchase price to the defendant?

(2) If not, then whether the contract between the plaintiffs and the defendants was discharged by reason of the plaintiffs' failure to pay the Balance Purchase Price by the Settlement Date?

(3) Whether the Termination Clause in the WestLB-Metro Trade Confirmation is a penalty and therefore unenforceable?

(4) Whether the plaintiffs are entitled in principle and/or on the facts to equitable relief from forfeiture of the Deposit?

The defendant prayed for the plaintiff's claim to be dismissed with costs if the questions are determined in the defendant's favour.

10 Summons No 4587 of 2006 was also heard in the same hearing on 4 January 2007. The assistant registrar determined the questions in the following manner:

Question (1): No.

Question (2): Yes.

Question (3): No, not in the sense of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 15 as the defendants were not seeking to enforce the Termination Clause but rather that the plaintiffs were seeking relief from forfeiture.

Question (4): No.`

11 In view of those determinations, the assistant registrar dismissed the plaintiff's claims in this suit and ordered it to pay costs to the defendant fixed at $17,000 inclusive of disbursements. The plaintiff appealed against this decision in Registrar's Appeal No 16 of 2007.

12 Both Registrar's Appeal Nos 15/2007 and 16/2007 were heard by me on 18 May 2007 at the end of which I dismissed the plaintiff's appeals and awarded costs to the defendant fixed at $10,000. The plaintiff filed a notice of appeal on 18 June 2007 against my decision and I now give my grounds of decision.

Question (1): Whether assignment of the [option participation assets] was a pre-condition to payment by the plaintiff of the balance purchase price

13 There clearly is no such pre-condition and the position is in fact the converse. Clause 2.1 of the option agreement provides as follows:

> Call Option: In consideration of the payment by the Purchaser to the Vendor of the Premium (payable in accordance with the provisions of Clause 3), the Vendor hereby irrevocably grants to the Purchaser … the Call Option to require the Vendor to sell to the Purchaser … the Option Participation Assets …

14 Clause 3.1 provides that the premium shall be the purchase price for the option participation assets plus transaction costs. Clause 3.2 requires the plaintiff to deposit, within three business days of the date of the option agreement, the Deposit into an account in a New York bank. It also obliges the plaintiff to deposit additional sums into that account within five business days of written request by the defendant. Clause 3.3 authorises the defendant to transfer from that account into its own account an amount equal to the premium estimated by the defendant to be payable by the plaintiff in respect of the option participation assets. Clause 3.5 provides as follows:

> Sufficient Funds: For the avoidance of doubt, the Vendor shall not be obliged to purchase Option Participation Assets if the Account does not contain sufficient funds for the Vendor to withdraw and transfer an amount equal to the Premium in accordance with Clause 3.3.

15 Clause 3.5 of the option agreement clearly provides that the defendant shall not be obliged to purchase the option participation assets if the Account did not contain sufficient funds for the defendant to withdraw and transfer an amount equal to the premium. As the plaintiff had not paid up the balance purchase price, there was simply no obligation on the part of the defendant to purchase the option participation assets, let alone transfer anything.

Question (2): Whether the contract was discharged by reason of the plaintiff's failure to pay the balance purchase price by the settlement date

16 The termination clause in the trade confirmation agreement provides as follows:

> The Purchaser's rights to the Assets, the Deposit, the PDI and Other Distributions shall be forfeited if the Purchaser fails to pay (a) the Deposit three business days before the Signing Date or (b) the Purchase Price Balance on Settlement Date, unless the Vendor, in its sole discretion, agrees to extend the Signing Date or the Settlement Date, as applicable.

17 This clause clearly deals with the consequences of breach of the plaintiff's obligation to pay the

purchase price balance on the settlement date. As the plaintiff had failed to make such payment by that date, the defendant was entitled to forfeit the Deposit under this provision. I should add that although labelled as a termination clause, this is more in the nature of a liquidated damages provision as it limits the damages payable by the buyer to the seller in the event of a breach of contract by the buyer.

Question (3): Whether the termination clause in the WestLB-Metro trade confirmation is a penalty

18 Before me, counsel for the plaintiff conceded that the termination clause is not a penalty. Therefore I need not deal with this issue, which the assistant registrar had answered in the negative.

Question (4): Whether the plaintiff is entitled to equitable relief from forfeiture of the Deposit

19 In *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1, the plaintiff had entered into a sale and purchase agreement with the defendant property developer for an uncompleted house, with provisions for payment by instalments. There was a dispute over whether the parties were entitled to set off sums owed in late completion interest and liquidated damages and both parties contended that the other had wrongfully repudiated the agreement. Although the suit was determined on the basis of other grounds, in its judgment, the Court of Appeal dealt extensively with the issue of equitable relief from forfeiture of the purchaser's interest in land. Thean JA (as he then was) cited Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at [722] where he reaffirmed "the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of the result." His Lordship added that in exercising such discretion to grant relief, the court would consider the conduct of the applicant, in particular whether his default was wilful, the gravity of the breaches, the disparity between the value of the property of which forfeiture is claimed and the damage caused by the breach.

20 Thean JA then referred to the House of Lords decision in *The Scaptrade; Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 which held that equitable relief from forfeiture was inapplicable in that case, where the shipowner, who had chartered his vessel to the charterer under a time charter, had withdrawn the vessel from hire for non-payment of hire on the stipulated date. Lord Diplock held that what Lord Wilberforce said in *Shiloh Spinners Ltd* "was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights". Thean JA went on to cite *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 for the proposition that equitable relief has not been granted to purely commercial contracts unconnected with any interests in land, and declared at paragraph 42 that there was:

> no general principle that whenever a party to a contract is given a contractual right to terminate or rescind the contract for a breach which consists only of non-payment of a sum of money and where the purpose of incorporating such right is to secure payment of that sum, there is an equitable jurisdiction to grant relief against the exercise of such right of termination or rescission.

In accepting that the court had the power in appropriate cases to grant relief from forfeiture in a contract for sale of land, Thean JA said that such jurisdiction would only be exercised in exceptional circumstances since the courts would not ordinarily countenance a departure from contractual rights and obligations. In order to invoke successfully the courts' jurisdiction, the circumstances of the case must reveal elements of unconscionability and injustice.

21 In *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2001] 1 SLR 370 ("*Triangle Auto's* case"), Selvam J (as he then was) reviewed the law on deposits and three cases: *Mayson v Clouet* [1924] AC 980, *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 and *Workers Trust & Merchant Bank Ltd v Dojup Investments Pte Ltd* [1993] 2 WLR 702. The judge concluded that if the deposit was penal, that is, not reasonable as earnest money, the court could grant relief from forfeiture of the deposit when the contract is discharged. He found that this principle, established in contracts relating to the sale of land also applied to contracts relating to the sale of goods.

22 The cases on relief from forfeiture of payments made in the context of a contract that has been discharged have been examined in *Goff and Jones: The Law of Restitution* where the authors concluded as follows at [20-046]:

> The scope of equity's power to grant relief is then uncertain. The cases suggest that the courts may relieve against the forfeiture of proprietary or possessory interests if the forfeiture can be characterised as unconscionable. It is doubtful whether the certainty of commercial transactions would be endangered if, following Lord Denning in *Stockloser v Johnson*, the courts were to accept a jurisdiction to relieve against the consequence of forfeiture of instalment payments, even if there was no forfeiture of a proprietary or possessory right, if the forfeiture would be penal and out of proportion to the loss suffered. Equity already relieves against the payment of penalties, and may raise an estoppel against a person if it would be unconscionable for him to assert his legal rights. It would be regrettable, therefore, to conclude that the courts never have jurisdiction to relieve against the forfeiture of such payments, made in the course of the performance of commercial contracts, although it is proper to affirm that relief should be granted only in exceptional circumstances and that the burden should be on the party in breach to demonstrate that the retention of any payment was unconscionable.

There is no doubt therefore that the burden is on the plaintiff to prove that it would be unconscionable on the part of the defendant to forfeit the Deposit.

23 The situation in this case does not concern the forfeiture of a proprietary or a possessory right. It essentially concerns an arm's length contract between two parties who were advised by their solicitors at all times pertaining to the purchase of a distressed debt. Even if the court has power to grant relief against forfeiture in this case, it would be necessary to inquire into the necessity, in the circumstances of this case, of exercising such power, which alters the bargain between the parties. I am not satisfied that the need to do so arises in this present case.

24 In support of their case for equitable relief, the plaintiff relied principally on *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 WLR 702 ("*Workers Trust's* case"), a decision of the Privy Council on appeal from Jamaica. A purchaser of property from a bank had paid a deposit of 25% of the price but failed to pay the balance purchase money in time. The Privy Council held that as the customary practice was for a 10% deposit to be taken, a vendor who seeks to obtain a larger amount must show special circumstances to justify such a deposit. The bank was unable to do so and their Lordships found the deposit to be unreasonable and granted the purchaser equitable relief against forfeiture. The Privy Council ordered that the deposit be refunded subject to a deduction of a sum to account of damages which the bank may have suffered. This position was followed by the High Court in *Triangle Auto's* case.

25 The plaintiff filed an affidavit by one Chun Jung Hoon, the business head of the Korea/Japan corporate institutional group of ARAB Bank plc. He claimed to be an expert in distressed debt transactions and gave his opinion that "it has never been customary for any seller to require a deposit to be paid for the distressed debt. The established customary practice in such transactions, over the

decades and even before that, is that no deposit is paid in the purchase of a distressed debt." He concluded that the deposit in the present case, amounting to almost 15% of the purchase price, did not accord with the customary market practice whereby no deposit is paid. Chun subsequently filed a second affidavit in which he said that, "for the type of transactions such as the proposed sale and purchase of the Asset in the present case, the customary practice is not to have any deposit paid in advance …" However in the next paragraph, he said that in the present case "if a deposit were to be payable .. a reasonable deposit would be a nominal amount in the region of 1% …" It should be noted that Chun had stated that it was customary that no deposit would be paid, then proceeded to state that if a deposit were payable, a reasonable (but no longer customary) deposit would be a nominal 1%.

26 I am not impressed by this evidence. Furthermore, the transaction in question is not even the usual sale of distressed debt by a party that owns such debt. It concerns a party, the defendant, who was brought in because it had the qualification to purchase the debt from Citigroup and from which the plaintiff could then purchase such debt once the defendant had acquired it upon being put in funds by the plaintiff. Chun did not refer to a transaction of this nature. Indeed it is difficult to say that there is anything customary about this transaction and certainly there would be no such thing as a customary deposit in such an unusual transaction. Chun was talking about a normal transaction in distressed debts, although even for that, it is difficult to fathom that it is anything near the established practice in purchases in real property, which was what the *Workers Trust's* case is concerned with.

27 I therefore found no grounds to grant relief against forfeiture in this case.