Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd
[2005] SGHC 134

Case Number : OS 456/2004, RA 179/2004

Decision Date : 29 July 2005

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Hri Kumar and Wilson Wong (Drew and Napier LLC) for the plaintiff; Michael Hwang SC and Ernest Wee (Michael Hwang) and Oommen Mathew (Haq and Selvam) for the defendant

Parties : Oversea-Chinese Banking Corp Ltd — Infocommcentre Pte Ltd

Banking – Lending and security – Overdrafts – Overdraft facility granted for purpose of supplementing defendant's working capital – Whether facility granted for fixed term or particular purpose – Whether facility recallable on demand

Contract – Consideration – Forbearance – Whether variation of terms effected by compromise arrangements contractually ineffective – Whether fresh consideration furnished

Contract – Misrepresentation – Inducement – Whether plaintiff's failure to disclose document in its possession amounting to act of misrepresentation – Whether such misrepresentation inducing defendant to enter into compromise arrangements with plaintiff

29 July 2005

V K Rajah J:

Background

1 The defendant is an investment company, its sole asset being a substantial piece of vacant land at Lot 1669 of Mukim 20, Tagore Drive/Tagore Avenue ("the Property"). Around 1995 the defendant entered into an agreement with Bank of Singapore ("BOS") for the provision of banking facilities. Pursuant to a letter of offer dated 18 July 1995, BOS granted the defendant a US$17,000,000 short term advance facility ("the LOF"). The LOF stated specifically that the purpose of the facility was to "supplement the working capital requirements" of the defendant. Clause 17 of the LOF further provided that "the facility is subject to our periodic reviews and the Bank reserves the right to continue with the facility herein offered".

2 Clause 3 of a short term advance facility agreement dated 31 October 1995 ("the STAFA") between the parties also stipulated that:

> The Facility shall be used to supplement the Mortgagor's working capital and/or such other purpose(s) as may be approved by the Bank

Clause 8 of the STAFA reiterated that BOS was entitled to terminate and cancel the facility as it thought fit.

3 The facility was secured by a mortgage dated 31 October 1995 ("the Mortgage") together with a guarantee for the sum of US$17m furnished by Dr Ang Thian Soo ("Dr Ang"), a director of the defendant, who is in effect its alter ego. The Mortgage secured the defendant's entire registered estate or interest in respect of the Property in favour of BOS. Upon the defendant's acceptance of the facility, it drew promptly on the facilities and applied the moneys to its own use.

4 In 1998, the STAFA was restructured and converted into a Singapore dollar denominated overdraft facility.

5 By way of a further letter of offer dated 13 February 1998 ("the FLOF"), BOS offered the defendant a Singapore dollar overdraft facility to be utilised in order to repay the then existing US dollar facility. The FLOF which was concisely captioned "Restructuring of Facility" sought quite simply "to fully repay the existing US$ Short Term Loan". There was no express offer of additional or fresh funds to the defendant. In line with the earlier LOF, cl 15 of the FLOF provided that the facility granted to the defendant was "repayable on demand".

6 The defendant agreed to the implementation of the restructured facilities. There was no alteration to the security arrangements save that Dr Ang was to execute a fresh guarantee in the Singapore dollar equivalent based on the prevailing exchange rate at the point of conversion.

The release letter

7 The defendant now alleges, *inter alia* that BOS had also agreed to release to the defendant and/or its contractor, upon the completion of a commercial warehouse project ("the Proposed Project") on the Property, 40,000 sq ft of saleable area ("SA") equally distributed on all floors and free from any encumbrance. The defendant contends that BOS subsequently reneged on this important agreement. I pause at this juncture to set out briefly the pertinent factual context.

8 It is incontrovertible that by early 1998 the defendant had defaulted on its contractual obligations to BOS. The value of the Property as it then stood, and indeed even more so as it stands now, was insufficient to repay the outstandings. The defendant claims that it intended to repay BOS by developing the Property and thereafter employing the sale proceeds in discharge of its debt. As it did not have sufficient funds to pay for the development, it proposed paying the main contractor by releasing the 40,000 sq ft of SA of the completed warehouse to the contractor as payment in kind. The defendant claims that BOS agreed to this arrangement.

9 The defendant also adds that BOS's agreement allegedly to release the SA "equally located at all floors to the Contractor for arranging construction finance" was documented in a "Supplemental Letter of Offer" to the defendant issued in 1998. BOS was acquired by the plaintiff sometime in 2000. When the plaintiff asked the defendant to produce that letter, the defendant claimed that it had misplaced its copy and asked in turn that the plaintiff let it have its file copy. It is pertinent to note that at this point of time the bank officers who were liaising with Dr Ang were not the same officers who had earlier dealt with him. The bank officers, after having combed through the files, claimed they could not find the letter in question and informed Dr Ang that they could not substantiate his claim.

10 The plaintiff, however, subsequently managed to locate the letter dated 18 February 1998 ("the Release Letter") and has produced it in these proceedings. In the Release Letter, BOS had informed the defendant that it was agreeable to release 40,000 sq ft of SA free from encumbrance to the contractor. The defendant now claims that this letter is nothing short of a "Supplemental Letter of Offer". For the ease of reference the Release Letter is reproduced in full:

> We refer to the above and *your proposed development of a 4-storey showroom/warehouse/office complex thereon with M/S RAP International Consultants and its Associates*.
>
> We are pleased to inform you that the Bank is agreeable to allow partial discharge of 40,000 square feet of warehouse or office space, free of payment, upon the *proposed complex*

development receiving Temporary Occupation Permit from the authorities.

Furthermore the bank is agreeable to allow partial discharge of the remaining warehouse or office space room upon receipt of not less than $510 per square feet or 85% of the sales proceeds, whichever is higher.

[emphasis added]

It is important to note that the Release Letter itself did not specify where the 40,000 sq ft of SA was to be located.

11 The plaintiff, on the other hand, contends that even if there was such an agreement in February 1998 for the 40,000 sq ft to be "equally located on all floors" it is wholly irrelevant as the parties subsequently arrived at an express written agreement on the exact location of the SA to be released to the contractor in connection with any proposed development of the property.

12 The plaintiff granted the defendant several extensions of time and considerable indulgence since 1998 but despite this no progress has been made in relation to the development of the Property. Despite the full drawdown on the facilities the development of the Property never commenced.

The recall of the facility

13 The plaintiff eventually reached the end of its tether. By way of a letter dated 16 April 2002, the facilities granted to the defendant pursuant to the LOF and FLOF were terminated. The plaintiff demanded that the defendant effect full repayment of all the outstanding sums failing which it would take appropriate steps to protect its interests. The defendant did not at this juncture dispute its liability to pay. Instead, the defendant entered into discussions and negotiations with the plaintiff with a view to obtaining the plaintiff's further indulgence.

14 After lengthy and extensive negotiations with the defendant, the plaintiff reinstated the overdraft facility on the basis that the defendant comply with various terms and conditions. The defendant unequivocally accepted the additional terms and conditions. This compromise agreement is evidenced by the defendant's acceptance of the plaintiff's letters dated 20 September 2002 and 2 October 2002 (collectively "the first compromise agreement"). Consistent with the existing facility, the plaintiff was once again expressly conferred the discretion to review and/or terminate the facility as it saw fit.

15 Despite the further indulgence granted to the defendant pursuant to the terms of the first compromise agreement, the defendant failed to comply with its obligations. The defendant then entered into further discussions and negotiations with the plaintiff and exhorted the plaintiff to withhold remedial action.

16 The plaintiff once more acceded to the defendant's request and revised the facility terms yet again. Pursuant to a letter dated 29 November 2002 ("the second compromise agreement") the plaintiff agreed to continue granting the defendant the use of the credit facility on fresh terms. The second compromise agreement stipulated that the existing security arrangements were to remain and Dr Ang's express consent *qua* guarantor to this compromise was also sought. Clause 17 of that letter stipulated:

Notwithstanding anything herein to the contrary, expressed or implied, the Facility hereby agreed

to be made available by the Bank, shall at the absolute discretion of the bank, be reviewed from time to time and at any time, or be revised, reduced or cancelled accordingly.

The plaintiff's letter of 16 April 2002 recalling the facility was expressly revoked and the first compromise agreement deemed superseded by the second.

17 On 5 December 2002, the defendant and Dr Ang accepted the terms of the second compromise agreement without qualification. The plaintiff had hoped that with such carefully negotiated detailed terms for the Proposed Project the defendant would honour its commitments. This, however, was not to be.

18 The defendant again, and it would not be unkind to say, quite predictably, failed thereafter to fulfil its fresh obligations. The plaintiff, after terminating the facility by way of a letter dated 27 March 2003, then agreed to revise some of the terms and conditions. The plaintiff subsequently issued supplemental letters of offer dated 7 August 2003 and 15 October 2003 (collectively "the third compromise agreement") to vary some of the terms of the letter of offer dated 29 November 2002. These letters were again accepted by the defendant.

19 Pursuant to the varied terms, the parties agreed, *inter alia*, to the following:

(a) The defendant would procure its contractor, Union Corporation (China) Pte Ltd ("Union") to furnish a performance bond of not less than S$1.3m to be assigned to the plaintiff.

(b) The sale price for each floor of the proposed development was fixed. However the plaintiff reserved the right to revise the minimum selling price of the units from time to time at its sole discretion.

(c) All proceeds from the sale of the Proposed Project were to be paid into a project account with the plaintiff.

(d) An area of 40,000 sq ft of SA on the third storey of the proposed development as delineated on such as plans approved by the plaintiff was to be released to Union free from encumbrance upon completion of the Proposed Project.

(e) The defendant was to pay the plaintiff the monthly sum of S$30,000 towards interest.

(f) The defendant would ensure Union would adhere to a target timeline and/or work schedule acceptable to the plaintiff.

20 Despite the lengthy and arduous negotiating process and the substantial concessions made by the plaintiff, the defendant was once again unable to adhere to its commitments under the third compromise agreement. This was the final straw as far as the plaintiff was concerned. It had lost all confidence both in the defendant and in Dr Ang's ability to honour their commitments.

21 Pursuant to a letter dated 18 November 2003, the plaintiff through its solicitors terminated the facility arrangement and demanded repayment of the sum of S$33,430,514.23. The defendant was unable to comply with this demand and now claims that the plaintiff has acted in bad faith and/or inappropriately throughout their various negotiations and compromise agreements.

Overview of train of proceedings to date

22 Earlier in the proceedings the plaintiff successfully obtained summary judgment against the

defendant before Assistant Registrar Joyce Low ("AR Low"). AR Low ordered that the defendant pay the plaintiff the sum of $34,668,133.72 with interest thereon as at 12 April 2004 and declared that the plaintiff was entitled to take possession of and sell the Property. AR Low, in entering the summary judgment, had refused to admit in evidence two affidavits filed by the defendant literally at the eleventh hour. When the appeal was first heard by me, I allowed the defendant to file the further affidavits as well as additional affidavits by Dr Ang and Mr Freddy Yeo ("Mr Yeo"), a former vice-president (corporate banking) of BOS who had principal carriage of the dealings between the parties when the facilities were initially arranged. These additional affidavits were filed on the day of the hearing. I allowed the defendant to rely on these affidavits as Mr Hwang, counsel for the defendant, claimed he had only been briefed a week earlier.

23 At the conclusion of the resumed hearing, I indicated to the parties that I required additional submissions on certain legal issues. Shortly before this final hearing, the defendant filed yet another draft affidavit by Dr Ang introducing several new and *prima facie* material documents. Extensive new factual arguments were also canvassed. Plaintiff's counsel vigorously opposed the application to admit the fresh evidence. Defence counsel asserted "it would be unfair to the appellant if he was shut out" and that the "court is making a decision of great magnitude".

24 After careful deliberation, I allowed, albeit reluctantly, the admission of the further evidence. I was concerned that some of the factual assertions therein, although raised again at the last moment, gave the defence some verisimilitude, and could raise triable issues. I was not inclined to deprive the defendant of an opportunity to place all the material facts before the court. However, I directed that Dr Ang make himself available for cross-examination, and further that the defendant make full disclosure of all material documents in its possession to preclude it from springing any further surprises.

25 The hearing before me was therefore somewhat unusual in that while I was essentially dealing with a summary judgment appeal I also had the benefit of hearing oral evidence of the defendant's principal protagonist, Dr Ang. After entertaining extensive submissions by both parties, I dismissed the defendant's appeal as being wholly unmeritous. As the defendant has appealed against my decision, I now give my reasons for the decision.

The alleged triable issues

Misrepresentation

26 The defendant alleges that it was induced to accept the various compromise agreements because of the plaintiff's misrepresentation that it did not have a copy of the Release Letter.

27 It is important to examine this allegation in its proper setting. The entire facility of US$17m extended by BOS pursuant to the LOF had been utilised by the defendant by 1998. The defendant has not articulated precisely how it spent this money. Suffice it to say that it was not utilised substantially for the purpose of developing the Property.

28 It is clear that BOS issued the Release Letter to assist the defendant in developing the Property. By then it was quite apparent that the defendant did not have sufficient resources to repay the entire outstanding loan facility without availing itself of the sale proceeds from the Proposed Project or through a sale of the Property.

29 However, the defendant did not take any concrete steps to commence any such development between 1998 and 2002. Dr Ang initially claimed, rather disingenuously, that the

development did not commence because the plaintiff had failed to advance to the defendant a further S$5m that it was contractually obliged to do. This is patently incorrect, (see [60] to [66] below).

30 It is incontrovertible that the defendant's account with BOS and the plaintiff was unsatisfactorily maintained between 1998 and 2002. There were several discussions during this period between the parties to resolve this unhappy state of affairs. The defendant acknowledged in correspondence the plaintiff's unambiguous right to review and to take appropriate steps to protect its interests. In a letter dated 2 July 2001, the defendant informed the plaintiff that it would be selling the Property by tender as "there is practically no possibility of our undertaking the development". This letter followed a letter from the plaintiff dated 13 June 2001 demanding that the defendant regularise the unsatisfactory state of the facility. Further discussions ensued. The defendant then maintained that it was entitled to an additional facility of S$5m that was part of the alleged S$34m loan facility. The plaintiff vigorously disagreed.

31 Dr Ang also took the position that the defendant was entitled to 40,000 sq ft of SA "without conditions". In cross-examination he nevertheless acknowledged that he would accept reasonable conditions in order to achieve a commercial settlement. He admitted that he would not have agreed to the conditions had they been unreasonable. This testimony is important. It wholly undermines the defence that there was a misrepresentation by the plaintiff apropos the "missing" Release Letter. Dr Ang had signed the first compromise agreement unequivocally. Dr Ang could not coherently explain why he had agreed to accept the first compromise agreement and yet sought to maintain that there had been a misrepresentation. It is crystal clear that he willingly and unreservedly agreed with the plaintiff that the various compromise agreements would govern their relationship thereafter regardless of any pre-existing disputes (legitimate or otherwise) the parties had.

32 To succeed in its contention of misrepresentation, the defendant has to demonstrate, *inter alia*, that there had been an inducement arising out of a false misrepresentation made by another party. *Halsbury's Laws of Singapore* vol 7 (Butterworths Asia, 2000) at para 80.189 states:

> An essential ingredient of an operative misrepresentation is that it influenced or induced the representee in his decision to enter into the contract. There would be no inducement if the representee did not know of the representation or was aware of its untruth or was not influenced by it, as where he would have entered into the contract even had he known the true facts or where he relied on his own judgment or investigations.

33 The defendant, however, is unable to show precisely what the purported misrepresentation was and how such a purported misrepresentation effectively induced it to enter into the various compromise arrangements. First of all, the defendant and Dr Ang failed to satisfactorily explain when and how it lost its own copy of the Release Letter. Secondly, neither Dr Ang nor defence counsel could point to any written request for this letter prior to June 2003. In his written submissions, defence counsel described Dr Ang as "being no fool". I agree. Dr Ang strikes me as a shrewd businessman, perfectly capable of looking after his and the defendant's interests. He has shown a remarkable ability to document all manner of facts and issues – ranging from trivia to critical issues. It is curious, to say the least, why there is no written evidence of his "earlier" requests, if indeed they were made. Admittedly, Dr Ang does appear to have asked the plaintiff's Ms Sylvia Chang ("Ms Chang") for the Release Letter in September 2002. From the evidence, this appears to have been the first request made of Ms Chang and/or the plaintiff and Dr Ang does not appear to have been unduly perturbed when Ms Chang was unable to extend a copy of the Release Letter. Thirdly, the Release Letter would have been material earlier if the defendant genuinely intended to develop the Property. However the defendant acknowledged in its letter of 2 July 2001 that there was "practically no possibility" of proceeding with the development. Even counsel for the defence,

Mr Hwang, could not credibly assert that this situation had been caused by the "missing" Release Letter. Dr Ang had no alternative but to concede during cross-examination that the letter would have proved to be entirely irrelevant if the defendant had sold the Property.

34 Critically, the defendant's documents (disclosed only after the court directed discovery) established that the defendant itself had felt it was not viable to develop the Property unless the Urban Redevelopment Authority ("URA") reinstated the plot ratio of 2.5 which had been permissible when the Property was initially purchased. Indeed, the defendant had in 1984 received permission to develop the Property with a plot ratio of 2.5. However, in line with a policy re-evaluation of the relevant precinct, the URA lowered this plot ratio to 2.0 in June 1996. The defendant in its correspondence and representations to the URA maintained that any development with the then applicable plot ratio of 2.0 was "financially unviable" and "suicidal". The defendant's numerous appeals to the URA and the Minister for National Development were to no avail. Regrettably, the defendant did not voluntarily disclose these facts in its affidavits. It became clear to me in the course of the proceedings that the defendant had consciously decided not to bare all the relevant facts in its desperate attempt to create triable issues. There is ample evidence reflecting that between June 2001 and September 2002, the defendant had decided that a commercial project of the Property with a plot ratio of 2.0 was not commercially sensible. Indeed, in a letter to the Minister for National Development dated 21 June 2001, the defendant stated:

> 7.1 *We have not commenced the development because it is not viable to do so with the plot ratio of 2.0 and also partly because of the economic situation.*
>
> …
>
> 11.6 To go ahead and develop the [P]roperty based on a plot ratio of 2.0 will be suicidal *besides no bank will fund this project*.
>
> [emphasis added]

35 Significantly, Dr Ang also accepted during cross-examination that the Release Letter neither impeded discussions with the contractors nor impaired the defendant's attempts to develop the Property. It is also significant that not one of the numerous affidavits filed by the defendant in these proceedings specifically adverted to thwarted attempts to develop the Property stemming from the defendant's inability to produce the Release Letter.

36 Initially, the defendant appointed Myriad Forte Projects Pte Ltd ("Myriad") as its contractor to develop the Property. Myriad accepted the defendant's representation that 40,000 sq ft of SA would be allotted to it even in the absence of written confirmation or the Release Letter. However, it subsequently backed out of the arrangement after the plaintiff allegedly imposed terms and conditions in its 20 September 2002 letter. The defendant has, however, led no cogent evidence to show that after Myriad pulled out of the Proposed Project, its attempts to secure another contractor were hampered by the "missing" Release Letter. Indeed, on the contrary, on 23 October 2002, the defendant appointed Union to assume carriage of the development. Once again, there is no satisfactory evidence that the Release Letter was material in any significant way.

37 I am satisfied that the absence of the Release Letter did not materially affect the defendant's position in advancing or preserving its interests either with the plaintiff and/or the contractors with whom it had discussions. Indeed, it is plain to me after listening to the contents and the verbal nuances of a conversation Dr Ang had with Ms Chang in September 2002, which he had surreptitiously taped, that Dr Ang himself did not attach any real significance to the letter. To that extent, the defendant's contention that the bank's failure to locate or disclose the Release Letter in

its possession amounted to misrepresentation simply does not stand up to scrutiny.

38 The Defence also contends that the Release Letter evidences an agreement between the parties that the plaintiff would release 40,000 sq ft of SA without restrictions; this, it claims, was in contrast to the first compromise agreement which was fettered by "restrictions" that the defendant had been constrained to accept. Again, this contention misses the point entirely. It cannot be seriously disputed (see [56] below) that the plaintiff was entitled to recall the facilities at its discretion. If the plaintiff had such a right, then it is clearly disingenuous for the Defence to assert that the Release Letter would have made a material difference. The plaintiff was clearly at liberty to rewrite the script as it saw fit once the defendant started to persistently and habitually default on its obligations. In any event, the plaintiff did not, as far as I can see, act unreasonably in imposing the terms of the various compromise arrangements. It had legitimate interests to protect. Furthermore, it clearly wanted the defendant to complete the Proposed Project without compromising its interests any further. It had quite understandably lost confidence in the ability of the defendant to proceed with, let alone complete, the Proposed Project. Moreover, it bears emphasis that, even if Myriad found such terms difficult to satisfy, Union was quite prepared to initially proceed on the basis of these terms.

39 Mr Hwang also contended that the defendant would have been in a better position to negotiate with the plaintiff if the defendant had had possession of the Release Letter. He is missing the point. The real issue is whether the Release Letter had any overriding legal effect committing the plaintiff to adopt a particular course of action. It did not. The Release Letter was tantamount to a statement of intention that presupposed that the banking facilities were still in existence and satisfactorily maintained. One final subsidiary point: a perusal of the Release Letter (see [10] above) indicates that the discharge of 40,000 sq ft of SA was specifically in relation to a *proposed development* with M/s Rap International Consultants and its associates. Such a development never materialised. On the contrary, it was abandoned. It stands to reason that the plaintiff had never through the Release Letter committed itself to *any* type of proposed project or irrevocably compromised or forfeited its ability to act as it saw fit in order to recover its outstandings in full. The Defence is plainly barking up the wrong tree in attempting to conjure a legal commitment from the contents of the Release Letter. This is plainly another extended and unproductive exercise in legal Micawberism.

40 It is also important to stress that the defendant's contention that the Release Letter irrevocably allowed it to allot space on any floor is undermined by its own letter of 22 August 2003 to the plaintiff which pointedly states:

> However, approximately 2 years ago, *on our own initiative*, we attempted to fix all the 40,000 sq ft at the 3rd storey as payment in kind to the contractor for the Design and Construction of the Project, *and OCBC did not object to our attempt*. [emphasis added]

41 This document strikes at the heart of the defendant's contention relating to the alleged criticality of the Release Letter. Dr Ang could not credibly reconcile the contents of this letter with the present stance maintained by the defendant's counsel.

42 I should also add that I am not persuaded that the purported minutes of 29 August 2002 produced by the Defence, at a very late juncture, accurately reflect the parties' discussions apropos the Release Letter. These minutes were apparently prepared by Dr Ang's daughter and conveniently echoed the position taken in some earlier affidavits. I have serious concerns as to whether these minutes were in fact prepared after the affidavits had been filed. It is also curious, to say the least, that the minutes were handed to the defendant's solicitors only after the initial written submissions in

the appeal proceedings had been exchanged.

43 It is moreover highly significant that there was no mention in the earlier affidavits that Ms Chang had allegedly informed Dr Ang that the availability of the Release Letter would place the defendant "in a different position". Finally, the veracity of the minutes, allegedly dated 29 August 2002, is wholly undermined by the taped conversation of the discussion between Ms Chang and Dr Ang on 11 September 2002 which the Defence itself produced. I had directed that the tape be played in open court. It is clear to me that in the 11 September 2002 exchange, Ms Chang appeared to be quite nonplussed as to what all the fuss about the Release Letter was. She did not appear to have had any prior discussion with Dr Ang on this issue. When I communicated my impression to counsel, Mr Hwang then rather surprisingly observed that this was "not a big thing". In my view, if the minutes were genuine this would have cast quite a different light onto the contentions advanced by the Defence. It would indeed have been "a big thing".

The effect of the various compromise arrangements

44 The Defence submits that the variation of terms effected by the various compromise agreements, were contractually ineffective as there had been no fresh consideration. Such an argument is made notwithstanding that the defendant had unambiguously accepted these terms at the material times without any qualification whatsoever. This contention is clearly untenable. In point of fact, pursuant to these compromise agreements, the plaintiff, *inter alia*, withdrew its various letters of demand and further exercised forbearance in relation to its rights. This by itself constitutes sufficient consideration: see *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393 and my observations in *Chwee Kin Cheong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at [139]. In addition, the facility arrangement was reinstated and the defendant given additional time to complete construction at the Property. The defendant's monthly interest payments were also reduced.

45 Purely for the sake of argument, it should also be noted that even if the compromise arrangement(s) were impeached, the plaintiff nevertheless retained extensive and uncompromised rights in relation to the Property pursuant to the LOF, the FLOF and the mortgage documentation.

Were the facilities recallable in demand?

46 The Defence further contends that the facilities were extended for the primary purpose of developing the Property. It argues that it would accordingly be inconsistent with such a purport and intent for the facility to be recalled on demand prior to the redevelopment of the Property. There are two strings to the defendant's bow in relation to this contention. The first was that the plaintiff could not demand the repayment of the loan until the Proposed Project had been completed. Secondly, the plaintiff was obliged to do everything possible and reasonable in helping the defendant to complete the Proposed Project.

47 Dr Ang under cross-examination acknowledged that the LOF expressly preserved the plaintiff's right to recall it on demand. He accepted that the defendant had agreed to accept the facility on the basis of the plaintiff's overriding discretion to recall it. The FLOF also conferred a similar right on the plaintiff. The purpose of that restructuring exercise was merely to convert the US dollar loan into Singapore dollars. Dr Ang was unable to coherently articulate how the 1998 LOF, which expressly permitted a discretionary and an "on demand" recall, had been modified. Indeed, I find his contrived attempts to shore up this line of defence tenuous and contrived. The express purpose of the FLOF was to supplement the defendant's "working capital requirements". It is undisputed that the defendant did not utilise the facility to develop the property. Such a line of defence, if correct, would be tantamount to asserting that; notwithstanding the plaintiff's *express rights* to recall the facilities

on demand, notwithstanding that the facilities were *not employed* by the defendant towards the development of the Property, and last but not least notwithstanding the defendant's *persistent default* on its obligations to maintain the facility in a satisfactory manner, the plaintiff was nevertheless constrained from recalling the facility until the Property was developed. This is absurd. One might as well suggest that the ordinary banker-customer relationship had either started off as a quasi joint venture relationship and/or had somehow evolved itself into such a union without BOS or the plaintiff ever intending it to. In the absence of unequivocal representations grounding such an allegation, it surely cannot pass muster and must be categorically rejected.

The* Titford *gloss

48 The Defence also relied on the unreported decision of *Titford Property Co Ltd v Canon Street Acceptances Ltd* (Chancery Division, 22 May 1975) ("*Titford*") in support of its nebulous claim that the plaintiff is precluded from exercising its express rights until the purpose of the loan is fulfilled. This contention is again misconceived.

4 9 *Titford* appears to be a decision that is largely peculiar to its factual matrix. The facility in that case was for *a fixed term* of 12 months and the documentation appeared to cogently indicate that the bank in that case had unequivocally committed itself to allowing the borrower to achieve the loan's specific objective. In the circumstances of that case it was held that it was inappropriate for the bank, notwithstanding a documented right to withdraw the facility contained in an incorporated standard printed form, to prematurely and without adequate justification terminate its contractual commitment. Goff J observed:

> *It seems to me, where a bank allows an overdraft for a fixed term for a specific purpose – whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here*. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure.
>
> … [S]o construed clause 9 [*ie*, the "on demand" clause] is in my judgment completely repugnant to the whole facility. [*The bank*] *could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in incurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time*. In my judgement, therefore, I must modify clause 9, by reading it as subject to the provision as to the duration of this facility, or ignore it altogether.
>
> [emphasis added]

50 In the present matrix, the facility was not expressly granted for a fixed term or indeed for any special or particular purpose. The LOF expressly described the facility as being extended for "working capital purposes". The funds were not provided here solely for the development of the Property. Indeed, Mr Yeo on behalf of the defendant itself confirms that it was BOS's "understanding that the defendant had their [*sic*] own means or connections to complete the construction on their own". It also bears reiteration that the defendant did not employ the facility to develop the Property. There is no inconsistency between the plaintiff's express discretionary right to recall on demand and the express purpose of the facility. I cannot understand how the Defence can even begin to contend that the plaintiff has in these circumstances hamstrung itself contractually. There is certainly no basis for

implying any such term.

51 It is also correct to say that the *Titford* decision itself does not lay down any wider principle of general application. In *Williams and Glyn's Bank Ltd v Barnes* [1981] Com LR 205 ("*Williams*"), Gibson J incisively observed:

> *It is clear to me that Goff J decided that the true purpose of the agreement contained in the facility letter was to provide money to be laid out in a development project with a view to profit. A provision for repayment on demand was, he concluded, repugnant to that main purpose. If on the proper construction of that agreement, the true purpose had been held to be that the bank would lend the money for the project, on terms that the lending should not in any event extend beyond the term date, and on the terms that the bank's participation should continue only so long as the bank judged it useful in their own interest to continue the lending, then there is nothing in the judgment of Goff J, to require that provision for repayment on demand to be disregarded as repugnant*. If the judgment of Goff J did require such a conclusion upon a different construction of the facility letter, if justified, and is to be regarded as stating that in a contest for primacy between a term loan, and a clause for repayment on demand, the provision for the term loan must always prevail, then, with respect, I should not feel able to follow it. Such a conclusion would in my judgment be contrary to the basic principle of the common law of contract, restated by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [[1980] AC 827] to the effect that parties to a contract are free to determine for themselves what primary obligations they will accept, subject to certain well known categories of exception which are not relevant to this point. I take the true principle to be that stated by Lord Denning MR, in *Neuchatel Asphalt Co v Barnett* [[1957] 1 All ER 362] which Goff J, cited: "It is a well settled rule of construction that if one party puts forward a printed form of words for signature by the other, and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the words specially agreed, then the court will limit or reject the printed word so as to ensure the main object of the transaction is achieved." Further, in determining what the main object and intention of the transaction is, the court is not free to disregard the provision in the contract which it is sought by this doctrine to exclude: in this case, the provision for repayment on demand. *The point of construction can perhaps be expressed by asking, with reference to the term in question, can the bank in including the term in their document, reasonably have supposed that the borrower would treat it seriously? Alternatively, in the circumstances, and on the terms of the contract, must the borrower sensibly or reasonably have supposed that the bank meant the term to be effective? If those questions can be answered in the sense that the bank could not reasonably have supposed that the borrower would treat the clause seriously, and that the borrower could not sensibly be expected to have supposed that the bank did mean the term to be effective, then the law both permits and requires the court to disregard the term.* [emphasis added]

52 The editors of the *Encyclopaedia of Banking Law* (LexisNexis, Issue 69, September 2004) at p C 271 have quite correctly endorsed the approach of Gibson J in *Williams.* In this regard I would be remiss if I did not also make a reference to the decision of *Lloyds Bank plc v Lampert* [1999] 1 All ER (Comm) 161. In that case the facility letter stated that the amounts due under the overdraft facility were repayable on demand. It further provided that it was the bank's *present* intention to make the facility available until 28 February 1997 or such later date as may from time to time be advised in writing by the bank. Notwithstanding such a provision, the bank called in the overdraft on 10 July 1996. The English Court of Appeal considered both *Titford* and *Williams*. Kennedy LJ, on behalf of the court, opined at 167–168:

> I am wholly unpersuaded that the words 'repayable on demand' used in the facility letter do not

> mean what they say. *It is in no way inconsistent for a bank, or any other lender to grant a facility which it and the borrower both envisage will last for some time, but with the caveat that the lender retains the right to call for repayment at any time on demand. This is what happened here*. [emphasis added]

I should add that it is also settled law that a bank does not owe any duty of care to a borrower, or indeed any interested third party, when it exercises its discretionary right to withdraw overdraft facilities: *Chapman v Barclays Bank Plc* [1997] 6 Bank LR 315.

Characteristics of an overdraft facility

53 In summary, an overdraft facility is a loan arrangement by a bank to a customer. It can either be an express arrangement or be implied as when a bank without any prior request allows a customer to draw on his account. "A common feature of banking overdraft is that it may be withdrawn at any time by the bank": *per* Chao Hick Tin J (as he then was) in *Industrial & Commercial Bank Ltd v Li Soon Development Pte Ltd* [1994] 1 SLR 471 at 480–481, [42]. It would, in general terms, be correct to state that overdraft facilities are *prima facie* viewed to be repayable on demand even without an express stipulation spelling this out (*per* Gibson J in *Williams* ([51] *supra*) at 210):

> [T]his custom or usage [of banks lending on overdraft] is no more than recognition of the rule of law which results from the nature of lending money: money lent is repayable without demand, or at latest on demand, unless the lender expressly or impliedly agrees otherwise.

That said, the bank's right to reclaim payment of the overdraft at its pleasure may be abrogated by an agreement, express or implied: E P Ellinger, Eva Lamnicka & Richard H Wooley, *Modern Banking Law* (Oxford University Press, 3rd Ed, 2002) at 641. If there has been an agreement to extend an overdraft facility for a specified period or particular purpose, an attempt to prematurely terminate the relationship may be enjoined as a breach of contract.

54 A term loan, on the other hand, is a facility for a fixed period that contemplates payment at or before the end of that period. An overdraft for a fixed period, *eg* a bridging loan, is a hybrid creature bearing characteristics of both a term and overdraft facility. In such a case a bank has to exercise prudence in unequivocally spelling out its contractual rights. In the absence of a clear stipulation, a bank may find that general clauses (say, in printed forms) contemplating an "on demand" discretionary right to recall an "overdraft" facility might be viewed as inconsistent with or repugnant to the express purpose of that facility. In short, an express term that an overdraft facility is repayable on demand will usually be given effect to although this is not invariably the position, particularly if the purported right is repugnant to an agreement the parties have reached on the express purpose and/or duration of the facility. Banks and their advisers should take pains to spell out clearly the parties' intentions and rights. From time to time a bank may find that reliance on a standard printed term conferring a general right of recall may be found to be misplaced if such a general right collides plainly with the agreed intent and/or purpose of a loan.

55 It seems plain to me that whether a facility is recallable on demand or not is in the final analysis simply an issue of interpretation. Substance takes precedence over form. Labelling a term loan "an overdraft facility" will not alter the substance of that facility. In every case the court should be astute enough to probe the relevant factual matrix to ascertain the purpose of the loan and the lender's rights that prevail within that matrix. Have the parties expressly or impliedly agreed to any term relating to the length and/or duration of the facility? Is an "on demand" recall of the facility inimical or contrary to the agreed purpose of that particular facility? Also, knowledge of the usage of a particular facility should not as a matter of course be conflated with an agreed purpose or an

agreement to extend a facility for a particular period. *Titford* must be understood and interpreted as a decision engendered on its own special facts, as is the case with the decisions of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76 and *Bumiputra-Commerce Bank Bhd*, *Kuala Terengganu v Chendering Development Sdn Bhd* [2004] 1 MLJ 657.

56 It is incontrovertible that both BOS and the plaintiff had unfailingly reiterated their overriding right to recall the facility on demand. The LOF, STAFA, FLOF and the compromise agreements all contain practically identical clauses spelling out in no uncertain terms BOS's and the plaintiff's express right to recall the facility on demand. There was no representation or indeed even the slightest intimation by the plaintiff that it would not exercise its contractual discretionary right to recall, on demand, the facilities. In point of fact the plaintiff repeatedly and tirelessly conveyed to the defendant in its correspondence and the various compromise agreements its intention to exercise this right should the need arise. Dr Ang and the defendant not only knew this, they fully understood the true purport of the plaintiff's right and accepted it at each and every material juncture.

57 For completeness, I must also emphasise that even if the purpose of the banking facilities was to permit the development of the Property this ought to have taken place within a reasonable period. Dr Ang has not been able to dispute this position. It is clear that the plaintiff was not responsible for the delay in commencing with the Proposed Project. The tenuous claim made earlier in these proceedings suggesting that the Proposed Project could not be commenced because of the plaintiff's failure to extend additional facilities is entirely without substance. The following statements annexed to the defendant's letter to the plaintiff dated 26 June 2001 provide a valuable insight into the actual state of affairs:

> 1.0 From 1984 to 1995, we withheld the development of the property because of uncertainty of market demand.
>
> 2.0 From 1995 to present time, we continue to withhold development because we are not confident of market demand.
>
> 3.0 Our decision not to commence the project during the short-lived industrial property upturn has proved to be correct; had we gone ahead, we would have been saddled with greater financial exposure.

58 It is clear both from this and evidence emerging from Dr Ang's cross-examination that the defendant's failure between 1995 and 2002 to commence development of the Proposed Project was the result of a unilateral decision it had taken. It had been unsuccessful in its attempts to persuade the URA to reinstate the initial plot ratio of 2.5. The defendant had not been candid with the plaintiff during this period. Dr Ang failed to clearly convey to the plaintiff that the URA had unequivocally rejected the defendant's appeal. He chose instead to paint a rosy picture of the Property's value and the applicable planning parameters when the reality was clearly otherwise.

59 It is also noteworthy that by mid-2001 the defendant had expressly stated that it intended to sell the property by tender. Even if there was a specific purpose in relation to the banking facility, such a purpose had clearly become unfeasible at that point of time. It is obvious that the defendant expects to have its cake and eat it. The plaintiff was clearly entitled, as a result, to exercise its contractual rights given both the parlous state of the defendant's finances and its dismal, repeated failures in satisfactorily maintaining the facility.

The alleged $34 million overdraft limit

60 Pursuant to the LOF, BOS had in 1995 furnished a facility of US$17m to the defendant. The entire loan was disbursed by 1998. The parties then decided to convert the loan to Singapore dollars to protect the defendant from further currency fluctuations.

61 The FLOF expressly stated that the purpose of the Singapore dollar denominated overdraft was to *fully* repay the existing US dollar facility. There is no written evidence of any other intention or agreement with BOS to furnish additional financial assistance.

62 On 18 September 1998, BOS wrote to the defendant as follows:

> Please be informed that we have on 17 September 1998 debited your account and made available an additional overdraft facility of S$4,229.149.07 which together with the existing limit of $25,677,599.61 will make a total overdraft facility of $29,906,748.68 being partial payment of your Short Term Advance facility and interest due today (debit advice attached). *We have in total converted US$17,000,000 as per our Letter of Offer dated 13 February 1998*. [emphasis added]

63 The defendant did not take issue with this letter nor indeed with any of the several statements of account dispatched to it during this period. The contention that the facility ought to be for S$34m is wholly unmeritorious. When Dr Ang was cross-examined on this issue his response was once again rather unsatisfactory:

> Q: Right. And you did not at any time write to the bank challenging these statements or telling them, "These statements are wrong. My OD is 34 million."
>
> A: We *did not bother to look at all these things*.
>
> Q: Thank you.
>
> A: We *assumed that the bank, whatever the bank sent is correct*.
>
> [emphasis added]

64 Dr Ang also asserted that he would not have signed a bank guarantee for S$34m if the banking facility was not for a corresponding amount. In my view this bald assertion alone is an insufficient basis on which to ground the allegation that BOS had agreed to extend additional funds. Why would the plaintiff extend additional financial assistance when the existing account was already being unsatisfactorily maintained? The following exchange between Mr Hri Kumar, the plaintiff's counsel, and Dr Ang is illuminating:

> Q: But the fact remains that the bank wanted you to settle everything up to – and only have an exposure of US$17m flat?
>
> A: Yes ...

65 In a tenuous attempt to establish an overdraft limit of $34m, Mr Hwang sought to rely on a letter dated 4 August 1998 written to the plaintiff by M/s Yeo Leong & Peh ("YLP") who were then acting for both parties in the documentation. YLP's letter stated:

> We note your instructions and confirmation that the prevailing exchange rate for the aforesaid facilities to convert the Borrower's existing US$ Short Term Loan of US$17,000,000 to a S$

> Overdraft facility is US$1 to S$2. In the premises, the personal guarantee from Dr Ang Thian Soo for the Short Term Loan of US$17M shall be for the sum of S$34M (that is US17M x S$2 = S$34M).

66 This letter was not addressed to the defendant. It made no reference to any overdraft limit. While this letter adverted to an exchange rate of US$1 to S$2, it did not state expressly that the overdraft facility itself would be for an equivalent amount. It did however state that "In the premises" the guarantee "shall be for" S$34m. More importantly, the plaintiff's own subsequent letter of 20 August 1998 confirmed that the exchange rate for one of the tranches was actually S$1.7480 for every US dollar. I do not attach any overriding significance to this YLP letter. Firstly, it pre-dated BOS's letter of 18 September 1998, addressed to the defendant, which states clearly that the total overdraft facility was of S$29,906,748.68 (see [62] above). Secondly, it is illogical that BOS would extend additional facilities of S$5m to the defendant when the existing account was less than satisfactorily maintained. Thirdly, all subsequent statements of account adverting to the $29,906,748.68 facility limit were accepted by the defendant without qualification. Fourthly, even Mr Yeo who filed an affidavit *on behalf of the defendant* in these proceedings did not make any reference to any agreed S$34m overdraft limit. An initial reference made by him in relation to the YLP letter in an earlier draft affidavit did not reappear in the affirmed affidavit. Finally, and in any event, I note that Dr Ang had acknowledged in the first and second compromise agreements that the correct amount extended through the restructured facility was $29,906,748.68.

Conclusion

67 After carefully considering the written submissions as well as reviewing Dr Ang's testimony, I rejected, without diffidence, the defendant's submissions on the alleged triable issues. I found Dr Ang to be an unsatisfactory witness – unwilling to face up to the truth and less than forthcoming on several material issues. A rather remarkable feature in these proceedings is how the defendant's position has continuously evolved through a catalogue of affidavits, which were tendered one after another invariably at the eleventh hour, after gaps and inconsistencies in its motley array of contentions were identified. I am also plagued by doubts about the authenticity of some of the minutes tendered by the defendant, (see for example [42] above). It appears to me that Dr Ang consciously and consistently misled the plaintiff on the various valuations of the Property and the updates of his discussions with the URA, not to mention the defendant's purported intention to sell the Property. On the basis of the established facts, Dr Ang can be fairly described as an individual who believes that the ends justify the means. Indeed in the course of cross-examination, Dr Ang actually acknowledged that he would say "anything" just to get the plaintiff "off his back".

68 As part of the court-directed discovery, the defendant's letter of 15 February 2002 to the Ministry of National Development ("MND") was produced. In this letter the defendant, *inter alia*, informed MND that:

> As you know, *OCBC had been very accommodating and patient* during the last 12 months mainly because of the favourable feedbacks [*sic*] of our telephone conversations and the possibility of change of use which would enhance the value of the subject site. [emphasis added]

It is amply evident that the plaintiff had indeed been more than "accommodating" with the defendant. The plaintiff cannot by any stretch of imagination be said to have acted precipitately. It had held back time and time again from enforcing its rights even after the defendant and the Proposed Project had quite clearly crossed the Rubicon of financial viability. The plaintiff had almost invariably accepted at face value whatever Dr Ang had "optimistically" chosen to convey to it apropos the progress of the Proposed Project as well as his discussions with MND. It is now clear that much of the picture he

portrayed to the plaintiff was, to put it mildly, inaccurate. In the ultimate analysis, the defendant has, and I say this emphatically, absolutely no basis to complain about the plaintiff's conduct in this matter. Given all that has transpired and particularly in the light of the plaintiff's repeated commendable restraint, Dr Ang's criticisms alleging bad faith against the plaintiff can be construed as nothing short of intemperate and churlish. In the result, I see no reason to disturb AR Low's decision.

Appeal dismissed.