

Societe Generale v Statoil Asia Pacific Pte Ltd
[2000] SGCA 61

Case Number : CA 62/2000
Decision Date : 10 November 2000
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s) : Sarjit Singh Gill SC, Suhaimi Lazim and Ng Yeow Khoo (Shook Lin & Bok) for the appellants; Lawrence Quahe and S Suresh (Harry Elias Partnership) for the respondents
Parties : Societe Generale — Statoil Asia Pacific Pte Ltd

Contract – Contractual terms – Construction of contract terms – Application of proviso – Whether oral agreement made between parties – Whether right of recourse exists

(delivering the grounds of judgment of the majority): **Introduction**

The appellant bank, Societe Generale (`Soc Gen`), instituted this action against the respondent company, Statoil Asia Pacific Pte Ltd (`Statoil`), claiming the sum of US\$4,408,599.73 together with interest. Their claim was dismissed by the High Court, and they appealed against the dismissal. We dismissed the appeal, and now give our reasons.

Facts

The respondents, Statoil, are a company incorporated in Singapore and are engaged in the business of selling petroleum and petrol-related products. They are a wholly owned subsidiary of Dan Norske Stats Oljeselskap AS (`Dan Norske Oil`), the national oil company of Norway. Dan Norske Oil and their subsidiaries had a long-standing corporate policy of only trading with customers on a secured basis. Soc Gen had a good business relationship with Dan Norske Oil in Europe, and for some years had been attempting through their Singapore branch to extend their banking and other services to Statoil, but without much success. They were aware of the corporate policy of Dan Norske Oil and their subsidiaries.

Sometime in early 1996, Soc Gen offered a certain banking facility to Statoil as a means of securing the latter's business. The proposed banking facility was called the `Payment confirmation with invoice discounting facility` (`the facility`). It was to be available only in respect of those buyers trading with Statoil, who were acceptable to Soc Gen. The facility would operate in the following manner. Whenever a shipment of petroleum products was made by Statoil to an approved buyer, the buyer would sign and deliver to Soc Gen a document expressed as a `Payment Undertaking` (`Payment Undertaking`), under which the buyer would confirm its purchase of a shipment of oil product from Statoil at a certain price and undertake that, upon Soc Gen presenting the seller's commercial invoice and relevant shipping documents from Statoil, it would pay to Soc Gen, for the account of Statoil, the amount due on the invoice on the due date of payment. Upon receipt of the Payment Undertaking from the buyer, Soc Gen and Statoil would sign a document expressed as a `Payment Confirmation and Invoice Discounting Agreement` (`Payment Confirmation and Invoice Discounting Agreement`). This latter document referred specifically to the Payment Undertaking, and by the terms of this document, Soc Gen undertook to pay to Statoil the sum due from the buyer (as stated in the Payment Undertaking), not later than seven days of the due date for payment and upon receipt by Soc Gen of Statoil's certified true copy of `related documents including sales contract, bill of lading, invoice issued by Statoil specifying payment term` not exceeding a certain period and

`funds to be paid to the account of Statoil with Soc Gen`. It was also provided in this agreement that Statoil would pay Soc Gen a `non-refundable upfront risk commission` at a stated rate, and Soc Gen would discount the amount due on the invoice at a stipulated rate. This facility would be provided to Statoil on a case-by-case basis, and Soc Gen would be entitled to refuse to sign a Payment Confirmation and Invoice Discounting Agreement in respect of the Payment Undertaking of any buyer of Statoil at any time.

In July 1996, Statoil asked Soc Gen to consider making the facility available to one of their buyers, Siam United Services Public Co Ltd (`SUSCO`). SUSCO were a public company listed on the Stock Exchange of Thailand, whose business involved the distribution of petroleum products through their own network of gas stations and pumps in Thailand, and also through other retailers in Thailand. Soc Gen conducted a credit evaluation of SUSCO and found them acceptable. On 10 October 1996, they informed Statoil that the facility would be made available in respect of Statoil`s sales to SUSCO.

Statoil and SUSCO then entered into a contract, dated 15 October 1996 (`the first contract`), for the regular supply of gas-oil by the former to the latter over a certain period. Pursuant to this contract, Statoil effected a number of shipments of gas-oil to SUSCO. Payments for the shipments were effected by means of the facility provided by Soc Gen. For each shipment, SUSCO issued a Payment Undertaking to Soc Gen, and on receipt of the Payment Undertaking by Soc Gen, Statoil and Soc Gen signed a Payment Confirmation and Invoice Discounting Agreement.

The form of the Payment Confirmation and Invoice Discounting Agreement used by Soc Gen and Statoil in relation to the shipments under the first contract was, in so far as relevant, in the following terms:

Payment confirmation with invoice discounting on your sales to Siam United Services Public Co Ltd

We refer to the payment undertaking letter dated [lowbar][lowbar][lowbar] [lowbar][lowbar] issued by Siam United Services Public Co Ltd and covering shipment of Metric Tons of GASOIL 0.25% SULPHUR by vessel [lowbar][lowbar] [lowbar][lowbar][lowbar].

Unit Price:

Delivery Date:

We, Societe Generale Singapore Branch (`the Bank`) hereby undertake to pay you up to an amount of USD[lowbar][lowbar][lowbar][lowbar][lowbar] not later than 7 working days after the due date the sum due to you under the above-mentioned payment undertaking and upon receipt of your certified true copy by Statoil Asia Pacific Pte Ltd (`Statoil`) of related documents including sales contract, bills of lading, invoice issued by Statoil specifying payment term not exceeding 180 days from Bill of Lading Date and funds to be paid to account of Statoil with Societe Generale, Singapore Branch.

The Bank shall not be under any obligation or liability whatsoever in the event of failure by you to perform any of your obligations under the relevant contract for the shipment by you to Siam United Services Public Co Ltd of [lowbar] [lowbar][lowbar][lowbar] (`Contract`) and our guarantee herein shall become null and void if payment from Siam United Services Public Co Ltd is not

made on due date because of a commercial dispute or for any other reasons whatsoever including without limitation, circumstances where the documents and/or drafts and/or their presentation thereof are not accepted by Siam United Services Public Co Ltd as being strictly in accordance with the Contract.

...

In event of the Bank making a payment under this guarantee, you hereby undertake:

(a) promptly upon receipt of our request to transfer and/or assign in our favour all your rights, title and interests under the Payment Undertaking, the underlying Contract and all other relevant documents;

(b) to do or procure to be done each and every act or thing and execute and procure the execution of each and every document which the Bank may from time to time require to be done or executed for the purpose of securing to the Bank the full benefit of the above assignment and / or transfer, including without limitation to take all steps and initiate proceedings in your name.

(c) to promptly pay to the Bank any moneys received directly by you under the Payment Undertaking, to hold these moneys on trust for the Bank.

This guarantee is valid until [lowbar][lowbar][lowbar][lowbar][lowbar] after which date our liability hereunder shall cease absolutely.

You shall pay us upfront a non-refundable risk commission of per annum from date of payment undertaking to payment due date based on the invoice value. We will also cover you for the discounting of the proceeds at [lowbar][lowbar][lowbar][lowbar][lowbar] per annum over SIBOR for 180 days from Bill of Lading date.

...

In respect of all the shipments under the first contract, SUSCO honoured all the Payment Undertakings that they issued to Soc Gen, and consequently Soc Gen and Statoil did not encounter any glitch in the operation of the Confirmation Payment with Invoice Discounting arrangement.

Upon the expiration of the term of the first contract, Statoil entered into a second contract with SUSCO, dated 9 April 1997 ('the second contract'), for the regular supply of gas-oil for the period from 1 May 1997 to 31 October 1997. In or around May 1997, Soc Gen made a material amendment to the wording of the Payment Confirmation and Invoice Discounting Agreement. They amended the second paragraph of the form by adding a proviso, and that paragraph as amended read as follows:

We hereby confirm that at your request we have added our silent confirmation to the above Payment Undertaking. We therefore undertake to pay you the sum due to you under the Payment Undertaking up to the aggregate amount of USD[lowbar][lowbar][lowbar][lowbar][lowbar] not later than 7 working days after the due date of the sum due to you under the Payment Undertaking and

*upon receipt of your certified true copy of related documents including sales contract, bill of lading, invoice issued by yourselves specifying payment term not exceeding 180 days from bill of lading date and showing funds to be paid to your account with Societe Generale, Singapore Branch **provided that the Counterparty has failed to perform its payment obligations under the Payment Undertaking and such a failure is only and directly due to the following circumstances:***

I) the decision by or under the authority of any government having jurisdiction over the Counterparty to declare a moratorium on payment by the Counterparty due to political reasons; or

II) the Counterparty has become insolvent, liquidated or wound-up.
[Emphasis is added.]

The `Counterparty` referred to in this document was SUSCO. The impact of this proviso (`the proviso`), which we have highlighted in italics, was central to the dispute between the parties. The rest of the form of the Payment Confirmation and Invoice Discounting Agreement remained largely unchanged in substance. In particular, the paragraph which contained the invoice discounting arrangement remained largely unchanged, save for the alteration of the period from 180 days to 150 days:

You shall pay us upfront a non-refundable risk commission of [lowbar][lowbar] [lowbar][lowbar][lowbar] per annum from date of payment undertaking to payment due date. We will also cover you for the discounting of the proceeds at [lowbar][lowbar][lowbar][lowbar][lowbar] PA for 150 days.

Shipments from Statoil to SUSCO under the second contract began around May 1997 and carried on until 11 October 1997. On or around 9 October 1997, SUSCO and Statoil entered into a third contract (`the third contract`) for further supplies of gas-oil for the period commencing 1 November 1997 to 30 April 1998. On or around 3 November 1997, Soc Gen received a Payment Undertaking from SUSCO in respect of the first shipment of gas-oil under the third contract, and also received from Statoil the usual set of shipping documents required for Soc Gen to sign their Payment Confirmation and Invoice Discounting Agreement in respect of that Payment Undertaking. However, Soc Gen decided not to sign the Payment Confirmation and Invoice Discounting Agreement. This decision was made by Mr Philippe Fournier, the Managing Director of the Corporate Commodity Finance Department of Soc Gen. His reason for so doing was to safeguard Soc Gen's interests in the light of the deteriorating state of the Thai economy. This decision was relayed to Statoil.

Statoil was taken aback by this action of Soc Gen, which effectively left SUSCO without any facility for financing their purchase of the shipments under the third contract. In view of the discontinuation of this facility by Soc Gen, SUSCO explored with Statoil as to how they could continue with their obligations under the third contract. Eventually both parties agreed to terminate the third contract.

During the period, from 1 December 1997 to 7 April 1998, SUSCO defaulted in making payments due under 12 Payment Undertakings issued by them to Soc Gen. These 12 Payment Undertakings were issued by SUSCO for 12 shipments of gas-oil respectively made by Statoil under the second contract, which were delivered between 4 June 1997 and 11 October 1997. In respect of each of these 12

outstanding Payment Undertakings, Soc Gen and Statoil signed a Payment Confirmation and Invoice Discounting Agreement, and pursuant to this document Soc Gen discounted the amount due on the relevant invoice. Thus, Soc Gen had made 12 payments to Statoil, and the total amount of these payments came to US\$4,408,599.73. This was the sum which Soc Gen sought to reclaim from Statoil in this case.

The appeal

Soc Gen's claim was based essentially on the revised form of the Payment Confirmation and Invoice Discounting Agreement which they began using from May 1997, and in particular they relied on the proviso. They pleaded in para 12 of the statement of claim as follows:

12 Further, it was, inter alia, an express term of the Payment Confirmation and Invoice Discounting Agreement that the plaintiff guaranteed to pay the defendant the sum due to the defendant under the Payment Undertaking not later than 7 working days after the due date of the sum due to the defendant under the Payment Undertaking provided that SUSCO had failed to perform its payment obligations under the Payment Undertaking and such a failure was only and directly due to the following circumstances:

(i) the decision by or under the authority of any government having jurisdiction over SUSCO to declare a moratorium on payment by SUSCO due to political reasons; or

(ii) SUSCO has become insolvent, liquidated or wound-up.

In response to a request for particulars on this paragraph, they pleaded:

The express term as stated in para 12(i) and (ii) of the statement of claim was orally agreed between the plaintiffs and the defendants initially and subsequently set out in writing in the Payment Confirmation and Invoice Discounting Agreements dated 4 June 1997, 4 June 1997, 19 June 1997, 9 July 1997, 22 July 1997, 1 August 1997, 25 August 1997, 4 September 1997, 10 September 1997, 10 September 1997, 24 September 1997, 3 October 1997, 16 October 1997 and 6 November 1997.

In respect of the discounting arrangement, Soc Gen pleaded in para 15 of the statement of claim as follows:

15 In addition, it was an express term of the Payment Confirmation and Invoice Discounting Agreement that in consideration of payment of a discounting rate of 1/8% per annum over SIBOR, the plaintiff would discount the invoices issued by the defendant to SUSCO in respect of each shipment of gasoil for a period of 150 days. It was expressly agreed between the plaintiff and defendant that the said invoice discounting would be on a with recourse basis, except in the event of failure on the part of SUSCO to perform its payment obligations under the circumstances specified in the Payment Confirmation and Invoice Discounting Agreement as set out in para 12 above.

In response to a request for particulars, they said:

It is not expressly stated in writing in the Payment Confirmation and Invoice Agreement that the said invoice discounting would be on a with recourse basis.

And then said as follows:

This term was orally agreed to by the defendants during the telephone conversations between the plaintiffs` Ms Denise Tan and the defendants` Mr David Goh between 27 September 1996 and 11 October 1996.

In response to the claim, Statoil in their amended defence raised the following plea:

*13 Save that the first sentence of para 15 of the statement of claim is admitted, para 15 of the statement of claim is denied. The defendant avers that the Payment Confirmation with Invoice Discounting service, inclusive of the invoice discounting thereunder, was provided on an unconditional **without recourse** basis subject to the [proviso].*

The second sentence in this paragraph struck us as somewhat vague and ambiguous. It seemed to say that the whole arrangement under the Payment Confirmation and Invoice Discounting Agreement was subject to the proviso. That was what was expressly provided in the agreement. The pleadings did not amplify or specifically spell out to what extent and in what manner the proviso would operate. No particulars were given.

The claim and defence turned on the terms of the Payment Confirmation and Invoice Discounting Agreement. As a matter of construction, there were two parts in this document, which were closely linked together. The first part was the obligation of Soc Gen to make payment of the amount due and referred to in the Payment Undertaking issued by SUSCO within a stated time and upon the receipt of certain specified documents by Soc Gen. Prior to May 1997, on the form of the Payment Confirmation and Invoice Discounting Agreement used, this obligation was not subject to any other condition. This payment obligation was in the following terms:

We hereby confirm that at your request we have added our silent confirmation to the above Payment Undertaking. We therefore undertake to pay you the sum due to you under the Payment Undertaking up to the aggregate amount of USD ... not later than 7 working days after the due date of the sum due to you under the Payment Undertaking and upon receipt of your certified true copy of related documents including sales contract, bill of lading, invoice issued by yourselves specifying payment term not exceeding 180 days from bill of lading date and showing funds to be paid to your account with Societe Generale, Singapore Branch.

Although this obligation (‘payment obligation’) of Soc Gen was referred to in the subsequent part of the document as a ‘guarantee’, it was more than a guarantee. It was a direct obligation on the part of Soc Gen to Statoil, and the obligation was to pay the sum due and referred to in the Payment Undertaking at a stipulated time and upon receipt of certain specified documents. Soc Gen was only relieved from such payment obligation, if Statoil failed to perform their obligations under the relevant shipment contract with SUSCO, and SUSCO’s failure to pay was due to a commercial dispute between Statoil and SUSCO. This was provided for in the next paragraph immediately following the payment obligation. However, nothing turned on this provision.

As from May 1997, the form of Payment Confirmation and Invoice Discounting Agreement was amended by Soc Gen by inserting immediately after the payment obligation the following proviso:

Provided that the Counterparty has failed to perform its payment obligations under the Payment Undertaking and such a failure is only and directly due to the following circumstances:

I) the decision by or under the authority of any government having jurisdiction over the Counterparty to declare a moratorium on payment by the Counterparty due to political reasons; or

II) the Counterparty has become insolvent, liquidated or wound-up.

With this proviso added, clearly Soc Gen’s payment obligation was qualified, and they were only obliged to pay to Statoil, if SUSCO’s default or failure to pay the sum due under the Payment Undertaking was ‘only and directly due’ to one of the two circumstances stated therein. This proviso, as appeared there, qualified only the payment obligation.

The second part of the Payment Confirmation and Invoice Discounting Agreement was the obligation of Soc Gen to discount the amount due on invoice of Statoil, and this obligation was spelled out as follows:

You [ie Statoil] shall pay us upfront a non-refundable risk commission of [lowbar][lowbar][lowbar][lowbar][lowbar] per annum from date of payment undertaking to payment due date based on the invoice value. We will also cover you for the discounting of the proceeds at [lowbar][lowbar][lowbar][lowbar] [lowbar] PA over SIBOR for 150 days from Bill of Lading date.

It is significant that nothing here was said of the proviso, and no reference was made to it. Purely on the terms as set out in the Payment Confirmation and Invoice Discounting Agreement, it is abundantly clear that the arrangement for discounting the amount due on the invoice was not subject to the proviso. There was nothing in this part of the document that referred to the proviso or suggested that the proviso applied to the invoice discounting arrangement or that the discounting arrangement was without recourse only on the basis as set out in the proviso.

It was the case of Soc Gen that the invoice discounting arrangement also incorporated the proviso, and accordingly they had a right of recourse against Statoil for recovery of the moneys they had paid in discounting the sums due on the invoices, and the only circumstances in which they did not have such a right were those set out in the proviso. In seeking to overcome the absence of an express

term in Payment Confirmation and Invoice Discounting Agreement to this effect, Soc Gen pleaded (in the particulars to the statement of claim) that they orally agreed with Statoil on such an express term during the time between 27 September and 11 October 1996. There was no specific finding by the trial judge below whether there was such an oral agreement. We, for our part, found that the allegation of the existence of this oral agreement extremely unconvincing. First, this alleged oral agreement took place long before the amendment to the form of the Payment Confirmation and Invoice Discounting Agreement, which was made in May 1997. If there were such an oral agreement, Soc Gen would have amended the form there and then or at least much earlier than May 1997. Secondly, in his affidavit evidence, Mr Phillpe Fournier said that sometime in March 1997 or thereabouts, the `existing Payment Confirmation and Invoice Discounting Agreement` was amended `to reflect that the plaintiffs` confirmation could only be called upon by the customers in the event that their counter-party`s failure to perform the payment obligations was only and directly due to the two circumstances` stated in the proviso. Nothing was said at this point in relation to their performance of the discounting arrangement. It seemed to us that whatever oral agreement that was made with regard to the variation of the terms of the Payment Confirmation and Invoice Discounting Agreement must have been incorporated in the amended form in May 1997. The amendment made in May superseded the oral agreement the parties had made, assuming that there was such an oral agreement.

It is significant that the trial judge found that when Soc Gen made the amendment to the Payment Confirmation and Invoice Discounting Agreement in May 1997, they did not bring it to the attention of Statoil. The trial judge said at [para] 15-17:

15 Although the proviso introduced a substantial limitation to Soc Gen`s liability under the Payment Confirmation, Soc Gen had, at the time it revised the form, not specifically drawn the revision to the attention of Statoil. Statoil claimed that they were not aware that Soc Gen had, from May 1997, inserted the proviso into the Payment Confirmation form. It was Statoil`s original case that it was never a term that Soc Gen`s liability under the Payment Confirmation would be so limited.

*16 Soc Gen did not deny that it had not specifically drawn Statoil`s attention to the modifications effected to the form in May 1997. Soc Gen`s explanation for this omission, as given by Miss Tan was that from the very inception it had been explained to Statoil several times, that the risks that Soc Gen covered under its guarantee were insolvency and political risks. **It was Miss Tan`s evidence that since Statoil had been informed so often of this limitation, it was not necessary, when Soc Gen revised its forms, to draw Statoil`s attention to the amendments. In her words: `the revision merely ensured that the documentation would now accurately reflect Soc Gen`s agreement with Statoil`.** [Emphasis is added.]*

17 The fact that Soc Gen`s liability to pay Statoil under its Payment Confirmations was limited to situations where SUSCO`s default was `only and directly` due to the two circumstances described in the proviso was, as Miss Tan readily agreed, an important matter. If it had indeed been a term of the agreement from the very beginning, one would have expected that there would have been some reference thereto, if not in the original Payment Confirmation form, then at least in the correspondence between the parties at that time. The absence of any such reference in the original form or in the correspondence supports Statoil`s denial that there had been any such

limitation.

In our judgment, there was no basis for Soc Gen's claim (as pleaded by them) that there was an express term orally agreed between them and Statoil during the time between September and October 1996, whereby the discounting arrangement was to be on the basis with recourse, except in the two circumstances stated in the proviso.

Next, we turn to the nature of the 12 payments in question which Soc Gen sought to reclaim from Statoil. It was common ground that each of these payments was made under the discounting arrangement as provided in the relevant Payment Confirmation and Invoice Discounting Agreement then in force. The amount paid therefore represented the discounted purchase price of the amount due on the relevant invoice. Once this payment was made, the payment obligation of Soc Gen under the Payment Confirmation and Invoice Discounting Agreement became spent, for the simple reason that they had purchased the amount due from SUSCO, and thereafter nothing was due from SUSCO to Statoil. They became entitled to exercise the rights of Statoil to recover the sums due from SUSCO. In effect, Soc Gen's potential liability under the twelve Payment Confirmation and Invoice Discounting Agreements was superseded by the 12 invoiced sums which they had purchased. There was nothing in these agreements which entitled them to have recourse against Statoil to recover the payments made, whether on the ground of insolvency of SUSCO or otherwise. On this ground alone, their claim against Statoil failed. In the circumstances, we did not find it necessary to consider the question whether SUSCO were at the material times insolvent.

For the reasons given, we held that this appeal had no merit and we dismissed it.

: I had dismissed the appeal on the ground that SUSCO was insolvent and I associated myself with the reasons given by Rajendran J. I also agreed with the finding of the court below that there was no commercial dispute between STATOIL and SUSCO.

Outcome:

Appeal dismissed.