

Bayerische Landesbank Girozentrale v Khaw Hock Seang
[2003] SGHC 42

Case Number : Suit 1116/2001
Decision Date : 28 February 2003
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Rebecca Chew and Poh Yan Fen (Rajah & Tann) for the plaintiffs; Edwin Tay and Xhuanelado Owen (Edwin Tay & Co) for the defendant
Parties : Bayerische Landesbank Girozentrale — Khaw Hock Seang

Credit and Security – Guarantees and indemnities – Whether defendant signed the guarantee that plaintiff was trying to enforce.

1. The plaintiffs, Bayerische Landesbank Girozentrale ("BLG"), a bank, instituted legal proceedings against the defendant, Mr Khaw Hock Seang ("Khaw"), to enforce their rights under a guarantee allegedly signed by the latter to secure a loan given by the bank to South Development Ltd ("SDL"). Khaw denied having signed the guarantee and pleaded in the alternative that the guarantee was signed on the basis of representations by the bank's staff that it will not be stamped or enforced until the securities required by the bank had been handed over.

Background

2. Khaw, a Malaysian businessman, is a director and the sole shareholder of SDL. In a letter dated 19 May 1997, BLG granted SDL a multi-currency revolving credit facility of MYR14.5m, which was to be secured by, among other things, the following:

- (a) a first party charge over deposits and credit balances to be executed by the Borrower;
- (b) a security agreement relating to shares and other securities to be executed; and
- (c) Khaw's personal guarantee.

3. Khaw accepted the bank's offer on behalf of SDL, which authorised him to operate the account. BLG asserted that Khaw executed the guarantee that he was required to furnish in late May 1997. This guarantee required Khaw to pay BLG on demand all moneys owing by SDL, including interest, and costs and expenses incurred by BLG to enforce its terms.

4. Khaw utilised the credit facility granted to SDL to invest in various share counters on the Malaysian Stock Exchange. Unfortunately, massive losses were suffered and when SDL failed to make the necessary payments to the bank, the credit facility in question was withdrawn. Relying on Khaw's guarantee, BLG's solicitors sent a letter of demand to him by AR registered post on 24 July 2001. In the letter, BLG demanded the payment of USD5,479,653.10, the amount outstanding as at 2 July 2001 under the credit facility granted to SDL, together with interest and bank charges from and including 3 July 2001 until the date of full payment.

5. Khaw had discussions with BLG's staff with respect to the settlement of SDL's losses. He was also appointed the spokesman of a group of BLG's other Malaysian clients, who owed the bank money after suffering similar losses in stocks and shares, to negotiate a deal with the bank. However, the massive debt incurred by SDL was not settled. As such, BLG instituted legal proceedings against Khaw to enforce the guarantee.

Withdrawal of Khaw's alternative defence

6. On the first day of the trial, Khaw abandoned his alternative defence that BLG's staff had represented to him that the guarantee will not be stamped and acted upon until all the requisite securities required by the bank had been handed over. When cross-examined, Khaw admitted that no one in the bank made the said representations to him. He said that the representations had been made to his colleague. No light was shed on what role this colleague played in relation to SDL's account. This prompted BLG's counsel, Ms Rebecca Chew, to submit that Khaw lied when he asserted in his defence and affidavit of evidence-in-chief that the said representations were made by the bank's staff to him.

Whether Khaw signed the guarantee

7. With the withdrawal of Khaw's alternative defence, the only issue to be resolved was whether or not he signed the guarantee in question. For this purpose, it is pertinent to note that *Phipson on Evidence*, 15th ed, states as follows at pp 1072-1073:

The handwriting and signature of unattested documents, or of documents which, though attested, are not required by law to be so, may be proved (1) by calling the writer; or (2) by calling a witness who saw the document signed; or (3) by calling a witness who has acquired a knowledge of the writing ... or (4) by comparison of the document in dispute with any other proved to the satisfaction of the judge to be genuine; or (5) by experts, with or without comparison, or (6) by the admissions of the party against whom the document is tendered The above methods, being equally admissible and equally primary, may be resorted to indifferently; subject, of course, to comment should weaker proof be tendered where stronger might have been adduced.

8. Admittedly, the evidence presented by BLG was not altogether satisfactory. BLG's main witness, Mr Wong Teck Long ("Wong"), was the bank's relationship manager in the private banking department at the material time and he handled matters relating to SDL's account and Khaw. He left BLG in 1998 and is now working for another bank. He testified that he was sure that Khaw signed the guarantee. However, he could not recall whether this was done in his presence. He said that he could have been present when Khaw signed the guarantee either in Singapore or in another country, as he often travelled abroad to meet his wide base of clients. He added that he could also have posted the relevant document to Khaw for the latter's signature. If this had been done, he would have compared the signature on the guarantee with Khaw's signature on the specimen signature card in the bank after the signed guarantee had been returned to him. Wong added that apart from checking the signature, he would have telephoned Khaw to confirm that the guarantee had been duly signed before he signed on the document as a witness of Khaw's signature. He also revealed that a second round of verification of the signature on the guarantee would have been conducted by BLG's operations department.

9. If Wong was not present when Khaw signed the guarantee, he should not have signed as a witness. It was common ground that if there was such an error on Wong's part, the lack of a witness did not, without more, affect the validity of the guarantee. A guarantee "will not be a forgery merely simply because it contains a false representation that a solicitor witnessed the guarantor's signature" (see *The Modern Contract of Guarantee* by James O'Donovan and John Phillips, 3rd ed, p 113).

10. Although Wong impressed me as a truthful and an unbiased witness, BLG wisely chose not to rely solely on his evidence to prove that Khaw signed the guarantee. The bank asserted that Khaw's

response to their assertion that he signed the guarantee showed that he must have signed it. For a start, it was pointed out that if Khaw did not sign the guarantee, he would have made this clear to the bank as soon as he knew that the latter relied on its terms. He claimed that he first knew about the guarantee in December 2001. However, he waited until after the Writ of Summons had been served and during the bank's Order 14 application to assert that he did not sign the guarantee. It was also pointed out that neither Khaw nor his solicitors sought to inspect the guarantee that was in the bank's possession before the trial commenced. In fact, until the original guarantee was produced by BLG as evidence in court, neither Khaw nor his counsel had set their eyes on it.

11. BLG's counsel submitted that it should be borne in mind that Khaw did not lodge a police report that his signature had been forged on the guarantee even though it made him liable to the bank for more than USD5m. The lack of a police report under such circumstances is not an irrelevant factor. (See, for instance, *Prosperous Credit Pte Ltd v Gen Hwa Franchise International* [1998] 2 SLR 649.) Even if Khaw's claim that he first knew of the guarantee in December 2001 may be believed, he had ample time to make a police report. His explanation as to why he did not make a police report did not put his case in a very good light. When cross-examined, he stated as follows:

Q. This is a guarantee and if it does not have your signature, do you agree that there is a serious fraud against you?

A. Yes.

Q. Did you lodge a police report in respect of the serious fraud?

A. No.

Q. Did you not think it important to lodge a police report to have the matter investigated?

A. No.

Q. Why did you not lodge a police report?

A. This a document of the bank. I saw it when there was a writ sent to me. I saw it in the last week of December 2001. I did not think it necessary to lodge a police report. I am ignorant and my lawyers did not advise me to do so.

12. BLG's counsel also pointed out that although Khaw claimed during cross-examination that some of SDL's letters to the bank with respect to the operation of that company's account were not signed by him, he made no police report with respect to these alleged forgeries. This, she asserted, showed that Khaw was clearly unconcerned with the fact that other persons were corresponding with the bank in his name and repeatedly forging his signature for the purpose of operating SDL's account. She submitted that if one takes into account Khaw's failure to inform the bank soon after December 2001 that he did not sign the guarantee, his failure to inspect the guarantee that was in the bank's possession, and his failure to make a police report about the forgeries with respect to the guarantee and letters of instructions given to the bank for the operation of SDL's account, the conclusion can only be that the guarantee in question could not have been forged.

13. BLG's counsel also said that Khaw must have signed the guarantee because he was prepared during negotiations with the bank to use his personal assets to reduce SDL's liabilities to the bank. This stand was clearly inconsistent with his position that he was not personally liable for the debts of SDL.

14. In the face of BLG's onslaught, Khaw's defence was weak and confusing. For a start, his assertion that he did not receive a letter of demand from the bank need not be considered as such a letter was sent to him in accordance with agreed terms. What merits attention is that while Khaw denied that he signed the guarantee, he was determined not to assert that the document had been forged. It is trite law that the burden of proving a forgery lies on the person asserting it and the burden of proving a forgery is more onerous than the ordinary standard required in civil cases. (See, for instance, the decision of the Court of Appeal in *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258.) Khaw assumed that if he did not allege that his signature had been forged, BLG had a more difficult task of proving their case. He thought that BLG had the obligation to, among other things, call handwriting experts as witnesses to prove that he signed the guarantee. Hence, he declined to call an expert witness to give evidence as to whether or not his signature had been forged. In the circumstances of the case, this was not a very wise move. BLG's task was merely to establish that Khaw signed the guarantee and if there is sufficient proof that he signed the guarantee, he cannot avoid liability merely because no handwriting expert had testified that the signature on the guarantee was his.

15. In essence, Khaw's defence rested on his assertion that he was not in Singapore on 27 May 1997, when the guarantee was said to have been signed. He produced an international passport to show that he was in Malaysia on that date. This argument is not flawless as he could have entered Singapore with a Malaysian restricted passport at the material time. More importantly, the bank did not assert that the guarantee was signed in Singapore.

16. While in the witness box, Khaw did not advance his case convincingly. He admitted that when he accepted the bank's offer of facilities for SDL in May 1997, he knew that he was required to furnish a personal guarantee to secure SDL's debts. Notwithstanding this, he testified that he was not prepared to sign the guarantee. When cross-examined, he explained why he would not sign the guarantee in the following terms:

Q. One of the conditions for the granting of facilities by the bank to SDL is a guarantee from you?

A. Yes, it is in the letter of offer.

Q. Therefore, is it true that there was no reason for you not to sign the guarantee?

A. I signed the facility letter to please my employer. I still would not have signed the guarantee if it had been sent to me because I don't want to be liable for something which is not mine. This account was not mine in the true sense.

(emphasis added)

17. As the trial progressed, Khaw repeatedly said that he was not the beneficiary of the funds in SDL's account even though this was not his pleaded case. When cross-examined, he said as follows:

Q. Being the only shareholder of SDL, you would benefit should SDL make a profit?

A. On face value, yes. I am a nominee for another person. In reality, I do not benefit.

18. Khaw subsequently named one "Dato Ambrose" as the man behind the SDL account and a number of other accounts with BLG. When cross-examined, he said as follows:

Q. If you say you did not sign the guarantee and you are not interested in the loans to SDL, why were you interested in settling the losses in this account?

A. After the meltdown, Dato Ambrose had no one to help. I had nothing to do. As such, I agreed.

Q. Why did Dato Ambrose approach you and not other people?

A. Some of the others were drivers and clerks. They are all nominees for Dato Ambrose.

(emphasis added)

19. When questioned by his counsel, Mr Edwin Tay, as to why he did not lodge a police report about the guarantee that he claimed that he did not sign, he again referred to Dato Ambrose. He said as follows:

Q. Why did you not lodge a police report?

A. I had been trying to get Dato Ambrose to pay for the cost of these proceedings so I have to be nice to him. Other people were also involved. The police report is a separate issue.

(emphasis added)

20. What Khaw was trying to say in relation to the police report, the alleged forgery of the guarantee, and Dato Ambrose's role cannot be fathomed. Was Khaw saying that if he lodged a police report, he would not be "nice" to Dato Ambrose? If that is so, one might ask why Dato Ambrose would be angered by a police report that the guarantee had been forged and why he would retaliate by refusing to pay for the cost of these proceedings. Khaw's counsel reiterated in the closing submission that as his client "did not have the necessary funds to instruct solicitors and was hoping that the persons responsible would assist him financially in the trial". What was meant by "persons responsible" was not made clear. While it is evident that the questions referred to in this paragraph need not be answered since Dato Ambrose's role, if any, in the operation of SDL's account was not part of Khaw's pleaded defence, it ought to be noted that this portion of Khaw's evidence showed how unfocussed his defence was and how often he had to clutch at straws to avoid sinking into the morass created by his own line of defence.

Conclusion

21. Taking all circumstances into account, I hold that it was established that Khaw signed the guarantee in question. As such, BLG is entitled to judgment for the sum owed by SDL as at 2 July 2001, namely USD5,479,653.10, and to interest on the credit facility at 2% per annum above their cost of funds from 3 July 2001 until the date of full payment. BLG is also entitled to be paid bank charges and applicable dues from 3 July 2001 until the date of full payment as well as costs on a full indemnity basis.

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