Bayerische Landesbank Girozentrale v Sng Chee Hua
[2000] SGHC 46

Case Number : Suit 130/1999

Decision Date : 24 March 2000

Tribunal/Court : High Court

Coram : Lim Teong Qwee JC

Counsel Name(s) : Ronald Choo and Michael Tan (Allen & Gledhill) for the plaintiff; Tan Yah Sze (Kang Associates) for the defendant

Parties : Bayerische Landesbank Girozentrale — Sng Chee Hua

Civil Procedure – Summary judgment – Whether plaintiffs' affidavit contains all necessary evidence in support of claim – O 14 r 2 Rules of Court 1997

Contract – Illegality and public policy – Loan agreement – Whether enforceable – Whether loan illegal under s 29(1) of Banking Act (Cap 19, 1999 Rev Ed) – Whether loan illegal under ss 4(1), 4(2) and 8 of Exchange Control Act of Malaysia – Whether loan illegal under Bretton Woods Agreements Act (Cap 27, 1985 Rev Ed) – Whether loan illegal under Malaysian Code on Take-overs and Mergers and Securities Commission Act of Malaysia

: The plaintiff (`bank`) is a company incorporated in Germany and carries on banking business by its branch office in Singapore. It has been doing so for a number of years and it is not disputed that it is in possession of a licence granted under the Banking Act to conduct such business.

The defendant (`Mr Sng` or `customer`) is a resident of Malaysia where the bank does not carry on banking business. On 15 March 1995 the bank issued a `facility letter` addressed to him in Malaysia. The facility letter was received by him and he does not deny that he signed it and by doing so agreed to the terms and conditions contained in it as stated in the acknowledgement signed by him.

The facility letter provided that the bank agreed to make advances of credit to the customer in United States Dollars and one or more optional currencies except Singapore Dollars `on a revolving basis in an aggregate principal amount at any one time outstanding not to exceed USD7,000,000` or the equivalent. Mr Sng said in an affidavit filed in these proceedings that he was then financially viable to the bank as he had a `reputation of a rich businessman from Malaysia`. He said that he had a controlling interest in a company called SAAG Corporation Bhd which was listed on the Kuala Lumpur Stock Exchange in Malaysia.

The facility letter also provided for it to be read together with the bank`s standard terms and conditions governing banking facilities and for a security agreement relating to shares and other securities to be executed. A copy of the standard terms and conditions was attached to the facility letter.

Interest was payable on each advance at the rate of `1.0% per annum above the Cost of Funds (COF) quoted by [the bank`s] Treasury Department`. There was also an `arrangement fee` of 0.125% of the loan amount to be paid. The interest period was one month or three months or six months at the election of the customer and the agreed interest was payable on the last day of the interest period. The default rate was 5.0% per annum above COF quoted by the bank`s treasury department.

On 14 December 1998 the bank`s solicitors wrote two letters to Mr Sng. In one they alleged that JPY777,468,948 was due and owing as at 11 December 1998 and in the other they alleged that GBP300,663 was due and owing as at the same date. Both letters were expressed to be without

prejudice to other sums outstanding in other currencies and in both letters a demand was made for payment within 14 days. Payment was not made and on 21 January 1999 this action was commenced.

In its statement of claim the bank referred to the arrangements for the multi-currency revolving credit (as the credit facility under and pursuant to the facility letter has come to be called) and said that it `extended credit Japanese Yen and Great Britain Pound` to Mr Sng. I think it meant and was understood to mean that the bank lent money to Mr Sng in Japanese Yen and Great Britain Pounds. It is alleged that as at 11 December 1998 JPY777,468,948 and GBP300,663 were due and owing and the bank claimed these amounts and interest.

An appearance was entered for Mr Sng and a summons for judgment was issued. On 12 November 1999 assistant registrar Thian Yee Sze gave judgment for the bank for the two sums claimed and for interest at 5% per annum above the COF quoted by the bank`s treasury department. Mr Sng appealed and on 19 January 2000 I dismissed his appeal. He has given notice of appeal and these are my written grounds.

A large number of affidavits filed in this action and in another were referred to and in his affidavits Mr Sng frequently departed from making statements in relation to relevant facts only. In the circumstances I asked counsel for the grounds on which it was to be submitted that I should allow the appeal and dismiss the application for judgment or make some other order under O 14 rr 3 and 4. She has provided me with a list and I will take each of the grounds in turn.

Failure to comply with O 14 r 2

Order 14 r 2 provides for affidavits to be received in evidence and para (8) of this rule states:

> *An affidavit or affidavits for the purpose of this Rule must contain all necessary evidence in support of or in opposition (as the case may be) to the claim, or a part of the claim, to which the application relates ...*

Counsel submitted that the affidavits did not contain sufficient evidence of the amount claimed.

I was referred to Mr Hansen`s first affidavit where he said in para 8:

> *As at 11 December 1998, the defendant had failed to settle outstanding credit payments on the Multi-Credit Revolving Facility to the extent of JPY777,468,948 and GBP300,663. On 14 December 1998, the plaintiffs had, through their solicitors, Messrs Allen & Gledhill, written to the defendant to demand payment within 14 days of the said outstanding credit payments due and owing from the defendant ...*

Counsel submitted that this evidence was insufficient. She referred to **Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof** [1989] SLR 290 where LP Thean J (as he then was) said at p 292:

> *... I was informed that the plaintiffs had since the commencement of the action sold all the shares held by them as security and credit had yet to be given for the net proceeds received by the plaintiffs. Clearly on that ground, the judgment then entered was not in order, and I adjourned the hearing to another date to enable a further affidavit to be filed by the plaintiffs giving particulars of*

the sales, the net proceeds received and the balance of the amount owing.

At the hearing of an application for judgment all the affidavits which have been received in evidence may be read and in coming to a decision any evidence in support of or in opposition to the application may be taken into account whether it be contained in an affidavit filed by one party or the other. In this case it is not even necessary to refer to any affidavit other than Mr Hansen`s first affidavit as to the amount claimed. In para 4 of Mr Hansen`s first affidavit he said:

> *Pursuant to the Facility Agreement, the plaintiffs extended credit Japanese Yen and Great Britain Pound to the defendant to the limit of USD7,000,000 or the equivalent thereof.*

This follows closely the language used in the statement of claim and as I have said earlier I think it means that the bank lent money to Mr Sng in Japanese Yen and Great Britain Pounds. Reading this with para 8 there can be no doubt that the evidence is that the bank has granted loans to Mr Sng in Japanese Yen and Great Britain Pounds and that as at 11 December 1998 the amounts claimed were outstanding and were due and payable.

In ***Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof*** the plaintiff commenced the action claiming about $2.1m and applied for judgment. Judgment was given for the amount claimed but in fact between commencement of the action and the hearing of the application for judgment the amount owing had been reduced by the sale of certain assets held as security. It was in those circumstances that the learned judge allowed a further affidavit to be filed giving the particulars.

I do not think that the passage cited means that a claim by a banker against its customer and the evidence in support must give `particulars of the sales, the net proceeds received and the balance of the amount owing` in every case where property held as security had been sold and that for an application for judgment under O 14 such particulars must be given and verified by affidavit. In the case before me the particulars have not even been asked for. I do not think that the evidence is insufficient by reason only of the absence of such particulars.

Amount claimed denied and no amount admitted due

Mr Sng said in his affidavit that he took issue over the rate of interest charged. He said he did not have a record of his own position statement issued by the bank and he referred to those of some of his associates. Counsel said that interest was charged to the accounts of these associates at rates varying from 26.5% per annum to 40.77% per annum. She said that under the arrangements the bank `could deduct any amount from other bank accounts held by [Mr Sng] and that included nominee accounts which he had the power over` and that it was `highly possible that the amounts accrued in the nominee accounts` were included in the bank`s claim. She did not say it but the argument must I suppose proceed on the basis that the accounts of these associates were `nominee accounts` which Mr Sng `had the power over`.

My attention has not been drawn to the provision in the documentation of the arrangements between the bank and the customer that counsel referred to but if there was a provision in the terms mentioned by her or in similar terms it would only mean that money in those accounts could be transferred to Mr Sng`s own account to reduce his own indebtedness and not that his own account

could be charged with any indebtedness under the other accounts. There is also no evidence that he had any power over these accounts.

Mr Sng has not denied that loans had been made to him in Japanese Yen and Great Britain Pounds. The ground under this head is that ` ***it is highly possible*** ` the indebtedness of his associates had been included in the claim against him and that such indebtedness included interest at very high rates. Mr Hansen denied any knowledge of the nominees or associates in his affidavit but for the purpose of this appeal I do not have to come to a finding on this. On the basis of counsel`s submission alone I do not see that the indebtedness claimed has been denied or that the claim includes any other person`s indebtedness.

Illegality

Breach of s 29 Banking Act (Cap 19)

Section 29(1) of the Banking Act (Cap 19) provides:

> *Subject to subsection (3), a bank shall not -*
>
> *(a) grant or permit to be outstanding to any one person or to any group of persons under the control or influence of any one person, any credit facilities if the aggregate amount of such credit facilities exceeds 25% of its capital funds or such other percentage not exceeding 100% of its capital funds as the Authority may approve;*

Subsection (3) provides for exceptions which are not applicable in this case. The loans to Mr Sng were of the order of about USD91m in the aggregate as alleged by him and the case is that this exceeded 25% of the bank`s capital funds.

No evidence has been adduced as to the capital funds of the bank. Counsel was unable to say what the bank`s capital funds were at any time. The onus is clearly on the customer alleging the illegality and this has not been discharged.

Breach of ss 4 and 8 Exchange Control Act 1953 of Malaysia (`ECA (Malaysia)`)

Counsel for Mr Sng conceded (and in my view quite properly) that the proper law of the contract between the bank and the customer was the law of Singapore. Her argument was that performance of the contract meant lending on the part of the bank and repayment on the part of the customer. She said that both the lending and the repayment took place in Malaysia. Since the loans had not been repaid in full I think she meant that the contract provided for repayment to be made in Malaysia. She did not direct my attention to any such provision and I have not come across any such provision in the documents before me.

Section 4(1) of ECA (Malaysia) provides:

> *Except with the permission of the Controller, no person, other than an authorised dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an*

authorised dealer.

Mr Sng`s case is that he borrowed foreign currency and the bank lent him foreign currency and that all this took place in Malaysia.

Counsel referred to the bank`s loan confirmation statements exhibited to Mr Sng`s first affidavit. She said that payment of the loan money was made to the customer in Malaysia. There were four statements. Three related to loans in Malaysian Ringgit and only one related to a loan in Great Britain Pounds. Under s 2 of ECA (Malaysia) `foreign currency` did not include Malaysian Ringgit and counsel did not attempt to submit that the three documents relating to loans in Malaysian Ringgit evidenced transactions which she said were in breach of s 4(1). They clearly did not.

The bank`s loan confirmation statement as regards the loan in Great Britain Pounds stated:

We confirm our loan to you value 5 Feb 98 maturing 9 Mar 98

CCY	Principal	Interest Rate	Interest	Total
GBP	278,463.62	9.0000000	2,197.19	280,660.81
Payment at maturity date to our a/c with Barclays Bank plc London		Payment at value date by Barclays Bank plc London		
Payment by	Payment to			
We await your advice	We await your advice			

All that Mr Sng said about this statement in his affidavit was that along with the three other statements `the nature of the transactions with [the bank] is illustrated in the documents`.

The statement shows on its face that the bank awaited Mr Sng`s advice as to where payment of the loan money was to be made to him. He has given no evidence that payment was made to him in Malaysia. The contract did not provide where payment to him was to be made or that payment to him was to be made in Malaysia only or to be remitted to an account in Malaysia only. In his affidavit Mr Sng stopped short of saying in which country or to which account payment to him was as advised by him to be made or in fact made.

Counsel has not made good the point that the foreign currency which was the subject of the loan was paid to the customer in Malaysia or that the payment to him was made in Malaysia. However I should observe that the place of payment is only one of the matters which may be taken into consideration. The question in this case is whether the customer did or did not `in Malaysia ... borrow any ... foreign currency` within the meaning of that provision in the law of Malaysia.

Borrowing is really the other side of the same transaction as lending and I think to borrow money (or foreign currency) is to enter into a contract with a lender whereby the lender pays or agrees to pay a sum of money (or foreign currency) to the borrower or to another person by the authority of the

borrower in consideration of a promise by the borrower to repay on demand or at some future time. See **Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd & Anor** [1995] 3 SLR 268 at p 272 and the authorities cited.

The bank`s loan confirmation statement was clearly issued in Singapore where it carried on banking business. The bank did not carry on banking business in Malaysia. It confirmed payment by a London bank and the bank awaited the customer`s advice. I think it means that payment by the London bank would be made to a payee or account on the customer`s advice. Counsel did not say that this evidenced a borrowing having taken place in Malaysia but I should have thought that what this evidenced was a borrowing that took place in Singapore.

Section 4(2) of ECA (Malaysia) provides:

> *Except with the permission of the Controller, no person resident in the scheduled territories, other than an authorised dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency from, or selling or lending any gold or foreign currency to, any person outside Malaysia.*

Mr Sng`s case is that as security for the loans he mortgaged his shares and the mortgage took place in Malaysia. I assume for the purpose of this appeal that he was a `person resident in the scheduled territories` although `scheduled territories` does not appear to be defined. Counsel submitted that s 4(2) of the Act was infringed and she referred to the evidence of Mr Sugunasingam a Malaysian legal practitioner.

Mr Sugunasingam said in his affidavit:

> *... even if one accepts the court`s decision [in **Keppel Finance Ltd v Phoon Ah Lek** [1994] 3 MLJ 26] that a person is not prohibited from doing any of those things outside Malaysia (p.37D) the preparatory acts alone inside Malaysia are sufficient to cause the contract to be avoided.*

I assume for the purpose of this appeal but without deciding the point as the evidence is not altogether clear that Mr Sugunasingam`s opinion is that the mortgage of shares was an act which was in association with or preparatory to borrowing foreign currency. The real difficulty with Mr Sugunasingam`s opinion is that assuming that the mortgage is an act that is prohibited it appears to me that it is the mortgage alone that may be unenforceable but not the loan. He has not addressed this issue.

Mr Lazar, another Malaysian legal practitioner, said in his affidavit:

> *As for Mr Sugunasingam`s point that in Keppel, the court held that s 4(2) had been contravened, what was actually said was: `There is no doubt that it can be said that the defendant in the instant case, when he without the permission of the Controller applied as he did from Malaysia to Singapore for the borrowing, contravened s 4(2) ...` It is not a contradiction for the court to then hold that the actual borrowing that took place in Singapore did not run foul of s 4(2). If therefore there was a contravention of the ECA in Keppel, it was the defendant who was in contravention, and a party cannot rely on his own act of default to avoid a contract.`*

I think Mr Lazar`s opinion is that if the customer contravened s 4(2) in the mortgage of the shares but did not contravene s 4(1) in the borrowing of foreign currency because the borrowing did not take place in Malaysia then the loan was enforceable.

This is an issue which Mr Sugunasingam has not addressed as I have pointed out. Mr Lazar has and he has also referred to ***Keppel Finance Ltd v Phoon Ah Lek*** a decision of a superior court of Malaysia. I have read the report of that case and I am satisfied that I can accept the opinion of Mr Lazar. There is no evidence to show that the mortgage of shares which according to counsel took place in Malaysia in breach of s 4(2) of the Act rendered the loan for which the security was given void or otherwise unenforceable in the law of Malaysia but on the contrary the evidence is that notwithstanding any breach of s 4(2) in this case the loan itself was not affected.

Section 8 of ECA (Malaysia) provides:

> *Payments in Malaysia*
>
> *Except with the permission of the Controller, no person shall do any of the following things in Malaysia:*
>
> *...*
>
> *(c) place any sum to the credit of any person resident outside the scheduled territories: ...*

Again I assume for the purpose of this appeal that the bank was `a person resident outside the scheduled territories`. Counsel conceded that there was no evidence of any payment to (or of any sum having been placed to the credit of) the bank. This ground must fail.

Breach of Bretton Woods Agreement Act (Cap 27)

Counsel referred to the Bretton Woods Agreement and said that the effect of the performance of the contractual arrangements between the parties was that Japanese Yen and Great Britain Pounds were exchanged for Malaysian Ringgit. She was unable to point to any provision in the contractual arrangements which involved any exchange of any currency for Malaysian Ringgit but on the materials before me there was no exchange contract. See **Singapore Finance Ltd v Soetanto & Ors** [1992] 2 SLR 407 . Counsel has not shown how an exchange contract would arise.

Breach of Malaysian Code on Take-overs and Mergers

Shares in SAAG Corporation Bhd were mortgaged to the bank and these shares as Mr Sng alleged amounted to more than 33% of the total issued shares of the company. Counsel said that the bank became the beneficial owner of all these shares and under the Malaysian Code on Take-overs and Mergers the bank was obliged to make a general offer for the remaining shares. She went on to say that upon the bank`s failure to do so it was in contravention of the Securities Commission Act of Malaysia. She conceded that there was no evidence as to these matters of Malaysian law and this ground must also fail.

Set-off and counterclaim

Mr Sng said in his affidavit:

> *As a result of a new ruling imposed by the Kuala Lumpur Stock Exchange sometime in late 1998 which requires [the SAAG Corporation Bhd] shares to be deposited in the beneficial owner`s Malaysian Central Depository Account, I am advised and verily believe that the [bank] failed, refused and/or neglected to do and now these securities have been transferred to the Minister of Finance thus causing loss to me.*

Mr Sng did not disclose the source of the advice which he said he verily believed and his evidence is inadmissible as regards the advice he received.

Counsel referred to a letter from the bank dated 16 September 1998 in which the bank advised Mr Sng as regards disclosure of beneficial ownership of the shares to Malaysian Central Depository. In that letter the bank said:

> *... as per the telephone conversations between [Mr Sng] and Ms Kathy and our Mr Wayne Lau, we shall proceed with the said registration of shares to protect your interest.*
>
> *Should you have any questions pertaining to this matter, please call Mr Wayne Lau at tel no: 3906691.*

There is no evidence of any further communication in regard to this matter.

On the basis of the materials before me this ground also fails. Counsel said that there were other reasons why this action should proceed to trial but she also said that all these other reasons related to a set-off and counterclaim arising out of a failure to realise the security early and the transfer of shares to the Malaysian Minister of Finance. No particulars as to these other reasons were given and there is no evidence pointing to these reasons.

At the conclusion of the hearing I was satisfied that there was no issue or question in dispute which ought to be tried or that for some other reason there ought to be a trial. There is no ground for dismissing the bank`s application. In my judgment the learned assistant registrar was right to have given judgment for the bank and the appeal is accordingly dismissed with costs which I fixed at $3,500.

Outcome:

Appeal dismissed.