

Industrial & Commercial Bank Ltd v P. D. International Pte Ltd
[2002] SGHC 269

Case Number : OS No 601461 of 2001
Decision Date : 15 November 2002
Tribunal/Court : High Court
Coram : S Rajendran J
Counsel Name(s) : Hri Kumar and Gary Low (Drew & Napier LLC) for the plaintiff; Vinodh S Coomaraswamy and Chua Sui Tong (Shook Lin & Bok) for the defendant
Parties : —

Banking – Lending and security – Bank providing credit facilities to two subsidiary companies of corporate guarantor – Guarantor depositing certain shares as additional security for facilities granted to one subsidiary – Whether guarantor depositing shares as security for facilities granted to that subsidiary only or for all obligations of guarantor

Contract – Mistake – Common mistake – Application for rectification of terms of security memorandum on ground that terms not consistent with bank's internal documents and parties' intention

Evidence – Admissibility of evidence – Whether evidence in affidavit admissible if deponent not present for cross-examination

Judgment

Cur Adv Vult

GROUND OF DECISION

1. The defendants P.D. International Pte Ltd ("PDI") had a number of subsidiary companies in Singapore. Amongst these were P.D. Manufacturing International Pte Ltd ("PDMI") and Manufacture Element Prefabricate Pte Ltd ("MEP").
2. In 1995, the plaintiffs Industrial & Commercial Bank Ltd ("ICB") provided various credit facilities to PDMI. The PDMI facilities were secured by a corporate guarantee issued by PDI dated 12 September 1996 ("the PDMI guarantee").
3. In October 1996, ICB approved a revolving credit facility of \$10 million (later raised to \$12 million) to MEP ("the MEP facilities"). The MEP facilities were secured by a corporate guarantee given by PDI as well as by the deposit of shares in Ace Dynamics Ltd ("ADL") – a public-listed company – on an approved advance margin of 66.6% of the market value of those shares.
4. Soon thereafter the market value of ADL shares began to decline. In order to remain within the margin limit, MEP in late 1997 deposited a sum of \$1.5 million to reduce its outstandings. The market price of ADL, however, continued to slide. To avoid the sale of the ADL shares by ICB arrangements were made – pursuant to various discussions between Jean Cheang ("Cheang") of ICB and Poh Ah Tee ("Poh") and Ms Yap Ming Choo ("Yap"), the Managing Director and the Group Financial Controller respectively of PDI – for PDI to deposit shares in another listed company, namely, Twinwood Engineering Ltd ("Twinwood"), with ICB.
5. Upon agreement being reached, ICB sent the standard Security Memorandum form of ICB to PDI for execution. ICB also required that the Board of PDI authorise the execution of the Security Memorandum in the following format:

"Resolved that authority be and hereby given to any director to sign on behalf of [PDI] the Security Memorandum for the deposit of 25,763,016 of its shares in the capital of [Twinwood] with [ICB] for the facilities extended by [ICB] to its wholly owned subsidiary [MEP]."

That resolution was signed on 17 December 1997. On the same day, the Security Memorandum was executed on behalf of PDI by Chua Sok Khim ("Chua"), a director of PDI. It was the evidence of Chua

that she had been told by Poh and Yap that the deposit of the Twinwood shares were to secure the MEP account. That was also what the Board resolution of PDI stated. She testified that had she known that under the terms of the Security Memorandum the Twinwood shares would also be security for PDI's other liabilities to ICB, she would not have signed.

6. The Security Memorandum and the Board resolution together with the Twinwood shares were thereafter sent to ICB. Subsequently, in July 1998, PDI deposited a further 4,896,984 Twinwood shares with ICB, making a total of 30,660,000 shares. This further deposit was, as required by ICB, authorised by the Board of PDI in a resolution couched in language similar to that of the resolution of 17 December 1997, ie as security "for the facilities extended by ICB to MEP".

7. PDI's only other liability to ICB at that time was in respect of the PDMI account under the PDMI guarantee. The PDMI account was not in default when the Security Memorandum relating to the Twinwood shares was signed. It, however, went into default sometime thereafter (in September 1998) and continued to remain in default.

8. PDI itself, by July 1998, faced financial difficulties and M/s Arthur Andersen were appointed special consultants to PDI. M/s Arthur Andersen were replaced as special consultants by KPMG Consulting Pte Ltd ("KPMG") in December 1998.

9. On 12 March 1999, ICB sold the ADL shares that it was holding as security for the MEP account. The market price of ADL had by then improved and the proceeds were sufficient to fully discharge MEP's liabilities to ICB. The same day ICB re-called the PDMI facilities and demanded payment of the sum of \$1,374,867.15 from PDMI as well as from PDI under the PDMI guarantee. In the said demand, ICB informed PDI that ICB would exercise its rights under the Security Memorandum should the demand not be met. This was a reference to the Security Memorandum executed when the Twinwood shares were deposited with ICB by PDI to secure the MEP account.

10. At a meeting between ICB, PDI and KPMG, held soon after (ie on 18 March 1999), the demand made by ICB was discussed. The minutes of this meeting stated the position of PDI on the demand to be as follows:

"The management of the Company are of the firm view that the Twinwood shares were deposited by ICB for the loan taken by MEP and not for PDMI."

And Mr Peter Chee of KPMG is minuted as having stated:

"based on the understanding from the company, the Twinwood shares were deposited with ICB to cover the shortfall on ADL shares. It was never the intention of PDI to give ICB security over the amount owing by PDMI."

PDI, by its solicitors' letter of 18 April 2000, challenged ICB's rights to the Twinwood shares in settlement of the PDMI debt. As the MEP facilities – to secure which the Twinwood shares had been deposited – had been discharged, the solicitors formally demanded that the Twinwood shares be returned to PDI.

11. In view of the challenge raised, ICB by way of these proceedings, sought a declaration that:

(a) the 30,660,000 Twinwood shares deposited with ICB by PDI stands as security for PDI's liability to ICB under the PDMI's guarantee dated 12 September 1996 in respect of the credit facilities furnished by ICB to PDMI; and

(b) ICB is entitled to enforce the said security pursuant to the terms of the Security Memorandum dated 17 December 1997 and to sell or otherwise dispose of the Twinwood shares in satisfaction of PDI's liabilities under the PDMI guarantee.

In support, ICB relied principally on the terms of the Security Memorandum. The Security Memorandum was a closely printed documented – as standard form documents are wont to be – and consisted of some eight pages.

12. The relevant clauses in the Security Memorandum stipulated:

Clause 1.1

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"Secured Obligations" means all obligations, indebtedness and liabilities of every kind due or owing or incurred by the *Borrower and/or the Mortgagor* to the Bank and at any time (whether any such obligation, indebtedness or liability shall be that of the Borrower and/or the Mortgagor solely or jointly with any other person(s)) whether in Singapore or elsewhere and including

(a) all present or future obligations, indebtedness and liabilities of the *Borrower and/or the Mortgagor* to the Bank on any current, advance, loan or other account whatsoever;

(b) all obligations, indebtedness and liabilities in respect of notes or bills discounted or paid or bills accepted for or at the request of the *Borrower and/or the Mortgagor* or other loans credits or advances or other Banking Facilities made to or for the accommodation or at the request of the Borrower and/or the Mortgagor;

(c) all other obligations, indebtedness and liabilities whatsoever of the *Borrower and/or the Mortgagor* to the Bank, present or future, actual or contingent, secured or unsecured (including obligations, indebtedness and liabilities as principal or surety or guarantor);"

...

Clause 8.1

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"If the *Borrower and/or the Mortgagor* (subject to the proviso to Clause 2.1) shall fail to pay or otherwise discharge when due or upon demand the *Secured Obligations* or any part thereof or any sums of money payable under this Memorandum or any other agreement with the Bank and/or upon the occurrence of any one or more other Event of Default, then the Secured Obligations shall (if not already due) thereupon become due and the Bank and/or the Bank's nominees shall be entitled, then or at any time thereafter and without prior notice to the Mortgagor, to sell or otherwise dispose and instruct any person(s) to sell or otherwise dispose of all the title, rights, benefits to and interest in the Mortgaged Security at such price for cash or other consideration (which may comprise or include Securities), and be payable immediately or by instalments and upon such terms and generally in such manner as the Bank may, in its discretion, think fit."

(Emphasis added.)

The word "Borrower" referred to MEP and the word "Mortgagor" referred to PDI. By depositing the Twinwood shares with ICB, PDI was therefore, under the terms of cl 1.1 and 8.1 of the Security Memorandum, securing not only the obligation of MEP to ICB but also its own obligations to ICB.

13. PDI did not dispute ICB's construction of the effect of the provisions in the Security Memorandum. PDI, however, contended that:

(a) At all material times the security created over the Twinwood shares, pursuant to the terms of the Security Memorandum, was intended by the parties to secure **only** MEP's liabilities to ICB and was never intended by the parties to secure PDI's liabilities to ICB under the PDMI guarantee;

(b) Insofar as they purport to create security for PDI's other liabilities, the terms of the Security Memorandum are contrary to the true intentions of the parties.

and PDI sought the rectification of the Security Memorandum by deleting the words "and/or the Mortgagor" from the definition of "Secured Obligations" in cl 1.1 and in cl 8.1;

14. Alternatively, PDI claimed that ICB knew that the Security Memorandum was executed in excess of the relevant director's authority as conferred by a board resolution drafted by ICB itself. It was PDI's case that to the extent that the Security Memorandum was executed in excess of the relevant director's authority, the Security Memorandum was unenforceable against PDI.

15. Before I deal with the merits of PDI's application for rectification and the defence of excess of authority that was raised, there is a preliminary matter relating to the admissibility of the affidavit of Cheang on which I have to make a final ruling

Admissibility of Cheang's affidavit

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16. These proceedings were commenced by way of originating summons. Proceedings by way of originating summons are generally heard on the basis of the affidavits filed by the parties. This is provided for in Order 38, rule 2(2), the material parts of which read:

"In any cause or matter begun by originating summons ... evidence shall be given by affidavit ..."

That rule then goes on to stipulate:

"but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence *without the leave of the Court*."

(Emphasis added.)

In the present case, the parties had, prior to the commencement of this hearing, applied for leave to cross-examine each other's witnesses and such leave had been granted.

17. Cheang had sworn her affidavit on 20 December 2001. Evidence was led that shortly thereafter she had been retrenched by ICB and had returned to her hometown in Ipoh. Evidence was also led that when asked to attend this hearing, Cheang, citing family commitments, had refused to attend.

18. Mr Vinodh Coomaraswamy, who appeared for PDI, submitted that as the crucial issue in this case was the intention of the parties when they signed the Security Memorandum, it was important that he cross-examine Cheang not only because the testimony in her affidavit differed materially from the testimony of Poh but also to elicit information material to his client not alluded to in her affidavit. He therefore urged the court, in the exercise of its discretion under Order 38 rule 2(2), to reject her affidavit since she was not present for cross-examination.

19. Mr Coomaraswamy was not able to cite any direct authority on the principles that should guide the court in exercising that discretion. He, however, drew the attention of the court to the case of *UMBC Finance Ltd v Woon Kim Yan* [1990] 3 MLJ 360 where the Malaysian Supreme Court held that the discretion to admit the affidavit of a person not called as a witness at the trial should not be exercised if the evidence was strongly contested or where the evidence related closely to the credibility of the witness. Mr Coomaraswamy submitted that although that case related to the calling of witnesses at a trial begun by writ, the approach taken by the court in that case would, nevertheless, be a relevant guideline.

20. Mr Hri Kumar, who appeared for ICB, also adopted the guidelines enunciated in *UMBC Finance Ltd*. Mr Kumar accepted that the more contentious the contents of the affidavit, the less likely it would be that the court would exercise its discretion to admit that affidavit in

evidence without cross-examination. Mr Kumar submitted that on that criterion there was nothing particularly contentious about the contents of the affidavit of Cheang. The most "contentious" part of her affidavit, he submitted, was paragraph 5 where she said:

"I did not, at any time, represent to any of the Defendants' representatives in any of our discussions and/or meetings that the deposit of the Twinwood shares were meant to secure **only** the MEP facilities ... It was not within my authority to vary the terms of the Security Memorandum."

Paragraph 5, Mr Kumar submitted, did not contain anything dramatically different from the evidence of Poh. He submitted that, to the contrary, Cheang's affidavit was consistent with Poh's evidence in that, like Poh, she too states that the discussions centred on the securing of MEP's facilities. There was therefore considerable common ground between the affidavits of Cheang and Poh. On the question of PDI not being able to question Cheang on matters not covered in her affidavit, Mr Kumar pointed out that all the documents (including internal documents) prepared by Cheang in connection with the deposit of the Twinwood shares had been produced to the court and those documents spoke for themselves.

21. I was satisfied that there was nothing particularly contentious in the affidavit that had been sworn to by Cheang and I noted Mr Kumar's submission that all relevant documents prepared by Cheang were available in evidence. ICB had also adduced satisfactory evidence to explain why they were not able to procure Cheang's attendance. Mr Coomaraswamy's complaint that because of the failure to call Cheang for cross-examination he will not be able to elicit information material to his clients that had not been covered in Cheang's affidavit was a valid complaint but was not by itself sufficient reason to exclude Cheang's affidavit which – as Mr Kumar submitted – did not contain any seriously contentious matter.

22. In the circumstances, I was inclined to grant ICB the leave it sought to use Cheang's affidavit as evidence. However, since the evidence as it unfolded in the course of cross-examination of the witnesses for both sides may have a bearing on the matter, I felt that it would be prudent not to make a final order until the close of the case. I therefore directed that pending a final ruling the case proceed on the basis that the affidavit was admissible.

23. Having now heard all the evidence and the submissions of the parties, I see no reason to alter that initial ruling. The fact that Cheang's affidavit was admitted without PDI having the opportunity which they sought to cross-examine her on matters not covered by her affidavit is a matter that I can take into account in assessing the overall merit of each party's case.

Rectification

24. In order to succeed in its application to rectify the Security Memorandum, PDI must establish either –

(a) that there was a common mistake in the terms set out in the Security Memorandum; or

(b) that PDI was unilaterally mistaken in respect of the terms of the Security Memorandum and ICB was aware of PDI's mistake but did nothing to draw PDI's attention to that mistake.

In this case PDI was not alleging unilateral mistake. Their defence was that it was never intended by either party that the deposit of the Twinwood shares would cover PDI's liability to ICB. PDI was, as Mr Coomaraswamy expressly confirmed, relying only on common or mutual mistake.

25. The only witness who gave direct evidence on behalf of PDI on the discussion that took place with Cheang of ICB prior to the execution of the Security Memorandum was Poh. Evidence was led that Yap, the other person who participated in these discussions, had left the employ of PDI and had refused to co-operate.

26. Poh's evidence was to the effect that at the time of the negotiations leading to the deposit of the Twinwood shares, only MEP's account was in default and the discussions he had with ICB related to regularising only that account. To quote from his affidavit:

"11. It is crucial to note that all my discussions with Ms Jean Cheang were conducted purely on the basis that the MEP facilities were in excess and had to be secured by further securities. This was because it was the only issue which was discussed and to which we directed our sole attention. There was no discussion of the facilities extended by the Plaintiff to us or our other subsidiaries apart from MEP."

Poh's claim that the discussions with ICB centred only on providing security for MEP's liabilities accorded, as noted earlier, with Cheang's testimony on the matter.

27. Mr Kumar submitted that the fact that the discussions with ICB centred on the provision of security for the MEP account was not, by itself, evidence that ICB did not intend that the securities provided by PDI would also constitute security for other liabilities of PDI to ICB. He pointed out that the standard form that ICB used for such deposits – the Security Memorandum – clearly envisaged that the securities provided would also be security for the Mortgagor's (ie PDI's) other liabilities to ICB. He submitted that Cheang's discussion with Poh relating to the deposit of the Twinwood shares was clearly in the context of that standard form. Mr Coomaraswamy, however, submitted that the discussions were only about obtaining additional security for the MEP account and that the common intention of both parties at the time of the discussion was to provide additional security for that account and no more. He submitted that in requiring PDI to execute the standard Security Memorandum form Cheang had overlooked the fact that that form in its fine-print contained terms making the deposit not only security for all of the "borrower's" (ie MEP's) liabilities but also security for all of the "mortgagor's" (ie PDI's) liabilities to ICB.

28. The question that I have to decide is therefore whether at the relevant time the parties intended to secure only the MEP account and nothing more or whether they also intended to secure PDI's liabilities to ICB in respect of other accounts.

29. It was not in dispute that a party seeking rectification of a document will be required to show "convincing proof" not only that the document to be rectified was not in accordance with the parties' true intention at the time of its execution but also that the document in its proposed form would accord with that intention (see: *Kok Lee Kuen & Anor v Choon Fok Realty Pte Ltd & Ors* [1996] 2 SLR 572; *Chitty on Contracts* (1999 Ed) at 326/327).

30. It was not in dispute that the reason why the Twinwood shares came to be deposited with ICB was that the MEP account exceeded the stipulated margin limit as a result of the decline in the value of the ADL shares that had previously been deposited to secure the MEP facilities. It is against that background that the evidence in this matter has to be evaluated. Poh's evidence in effect was that he (on behalf of PDI) agreed to deposit the Twinwood shares with ICB as a temporary measure to give PDI and MEP time to resolve the finances of MEP. It was also his evidence that Cheang assured him that when the MEP account was settled ICB would return the Twinwood shares to PDI.

31. As Cheang was not available for cross-examination, Poh's version of what transpired at the discussions between them could not be put to her. Cheang's evidence as contained in her affidavit also did not sufficiently delve into the details of the discussions she had with PDI. However, as part of the discovery process, ICB had disclosed its internal documents relating to the deposit. Mr Coomaraswamy took me through these documents in some detail. What was particularly interesting was the contents of two internal documents dated 12 December 1997 and 17 December 1997.

32. In the memo of 12 December 1997, Cheang informed the President of the United Overseas Bank ("UOB") – the parent bank of ICB – that MEP's account with ICB had fallen into excess and she made the following request:

"To allow a 3-month period for Borrower to repay the above shortfall of \$2,016,700 and *regularise the account* ...

Borrower will deposit about 20m newly listed Twinwood shares (SESDAQ) worth approximately \$5.6m (40% advance margin = \$2.24m) with our Bank *pending regularisation of the account*. However, these shares belong to the borrower's parent, PD International PL ('PDI') which, as a promoter of the Twinwood listing, is under a one year moratorium period not to dispose these shares. The same condition will apply to the shares deposited with us.

Borrower is actively seeking financing from other banks against pledging of these Twinwood shares. *We*

will progressively release the above deposited shares to these banks as funds generated from these new loans are utilised to regularise our account."

(Emphasis added.)

In the further memo to the President UOB dated 17 December 1997, Cheang stated:

"Further to our memo dated 12/12/97 (copy attached for reference), MEP has deposited a single share certificate for 25,763,016 Twinwood Engineering Ltd shares with us on 17/12/97 to provide *additional security comfort* ... These shares belong to PD International Pte Ltd, MEP's 100% holding company.

Meanwhile, we have advised them to obtain funds to regularise this account within 3 weeks.

In view of the short term

, we will not send the share script for splitting."

(Emphasis added.)

On this memo of 17 December 1997, in response to a handwritten query from senior management, appears the following handwritten note of Cheang: "*The shares are deposited with us for only a short term pending obtaining funds from other finance Cos to cover excesses (in cash).*"

33. The picture that emerges from these internal documents is that ICB was seeking to hold the Twinwood shares only until such time as the MEP account was regularised. It appears to have been expressly envisaged at that time that the Twinwood shares would be released when the MEP account was regularised. These internal documents are not consistent with the Twinwood shares being held as security for any purpose other than in connection with the MEP account. The internal documents therefore add considerable support to Poh's version of the discussions he had with Cheang

34. In his affidavit, Poh had stated that Cheang had assured him that ICB would hold the Twinwood shares as collateral and would not enforce the collateral. Mr Kumar submitted that no banker would give such an assurance and invited the court not to give credence to Poh's testimony. Whilst as a general proposition I would agree that no responsible banker would give such an assurance, I would have to consider the context in which this assurance was allegedly given before concluding that Poh's testimony should be rejected. When questioned on the context, Poh's response was:

"She said that if I give the Twinwood shares, it would be easy for her to put up a paper to management to help me. I told her the shares were under moratorium. She said it does not matter and asked me to give the Twinwood shares to her and she assured me that when the MEP account is settled she will return the Twinwood scrips."

Given the contents of the internal memos and given that the Twinwood shares were at that time subject to a moratorium on sale, it is entirely possible that Cheang may have given an assurance along those lines .

35. The Security Memorandum was sent to PDI for signature and it remained with PDI for a few days before it was signed and returned. PDI therefore had time to study the terms in the Security Memorandum before executing it. Mr Kumar submitted – relying on the case of *Taylor Barnard Ltd v Tozer & Anor* (1984) 1 EGLR 21 – that if it was reasonable to expect the other party to check the draft of the agreement, rectification will not be allowed.

36. *Taylor Barnard* was a case where two solicitors were negotiating the terms of a lease where, in the usual way, one solicitor would send a draft for the consideration of the other who would then return the draft with suggested modifications and the process would go on until the draft was settled. Where an agreement is reached on that basis, it would obviously be very difficult for a party to obtain rectification of the document on the grounds of mistake as the nature of the negotiation required the checking of every draft. That, however, was not the fact situation here. PDI and ICB had had discussions with ICB about the deposit of Twinwood shares as further security for the MEP until the

MEP account was regularised. After agreement was reached ICB sent the Security Memorandum to PDI for execution. Unlike the situation in *Taylor Barnard*, the Security Memorandum was not sent to PDI as a draft that was to serve as a basis for further negotiations. The principle in *Taylor Barnard* therefore had little or no application in this case.

37. Poh's evidence in this case was substantially supported by ICB's internal documentation. It was also consistent with the terms of the Board resolutions of PDI referred to at paragraphs 5 and 6 above which resolutions, as has been noted, were drafted by ICB for PDI's execution. These Board resolutions refer specifically to the Twinwood shares being security for the MEP account.

38. I am satisfied that PDI has shown convincing proof that the Security Memorandum that was signed did not accurately reflect the intention of either ICB or PDI. Having arrived at that decision, it becomes unnecessary for me to consider the alternative defence raised that as ICB knew that the Security Memorandum was executed in excess of the relevant director's authority as stated in Board resolutions, the Security Memorandum was to that extent unenforceable against PDI.

39. As I am satisfied beyond reasonable doubt that the Security Memorandum was signed under a common mistake, I dismiss with costs ICB's claims in the Originating Summons and grant PDI's application to rectify the Security Memorandum by deleting the phrase "and/or the Mortgagor" in cll 1.1, 8.1 and wherever else that phrase appears.

Sgd:

S. RAJENDRAN

Judge

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