Kwee Seng Chio Peter v Biogenics Sdn Bhd
[2002] SGHC 298

Case Number : Suit 1079/2001

Decision Date : 11 December 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : R Chandra Mohan and Edric Pan (Rajah & Tann) for the plaintiff; Danny Chua and Tan Hui Tsing (Joseph Tan Jude Benny) for the defendants

Parties : —

Companies – Directors – Nominee director bound by knowledge of person for whom he acts

Companies – Directors – Powers – Director authorised to sign loan document in absence of formal resolution – Whether board of directors' informal acquiescence sufficient to vest authority in director to accept loan agreement on behalf of company

Contract – Formalities – Existence of agreement – Whether parties aware of loan agreement

Contract – Formalities – Whether loan agreement binding on defendant company

Judgment

GROUNDS OF DECISION

1. This was an action by the Plaintiff, Peter Kwee Seng Chio ("Kwee") against the Defendants, Biogenics Sdn Bhd ("Biogenics") claiming the return of RM7 million remitted in three tranches pursuant to a Loan Agreement dated 16 August 2000. At the conclusion of a three-day trial on 15th, 16th and 18th October 2002, I gave short reasons and allowed the Plaintiff's claim together with contractual interest and costs. The Defendants have on 15 November 2002 appealed against my decision. I now set out my reasons in full.

2. It is the Plaintiff's case that the terms of the loan are found in a Loan Agreement dated 16 August 2000. The Defendants defaulted on the loan and hence this action.

Early Negotiations

3. It is necessary to mention in some detail the central role played by Ricky Goh ("Goh") a former director of Grandlink Group Pte Ltd (now in liquidation) and the background dealings between Goh and Kwee. Goh is now a bankrupt.

4. At all material times, Goh was a director with a substantial interest in Seng Hup Corporation Berhad ("Seng Hup"), a public company incorporated in Malaysia. Seng Hup ran into serious financial difficulties and on 9 September 1999 was placed under Special Administrators appointed pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998. Consequently, Seng Hup's listing on the Kuala Lumpur Stock Exchange was suspended. Goh as "promoter" emerged with a rescue plan or scheme to save and restructure Seng Hup. As a "promoter", Goh was required to pay the Special Administrators a deposit of RM2 million as a commitment to the scheme.

5. Under this restructuring scheme, Goh was to "inject" an income-generating property into Seng Hup to make it commercially viable and with a view to re-listing the company on the Kuala Lumpur Stock Exchange. The target acquisition was the Standard Chartered Bank Building at no. 2 Jalan

Ampang, 50450, Kuala Lumpur. It was said that Goh was able to secure the purchase of the Standard Chartered Building ("the building") at a favorable price and then lease back the building to the bank after completion of the sale and purchase. Seng Hup would issue fresh shares to the Defendants in exchange for the building. With the completion of the restructuring, Seng Hup shares were expected to be re-listed and rise substantially in value.

6. In the restructuring exercise, Goh was assisted by one Law Lee See ("Law"). Law was the managing director of Seng Hup. Biogenics, a shelf company incorporated in Malaysia on 15 May 2000 was used by Goh as the vehicle for the sole purpose of acquiring and holding the building. In July 2000, Goh appointed Ang Bee Kiong ("Ang") and Liow Seng Kee ("Liow") as his nominee directors and shareholders. They were the first directors of Biogenics and each held one share, there being only two shares allotted at that time. Both Ang and Liow were long-time employees who had worked for Goh in his restaurant as kitchen help and cashier respectively. Both admitted that Biogenics was one of the many companies controlled by Goh. Both also admitted that they were his nominees and as such, were subject to the direction and control of Goh. At all material times, Ang and Liow were also the nominee directors and shareholders of Sentowana Sdn Bhd.

7. In or about April 2000, Goh was introduced to Kwee by a long-time business associate Andrew Quek ("Quek"). Goh invited Kwee to participate in the Seng Hup restructuring scheme. A sum of RM7 million was required for the down payment of the purchase, expenses for securing the purchase and security deposit of RM2 million to the Special Administrators. Kwee met Law on several occasions in the course of negotiations for the loan and thereafter in connection with the purchase of the building. The building was purchased for RM42 million. Quek who also testified that Law attended several meetings leading to the conclusion of the loan corroborated Kwee's evidence.

8. Kwee agreed to lend Biogenics the RM7 million. The principal sum together with interest thereon at 3% above the prime lending rate of one of the then top four local banks in Singapore was to be repaid by 30 March 2001. For providing the loan, Kwee would receive a 20% interest in Biogenics. The remaining 80% stake would be distributed amongst Goh (60%), Quek (10%) and Law (10%). Quek explained that 10% would be earmarked for Law for his efforts in arranging and coordinating the purchase of the building and in the management of the building. Quek would get 10% for his role as the middleman who brought the parties together.

9. As security for the loan and 20% stake in Biogenics, it was agreed with Goh that Kwee would retain (i) all the original share certificates of the Defendants and share transfer forms (Form 32A) executed in escrow; (ii) directors' resolutions for the appointment of additional directors and approval for transfer of shares also executed in escrow and (iii) undated letters of resignation from the two nominee directors. The loan was also separately secured by a personal guarantee from Goh and Quek. On instructions of Kwee, Lim Lian Kee ("Lim") of M/s Chong, Chia & Lim prepared the necessary documentation.

The Defendants' witness - Knowledge of the loan

10. The Defendants called Law, Ang and Liow to testify on behalf of the Defendants. All testified that they knew nothing about Kwee's loan to Biogenics. Having seen and heard the three of them in the witness box, I found them to be unsatisfactory and unreliable witnesses. There were times when their oral evidence contradicted their written statements and with each other. Ang's testimony also contradicted his affidavit filed in Order 14 proceedings.

11. Overall, the objective facts in evidence discredit their testimony. The contemporaneous documents showed that Law gave instructions to Kwee to remit RM7 million in three tranches

between August and October 2000. There were two receipts issued to Kwee that plainly acknowledged the money as a loan to Biogenics. The receipts were prepared on the instructions of Law and signed by Ang. Sentowana Sdn Bhd issued two other receipts and they acknowledged that the money remitted by Kwee was "for the account of Biogenics". The fifth receipt is for the RM2 million security deposit for the restructuring scheme. In addition to receipts, there were exchanges of correspondence that described the loan of RM7 million as between Kwee and Biogenics.

12. The provision of security in the factual matrix was consistent with the structure of the entire transaction where the Defendants' obligations as borrowers were separately secured by individuals. Ang and Liow admitted to signing the blank transfer forms, which together with the share certificates were handed to Law. It was Law who couriered the share certificates and duly signed blank transfer forms to the Plaintiff as security for the loan. Kwee still has in his hands the two share certificates pledged to him as security. Goh and Quek furnished additional security in the form of a personal guarantee for the loan.

13. Looking from their point of view, Law, Ang and Liow at best misunderstood the situation. The other probability is that they manufactured their recollections. Given the combined vested interest in disclaiming the loan, the latter conclusion is in my view the more likely. Liow in his oral testimony said that Goh who is a bankrupt "is on the run". He and Ang no longer regarded themselves as Goh's nominee. After Goh's disappearance, the directors appointed Law to handle the affairs of the company. When queried, " to whom does the company now belong to?" Ang replied: "the three directors", meaning himself, Liow and Saari bin Lajim who is Law's nominee. In the witness box, Law claimed a 40% stake in Biogenics. It is obvious that with Goh out of the picture, Law, Ang and Liow stood to benefit from the multimillion-ringgit building owned by Biogenics. The Plaintiff's claim threatened to deprive them of the windfall. It is reasonable to infer from all the objective facts in evidence, and I so find, that Law, Ang and Liow were, at all material tines, aware of the loan between Kwee and Biogenics.

14. Should a different view be taken as to their knowledge of the loan, as a matter of law, Ang and Liow as nominee directors would be imputed with the knowledge of the loan transaction that Goh, their puppet master, possessed. If a person allows himself to be a mere nominee of, and acts for another person, without the exercise of his own discretion or volition, in utter disregard for his duties as a director of the company, that nominee director must be bound by the notice which the other person, for whom he acts, has of the nature of the transaction. Such was held by Ungoed-Thomas J in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073.

15. In *Selangor United Rubber Estates Ltd*, the defendant, Cradock, had obtained a controlling interest in the shareholding of the plaintiff company through improper use of the company's own funds via two nominee directors appointed by him to the company's board. Soon afterwards, the company was compulsorily wound up and the defendant left England. The Board of Trade brought proceedings against the two nominee directors in the company's name to recover the sums improperly paid away. Finding the two directors liable for misapplication of funds, being fixed by the court with knowledge of the defendant's improper purpose, Ungoed - Thomas J held:

> "In Gray v Lewis [(1873) 8 Ch. App. 1035 at p.1056] Mellish LJ said: 'If a person allows himself to be the mere nominee of, and acts for another person, he must be bound by the notice which that other person for whom he acts has of the nature of the transaction.' [1094]
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> ……..

> In my view, a director acting in a transaction on the direction of a stranger is fixed with that stranger's knowledge of the nature of the transaction. .. [1095]
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> They exercised no discretion or volition of their own and behaved in utter disregard of their duties as directors to the general body of stockholders or creditors or anyone but Mr. Cradock. They put themselves in his hands, not as their agent or adviser, but as their controller. They were puppets which had no movement apart from the strings and those strings were manipulated by Mr. Cradock. They were voices without any mind but that of Mr. Cradock; and with that mind they are fixed in accordance with the view which I have already expressed on the law. .."
> [1123]

The Defendants' case

(i) Loan to Biogenics was from Goh

16. It is the Defendants' pleaded case that they did not make or accept any loan from the Plaintiff. In Further & Better Particulars furnished on 3rd October 2002, the Defendants stated that funds to finance the purchase of the building came from Goh (10%) and MBF Finance Bhd (90%). Of the RM7 million remitted, the Defendants admitted to receiving RM4.2 million from the Plaintiff but averred that the money was remitted on behalf of Goh from whom the money was borrowed.

17. This alleged loan from Goh was oral. No particulars of the terms of the alleged loan were pleaded. It was therefore not surprising that at the trial, the Defendants led no evidence of this alleged oral loan between Biogenics and Goh. Law's testimony that he was told by Goh that the latter had taken the money from Kwee (intending to imply a personal loan between Goh and Kwee) is hearsay and inadmissible. I have already found that Ang and Liow were aware of Kwee's loan to Biogenics. In the result, the defence on this issue failed.

(ii) Loan not binding on Defendants

18. In this case, the Defendants have refused to be bound by a loan document which on the face of it was signed on their behalf. From the terms of the loan document itself, no conclusion could be drawn that the parties did not intend that the loan document executed by them should constitute a legally binding contract. The terms of the loan document were typical of a commercial agreement intended to be binding.

19. It was therefore necessary for the Defendants to overcome the general rule that extrinsic evidence is not admissible in order to prove that the intention of the parties was other than that appearing on the face of the document. It was for the Defendants to show that the exception to the parol evidence rule applied in this case: s94(a) Evidence Act (cap97).

(a) Did Ang sign on the loan document?

20. The Loan Agreement bore Ang's signature. The Defendants admitted that the signature of Ang on the Loan Agreement was genuine but unauthorised. Ang said that he did not remember the occasion where he had signed on the loan document. It was contended that the Loan Agreement was printed on one of the many blank pieces of A4 size paper that Ang had previously pre-signed on instructions of Goh. As this contention was not put to Kwee in cross-examination, Counsel for the Plaintiff submitted that Kwee's account of the creation of the loan document was not contradicted by way of cross-examination and therefore the court should accept what Kwee said: see *Browne v Dunn* (1893) 6 R 67; S*eet Melvin v Law Society of Singapore* [1995] 2 SLR 323 at 338 and *Dr. Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408.

21. Kwee, Quek and Lim were hardly challenged on their respective evidence on the matter. Nevertheless, from reading the pleadings, written statements, notes of evidence and closing submissions, it is clear that Kwee was well aware of the issue. The rule would not apply in circumstances where notice of the matter in issue was so distinctly and unmistakably given and it would be a waste of time in putting questions to Kwee upon it: see *Browne v Dunn* at p71. In any event, I did not think that the failure to comply with the rule in *Browne v Dunn* led to any prejudice.

22. Having looked at the loan document carefully, I find the Defendants' contention completely untenable given the positioning of the signature on the execution page relative to the format and text of the entire document. There was no sign of manipulation of the text to accommodate the signature.

23. In any case, Lim, the Plaintiff's solicitor, testified that he prepared and later emailed in draft the Loan Agreement, Deed of Guarantee and Warranty and Undertaking to the Plaintiff who printed out the draft documents. When the loan document was handed to him by the Plaintiff, it had only the Plaintiff's signature on it. Quek confirmed this. Having spotted the omission, Lim asked the Plaintiff to collect the Defendants' signature. Kwee passed the loan document to Quek and Goh to get it signed by the Defendants. It was later returned to Lim with Ang's signature on the loan document. In my judgment, I find that Ang did sign on the loan document itself in his capacity as director of Biogenics.

(b) Is the loan unauthorised in absence of a resolution?

24. On the question of authority, the Defendants argued that it was not bound by the Loan Agreement in the absence of a resolution approving the loan and authority of Ang to bind the Defendants. It was common ground that the power to borrow money was within the express powers of the Defendants under the memorandum of association.

25. The Defendants' contention that, on the facts of this case, the rule in Turquand was displaced had little weight or substance. There was no evidence as to when the Plaintiff or his lawyers had caused a registry of companies search to be carried out on Biogenics. After the Loan Agreement was signed but before the third tranche of the loan was disbursed, Lim had on 11 October 2000 as a matter of housekeeping asked Law to send the various documentation required of Biogenics which included a resolution approving the loan. It may be inferred from Law's reply that he had asked Kwee for the wording of the resolution which Kwee sent to Law on 24 October 2000. The Defendants did not provide the Plaintiff with a signed resolution as promised by Law. It would, in my view, be extremely unfair to allow the Defendants to use their own omission or failure against the Plaintiff. Besides, it cannot be said that the transaction was one in which the Defendants did not stand to benefit even if the Plaintiff was in any of the ways allegedly put on inquiry.

26. The Defendants also submitted that the Plaintiff ought to have been put on inquiry by the very fact that Ang and Liow were nominee directors and shareholders. On a balance of probabilities, the converse argument is the more likely. Biogenics was the deliberate creation of Goh for the

restructuring scheme. There was evidence as to the reason for the loan, which, in my judgment, was initiated and arranged by Goh, and the loan document was initialled by Goh to signify his consent to all the terms that he had negotiated and accepted in its final form on behalf of the Defendants. Ang together with Liow were persons who were accustomed to act on the directions and instructions of Goh. On the facts, I find that the circumstances were not such as to put the Plaintiff upon an inquiry.

27. In *SAL Industrial Leasing Ltd v Lin Hwee Guan* [1998] 3 SLR 482, the Court of Appeal expressed the view that informal assent of all the directors of a company could be tantamount to a resolution of the board. So, if an opposite view is taken that in this case the rule in Turquand was displaced, the Loan Agreement would still bind the Defendants if there was informal assent. It is reasonable to infer, as I do, from the objective facts in evidence that Ang was authorised to sign the loan document even though the transaction was not formally authorised by a resolution. It is unrealistic to reach any conclusion other than it was carried out with the consent and knowledge of Ang and Liow. I have already found that the directors were aware of the loan. It is not the Defendants' case, as will be remembered, that the security documents executed in escrow were prepared from pre-signed A4 size pieces of paper. It was in connection with the loan that all the security documents were created and then handed over to the Plaintiff. Having signed two directors' resolutions in escrow, it is likely that Ang and Liow would, if asked to do so, have signed the resolution approving the loan.

28. Ang and Liow were prepared to do whatever Goh required. Goh manipulated the strings and Ang and Liow responded to the directions like puppets. Evidence of compliance is significant for the reason that it is consistent with and hence is proof of consent or acquiescence. Ang and Liow admitted that everything was done at the behest of Goh who had put in place the loan to the Defendants.

29. I, therefore, find that the board had informally acquiesced in Ang's acceptance of the Loan Agreement on behalf of Biogenics. This was sufficient to vest authority in Ang. The Loan Agreement was thus binding on Biogenics.

Result

30. For all these reasons, I gave judgment for the Plaintiff for the principal sum of RM7 million with costs together with interest of RM1,361,285.01 as at 18th October 2002 and thereafter interest to continue at the contractual rate of 8.5% per annum until date of payment.

Sgd:

BELINDA ANG SAW EAN

JUDICIAL COMMISSIONER

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