Gao Bin v OCBC Securities Pte Ltd
[2008] SGHC 178

Case Number : Suit 224/2008, RA 341/2008

Decision Date : 20 October 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Deborah Barker SC and Ang Keng Ling (KhattarWong) for the plaintiff/appellant; Edwin Tong and Kristy Tan (Allen & Gledhill LLP) for the defendant/respondent

Parties : Gao Bin — OCBC Securities Pte Ltd

Civil Procedure – Summary judgment – Stay of execution – Brokerage house entering summary judgment against client – Client having subsisting claim against brokerage house – Anti-setoff clause – Whether court should order stay

Contract – Contractual terms – Unfair contract terms act – Whether anti-setoff clause subject to Unfair Contracts Terms Act (Cap 396, 1994 Rev Ed)

20 October 2008 Judgment reserved.

Choo Han Teck J:

1 The plaintiff/appellant, Gao Bin, is the Chairman of Zhonghui Holdings Ltd ("Zhonghui"), a company listed on the Singapore Exchange (SGX-ST). The defendant/respondent, OCBC Securities Private Limited, is a well-known brokerage house in Singapore. At all material times, the plaintiff maintained the following securities accounts with the defendant:

a. Securities Borrowing Account ("SBL Account");

b. Share Margin Account ("Margin Account"); and

c. Securities Trading Account.

2 The SBL Account is a credit facility which allows the account holder to borrow shares and execute trades as the account holder chooses. The share borrowings must be secured, and the account holder is contractually required to maintain the ratio of the value of security provided, to the market value of the total share borrowings at not less than 150%. As for the Margin Account, it is likewise a credit facility and allows the account holder to borrow funds and execute trades on the security of collateral deposited into the Margin Account. Here, the account holder is contractually required to maintain the ratio of the value of security to the value of loans at not less than 140%.

3 The Margin Account was opened on 10 July 2006 while the SBL Account was opened on 4 October 2006. From 5 October 2006 onwards, the plaintiff pledged a portion of his shares in Zhonghui to the defendant as security in respect of both the SBL Account as well as the Margin Account. Thereafter, the plaintiff carried out trades on both the SBL Account and the Margin Account through his remisier.

4 The defendant provided daily reports to the plaintiff's remisier in respect of the SBL Account ("Daily Holdings Report(s)"). These Daily Holding Reports detailed, *inter alia*, the number of shares held, the marginable value of the share collateral, the amount of cash held and whether any cash and

security top up was required. Prior to 17 September 2007, the Daily Holding Reports indicated that no cash or security top ups were required in respect of the SBL Account. The Daily Holding Report issued on 17 September 2007 however showed that the SBL Account was in a deficit position and that cash or security top ups were required. In this regard, the defendant had acknowledged that its administrative staff had made certain data entry errors in recording share trades in relation to the SBL Account, although its position was that the plaintiff was not entitled to and did not actually rely on the Daily Holding Reports. The plaintiff, on the other hand, claimed that he had relied on the Daily Holding Reports and had accordingly brought an action against the defendant alleging, amongst others, breaches of contract and duty of care.

5 On its part, the defendant counterclaimed for $344,501.80 outstanding under the Margin Account ("the Margin Claim") and for $1,470,469.33 outstanding under the SBL Account ("the SBL Claim"). Subsequently, the defendant applied for summary judgment on its counterclaims against the plaintiff. The defendant's application was heard by an assistant registrar, who gave judgment to the defendant. The plaintiff appealed against that decision.

Quantification of defendant's counterclaims

6 One of the issues raised by the plaintiff was the quantification of the defendant's counterclaims. The plaintiff submitted that the burden of proving the quantum of the defendant's counterclaims lies with the defendant, and further asserted that the reporting errors in relation to the SBL Account would have an impact on the defendant's computation of its claims. The first point to note is that there were no errors in relation to the Margin Account. Thus, any dispute in respect of the quantification of the counterclaims would have to be confined to the SBL Account. The computation provided by the defendant for the SBL Claim is as follows:

(1) Market purchase of borrowed securities	$1,708,296.99
(2) Cash deficit accrued	$138,518.89
(3) Less: Proceeds from sale of collateral	($376,346.55)
Total	$1,470,469.33

7 It is settled law that a claimant must be able to prove his loss. As can be seen from the above, the SBL Claim consists of three parts. There can be no dispute over the computation of (3), it being the proceeds from the sale of the pledged collateral. As for (1), the defendant avers that the sum was arrived at as a result of market purchases of 62,000 SGX and 191,000 CapitaLand shares borrowed but unreturned by the plaintiff. The loans of these shares were reflected in the SBL Account's Statement of Account for the month October 2007. No further trades were executed in this account since that month (save for the subsequent buy-ins). Head (2) relates to the cash deficit accrued on the SBL Account. Altogether, the deficit of $1,470,469.33 was reflected in the Daily Holding Report dated 17 April 2008, and the defendant's Head of Credit Risk had confirmed in an affidavit that the plaintiff was liable to the defendant for the amount of $1,470,469.33. *Prima facie*, there is therefore evidence on record that the plaintiff was indebted to the defendant for the sum of $1,470,469.33.

8 The main weakness in the plaintiff's case was his failure to challenge the sum arrived at by the defendant. As the defendant had pointed out, the plaintiff had actual knowledge of the trades done

under the SBL Account and would have received contract notes from SGX-ST in respect of each day's shares transactions on a contemporaneous basis. These contract notes would have confirmed the plaintiff's own knowledge of the trades done and the details thereof. The plaintiff would therefore have known the position of his holdings in the SBL Account on a day-to-day basis. This meant that at any time after receipt of the contract notes, the plaintiff would be in a position to challenge the computations arrived at by the defendant. The plaintiff could also have reconstructed his own accounts from the contract notes. That being the case, a bare denial of the defendant's claim on the plaintiff's part would clearly be futile. Thus, while there might be a possibility that the defendant's computations might have been tainted by the earlier reporting errors, without any input from the plaintiff, I am of the view that the defence raised by the plaintiff was at best a shadowy one.

Anti-setoff clause

9 The other substantive issue raised by the plaintiff was that its claim against the defendant meant that it had a right of equitable set-off against the defendant's counterclaim. There are however several obstacles that the plaintiff must surmount in order to succeed. The first is that it must show that its claim and the defendant's counterclaims arose from the same transaction or are closely connected with one another: see *Pacific Rim Investments v Lam Seng Tiong* [1995] 3 SLR 1.

10 In *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR 856 at [28], Sundaresh Menon JC made the following observations which I thought are apposite:

> … The question of whether a sufficient degree of closeness is established in the connection between the respective claims is not determined by some sort of formulaic process. In each case, the question turns on whether the respective claims are so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other.

11 On the facts before me, I do not see any relevant connection between the plaintiff's claim and the defendant's counterclaims. The former was essentially a claim for either breach of contract or in tort for misrepresentation which had allegedly led to the plaintiff's trading losses, while the latter were for the repayment of shares and/or monies borrowed by the plaintiff.

12 The other difficulty for the plaintiff is cl 6(c) of the defendant's standard terms and conditions:

> The payment of monies by you to us hereunder shall be made in immediately available and freely transferable funds, without set-off, counterclaim or other deductions or withholdings of any nature whatsoever and shall be made free and clear and without deduction for any present or future taxes.

Relying on *Steward Gill Ltd v Horatio Myer & Co Ltd* [1992] 1 QB 600 ("*Stewart Gill*") and *Esso Petroleum Co Ltd v Milton* [1997] 1 WLR 938 ("*Esso Petroleum*"), the plaintiff argued that cl 6(c) was unenforceable as it did not satisfy the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") requirement of reasonableness. It also sought to distinguish the mortgagor/mortgagee cases relied on by the defendant as being excluded from the UCTA by way of the First Schedule as they relate to the "creation or transfer of securities".

13 I do not think that the UCTA could apply to cl 6(c). A key pre-requisite under the UCTA is that a contractual term must be one which "exclude(s) or restrict(s) any liability". In *Stewart Gill*, the clause in question had two additional items, namely, "payment" and "credit". Donaldson LJ thought that "payment" would mean overpayment under another contract and "credit" meant "credit note" or

an admitted liability under another contract. As for *Esso Petroleum*, the clause in question had the additional item "unpaid debts", which is essentially a crystallised liability. Thus, it might be possible to construe "any liability" under the UCTA to include a crystallised or admitted liability under another contract or transaction. This is however not the case here, as the purported liability was disputed and related to a liquidated claim.

14 On the other hand, it is evident that cl 6(c) does not purport to restrict any liability on the defendant's part as the plaintiff is fully entitled to pursue its action against the defendant. In *The Fedora* [1986] 2 Lloyd's Rep 441 ("*The Fedora*"), the clause in question was as follows:

> All payments by the Guarantor under this Guarantee shall be made without set-off or counterclaim and without deductions or withholdings whatsoever in the currency and manner in which and to the account to which payments are to be made by the Borrowers under the Agreement.

Parker LJ, in delivering the judgment of the English Court of Appeal, said at p 443–444:

> On the face of them these clauses are clear enough but it is submitted that they do not apply to exclude a set off of counterclaim based on negligence. This argument is advanced on the basis that the clauses should be treated in the same way as exclusion clauses and thus that they do not apply to claims by way of set off or counterclaim which are based on negligence since – (a) such claims are not specifically excluded; (b) in the absence of the word "whatsoever" the general words are insufficient to include claims in negligence; (c) to exclude from their operation claims based on negligence would not rob the clauses of all effect.
>
> There are two initial difficulties in the way of this submission. The first is that there is no good reason for treating such clauses in the same way as exclusion clauses. The latter purport to exclude liability altogether. These clauses do not touch liability. The guarantors can still prosecute their claims to judgment. They are, if the clauses are effective, merely prevented from holding up payments admittedly due under the guarantees whilst disputed cross-claims are litigated. This being so the principle which lies behind the narrow construction given to exclusion clauses, that specific words or the use of all embracing words such as "whatsoever" are necessary to enable to exclude liability for his own negligence has no application.

In *Society of Lloyds v Leighs* [1997] 6 Re LR 289, the English Court of Appeal reached the same conclusion on a similar clause, at p 298:

> We should re-emphasize that the clause does not seek to exclude or limit liability for fraud. Its purpose, as Colman J pointed out, is to insulate recovery of the premium from claims by those who owe the premium. We know of no principle of law that should lead us to construe the words of the clause so as to exclude from its ambit any claim based or allegedly based on fraud.

In short, this all means that the UCTA has no application as cl 6(c) has no bearing whatsoever on the defendant's liability. This would be so even if the plaintiff's claim was for fraudulent misrepresentation. There is therefore no basis for this court to strike down cl 6(c).

Stay of execution

15 The court has the inherent jurisdiction to order a stay of execution. In determining whether to grant a stay in circumstances such as the present, the court would ordinarily consider the degree of connection between the opposing claims, the strength of the claim and the financial ability of the

plaintiff to satisfy the counterclaim. The court will also consider the fact that a stay order will effectively require a successful party to wait for its money: see *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) at p 145.

16 The last point is important. The defendant is a company in the business of providing full brokerage services for equities and derivatives trading. As events in the past few weeks have shown, the ability to access liquid funds is paramount to the well-being of banks and financial institutions. It is therefore not difficult to see why cl 6(c) states that a client must make payment in "immediately available and freely transferable funds" and without set-off or counterclaim. The defendant can hardly afford the luxury of having monies due to it to be tied-up pending a potentially lengthy counter-claim. In this regard, the observations by Parker LJ in *The Fedora* at p 445 are relevant and helpful:

> Indeed the present cases make it the more necessary that the Court should not interfere, for here the parties have specifically provided both in the loan agreement and the guarantees that payment should be made free of any set off or counterclaim. It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated. We do not doubt that the Court has a discretion to grant a stay but it should in our view be "rarely if ever" exercised, as Lord Dilhorne said in relation to claims on bills of exchange. Guarantees such as these are the equivalent of letters of credit and only in exceptional circumstances should the Court exercise its power to stay execution. The fact that a counterclaim which was likely to succeed existed would not by itself be enough, as Lord Justice Buckley pointed out.

17 The exceptional circumstances referred to by Parker LJ where a stay might be granted would include a situation where a defendant, if paid, would be unable to meet a judgment on the subsisting claim. Although I note that there are cases which have upheld the validity of an anti-setoff clause even in the face of alleged fraud, in my opinion, if the plaintiff is able to demonstrate, at the outset, a very strong *prima facie* case of fraud, then that might also suffice. Otherwise, I am of the opinion that a term such as cl 6(c) would represent an insuperable obstacle to any request for a stay.

Conclusion

18 The plaintiff has raised several other points which I do not propose to deal with, save to say that they have little bearing on my decision. For all of the foregoing reasons, I order that summary judgment be entered on the Margin Claim against the plaintiff for the sum of $344,501.80 with interest, and as for the SBL Claim, the plaintiff is to granted leave to defend on the condition that he pays the sum of $1,470,469.33 into court or by way of a banker's guarantee satisfactory to the defendant. I will hear the parties on costs at a later date.

19 Counsel for both parties sent several letters to the court after the hearing on 26 September 2008, advancing further arguments and counter arguments. This appears to be an increasingly popular practice by lawyers generally, not just present counsel. Counsel are reminded that they should obtain leave before making such further submissions, and should leave be granted, to file the submissions in the proper form.

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