City Hardware Pte Ltd v Goh Boon Chye
[2005] SGHC 25

Case Number : Suit 179/2004

Decision Date : 31 January 2005

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Peter Gabriel, Ismail bin Atan and Calista Peter (Gabriel Law Corporation) for the plaintiff; James Goon Hoong Seng and Sham Chee Keat (Ramdas and Wong) for the defendant

Parties : City Hardware Pte Ltd — Goh Boon Chye

Bills of Exchange and Other Negotiable Instruments – Cheques – Cheque truncation – Whether Cheque Truncation System modifying contractual obligations or liabilities on instrument intended to be negotiable instrument – Sections 89, 90 Bills of Exchange Act (Cap 23, 1999 Rev Ed)

Bills of Exchange and Other Negotiable Instruments – Duties of holder – Notice of dishonour – Whether notice of dishonour dispensed with – Whether defendant prejudiced or inconvenienced by failure to serve timeous notice of dishonour – Section 50(3)(c)(iv) Bills of Exchange Act (Cap 23, 1999 Rev Ed)

Bills of Exchange and Other Negotiable Instruments – Duties of holder – Presentment for payment – Whether bills of exchange must be presented for payment to engage payment undertaking of drawer or indorser – Whether requirement of presentment excused where drawer having no reason to believe bill would be paid if presented – Whether burden on defendant to satisfy court that presentment of cheque would have been appropriate and meaningful – Sections 45(1), 45(2), 46(3)(c) Bills of Exchange Act (Cap 23, 1999 Rev Ed)

Bills of Exchange and Other Negotiable Instruments – Presentation for payment – Plaintiff's bank returning cheque without physical presentment to defendant's bank – Whether plaintiff effecting proper presentment of cheque on defendant or defendant's bank qua agent – Sections 45(1), 45(2), 46(3)(c) Bills of Exchange Act (Cap 23, 1999 Rev Ed)

31 January 2005 *Judgment reserved.*

V K Rajah J:

1 This judgment ought to be read in conjunction with my judgment in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] SGHC 24 ("the Kenrich proceedings"). The plaintiff in these proceedings claims against the defendant on a cheque signed by him. The factual matrix can be stated in a brief compass.

2 In or about March 2000, the defendant visited the plaintiff's office. To reassure the plaintiff of his personal backing and support for business to be transacted with Kenrich Electronics Pte Ltd ("Kenrich"), the defendant handed the plaintiff's managing director, Lau Chui Chew ("LCC"), a blank cheque ("the Cheque") which he had signed. According to LCC, the defendant, who was the managing director of Kenrich, informed him that the plaintiff was entitled to complete the Cheque and present it for payment in the event Kenrich defaulted in its payment obligations to the plaintiff. The plaintiff asserts that it accepted the Cheque as security for outstandings due from Kenrich should Kenrich default on its repayment obligations.

3 When Kenrich did in fact default on its repayment obligations, the plaintiff completed the

Cheque on or about 30 June 2003 by dating it, naming itself as payee and stating the amount due to it, that is to say, the sum of $576,621.54.

4 On 30 June 2003, the Cheque was deposited with the plaintiff's bank for clearance. The plaintiff's bank, however, returned the Cheque the next day without arranging for the physical presentation of the Cheque to the defendant's bank. The Cheque did not conform to the then approved format for automated clearance and could not be electronically processed. It appears that since July 2002, cheque clearances in Singapore have been automated and a system of online image-based clearance procedures named the "Cheque Truncation System" ("CTS") has been implemented in banking on an industry-wide basis. The plaintiff made no further attempts to present the Cheque through manual clearance. Subsequently, the plaintiff served a notice of dishonour on the defendant on 3 October 2003. It is undisputed that the defendant did not have, at all material times, sufficient funds in his bank account to meet the amount claimed.

5 The defendant, in his original affidavit of evidence-in-chief, admits handing over the Cheque to the plaintiff. He, however, emphatically denies legal responsibility. He states:

> This was given at the request of the plaintiff to facilitate payment of any part of the said interest for outstanding loans should I be out of Singapore. At that time, neither Aloh [another company owed by the defendant] nor Kenrich had started a current account. The said blank cheque was a *temporary arrangement*. [emphasis added]

6 In a supplementary affidavit which was adduced only after the trial had commenced, the defendant dramatically changed his tack and adduced several new layers of facts and contentions in an attempt to refute liability. The relevant portions of this affidavit are reproduced:

> 3. The said instrument was a temporary arrangement and was meant to be obsolete when Kenrich or Aloh could use their bank accounts to pay the Plaintiffs.
>
> 4. The said instrument was only meant for any debt due and payable when the said instrument was given, and it was agreed by the Plaintiffs' Lau Chui Chew, that before presenting the said instrument, he would inform me of the amount and the intended presentment to enable me to arrange for sufficient funds to meet the amount concerned.
>
> 5. When Kenrich and Aloh subsequently began operating their respective bank accounts, I informed the said Lau Chui Chew in or about the middle of 2000 that I would not be using my DBS account no 0290097577 any more, for purposes of the business with the Plaintiffs.
>
> 6. In any event, when the new Cheque Truncation System ("CTS") came into being in or about July 2002, I assumed, from the Plaintiffs' conduct in not asking from me a fresh signed instrument which would comply with the CTS, that the Plaintiffs would no longer ask for payments from me.

Evaluation of evidence

7 I first consider the conflicting evidence relating to why the Cheque was given to the plaintiff by the defendant. In the Kenrich proceedings which were heard concurrently, I found the defendant to be an unsatisfactory witness. His testimony, in so far as it was relevant to these proceedings, was fraught with contradictions and discrepancies and only served to fortify my view that he lacked credibility.

8 The defendant had initially asserted that the Cheque was a "temporary arrangement" merely to service interest in the event it remained unpaid. This was obviously a tenuous concoction designed to buttress his principal line of defence – namely, that the transactions between Kenrich and the plaintiff were *de facto* moneylending transactions. In reality, amounts owing to the plaintiff on the invoices had never been apportioned. There were no known instances of "interest" *per se* being separately invoiced, apportioned or paid. Indeed, in his supplementary affidavit, such a contention was muted, if not altogether mute. He stated therein that the Cheque was meant to cover "*any debt* due and payable" [emphasis added] when it was given. In the face of such glaring contradictions the defendant was compelled to reluctantly concede that his earlier assertion that the Cheque was meant to cover only interest is "not true".

9 Soon after the initial exchange of affidavits of evidence-in-chief, the plaintiff's counsel specifically queried the defendant as to when Kenrich had opened its banking account. The defendant thereupon abruptly changed his stance and now asserts that the Cheque was given in February 2000 and not in March 2000 as earlier contended. It had become amply clear by then that Kenrich had opened a bank account from 11 February 2000. It also emerged during the hearing that Aloh had an operating account from January 2000.

10 The defendant's claim that the Cheque was given only as security for moneys "due and payable when the instrument was given" was another feebly conceived afterthought. The first transaction on which any moneys were due occurred only around 10 March 2000. The defendant ultimately acknowledged in cross-examination that the Cheque was "payment for anything which I [*sic*] owe to" the plaintiff.

11 The defendant also alleged that he later informed LCC sometime in the middle of 2000 not to present the Cheque as he "would not be using [his personal] account … any more". This assertion appears odd, to say the least. Firstly, his personal account continued to be in operation until at least July 2003. Secondly, even if he had informed LCC of this, he could not have unilaterally changed the basis on which the Cheque had been given and the understanding that the parties had, as long as the plaintiff continued to transact business with Kenrich. Thirdly, the defendant could not satisfactorily reconcile this version of events, which only emerged during the actual trial proceedings, with his earlier statement that the Cheque was only a temporary arrangement. When pressed to explain the various discrepancies in the various affidavits he had affirmed, he was at a complete loss for words and was incapable of giving a coherent response. All he managed was: "I don't know how to explain. I leave it to your Honour to decide, I don't know how to explain." The defendant found himself hoist by his own petard.

12 It appears to me that as evidence as to the true state of his personal as well as his companies' accounts slowly but surely crystallised, he attempted to clumsily tiptoe around inconvenient facts by throwing up alternative explanations in the desperate hope that at least one of his explanations would be accepted. I categorically reject each and every one of these variegated explanations as futile. I prefer instead the evidence of LCC who rendered his version of events in an entirely straightforward manner, remaining resolutely firm and convincing even in cross-examination.

13 The defendant's final abortive attempt in explaining his conduct came as a tepid attempt in contending that the CTS allegedly "modified" his agreement with the plaintiff. He states that he had assumed soon after the CTS was introduced that the plaintiff would no longer rely on the Cheque. This explanation again flies in the face of his original explanation that the Cheque was a "temporary arrangement". If the arrangement was of a temporary nature, it is strange that he should continue to give this matter any further consideration or thought whatsoever.

14 The defendant further alleges in his supplementary affidavit that there was an agreement that the plaintiff would inform him of the amount stated in the Cheque before it was presented. If indeed there was such an agreement, I have no doubt that the defendant would have raised this at the outset; not at the eleventh hour through his supplementary affidavit. Such a term would have been a vital point in any alleged agreement the parties had – a condition precedent. Instead, it was only pleaded after the trial had commenced. It also appears to me that if the Cheque was indeed meant to cover solely interest, as the Defence originally contended, there could be no mistake as to the defendant's maximum liability for each transaction. There was no need for any prior notification. I conclude that the parties never had any discussions on this issue.

15 I accept that the Cheque was given to the plaintiff in order to induce it to continue business with Kenrich, and as a testament of the defendant's good faith and financial commitment to their then blossoming, if not thriving, business relationship.

16 The Defence's contention pertaining to the CTS is yet another red herring. The CTS was introduced to facilitate and to automate the clearance of cheques in Singapore. It was not intended to affect the legal nature of cheques in Singapore. Indeed the Bills of Exchange Act (Cap 23, 1999 Rev Ed) ("BEA") was amended in 2002 to acknowledge and legitimise the reliance by banks on automated clearances by electronic means: see ss 89 and 90 of the BEA. The CTS dispenses with the need for physical presentation of cheques which comply with the prescribed CTS format. The physical cheque remains at the original bank of deposit and is thereafter presented and cleared by using electronically captured cheque data and images. Multiple steps of paper presentation and processing have thus been eliminated. The CTS is an arrangement reached between banks and the clearing house for the expedient electronic presentation and clearance of cheques. It does not preclude customers and banks from effecting a physical presentation of a cheque if they so desire.

17 The crux of the matter is that an instrument that is intended to be a negotiable instrument did not and does not lose the attributes of negotiability and its legal efficacy by a side wind through the introduction of the CTS. The CTS was not intended to modify contractual obligations or liabilities on instruments and agreements arrived at prior to, as well as after, its implementation. I am of the view that the plaintiff was under no obligation to request a replacement cheque from the defendant. The Cheque continued to be a valid negotiable instrument when the plaintiff completed it and deposited it with its bank. The real issues are, whether there was a proper presentment of the Cheque and whether presentment had been dispensed with.

Presentment

18 The plaintiff's claim on the Cheque is an independent cause of action based on its status as a bearer instrument. Notwithstanding the absence of any particulars, it remained a valid bill of exchange for the purposes of the BEA since it was clearly the intention of the defendant that the Cheque be utilised as a negotiable instrument in the event of a payment default by Kenrich.

19 The plaintiff pleads that the Cheque was duly presented despite the plaintiff's bank having returned the Cheque to it without physical presentment to the defendant's bank. This plea is incorrect. It is plain that the plaintiff did not effect a proper presentment of the Cheque on the defendant or his bank *qua* agent.

20 This is however a moot point. The plaintiff has in the alternative pleaded that the defendant had insufficient funds in his account at all material times and in the circumstances, the necessity for physically presenting the Cheque had been dispensed with. It bears mention that the defendant conceded during cross-examination that he never had sufficient funds in his account to settle the

invoiced amounts due to the plaintiff from time to time. Indeed he acknowledged that he had, during the entirety of the material period, less than $1,000 in his account. It is therefore pertinent, at this juncture, to pause and consider the sustainability of the defence of non-presentment in an instance where the drawer has insufficient funds in his account and the holder does not reasonably believe that the instrument will be paid if presented.

21 *Prima facie* all bills of exchange, inclusive of cheques, must be presented for payment in order to engage the payment undertaking of a drawer or indorser: s 45(1) BEA. If not so presented the drawer and indorser will be discharged: s 45(2) BEA. Generally speaking, presentment ought to be effected even if it might be ineffective:

> *English law has never, in general, favoured the view that presentment is dispensed with because it would in the circumstances be futile, i.e. because it is known that the bill will not in fact be paid*. Thus, at common law, it was held that due presentment was not dispensed with in cases where, to the knowledge of the holder, the drawer ordered the acceptor not to pay the bill or the acceptor became bankrupt or absconded before the due date, or where the acceptor stated that he could not or would not pay the bill at maturity. [The English equivalent of s 46(4) of the BEA] preserves this rule by providing that the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment. [emphasis added]

This passage from *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (Sweet & Maxwell, 15th Ed, 1998) at para 1172 accurately summarises the legal position in Singapore as well.

22 The BEA, however, accepts that presentment need not be invariably made and s 46 expressly enumerates the instances when presentment is excused:

> (3) Presentment for payment is dispensed with —
>
> (a) where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;
>
> (b) where the drawee is a fictitious person;
>
> (c) *as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented*;
>
> (d) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented;
>
> (e) by waiver of presentment, express or implied.
>
> (4) The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.
>
> [emphasis added]

23 Furthermore, s 46(3)(c) of the BEA specifically recognises that apropos the drawer, presentation may be dispensed with in certain situations (see *Chalmers and Guest* ([21] *supra*) at paras 1174 to 1176):

The prime example of the application of [s 46(3)(c) of the BEA] is where there are no funds in the account of the drawer of a cheque with the drawee bank and no arrangements made for an overdraft (with the result that the bank is not bound, as between itself and the drawer, to pay the cheque) and the drawer knows that the cheque will be dishonoured by non-payment. It also presumably applies where the drawer of a cheque countermands payment.

In contrast with the dispensation from giving notice of dishonour provided for in [the English equivalent of s 50(3)(c)(iv) of the BEA], the drawer must have no reason to believe that the bill would be paid if presented. The words "no reason" mean "no tenable reason". The relevant time would appear to be, in the case of a bill payable on or after a fixed date, the due date for payment, and, *in the case of a cheque or bill payable on demand, when the drawer would reasonably expect the instrument to be presented for payment.*

It is to be noted that presentment for payment is only dispensed with under paragraph (c) in respect of the drawer. Presentment is still necessary for the liability of indorsers. It is also to be noted that the fact that the *holder* has reason to believe that the instrument will, on presentment, be dishonoured does not in itself dispense with presentment for payment.

[emphasis added]

24 In *Wirth v Austin* (1875) LR 10 CP 689 at 691, Grove J explained the nature of the undertaking in a negotiable instrument in relation to the duty to present the instrument thus:

> The drawer undertakes to meet the cheque … well knowing that he has no effects there, and that it will not be paid. As against him, therefore, there was no necessity for proving a presentment there.

25 Similarly, in *Commercial Union Trade Finance v Republic Bottlers of SA (Pty) Ltd* 1992 (4) SA 728 at 734, it was observed:

> [T]he defence of non-presentment may or may not have been available to the defendant. The defendant could not rely on non-presentation *simpliciter*. He had to go further and show that the instrument would have been met if it had been presented.

26 It can be confidently stated that the burden is on the defendant to satisfy the court that a presentment of the Cheque would not only have been appropriate but meaningful in the existing factual matrix. On the evidence it is crystal clear that this arid defence has no substance and cannot be sustained. On the basis of the agreement the parties had reached, the defendant would have expected the plaintiff to present the Cheque when Kenrich defaulted on its payment obligations. The plaintiff had waited for a reasonable period before attempting to enforce the defendant's payment obligation on the Cheque. I am satisfied, given the history of their relationship and the defendant's "ownership" of Kenrich, that it was reasonable for the plaintiff to conclude that the Cheque would not be paid on presentment and that it would be pointless to effect a direct presentment of the Cheque on the defendant. As it turns out, the facts have subsequently vindicated the plaintiff's course of action. The defendant had not made, and could not make, any arrangements with his bank to effect payment on the Cheque.

Miscellaneous defences

27 The Defence also asserts that even if the plaintiff had authority to complete the Cheque, it was not completed within a reasonable time and therefore unenforceable. Again, I see no substance

in the point made. The issue of the plaintiff's authority to complete the Cheque is clear beyond peradventure: see s 20(1) of the BEA. It is trite law that the extent of the authority to complete a negotiable instrument is to be decided by reference to the factual matrix. I have determined that the plaintiff's version of events pertaining to the handing over of the Cheque is entirely credible. There can therefore be no real issue as to the date when the particulars of the Cheque were filled in. The final part-payment by Kenrich in the sum of $3,500 was only made to the plaintiff on 28 June 2003. The Cheque was completed soon thereafter and deposited with the plaintiff's bank on 30 June 2003. I do not understand why Mr Goon, who appears for the defendant, is quibbling about this point. He was unable to suggest what other period could, on the existing factual matrix, be considered as "reasonable time".

28 Mr Goon further complains that notice of dishonour was not effectively given to the defendant. Although there was no effective presentment of the Cheque, the plaintiff did send a letter to the defendant that purported to be a "notice of dishonour" on 3 October 2003. While there appears to be a delay of a few months between the purported presentment and the alleged notice of dishonour, I am of the view that the Defence is once again barking up the wrong tree. If the defendant did not have sufficient funds or an arrangement with his bank apropos his personal account to pay the amounts due, I do not see why he should be cavilling about not receiving a notice of dishonour. Indeed, s 50(3)(c)(iv) of the BEA makes this position as plain as a pikestaff by stipulating:

> Notice of dishonour is dispensed with as regards the drawer in the following cases:
>
> …
>
> (iv) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill;
>
> …

2 9 *Chalmers and Guest* ([21] *supra*) at para 1296 makes the following comments in relation to this provision:

> The most obvious situation is in the case of a cheque where the banker on whom the cheque is drawn is, as between himself and his customer (the drawer), under no obligation to pay the cheque because there are insufficient funds in the drawer's account and no arrangements have been made for an overdraft. *Notice to the drawer of the dishonour by non-payment is not then required to render the drawer liable on the cheque*. It is to be noted that, unlike the similar provision dispensing with presentment for payment contained in [s 46(3)(c) of the BEA], the present provision does not contain the additional words "and the drawer has no reason to believe that the bill would be paid if presented".

30 The account, relevant details of which were produced in court, functioned apparently only until 31 July 2003. There is no evidence that such an account continued to be in operation thereafter. The defendant himself purportedly could not remember whether or not it did. Indeed, if the defendant is to be believed, he had already informed LCC sometime in the middle of 2000 that the account was no longer to be used. By taking issue with the absence of a timely notice of dishonour, Mr Goon is yet again tilting at windmills. The issuing of a notice of dishonour is aimed at affording a drawer an opportunity to make good his obligations as well as at preserving his rights *vis-à-vis* any other parties to the instrument before legal proceedings are commenced. There is no basis, legal or otherwise, for Mr Goon's contention on this issue, as the defendant has not been prejudiced or inconvenienced in any manner whatsoever by the failure to serve a timeous notice of dishonour.

31 Finally, it is contended that the legal obligation, if any, to pay on the Cheque is vitiated by reason of the fact that the underlying transaction is tainted by moneylending. As I have already rejected this contention in my judgment in the Kenrich proceedings, reprising the facts and issues here would be an exercise in futility.

Conclusion

32 In the circumstances, the plaintiff is entitled to judgment in the sum of $576,621.54 with interest accruing at the rate of 6% per annum from 8 March 2004, when these proceedings were commenced. The plaintiff is also entitled to have the taxed costs of these proceedings.

Judgment for the plaintiff.