DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd
[2009] SGHC 62

Case Number : OS 1044/2008

Decision Date : 13 March 2009

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Sarjit Singh Gill SC/Koh Junxiang (Shook Lin & Bok LLP) for the plaintiff; Jimmy Yap/Ernest Subramaniam (Jimmy Yap & Co) for the defendant

Parties : DB Trustees (Hong Kong) Ltd — Consult Asia Pte Ltd

Credit and Security

13 March 2009

Tay Yong Kwang J:

Introduction

1 This is an application made by DB Trustees (Hong Kong) Limited ("the plaintiff") against Consult Asia Pte Ltd ("the defendant") for the following orders:

(a) That the plaintiff is entitled to declarations that pursuant to the terms of the Trust Deed dated 28 December 2006 entered into between the plaintiff and the defendant ("the Trust Deed") and the Security Deed also dated 28 December 2006 entered into between the plaintiff and the defendant ("the Security Deed"):

(i) An Event of Default has occurred pursuant to inter alia Clause 10.1(a) of the Conditions of the Notes set out at Part 2 of the Trust Deed ("the Conditions of the Notes"); and

(ii) The plaintiff's appointment of Mr Kon Yin Tong, Mr Wong Kian Kok and Mr Aw Eng Hai, all of Messrs Foo Kon Tan Grant Thornton as joint and several receivers and managers ("the Receivers") of the defendant is valid.

(b) An injunction restraining the defendant, by itself or by its officers, directors, shareholders, agents or employees from interfering with and/or preventing the Receivers from the lawful execution of the Receivers' powers and performance of the Receivers' duties under the Security Deed;

(c) That the defendant forthwith deliver up and/or furnish to the Receivers all property, books and records as the Receivers may reasonably require in order to carry out the lawful execution of the Receivers' powers and performance of the Receivers' duties under the Security Deed;

(d) Judgment for the sum of US$42,080,000 and interest at the rate of 2% per annum from 1 July 2008 to the date of payment pursuant to Clause 2 of the Trust Deed and Condition 5 of the Conditions of the Notes; and

(e) Costs on an indemnity basis.

2 The defendant, in turn, seeks the following relief by way of Counterclaim in these proceedings:

(a) a declaration that the plaintiff is barred by Section 15 of the Moneylenders Act (Cap 188, 1985 Rev Ed) from enforcing its rights under the Trust Deed or the Security Deed with consequential relief including an injunction to require the plaintiff to remove the Receivers and deliver up the security held in respect of the transaction;

(b) further or in the alternative, if the plaintiff is not exempted from obtaining a trust business licence under the Trust Companies Act (Cap 336, 2006 Rev Ed), a declaration that the plaintiff is precluded by the principles of illegality and public policy from enforcing its rights under the Trust Deed or the Security Deed with consequential relief including an injunction to require the plaintiff to remove the Receivers and deliver up the security held in respect of the transaction;

(c) further or in the alternative, a declaration that in the events that have happened and upon the true construction of the Trust Deed, the Conditions of the Notes as well as the other documents including the mortgage documents in the transaction, an "Event of Default" within the meaning of Condition 10.1 of the Notes has not occurred in that it was the plaintiff which wrongly prevented the defendant from paying the amounts due;

(d) further or in the alternative, a declaration that the plaintiff's appointment of the Receivers is invalid because of bad faith with consequential relief including damages and/or an injunction to require the plaintiff to remove the Receivers.

In essence, therefore, the defendant has raised two contentions of law in (a) and (b) above and two issues of fact in (c) and (d) above.

Factual background

3 The plaintiff is a limited company incorporated under the laws of Hong Kong. The defendant is a local exempt private company limited by shares and was incorporated in 1993.

4 The defendant owns two properties in Singapore. The first property is a refurbished conservation two-storey corner shophouse and a six-storey extension with attic hostel block at Balestier Road ("the Balestier property"). The second property is a piece of land off the junction of Still Road and Changi Road ("the Changi property"). It is not in dispute that these two properties constitute the entirety of the defendant's assets. As at July 2008, the two properties were worth a total of S$107 million (on an as is basis) and S$147 million (on the basis that the Changi property would be fully developed into the proposed Beulah Regency Mall and Studios).

5 The defendant financed its acquisition and development of the two properties through two avenues: shareholder funds and borrowings from financial institutions. In 2006, the Balestier property was mortgaged to OCBC and the Changi property was mortgaged to DBS to secure the borrowed funds from the respective banks (totalling approximately S$27 million).

6 Around October or November 2006, the defendant decided to seek alternative financing with the view of discharging the OCBC and the DBS loans and in order to finance its proposed development of the Changi property. The defendant's director, Florence Koh ("Florence"), a lawyer by training, was introduced to one Enoch Tan ("Enoch") of UBS AG ("UBS"). Enoch proposed that UBS raise a credit facility in the sum of US$32 million for the defendant to:

(a) discharge the S$27 million loan from DBS and OCBC;

(b) pay UBS for the arrangement fees;

(c) pay the professional fees of lawyers, trustees and valuers;

(d) pay the 1st year interest for the US$32 million loan;

(e) pay the construction costs and/or purchase adjoining houses and land to expand the proposed development; and

(f) use the rest of the funds as working capital.

7 On 11 December 2006, Florence signed an Engagement Letter prepared by UBS appointing UBS as the defendant's sole arranger and lead manager to raise the US$32 million credit facility.

8 The rest of the saga revolves around four finance documents all of which were signed by Florence and her co-director, Tan Swee Oon Maureen ("Maureen"), on 28 December 2006. The four documents are as follows:

(a) Subscription Agreement between the defendant and UBS dated 28 December 2006 ("the Subscription Agreement");

(b) Trust Deed between the plaintiff (which acted as the trustee) and the defendant dated 28 December 2006 (the Trust Deed as in [1] above);

(c) Security Deed between the plaintiff (which acted as the security trustee) and the defendant dated 28 December 2006 (the Security Deed as in [1] above); and

(d) Agency Agreement between the plaintiff, the defendant and Deutsche Bank AG, Hong Kong Branch ("Deutsche Bank") dated 28 December 2006 ("the Agency Agreement")

Subscription Agreement

9 Pursuant to the terms of the Subscription Agreement, the defendant agreed to issue US$32 million Senior Secured Notes ("the Notes") due in 2008 and UBS, in turn, agreed to subscribe and pay for the Notes at an issue price of 100%. In this regard, it was agreed that the Notes would be constituted by a Trust Deed and issued subject to and with the benefit of an Agency Agreement.

Trust Deed

10 In accordance with the terms of the Trust Deed, which constituted the Notes, the plaintiff agreed to act as trustee and security trustee of the Trust Deed for the benefit of the Noteholders. In particular, Clause 2.2 of the Trust Deed reads as follows:

> The [defendant] covenants with the Trustee that it will, in accordance with this Trust Deed, on the due date for the final maturity of the Notes provided for in the Conditions, or on such earlier date as the same or any part thereof may become due and repayable thereunder, pay or procure to be paid unconditionally to or to the order of the Trustee in U.S. dollars in New York City in immediately available funds the principal amount of the Notes repayable on that date together with any other amounts comprising the Mandatory Prepayment Amount and shall in the meantime and until such date (both before and after any judgment or other order of a court of competent jurisdiction) pay or procure to be paid unconditionally to or to the order of the Trustee as

aforesaid interest (which shall accrue from day to day) on the principal amount of the Notes at rates calculated from time to time in accordance with Condition 5 (*Interest*) and on the dates provided for in the Conditions…

11 Clause 9.1 of the Trust Deed reads as follows:

Each of the Trustee and the Security Trustee may at any time, at its discretion and without notice, take such proceedings and/or other steps as it may think fit against or in relation to the Issuer to enforce its obligations under this Trust Deed, the Security Documents and the other Finance Documents (as the case maybe).

12 The Conditions of the Notes have been incorporated by reference into the terms of the Trust Deed. The salient conditions are Conditions 7.1 and 10.1(a).

13 Condition 7.1 provides:

Unless previously redeemed or purchased and cancelled as provided below, the Issuer shall redeem the Notes at 128 per cent of their principal amount on the second Interest Payment Date.

The plaintiff therefore asserts that the aggregate amount due to the plaintiff on the second Interest Payment Date (stated in Condition Rule 5.1 to be 28 June 2008) was US$42,080,000. This figure of US$42,080,000 is, in my view, the correct amount that the defendant has to pay to the plaintiff on 28 June 2008.

14 Condition 10.1(a) provides:

The Trustee at its discretion may, and if so requested in writing by the holders of at least 25 per cent in principal amount of the Notes then outstanding or if so directed by an Extraordinary Resolution of the Noteholders shall (subject in each case to being indemnified to its satisfaction) give notice to the [defendant] that the Notes are, and they shall accordingly forthwith become, immediately due and repayable at the Mandatory Prepayment Amount, in any of the following events (**Events of Default**):

(a) if default is made in the payment of any interest or principal in respect of the Notes or any of them; …

It is therefore clear that default in payment of any interest or principal in respect of the Notes is considered an Event of Default.

Agency Agreement

15 Pursuant to the Agency Agreement, Deutsche Bank, Hong Kong Branch was appointed the Calculation Agent, the Principal Paying Agent and the Registrar (collectively referred to as "the Agents") in respect of the Notes. Clause 4.1 of the Agency Agreement reads as follows:

"The Issuer shall, not later than 11 a.m. (London time) on one Business Day prior to each date on which any payment of principal and/or interest in respect of any of the Notes becomes due and payable under the Conditions, transfer to an account specified by the Principal Paying Agent such amount of U.S. dollars as shall be sufficient for the purposes of the payment of principal and/or interest in same day funds."

[emphasis added]

Clause 21.2 of the Agency Agreement provides:

> "Save as provided in clause 7, in acting under this Agreement and in connection with the Notes the Agents shall act solely as agents of the Issuer and will not assume any obligations towards or relationship of agency or trust for or with any of the owners or holders of the Notes, except that funds received by the Principal Paying Agent for the payment of any sums due in respect of any Notes shall be held by them on trust for the relevant Noteholders until the expiration of the relevant period under Condition 9 (Prescription)"
>
> [emphasis added]

Security Deed

16 Pursuant to the Security Deed, the defendant charged its assets ("the Secured Assets") to the plaintiff which acted as security trustee for the Noteholders. In connection with the Trust Deed and the Security Deed, the defendant entered into the following agreements in favour of the plaintiff:

(a) Deed of Share Charge dated 28 December 2006 entered into between Maureen and the Plaintiff ("the First Deed of Share Charge")

(b) Deed of Share Charge dated 28 December 2006 entered into between Florence and the plaintiff ("the Second Deed of Share Charge")

(c) Mortgage dated 29 December 2006 made by the defendant in favour of the plaintiff ("the Mortgage"). Pursuant to the Mortgage, the defendant mortgaged all the land, premises and buildings situated thereon, comprised in Lot Nos. MK26-95877M, MK26-3268A, MK26-3270T and TS29-99523T.

17 In essence, the significance of the First and Second Deeds of Share Charge and the Mortgage is that in addition to being secured by a charge over all the defendant's assets, the US$32 million credit facility was secured by a legal mortgage of the Balestier property and the Changi property in favour of the plaintiff.

Engagement Letter

18 On 1 February 2008, Florence (representing the defendant) secured the agreement of Merrill Lynch (by way of an engagement letter) ("the Engagement Letter") to "act as exclusive placement agent for the [defendant] of approximately SGD [90] million principal amount of senior secured notes to be issued by the [defendant] and/or as Lead Arranger in the case of a senior secured term loan".[note:1] The Engagement Letter also provided that "[i]n acting as the exclusive placement agent for the Private Placement, Merrill Lynch will seek to assist the [defendant] in completing the financing on a reasonable endeavors basis, acting as the [defendant's] agent and not as a principal in the sale and placement of the Notes".

19 On 27 May 2008, the defendant through its solicitors (M/s Lee & Lee) gave the plaintiff notice of the defendant's intention to redeem the mortgages on 28 June 2008. The notice of redemption requested, among other things, the redemption statement as of 28 June 2008.

20 On 2 June 2008, the defendant received a fax from Deutsche Bank, which I shall set out in full

("the 2 June Fax"):

> This fax is to remind you that a principal and interest payment is due on 30 June 2008. The total funds due will amount to USD 33,120,000 which should be paid in immediately available funds on a prior day basis, that is, by 27 June 2008 by 10.00 am New York time.
>
> Principal 32 x 1M denom @1000000 USD 32,000,000.00
>
> Interest 32 x 1M denom @35000 USD 1,120,000.00
>
> TOTAL FUND DUE ON 27 June 2008 USD 33,120,000.00
>
> Please confirm by return fax that funds will be paid and advise us of the name of the bank through which payment will be made. Please arrange for payment of the above amount to be made on 27 June 2008 to the following:
>
> Deutsche Bank Trust Company Americas SWIFT:BKTRUS33XXX
>
> ABA 021-xxx-xxx
>
> Deutsche Bank AG, London
>
> A/C No. 04-xxx-xxx
>
> REF: CTAS/08060200061
>
> If you have any questions about the payment, please call our direct line.

21 On 13 June 2008, a letter from Deutsche Bank was faxed to the defendant ("the 13 June Fax"). The fax is identical to the earlier fax set out at [20] above, save that the principal was changed to US$40,960,000, the interest was changed to US$1,120,000 and the total funds due on 27 June 2008 was revised to US$42,080,000.

22 Around that time, one Michelle Tan ("Michelle") of M/s Lee & Lee was in communication with the plaintiff's representative, Aric David Kay-Russell ("Aric"), regarding the proposed redemption of the mortgages. On 17 June 2008, M/s Lee & Lee, in their email to the defendant, reported that Aric took the position that the redemption monies and all other outstanding amounts (including the fees of Taylor & Co, the plaintiff's lawyers) must be paid by 11 am on Friday, 27 June 2008 (London time) but the release of the security will only take place on Monday, 30 June 2008. M/s Lee & Lee then advised the defendant that Aric's requirement is "unlikely to be acceptable to the new noteholders who will require security before or at least concurrently with their release of funds".

23 On 20 June 2008, the defendant wrote to inform the plaintiff that (i) the plaintiff's proposed process of redemption was not workable and (ii) the defendant disputed the redemption amount of US42,080,000 as stated in the 13 June Fax. The defendant suggested that a conference discussion be held on 24 June 2008 to attempt to resolve the dispute. No positive response was forthcoming from the plaintiff. As such, the defendant wrote again on 27 June 2008 to reiterate its request for a meeting.

24 The plaintiff responded on 30 June 2008 and affirmed its position that (i) the redemption process it proposed "accords with usual practice in connection with the release of security" and (ii) the redemption amount stipulated in the 13 June fax was the correct figure.

25 On 4 July 2008, the plaintiff by letter exercised its right under Condition 10.1 of the Notes to give the defendant notice that an "Event of Default" has occurred within the meaning of that Condition, and that the plaintiff intended to enforce its rights as Trustee and Security Trustee under the Trust Deed and the Notes. On the same day, the plaintiff also exercised its right under the Security Deed to appoint the Receivers.

Plaintiff's Case

26 The plaintiff's case can be summarised thus. In essence, the plaintiff's main contention in these proceedings is that the defendant has failed to redeem the Notes at 128% of their principal amount on the second Interest Payment Date, namely 28 June 2008. As a result, an Event of Default under Condition 10.1 of the Conditions of the Notes has occurred. It therefore follows that the Receivers were validly appointed upon the terms and subject to the powers and provisions in the conditions indorsed and contained in the Security Deed. It is also the plaintiff's complaint that to date, the Receivers have yet to obtain any assets, books and/or records of the defendant, despite repeated requests and attempts to obtain the same. In the circumstances, the plaintiff submits that it should be granted an order in terms of its application.

Defendant's Case

27 There are four grounds of defence in the defendant's case in answer to the plaintiff's claim. First, the defendant submits that it was ready and willing to pay the principal sum of the Notes and the agreed interest in the sum of US$32,120,000 but was unable to do so because the plaintiff had *wrongfully refused to release the security concurrently with the payment of the amount due*. Accordingly, an "Event of Default" within the meaning of the Trust Deed and the Notes has not occurred ("the concurrent release of security issue").

28 Second, the defendant contends that the plaintiff's appointment of the Receivers was not *bona fide* as the plaintiff knew or must have known that appointing the Receivers in the circumstances would make it almost impossible for the defendant to obtain alternative financing ("the receivership issue").

29 Third, the transaction underlying the Trust Deed and the Notes is alleged to be, in substance, a moneylending transaction and unless the Noteholders are exempted from the requirement to hold a moneylending licence, the plaintiff would be barred by Section 15 of the Moneylenders Act from enforcing its rights in the transaction ("the moneylending issue").

30 Finally, the defendant argues that the plaintiff is not licensed to carry on a trust business in Singapore, thereby rendering its powers under the Trust Deed and Security Deed unenforceable ("the trust business issue").

My decision

Whether an Event of Default has occurred

31 In so far as this issue is concerned, the plaintiff is relying on Condition 10.1(a) of the Conditions of the Notes (which I have already set out above at [14]) in its submissions that an Event of Default has occurred. Condition 10.1(a) relates essentially to the default in payment of any interest or principal in respect of the Notes. The issue of what are the circumstances under which the defendant may redeem the Notes therefore arises and it is necessary to turn to the terms of the

Trust Deed and the Conditions of the Notes, in particular Conditions 7.1 and 7.2.

32 Condition 7.1 provides:

> Redemption at Maturity
>
> Unless previously redeemed or purchased and cancelled as provided below, the Issuer shall redeem the Notes at *128 per cent*. of their principal amount on the *second Interest Payment Date*.
>
> [emphasis added]

33 Condition 7.2, on the other hand, provides as follows:

> Optional Redemption
>
> The Issuer may at its option, on the first Interest Payment Date, redeem all the Notes, but not some only, at 118 per cent. of their principal amount by giving no less than 15 and no more than 60 days notice to the Trustee and the Noteholders in accordance with Condition 13 (Notices) (which notice shall be irrevocable).

34 There were therefore only two occasions where the defendant may redeem the Notes: on the first Interest Payment Date (as provided for in Condition 7.2) and on the second Interest Payment Date (as provided for in Condition 7.1). The first Interest Payment Date was 28 December 2007 while the second Interest Payment Date was 28 June 2008. After the passing of the first Interest Payment Date, the defendant was only entitled, and in fact obliged, to redeem the Notes in accordance with Condition 7.1. In this regard, I pause to note that the redemption price on the due date for the maturity of the Notes is specifically stated to be 128% of the principal amount.

35 Indeed, in the absence of an express right conferred by the bond agreements, an issuer is not accorded any right of early redemption. Reference can be made to Philip R Wood, *International Loans, Bonds, Guarantees, Legal Opinions* (2nd Ed) at paragraph 23-043 which reads:

> Normally it will be clear from the language of the bond that an issuer does not have a right of early redemption if no express right is conferred by the bond. It was held in *Hooper v Western Counties and South Wales Telephone Co Ltd* (1892) 68 LT 7823 that debentures are not redeemable before the stated fixed date unless otherwise provided. An Australian court has delivered a similar opinion in relation to a loan: *Hyde Management Services (Pty) Ltd v FAI Insurances* (1983) 144 CLR 541.

36 Although the defendant enjoyed no right of early redemption, Counsel for the defendant, Mr Jimmy Yap, argued that the defendant possessed an equity of redemption in the mortgaged properties and referred to the House of Lords decision of Samuel v Jarrah Timber And Wood Paving Corporation Limited [1904] AC 323 at 329, where Lord Lindley explained that the doctrine of "once a mortgage, always a mortgage" means that:

> "... no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage...".

37 Counsel for the plaintiff, Mr Sarjit Singh Gill SC, on the other hand, asserted in his written submissions that it was "under no obligation to release the security prior to being assured that the redemption amount had been fully paid". However, during his oral submissions, he accepted that "if the defendant is able to satisfy the court that it has all the documentation ready, he would concede that the defendant would have a case that it was ready to launch the notes but was stopped by the plaintiff's refusal to allow the simultaneous release of security".

38 With that qualified concession in mind, the legal significance of the Engagement Letter, which the defendant entered into with Merrill Lynch, assumes paramount importance. The Engagement Letter must be assessed to see whether it constitutes a serious enough proposal for the projected refinancing. As already noted above at [18], the defendant, on 1 February 2008, secured the agreement of Merrill Lynch to act as its exclusive placement agent, with the view of raising S$90 million by means of senior secured notes to be issued by the defendant. Since the mortgaged properties (the Balestier property and the Changi property) represent substantially the whole of the defendant's assets, this necessarily required the defendant to redeem the mortgaged properties for use in the intended refinancing.

39 In my view, the Engagement Letter is clear evidence of the defendant's intention to redeem the Notes on the second Interest Payment Date. This is supported by Merrill Lynch's agreement to act as exclusive placement agent and "assist [the defendant] in completing the financing on a reasonable endeavors basis, acting as [the defendant's] agent and not as a principal in the sale and placement of the Notes." The Engagement Letter is an indicative term sheet of the proposed alternative financing facility and is a concrete enough proposal for the proposed refinancing. The plaintiff's refusal to release the security concurrently with the defendant's intended redemption of the mortgaged property, however, prevented the defendant from redeeming the Notes on their maturity date (28 June 2008).

40 By refusing to release the security concurrently with the proposed payment by the defendant, the plaintiff effectively frustrated the defendant's attempt to proceed with alternative financing in order to pay off the principal sum and interest due. It therefore follows that it would be unfair and unjust for the plaintiff to enforce its rights under either the Trust Deed or Security Deed by relying on the defendant's failure to redeem the Notes as an "Event of Default".

Whether the appointment of the Receivers was done in bad faith

41 It is axiomatic that in order to establish that the plaintiff had appointed the Receivers in bad faith, it is necessary for the defendant to show that there was some dishonesty or improper motive on the lender's part. Mere negligence by itself will clearly not suffice. As the Court of Appeal put it in Roberto Building Material Pte Ltd v. Oversea-Chinese Banking Corp (No 2) [2003] 3 SLR 217 ("Roberto") (at [23]-[24], [28]):

> 23 All that the law requires of the lender before exercising his power of appointing a receiver is that he must act in good faith. The lender is entitled to act in his own interest. There is no general duty of reasonable care to consider or have regard to the interests of the debtor. While in most cases, the appointment of a receiver will not be in the interest of the borrower company, that cannot defeat the right of the lender to make the appointment. In the words of Oliver LJ in Shamji v Johnson Matthey Bankers Ltd [1991] BCLC 36 at 42:
>
> > The appointment of a receiver seems to me to involve an inherent conflict of interest. The purpose of the power is to enable the mortgagee to take the management of the company's property out of the hands of the directors and entrust it to a person of the mortgagee's

choice. That power is granted to the mortgagee by the security documents in completely unqualified terms. It seems to me that a decision by the mortgagee to exercise the power cannot be challenged except perhaps on grounds of bad faith. There is no room for the implication of a term that the mortgagee shall be under a duty to the mortgagor to "consider all relevant matters" before exercising the power.

24 In order to show bad faith, there must be dishonesty or improper motive on the part of the lender. Even where there is negligence, that fact per se would not be sufficient to establish dishonesty or improper motive.

…

28 In the light of the above, we did not see how it could be alleged that OCBC had acted dishonestly or that there was any bad faith. Furthermore, there was nothing to suggest that the bank had acted recklessly as to amount to bad faith. The bank was entitled to exercise the rights conferred upon it in its own interest after having given Roberto considerable time to put its house in order. We accepted that the bank could have granted further indulgence to Roberto by either not appointing the Receiver, or revoking the appointment. The fact that it refused to do so in its own self or commercial interest could not amount to dishonesty or bad faith. Even if the bank had not quite accurately assessed its own interest in refusing further indulgence (we are not here suggesting that there was any such appreciation on the bank's part), that could not turn a honestly held view into bad faith. Neither was a refusal to grant further indulgence, or to accept an alternative proposal (which had drawbacks), an act of bad faith. We should add that the CSA's proposal was subject to a condition that there should be a moratorium of 45 days during which OCBC could not appoint a receiver and it was understandable that OCBC had found this difficult to accept.

[emphasis added]

42 The defendant has not alleged that the plaintiff acted dishonestly or with improper motive. Further, I am unable to find any evidence that the plaintiff had acted so recklessly as to amount to bad faith. As such, I could not accept the defendant's contention that the plaintiff acted in bad faith when it appointed the Receivers.

Whether the transaction underlying the Trust Deed and the Notes ("the transaction") is a moneylending transaction

43 In so far as this particular issue is concerned, the defendant submitted that the transaction was in essence a loan of money transaction and the contract was one for the repayment of money lent within the meaning of Section 15 of the Moneylenders Act. In my view, the defendant's submissions that the transaction is caught by Section 15 of the Moneylenders Act cannot be correct.

44 It is clear, as seen from the Subscription Agreement, that even if any monies were lent to the defendant, the lending party was UBS. In particular, Clause 1.1 of the Subscription Agreement provides that "the Issuer agrees to issue the Notes and the Manager agrees to subscribe and pay for the Notes on Closing Date…at an issue price of 100%". Clause 2 then provides for the payment mechanism that UBS should adopt.

45 The Noteholders purchased the Notes not from the defendant but from UBS. It is clear therefore that the Noteholders have not lent any monies to the defendant.

46 Even if I were to accept the defendant's argument that the transaction constitutes money lending, it cannot be disputed that UBS is not required to obtain a licence under the Moneylenders Act. Indeed, since UBS (as the original subscriber of the Notes) is bona fide carrying on the business of banking in Singapore, it would therefore be considered an exempt person within the definition of the Moneylenders Act.

Whether the transaction falls foul of the Trust Companies Act

47 In my view, the plaintiff is clearly not carrying on any trust business or holding itself out as carrying on any trust business in or from within Singapore. In any event, the plaintiff is an exempt person under Section 15(1)(d) of the Trust Companies Act (Cap 336, 2006 Rev Ed) read with Regulation 4(1)(f) of the Trust Companies (Exemption) Regulations (Cap 336, Rg 1). The said Regulations defines "debenture" as having the same meaning as in s 2 of the Securities and Futures Act (Cap 289, 2006 Rev Ed). The said s 2 in turn defines "debenture" as including debenture stock, bond, note and any other debt securities issued by a corporation or any other entity. The plaintiff is therefore exempted from the requirement of holding a trust business licence.

The Estoppel Issue

48 I now address one final issue which the defendant first introduced in its further submissions. The issue deals with an alleged representation made by Enoch of UBS. Florence's evidence is that before she signed the Trust Deed, she asked Enoch how Condition 7.1 would operate and Enoch replied to the effect that 128 per cent was payable only if the defendant was in wilful default of its obligations under the Trust Deed. In light of the above, Florence asserts that she was misled by UBS and that the plaintiff is therefore estopped from relying on Condition 7.1.

49 Condition 7.1, to my mind, makes it very clear that the redemption price on the second interest payment date is to be 128% of the principal amount. The parol evidence rule as embodied in section 94 of the Evidence Act prevents the admission of extrinsic evidence in the form of the alleged collateral oral representation made by Enoch. As such, the extrinsic evidence cannot be admitted for the purpose of contradicting an express term in the Conditions of the Notes or any of the other finance documents, which the parties had objectively intended to embody their entire agreement into.

50 Further, given that Florence is a trained lawyer, there is no reason why she should accept Enoch's interpretation of a term of contract which contradicted its clear wording. No credence should therefore be given to the defendant's contention on the estoppel issue.

Conclusion

51 Having regard to the reasons set out above, I made the following orders:

(a) The plaintiff's application is dismissed with costs fixed at $2,000.00 (exclusive of reasonable disbursements) to be paid by the plaintiff to the defendant.

(b) The plaintiff's appointment of the receivers of the defendant on 4 July 2008, namely, Mr Kon Yin Tong, Mr Wong Kian Kok and Mr Aw Eng Hai of Messrs Foo Kon Tan Grant Thorton, is discharged.

(c) The defendant shall pay the plaintiff a sum of US$42,080,000 to redeem the US$32 million Notes together with interest to be calculated in accordance with the Trust Deed and the conditions of the Notes; such payment shall be made by 4 pm, 29 April 2009, failing which an

'Event of Default' within the meaning of the Conditions of the Notes shall be deemed to have occurred. (The allowance of three months from the date of hearing was given on the basis of the defendant's contention that it would require three months to put into effect the redemption process which was frustrated by the plaintiff.)

(d) The defendant's payment to the plaintiff of the amounts due under the Notes shall be on the basis that the plaintiff shall simultaneously release the secured assets in exchange for the defendant's payment by means of cashier's order, cash or any other mutually acceptable means.

[note: 1] Florence Koh's 2nd Affidavit, p 125.