

Northstar Marine Pte Ltd and another v Solvators Inc Pte Ltd and others
[2010] SGHC 56

Case Number : Suit No 791 of 2009 (Registrar's Appeal No 484 of 2009)
Decision Date : 17 February 2010
Tribunal/Court : High Court
Coram : Philip Pillai JC
Counsel Name(s) : Thio Shen Yi, SC (Instructed counsel) (TSMP Law Corporation) and Kenny Khoo Ming Sang (Ascentsia Law Corporation) for the plaintiffs; Chan Kia Pheng and Sim Mei Ling (KhattarWong) for the defendants.
Parties : Northstar Marine Pte Ltd and another — Solvators Inc Pte Ltd and others

Civil Procedure – summary judgment

17 February 2010

Philip Pillai JC:

Background

1 This was an appeal by the first plaintiff against the Assistant Registrar's decision in an application for summary judgment. The Assistant Registrar granted unconditional leave to the first defendant to defend against its claim for the sum of US\$1,575,949.72, such sum as may be allowed, or alternatively damages, interest and costs on an indemnity basis. The first plaintiff did not, in this appeal, rely on allegations of misrepresentation. Its appeal was based solely on the grounds that a funding agreement had been terminated and accordingly, that the collateral provided thereunder was refundable.

2 The first plaintiff entered into a funding agreement with the first defendant on 8 August 2008 (the "Funding Agreement"). Under the Funding Agreement, the first defendant would provide funding to the first plaintiff upon the successful completion of its due diligence investigations. As a pre-condition to the commencement of due diligence, the first plaintiff was required to pledge liquid collateral of US\$2 million ("Liquid Collateral") to the first defendant and deposit the amount into a Credit Suisse bank account opened in the first plaintiff's name (the "Credit Suisse Singapore bank account").

3 Cl 1.2(d) of the Funding Agreement provided that both parties would have the right to terminate the agreement and funding program at any time prior to the expiration of the due diligence process by providing written notice specifying in reasonable detail the reason(s) for its termination; if the receiver of the funds elected not to rectify the deficiency(ies), or failed to do so within the cure period, the agreement and the funding program would be cancelled without penalty to either party, whereupon the Liquid Collateral and all applicable interest earned thereon should be released, returned and/or paid over to the first plaintiff. This should be done within seven business days of the date of the receiver's notification that it has elected not to rectify the deficiency(ies), or upon expiration of the cure period, whichever is applicable.

4 Other relevant terms of the Funding Agreement included:

10.3 *Integration.* This Agreement and such other written agreements, documents and instruments as may be executed in connection herewith are the final, entire and complete agreement between RECIPIENT and SOLVATORS and supersede all prior and contemporaneous negotiations and oral representations and agreements, all of which are merged and integrated in this Agreement. There are no oral understandings, representations or agreements between the parties which are not set forth in this Agreement or in other written agreements signed by the parties in connection herewith.

10.5 *Amendment.* The terms and provisions of this Agreement may not be waived or amended, except in a writing executed by RECIPIENT and a duly authorized officer of SOLVATORS.

5 The details relating to the Liquid Collateral were set out in Appendix A of the Funding Agreement which provided:

Liquid Collateral is a form of performance guarantee to allow the required Due Diligence process to commence. As determined during the Due Diligence, it may also continue to be a performance guarantee after funding has started.

...

Types of LIQUID COLLATERAL

1. (Deposit in RECIPIENT's own account and pledge to SOLVATORS)

RECIPIENT shall deposit \$2 million USD into its own account at a Bank specified by SOLVATORS. RECIPIENT shall pledge the account to SOLVATORS as collateral for six (6) months. The deposit and pledge shall be in a manner mutually acceptable to SOLVATORS and RECIPIENT.

6 Following the opening of the first plaintiff's Credit Suisse Singapore bank account, the second plaintiff on behalf of the first plaintiff, and the second defendant on behalf of the first defendant, signed various documents pledging the Liquid Collateral to the first defendant.

7 The due diligence process commenced sometime in December 2008 continued until 3 March 2009, where by way of letter written by the second defendant on behalf of the first defendant, the first defendant gave notice of its intention to terminate the Funding Agreement to the first plaintiff in the following terms:

Late last week you presented your business plan. To say that it was disappointing would be understating our feelings. It was incredible that you were expecting Solvators to fund Northstar Marine with hundreds of millions of dollars and expect us to be happy with a 1.5% annual return.

...

We do not invest any money until we have completed a successful Due Diligence. We made an exception for you and provided you with funds during Due Diligence because we wanted you to fully concentrate on building your knowledge and preparing a proper plan for the running of your business.

We have come to a decision point, whether to continue or to terminate. Our decision is to give you one more chance to make it work. So, we are exercising our right under the Funding

Agreement to inform you that we must terminate for all the above stated reasons, unless you can rectify the situation. You have two choices:

1. As per the agreement you have 30 days ("cure period") to find a competent person to run the company and prepare an acceptable business plan with that person. After that we will start the process to release your pledge of the \$2 million Liquid Collateral.
2. Alternatively, should you decide not to proceed with the "cure period", we will then immediately terminate this Funding Agreement and start the release of your pledge next week.

You have until the end of this week (Monday March 9th) to let us know, in writing, which way you wish to go. [\[note: 1\]](#)

8 By letter of 5 March 2009, the second plaintiff on behalf of the first plaintiff replied, *inter alia*, as follows:

I deeply regret to inform you that I have decided not to proceed with the cure period. [\[note: 2\]](#)

9 After the termination of the Funding Agreement, the first defendant did not proceed to release the Liquid Collateral to the first plaintiff and there laid the origin of this action.

10 The second plaintiff discovered sometime in August 2009 that the first defendant had used the Liquid Collateral as security to Credit Suisse Singapore in respect of the utilisation of a US\$27 million credit facility, and sometime in September 2009, Credit Suisse Singapore declared an event of default and had applied the Liquid Collateral towards payment of US\$3,562,294.23 owing by the first defendant to the bank. The first plaintiff, through its solicitor, wrote a letter dated 7 September 2009 to the first defendant, demanding the return of the Liquid Collateral on the basis of alleged misrepresentations by the first defendant, or alternatively, the first plaintiff's letter of 5 March 2009.

Issues in this appeal

11 The only issue before me in this appeal is whether summary judgment should be granted or whether there were triable issues raised by the first defendant such that leave to defend ought to be granted as determined by the AR.

Whether the Funding Agreement had been terminated

12 The pivotal issue turns on whether there are triable issues on whether (as the first plaintiff avers) the Funding Agreement had been terminated or (as the first defendant avers) that termination had been subsequently rescinded. The first defendant's case was that the first plaintiff's letter of 5 March 2009 could not be seen as an election not to exercise the cure period as the letter ought to be viewed in the context of the parties' conduct at the material time. It was submitted that despite the purported termination of the Funding Agreement by this letter, the first plaintiff had by conduct, subsequent to the letter, expressed a desire to continue with the due diligence process under the Funding Agreement by working on the business plan. The first defendant relied on extensive contemporaneous telephone conversations and email correspondence in order to run its defence that the second plaintiff had rescinded the termination of the Funding Agreement in light of his subsequent conduct.

13 In the cold light of the Funding Agreement, the critical written ultimatum issued by the first

defendant, and the prompt written election in response, I found no merit in these extensive factual submissions. The Funding Agreement appeared on its face to be a standard document prepared by the first defendant. In cl 10.3 it carefully excluded oral understandings, representations or agreements between the parties which had not been set forth in the agreement or in other written agreements signed by the parties in connection herewith prior to and contemporaneous with its execution. Furthermore, cl 10.5 provided that there was not to be, subsequently, any waiver or "amend[ment]", except in writing executed by RECIPIENT and a duly authorised officer of SOLVATORS'. It was beyond debate that there had been no such subsequent written amendment or waiver on the terms prescribed by cl 10.5 that would have supported the first defendant's submission.

14 The second plaintiff's subsequent conduct in working on a business plan despite having elected in writing to terminate the Funding Agreement does not necessarily denote that the prior written definitive termination was rescinded. According to the Funding Agreement, in the event the second plaintiff was able – after the termination of the Funding Agreement – to develop a business plan acceptable to the first defendant, it would have been open to the parties either to agree in writing to revive the terminated Funding Agreement as provided or, indeed, to enter a fresh funding agreement.

15 The first defendant further submitted that cl 1.2(d) of the Funding Agreement had not been properly triggered by the first plaintiff's notice of termination in the letter dated 5 March 2009 because the Funding Agreement could not be terminated without cause. This submission was again, in my view, unmeritorious. The cure period was for the benefit of the recipient if it elected to use it. When the recipient replied to the terminating party, in response to an express notice to a cure period or immediate termination, he would be entitled to elect termination in lieu of cure. The termination was issued by the first defendant in its letter dated 3 March 2009 in clear and unambiguous terms, requiring the first plaintiff to elect either for the cure period or termination of the Funding Agreement and release of the pledge. This was followed by the first plaintiff's equally clear and unequivocal letter of election of termination and request for the release of the Liquid Collateral in its reply of 5 March 2009. Having been issued an unequivocal cure or terminate ultimatum in writing, which it followed by a prompt written reply and election to terminate, it did not then lie in the mouth of the first defendant to say that the termination had not been properly triggered by the first plaintiff's reply of 5 March 2009.

16 Moreover, it was evident from the email correspondence subsequent to the 5 March 2009 letter and between the second plaintiff and the second and fourth defendants that the corporate first defendant could not be said not to have been put on notice of the first plaintiff's exercise of its right of termination and the consequential requirement to release the Liquid Collateral. Extracts of the relevant emails between the parties read as follow:

(a) Email of 5 March 2009 from the second plaintiff to the fourth defendant:

I deeply regret to inform you that I would not proceed with the cure period. ...

Pls kindly inform me the LC [Liquid Collateral] release date. ... [\[note: 3\]](#)

(b) Email of 6 March 2009 from the second plaintiff to the fourth defendant:

I did intend to want to arrange a biz plan presentation on next tues or wed as I am working with a team on biz, to discuss if I can see support till next Wed and have LC returned immediately after. But I am required to make the decision first on the options. I cannot afford 30 days, so I only have the other option. [\[note: 4\]](#)

(c) Email of 7 March 2009 from the second plaintiff to the fourth defendant:

I have chosen officially the termination option two days ago. For the part on business plan, I want to complete the work.

Thank you. [\[note: 5\]](#)

(d) Email of 7 March 2009 from the second plaintiff to the fourth defendant:

I understand I have already formally exercised the termination option and not entitled to further project rights. However, pls allow me to continue to work on the biz plan to complete the work and hence would appreciate your inputs for (1) and (2). Thank you. [\[note: 6\]](#)

(e) Email of 19 March 2009 from the fourth defendant to the second plaintiff:

We had given you one more chance to put a proper business plan together so we could complete a successful Due Diligence and start the proper funding for your project. You chose to terminate and not exercise your right for a "cure" period. That then allows us a "cure" period plus 7 days to release your pledge. [\[note: 7\]](#)

(f) Email of 24 March 2009 from the fourth defendant to the second plaintiff:

After consulting with the funder regarding the date, here is the reply on official date on the release of LC – 30 calendar days plus 7 business days tales [sic] it to Friday April 17th as the last date. [\[note: 8\]](#)

17 In the light of the above, I allowed the appeal with summary judgment for the first plaintiff against the first defendant for the adjusted sum of US\$1,469,131.32 and interest at the rate of 5.33% per annum and a stay of execution for up to US\$300,000 until final determination of Suit No 791/2009N at trial.

18 I awarded costs of this appeal of S\$7,000 (excluding disbursements) to the first plaintiff to be paid by the first defendant.

[\[note: 1\]](#) See pp 190 of Plaintiff's Bundle of Documents dated 13 January 2010 ("PBOD").

[\[note: 2\]](#) See pp 177 of PBOD.

[\[note: 3\]](#) See page 177 of PBOD.

[\[note: 4\]](#) See page 178 of PBOD.

[\[note: 5\]](#) See page 181 of PBOD.

[\[note: 6\]](#) See page 182 of PBOD.

[\[note: 7\]](#) See page 183 of PBOD.

[\[note: 8\]](#) Ibid.

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