

Tong Guan Teck v DBS Bank Ltd and others
[2012] SGHC 72

Case Number : Suit No 406 of 2011(Registrar's Appeal No 350 of 2011; Registrar's Appeal No 351 of 2011)
Decision Date : 05 April 2012
Tribunal/Court : High Court
Coram : Quentin Loh J
Counsel Name(s) : Chua Beng Chye and Stephanie Tan (Rajah & Tann LLP) for the plaintiff;
Christopher Anand s/o Daniel and Harjean Kaur (Advocatus Law LLP) for the third defendant
Parties : Tong Guan Teck — DBS Bank Ltd and others

Credit and Securities – Guarantees and Indemnities – Discharge – Equity – Estoppel – Promissory

5 April 2012

Quentin Loh J:

1 The 1st Defendant, DBS Bank Ltd, ("DBS"), extended banking facilities to Marine Accom Pte Ltd ("MAPL"), a company started and incorporated by Mr Tong Guan Teck ("Mr Tong") and his partner Mr Tan Teck Ming ("Mr Tan") sometime in late 1988 or early 1989. As was usual, DBS required Mr Tong and Mr Tan to guarantee repayment by MAPL of any sums due to DBS. Mr Tong and Mr Tan signed the guarantee ("the Guarantee") on 4 October 2005.

2 Alleging a default, DBS then sued MAPL, Mr Tan and Mr Tong for liquidated sums under the Guarantee. Judgment in default of appearance was entered against MAPL and Mr Tan on 15 and 24 June 2011 respectively. DBS took out Summons No 3764/2011/K ("Summons 3764") applying for summary judgment against Mr Tong under O 14 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") and an order that Mr Tong's counter-claim against DBS be struck out under O 18 r 19 of the Rules of Court with indemnity costs paid to DBS.

3 Mr Tong vigorously opposed DBS's application for summary judgment. The learned Assistant Registrar granted Mr Tong conditional leave to defend and refused to strike out Mr Tong's counter-claim. Against that decision, Mr Tong appealed in RA 350 of 2011, ("RA 350"), contending that DBS's application in Summons 3764 should be dismissed or alternatively that he be given unconditional leave to defend the claim. DBS also appealed in RA351 of 2011, ("RA 351").

4 The 2nd and 3rd Defendants in the counterclaim entered an appearance, but were not directly involved in these appeals, nor did they seek judgment in their favour.

5 After hearing the parties, I dismissed both appeals with costs in the cause. Mr Tong has appealed against my decision and I now issue my grounds.

Facts

6 The following facts are not in dispute. MAPL defaulted in its payment obligations to DBS under the banking facilities. These proceedings arise out of the Guarantee signed by Mr Tong and Mr Tan on

4 October 2005 in favour of DBS, which was followed by a Deed of Confirmation dated 29 May 2009 ("Deed of Confirmation"). At the time of signing the Guarantee and Deed of Confirmation, Mr Tan held 50% of the shares in MAPL, with the remaining 50% held by Brosea Pte Ltd ("Brosea"), a company started by Mr Tong and in which Mr Tong was both a director and shareholder. The Guarantee and its terms are not in dispute, and are not in issue in this case. On 24 May 2011, DBS issued a letter of demand to Mr Tong and Mr Tan as guarantors for a liquidated sum due and owing under the Guarantee.

7 The case turned on what happened after the signing of the Deed of Confirmation and the Guarantee, specifically, whether Mr Tong's liability under the Guarantee was discharged. DBS maintained in Suit 406 that his liability under the Guarantee had not been discharged. Mr Tong filed a counter-claim against DBS, which also included two other defendants, UOB Bank ("UOB"), in whose favour he had also executed a guarantee, and Viking Offshore and Marine Limited ("Viking"), a company that had bought over Mr Tong's share in MAPL. The claims against Viking and UOB are not the subject of this appeal.

8 The basis of Mr Tong's counter-claim against DBS was that DBS had notice of both the transfer of his shares in MAPL to Viking, and of the Sale and Purchase Agreement ("the Agreement") on 19 July 2010 effecting that transfer. A Memorandum of Disclosure ("Disclosure Memorandum"), executed on 30 July 2010, which Mr Tong argued formed an appendix to the Agreement, stated at Clause 15 that "all personal guarantees granted by Tong Guan Teck in respect of the Company shall be discharged... and the Purchaser [ie Viking] shall grant a corporate guarantee for the equivalent amount in substitute of the aforementioned personal guarantees". Mr Tong contended that DBS owed him a duty to ensure that Viking executed this transfer as agreed. By failing to fulfil this duty, and by way of its assurances in letters and a meeting in August or September 2010, DBS had effectively discharged Mr Tong from the Guarantee and was estopped from claiming against him the liquidated sums owing.

9 On appeal, DBS contended that no such duty existed in law or in fact, nor had it given Mr Tong any assurance that they would take him off the Guarantee. DBS further contended that Mr Tong's attempts to establish such a duty was wholly unmeritorious, vexatious and frivolous, and should be struck out under O 18 r 19 of the Rules of Court, with judgment entered for DBS.

Issues

10 This appeal turns on whether or not there is a triable issue that Mr Tong had been discharged from the Guarantee. This hinges on:

- (a) Whether DBS gave Mr Tong any express assurance that they would take him off the Guarantee;
- (b) Whether the granting of further facilities after the Agreement and the Disclosure Memorandum had been executed was enough to discharge the Guarantee; and
- (c) Whether it is a triable issue that DBS owed a duty to Mr Tong to ensure that Viking executed a corporate guarantee.

Evidence of an express assurance given by DBS

11 I found that there was no evidence of any assurance by DBS, even on the low threshold of proof required under O 14 r 1 of the Rules of Court, that it would discharge Mr Tong from the

Guarantee.

12 Mr Tong relies on two matters to support his assertion that this assurance was given:

- (a) A letter from DBS on 6 January 2011 ("the 6th January Letter") agreeing to a conditional discharge of the Guarantee; and
- (b) A meeting with DBS around August/September 2010.

The 6th January Letter

13 The 6th January Letter was primarily a letter of offer issued by DBS for revisions to the limits on its Banking Facilities to MAPL and allowing of Foreign Exchange Transactions from time to time. This made reference to the fact that there had been a request for a discharge of the Guarantee. In paragraph (a) of the pre-amble, the 6th January Letter stated:

We are agreeable to discharge Tong Guan Teck as guarantor *subject to* the provision of the guarantee from Tan Teck Ming and corporate guarantee from VIKING OFFSHORE AND MARINE LIMITED.

[emphasis added]

14 The wording of the letter of offer is clear; it was not an agreement to discharge Mr Tong as guarantor unconditionally, but only "subject to" the provision of substitute guarantees. If this letter were to stand on its own, Mr Tong's contention must fail. I accept, however, that there may have been discussions preceding the writing of the 6th January Letter which may have provided further assurances, and it is to this issue that I now turn.

Meeting with DBS

15 Mr Tong relied on a meeting with DBS, which took place in August or September 2010. This is the only meeting he relied on to claim that DBS gave assurances that he would be discharged under the Guarantee. He claims that during this meeting, DBS's Ms Tan Soh Leng ("Ms Tan") and Ms Low Kia Min ("Ms Low") had requested him and Mr Tan to loan MAPL a sum of \$1,000,000 as payment towards DBS's outstanding facilities to MAPL, in exchange for DBS expediting the procurement of the corporate guarantee from Viking. [\[note: 1\]](#) This was flatly denied by DBS, and Ms Tan deposed that DBS had never made such a request of Mr Tong and Mr Tan. Rather, DBS claims that the meeting was to settle "overdue bills under the Banking Facilities" before the commencement of legal action against Mr Tong and Mr Tan as guarantors. [\[note: 2\]](#) Mr Tan, who has since left the country, was unavailable to testify as to what happened at the meeting.

16 It should be noted that, even taking Mr Tong's affidavit evidence at its highest, his evidence falls short of saying that DBS undertook to discharge him from the Guarantee. In any case, he deposed that he had "turned down the request to loan the money". [\[note: 3\]](#) He does not use this as evidence, therefore, that DBS had assured him that he would be discharge from the Guarantee, but as evidence only that DBS was "fully aware of Viking's Transfer obligation and that DBS itself appeared to be taking steps to procure the corporate guarantee from Viking". [\[note: 4\]](#) This is consistent with Ms Tan's evidence, which was that a conditional discharge had been offered by the 6th January Letter, but it was not accepted and the offer eventually lapsed. [\[note: 5\]](#)

17 It would have been clear to Mr Tong, and his affidavit indicates that he was aware, that he would not be discharged from the Guarantee before and unless a substitute guarantee was obtained. Clause 12 of the Guarantee states this clearly:

The Guarantor agrees and acknowledges that the obligation and liabilities of the Guarantor hereunder shall be *absolute and unconditional* and in addition to the other provisions of this Guarantee, shall *not be abrogated, prejudiced, affected or discharged*,

(a) by the Bank granting explicitly or by conduct or otherwise, whether directly or indirectly, to the Borrower, any of the Guarantor or any other person of any time, forbearance, concession, credit compounding, compromise, waiver, variation, renewal, release, discharge or other advantage or indulgence;

(b) by the Bank failing, neglecting or deciding not to recover the moneys hereby guaranteed or any part thereof by the realisation of any collateral or other security or in any manner otherwise or in the event of enforcement by the Bank of any collateral or other security or any remedy or otherwise, by any act, omission, negligence or other conduct or failure on the part of the Bank or any other person in connection therewith;

(c) *by any laches, acquiescence, delay, acts, omissions, mistakes on the part of the Bank or any other persons;*

...

[emphasis added]

Clause 22 goes on to state, *inter alia*, that:

The Guarantor may not determine or revoke this Guarantee unless the Guarantor makes full provision for any other outstanding liabilities or obligations to the Bank of the Borrower's account guaranteed hereunder and not unless the Guaranteed Money is paid to the Bank, in full. ...

18 Mr Tong does not plead rectification or *non est factum*, and indeed affirmed the Guarantee in the Deed of Confirmation. He even signed a very similar guarantee with UOB, who were the co-defendants in his counter-claim, on 14th June 2010, and this also contained a similar clause, Clause 16.18, which stated that he "shall not assign all or any of its rights and liabilities under this Agreement without the prior written consent of [UOB]". Mr Tong appeared to be an experienced businessman and was dealing with more than one bank; he never pleaded that he was not *au fait* with the implications of signing either of these guarantees and the subsequent Deed of Confirmation. He would have been and was aware that something more than a conditional offer would be required for him to be discharged from the Guarantee.

19 There is no evidence either on the face of the documents or on the affidavits filed by Mr Tong that DBS had ever assured him that they would discharge the Guarantee. As the evidence before me on the August/September 2010 Meeting stands, Mr Tong does not really fulfil the threshold of a triable issue however given his contentions and having regard to Mr Tong's right to have his day in court, I agreed with the learned Assistant Registrar's decision to give Mr Tong conditional leave to defend.

Whether granting of further facilities was enough to discharge the Guarantee

20 Mr Tong claimed that further facilities were to be granted to MAPL after the shares had been transferred to Viking, and DBS was aware that Viking, and not Mr Tong, was now behind MAPL. He thus contended that DBS impliedly discharged the Guarantee by making an offer to grant further facilities on the strength of MAPL's new controlling shareholder, Viking.

21 Clause 22 of the Guarantee states:

...Notwithstanding the bank's receipt of notice of the Guarantor's intention to revoke this Guarantee, the Bank shall be entitled to continue to make advances to the Borrower in respect of the Facilities and the Guarantor irrevocably and unconditionally agrees that he shall continue to be liable for all such advances until all monies hereby guaranteed are paid to and received by the Bank in full.

[emphasis added]

It is clear from the Guarantee that the granting of further facilities or advances does not thereby discharge Mr Tong from liability under the Guarantee, even if he notified the Bank that he intended to revoke the Guarantee or obtain a substitute guarantee from Viking. Mr Tong did not even claim that he had notified the bank of any intention to revoke the Guarantee. Instead, in his affidavit, he only stated that DBS was aware that the shareholding of MAPL had changed, and that DBS had approved of such change. If a notice of intention to revoke was not enough, how could a notice of change in shareholding in MAPL suffice to discharge Mr Tong from the Guarantee?

22 It is also clear from the documents that all that was "accepted" by DBS was a change in the shareholding in MAPL. The letter from Mr Tan to DBS's Ms Tan on behalf of MAPL and his co-guarantor Mr Tong, dated 29 July 2010, was a notification "in accordance with Clause 7" of the facility letter to inform DBS of "the proposed change in ownership of the Company". [\[note: 6\]](#) The letter further stated that, upon completion of transfer of ownership to Viking, MAPL "undertakes to set aside \$1.5 mil from the loans given by Brosea PL and/or Viking Offshore and Marine Limited to MAPL to settle the loan outstanding at DBS Bank". [\[note: 7\]](#) I note that the reference to the duty to inform in Clause 7 was mistakenly taken from the terms attached to UOB's letter of facility, rather than DBS's, and the clause in UOB's letter of facility stated that any reorganisation or substantial change of shareholders shall not be taken without the bank's prior written consent. This was with reference to the banking facilities. There was no mention of the Guarantee, or any indication that the new ownership should or would discharge the Guarantee. DBS's letter in reply was brief and clear; it merely consented to the proposed change in shareholding in the company. Insofar as Mr Tong alleges that the granting of further facilities on the basis of the new shareholding was enough to discharge the Guarantee, there is no evidence for such a proposition either in the affidavits, pleadings, or documents. This is not a triable issue and cannot constitute a basis for allowing RA 351 or for striking out Summons 3764.

DBS's alleged duty to Mr Tong

23 Mr Tong's final effort in bringing his counter-claim is built on the evidence mentioned in the preceding paragraphs, in order to found a claim of estoppel. He argued that DBS's early attempts to have Viking sign the corporate guarantee, coupled with their representations during the August/September 2010 Meeting and the 6th January letter, was effectively a representation to Mr Tong that they were in the midst of discharging and transferring the Guarantee from him to Viking. While not strictly provided for in the Guarantee itself, he contended that this supported a claim of estoppel.

24 Mr Tong brought up a number of preliminary claims to support this, and among them, the contention that DBS sent "a Letter of Facilities and related correspondence stipulating and/or requiring Viking to sign as a corporate guarantor in accordance with Viking's Transfer Obligation". [\[note: 8\]](#) Mr Tan, who was still involved as sole director of the then Viking-owned MAPL, informed Mr Tong of these letters. This was denied by DBS. [\[note: 9\]](#) Presumably if DBS's appeal were dismissed, Mr Tong would ask for discovery of these documents. I am of the view that in a situation such as this where it was Mr Tong's word against DBS's, Mr Tong should be given the benefit of the doubt to get discovery of these documents.

25 This was not the only evidence that Mr Tong relied upon. He also claimed that the August/September 2010 Meeting included some discussion of the procurement of the corporate Guarantee. DBS did not deny that this meeting took place, although they denied that there had been a request for a sum of \$1,000,000 for expedition of this procurement. I note that Ms Tan, in her reply affidavit on behalf of DBS denying the request for this sum, did not say that the procuring Viking's corporate guarantee was not mentioned at this meeting. On my reading, the 6th January Letter did indicate that there must have been some discussion, or at a least a mention, of the transfer of this guarantee to Viking, as it stated that DBS was agreeable to such a transfer. What was unclear from the evidence was the nature of the discussion. If this discussion included mention of an express undertaking from DBS that it would secure the corporate guarantee from Viking, this could have placed Mr Tong under the impression that there was no need for strict compliance with the terms of the Guarantee which required him to expressly assign the Guarantee to Viking. Without knowing more about what transpired during the August/September 2010 meeting, or whether there was, indeed correspondence between DBS and Viking which was referenced during this meeting, I was of the view that summary judgment ought not to be given in favour of DBS.

26 DBS has strenuously objected to this contention, arguing that banks do not owe a general duty to guarantors to secure the transfer of a Guarantee simply because they knew that such transfer had been agreed upon. DBS made much of the fact that the Agreement between Viking, Mr Tong, and Mr Tan for the sale of their shares was not binding on DBS, and this is confirmed in Clause 24 of the Agreement. This argument was admittedly persuasive, and even more so when I considered that the Disclosure Memorandum was only signed on 30 July 2010, 11 days after the execution of the Agreement and a day after the letter was sent from Mr Tan to DBS requesting DBS's consent to a change in ownership of MAPL. The latter document was intended to record the accounts of the parties for disclosure purposes, and not to discharge any guarantees, as seen from Clause 8.4 of the Agreement. However, Mr Tong's argument is not that DBS was bound by the Agreement, but that DBS took positive steps on strength of the notice given under the Agreement and the letters sent by Mr Tong and Mr Tan, to secure the corporate guarantee, and that DBS kept Mr Tong apprised of such developments and actively gave the impression that Mr Tong need do nothing further. Whether DBS was a third party to the Agreement was therefore a red herring.

Conclusion

27 Following a comprehensive multi-jurisdictional review of case law in its submissions, DBS admitted that a duty of care between a bank and a guarantor may arise "where the creditor has taken *positive* steps such that the law imposes on the creditor a duty to act reasonably in taking these positive steps as the interests of the surety might be affected" [emphasis in original]. [\[note: 10\]](#) Mr Tong contended that DBS, by indicating to him at the August/September 2010 meeting that they were in the midst of discussions with Viking to execute a corporate guarantee, and by in fact initiating correspondence with Viking, did take such a positive step as to affect his interests. In order for DBS to succeed in RA 351, it must show that this alleged cause of action is certain to fail: *Gabriel*

Peter & Partners v Wee Chong Jin [1998] 1 SLR 374 ("*Gabriel Peter & Partners*"). For the reasons given above (*supra* [24] to [26]), I find that DBS has not shown this in relation to the issue of estoppel. Neither has it convincingly shown that Mr Tong's counter-claim disclosed no reasonable cause of action or defence (O 18 r 19(a) of the Rules of Court); is scandalous, frivolous or vexatious (O 18 r 19(b) of the Rules of Court); would prejudice or delay fair trial of the action (O 18 r 19(c) of the Rules of Court); or is otherwise an abuse of the process of the court (O 18 r 19(d) of the Rules of Court). While DBS is right to point out that estoppel operates as a shield and not a sword, I note that Mr Tong used the estoppel claim as part of his defence to DBS's original suit, and the fact that he does so by a counter-claim should not prejudice him by an order to strike out what was essentially part and parcel of his defence to Suit 406.

28 DBS claimed that no assurance was pleaded by Mr Tong. [note: 11] To the contrary, the claims in Mr Tong's affidavit [note: 12] and written submissions [note: 13] that DBS had indicated that it would expedite the procurement of the corporate guarantee were effectively claims that there was an assurance given that DBS would take care of the transfer of the Guarantee from Mr Tong to Viking. Whether this also amounts to an assurance that DBS would waive its rights under the Guarantee is a matter to be decided at trial. I note, in passing, that Mr Tong is on thin ice, as it is not at all clear that the action that DBS had taken constituted such positive steps as to raise a claim of estoppel, and there was clearly no express assurance that the Guarantee would be discharged. I note, however, the observations in *Gabriel Peter & Partners* at [18]:

In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86, at 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

It is immaterial that Mr Tong has not made out his case at this stage, as this can only be done with the benefit of discovery, further preparation, and evidence adduced at trial. What is important is that Mr Tong is, in claiming his right to have his day in court, acting *bona fide* and not merely attempting to "annoy or embarrass his opponent, or [conducting the case in a manner] not calculated to lead to any practical result": *Goh Koon Suan v Heng Gek Kiau & Ors* [1990] SLR 1251. DBS has not, in its affidavits or in its written submissions, suggested or given any evidence that Mr Tong is acting *mala fides*.

29 In relation to DBS's application for summary judgment, I have already set out above, all the facts and evidence that points to the strength of DBS's case and the paucity of any facts or evidence in Mr Tong's favour. Mr Tong however refers to that one meeting in August/September 2010 where he claims certain assurances were given by DBS. In my view, he is entitled to his day in court but should only be given conditional leave to defend. I accordingly dismiss DBS's appeal, RA 351, for an order for summary judgment and to strike out Mr Tong's defence and counter-claim.

30 I also agree with the decision of the learned Assistant Registrar and dismissed RA 350. I have already said that I can find no evidence that DBS gave an express assurance to Mr Tong that he would be discharged from the Guarantee. I have also noted the dubiousness of Mr Tong's leap of logic that the mere fact that DBS told him they were expediting the procurement of Viking's corporate guarantee amounted to an implied assurance that he need do no more to be discharged from the Guarantee. I accordingly find no basis for a dismissal of DBS's application in Summons 3764 altogether,

nor a granting of unconditional leave to defend. Unconditional leave would be unwarranted on the facts and circumstances as they now stand before me at this interlocutory stage.

[\[note: 1\]](#) Tong Guan Teck's Affidavit of Evidence-in-Chief, p 12, [37].

[\[note: 2\]](#) Tan Soh Leng's Affidavit of Reply, p 5, [16].

[\[note: 3\]](#) Tong Guan Teck's Affidavit of Evidence-in-Chief, p 12, [37].

[\[note: 4\]](#) *Ibid.*

[\[note: 5\]](#) Tan Soh Leng's Affidavit of Reply, p 7, [22].

[\[note: 6\]](#) BA, p 354.

[\[note: 7\]](#) *Ibid.*

[\[note: 8\]](#) Tong Guan Teck's Affidavit of Evidence-in-Chief, p 12, [40].

[\[note: 9\]](#) Tan Soh Leng's Affidavit of Reply, p 7, [22].

[\[note: 10\]](#) Plaintiff's written submissions, 13 Feb 2012, p 41, [98].

[\[note: 11\]](#) *Ibid.*, p 61.

[\[note: 12\]](#) Tong Guan Teck's Affidavit of Evidence-in-Chief, p 12, [40].

[\[note: 13\]](#) 3rd Defendant's written submissions, 14 Feb 2012, p 10, [32].

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