PSA Corp Ltd v Korea Exchange Bank
[2002] SGHC 88

Case Number : Suit 937/2001, RA 26/2002

Decision Date : 26 April 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Siraj Omar (Drew & Napier LLC) for the plaintiff; Toh Kian Sing and Chia Song Yeow (Rajah & Tann) for the defendant

Parties : PSA Corp Ltd — Korea Exchange Bank

Civil Procedure – Disclosure of documents – Prohibition against disclosure – Banking secrecy – Customer confidentiality – Whether s 47 Banking Act (Cap 19, 1999 Ed) prohibits discovery of documents sought – Whether prohibition general or limited – Whether documents relate to account of bank's customer – Whether court can order disclosure if statutory exceptions in applicable – Whether right for court to order disclosure of certain documents and not others – Whether s 47(3) should be amended – s 47, 47(3) & Sch 6 Banking Act (Cap 19, 1999 Ed)

Words and Phrases – 'Customer information' – ss 40A & 47 Banking Act (Cap 19, 1999 Ed)

Judgment

GROUNDS OF DECISION

1. In this action, PSA Corporation Limited ('PSA') claims against Korea Exchange Bank ('KEB') for payment under two guarantees issued by KEB in favour of PSA.

2. For the purpose of my Grounds, the main defences of KEB are that:

> (a) PSA did not open an account for Cho Yang (Singapore) Pte Ltd ('CY Singapore') as required under each guarantee and that the account was opened for Cho Yang Shipping Co Ltd ('CY Korea') instead.
>
> (b) KEB also alleged that the second guarantee was issued in replacement or substitution of the first guarantee and not in addition to it.

3. PSA then applied for discovery of two categories of documents in relation to each of the two guarantees:

> (a) copies of all correspondence, including e-mail, between KEB and CY Singapore and/or CY Korea relating to each particular guarantee,
>
> (b) copies of all documents, including but not limited to KEB's internal memoranda, file notes and e-mail, relating to KEB's processing and issue of the particular guarantee.

4. KEB did not dispute that the documents for which discovery was sought were relevant to the disputes in the action. However, it took the position that it was precluded by s 47 of the current Banking Act (Cap 19) from giving discovery.

5. At the hearing before Assistant Registrar Phang Hsiao Chung, PSA obtained an order for discovery of the first category but not the second category of documents.

6. However, only PSA appealed against AR Phang's decision. PSA wanted an order of discovery to be made against KEB in respect of the second category of documents as well. On 27 March 2002, I dismissed PSA's appeal with costs.

Section 47(3) Banking Act (Cap 19) 1994 Edition

7. The previous s 47(3) Banking Act ('the Act') stated:

> '(3) Subject to subsection (4), no official of any bank and no person who by reason of his capacity or office has by any means access to the records of the bank, registers or any correspondence or material with regard to the account of any customer of that bank shall, while his employment in or professional relationship with the bank, as the case may be, continues or after the termination thereof, give, divulge or reveal any information whatsoever regarding the money or other relevant particulars of the account of that customer.'
>
> [Emphasis added.]

8. Various exceptions were set out in subsection (4) but I need not refer to them.

Current Section 47 Banking Act (Cap 19)

9. The previous s 47 was repealed and substituted by the current s 47 with effect from 18 July 2001. The banking secrecy provision is now spread over two subsections instead of one. The relevant provisions are s 47(1) to (2). There is also another provision i.e s 47(3) on the court's power to give directions or orders to ensure confidentiality.

10. Section 47(1) to (3) state:

> '**Banking secrecy**
>
> 47. (1) Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act.
>
> (2) A bank in Singapore or any of its officers may, for such purpose as may be specified in the first column of the Sixth Schedule, disclose customer information to such persons or class of persons as may be specified in the second column of that Schedule, and in compliance with such conditions as may be specified in the third column of that Schedule.
>
> (3) Where customer information is likely to be disclosed in any proceedings referred to in item 3 or 4 of Part I of the Sixth Schedule, the court may, either of its own motion, or on the application of any party to the proceedings or the customer to which the customer information relates
>
> (a) direct that the proceedings be held in camera; and
>
> (b) make such further orders as it may consider necessary

to ensure the confidentiality of the customer information.'

11. As is evident, exceptions to banking secrecy are stated in the first column of the Sixth Schedule to the Act. For present purposes, I need refer only to items 3 and 4 thereof which state:

' **SIXTH SCHEDULE**

PART I

FURTHER DISCLOSURE NOT PROHIBITED

First column

Purpose for which customer information may be disclosed

3. Disclosure is solely in connection with -

(a) where the customer is an individual, the bankruptcy of the customer; or

(b) where the customer is a body corporate, the winding up of the customer.

4. Disclosure is solely with a view to the institution of, or solely in connection with, the conduct of proceedings-

(a) between the bank and the customer or his surety relating to the banking transaction of the customer;

(b) between the bank and 2 or more parties making adverse claims to money in an account of the customer where the bank seeks relief by way of interpleader; or

(c) between the bank and one or more parties in respect of property, whether movable or immovable, in or over which some right or interest has been conferred or alleged to have been conferred on the bank by the customer or his surety.'

12. In addition, 'customer information' in s 47 is defined in s 40A as follows:

' "customer information", in relation to a bank, means

(a) any information relating to, or any particulars of, an account of a customer of the bank, whether the account is in respect of a loan, investment or any other type of transaction, but does not include any information that is not referable to any named customer or group of named customers; or

(b) deposit information;'

[Emphasis added.]

There is a definition of 'deposit information' also but that is not relevant for present purposes.

Submission for PSA

13. Mr Siraj Omar, Counsel for PSA, submitted that under the predecessor to s 47, the prohibition from disclosure of information was restricted only to the money in the account of the customer and particulars of the account. In other words, other information was not precluded from disclosure by a bank. He derived support from some textbooks.

14. For example, International Bank Secrecy, 1992, by Dennis Campbell states at para 31-027:

> '**Subject matter of statutory duty**
>
> Section 47 prohibits those concerned from giving, divulging, or revealing "any information whatsoever regarding the money or other relevant particulars of the account of [the bank's] customer". It will be noticed that a moratorium is imposed on "any information whatsoever", that relates to:
>
> (1) The money in the customer's account, or
> (2) Relevant particulars of the account.
>
> It would appear that an omission has been made in respect of the affairs of the customer other than the money in, or relevant particulars, of the account. The situation in *Tournier*, for example, would apparently fall outside the wording of section 47 as the information divulged in that case was that the banks' customer had diverted the proceeds of a check to his bookmaker. This neither relates to the money in his account, nor is it a particular of his account.'

15. Another textbook which he relied on was Bank Confidentiality by Francis Neate, Second Edition 1997, at p 442:

> '***Subject matter of statutory duty***
>
> The prohibited matter under BA, s 47(3) relates to the balance in the customer's account and other relevant particulars of the account of the customer. In *Tournier*, the bank had made disclosure to a third party of the fact that the customer had diverted the proceeds of a cheque to a bookmaker. Since such information neither relates to the money in the customer's account nor is it a particular of his account, this raises the issue of whether the bank would have been held to have breached its statutory duty of confidentiality in Singapore even though it may have breached its contractual duty at common law, which is framed more widely.'

16. However the next two paras state:

> ' This is a (*sic*) possibly anomaly, which unfortunately has also not come before the courts. Although it is appreciated that the argument made above that s 47 is not intended to be exhaustive, it is submitted here that the narrower wording of s 47(3) should be followed, on the principle of statutory interpretation that a penal statute be narrowly construed.

It should be noted that the Malaysian statutory duty does not have this anomaly, because their equivalent provision prohibits the disclosure of 'any information or document whatsoever relating to the affairs or account' of a customer.'

17. Mr Omar submitted that there was no radical departure from this regime when the predecessor Act was repealed and the new Act came into force because no such departure was suggested when Deputy Prime Minister Brigadier-General Lee Hsien Loong ('DPM') moved the reading of the Banking (Amendment) Bill. DPM said, inter alia,

'Revision of Banking Secrecy Provisions

The banking secrecy provisions of the Banking Act protect the confidentiality of customer information. Tight banking secrecy is important to maintaining the confidence of customers in our banking system. However, our present banking secrecy provisions have impeded banks wanting to take advantage of potential operational benefits and savings. For example, banks find it difficult to securitise mortgage loans, or to outsource data processing to third parties. MAS has reviewed the banking secrecy provisions in consultation with the industry. We have considered both the operational requirements of banks and the need to preserve customer confidentiality. The measures set out in the new section 47 strike a careful balance between these two sets of considerations.

The new section 47 will stipulate a wider set of circumstances under which banks can disclose customer information, and the terms of such disclosure. These are set out in a new Sixth Schedule, which consists of two parts. Part I will contain many of the existing exceptions, and Part II will contain most of the new exceptions to the secrecy provisions. Examples of new exceptions are the disclosure of credit information in a sale or transfer of credit facilities (for example, asset securitisation), and the disclosure of customer information to a bank's head office for risk management purposes. Two key points about the new exceptions are, first, only very few exceptions have been allowed for the disclosure of information relating to a customer's deposit and funds placed for investment; and second, a person who receives customer information will be required by law to keep the information confidential.

These measures ensure that by law, all banks will provide a basic level of customer confidentiality to all their customers. Beyond this legal minimum, individual banks and customers may reach their own contractual arrangements offering higher standards of confidentiality. The Act does not compel a bank to invoke the newly introduced exceptions if the bank deems this to be in the best interests of its business and its customers.'

18. Mr Omar submitted that since the category of documents for which PSA sought discovery did not pertain to money in the account of KEB's customers, whether it be CY Singapore or CY Korea, or particulars of the account as such, KEB was not prohibited from disclosing the same under s 47 of the current Banking Act. In addition, if any document disclosed would reveal any prohibited information which was not relevant to the action, portions of the document could be blanked out.

19. Finally he submitted that it was anomalous to allow one category of documents to be disclosed

and not another.

Submission for KEB

20. Mr Toh Kian Sing, Counsel for KEB, stressed that it was common ground that the exceptions in the Sixth Schedule did not apply. The question was whether the prohibition in s 47 was as limited as advocated by Mr Omar or the prohibition was wider. He submitted that as the definition of 'customer information' was wider than the words in the previous s 47(3), the prohibition was wider.

21. As for the current s 47(3), Mr Toh submitted that the court can make such orders as it may consider necessary to ensure the confidentiality of the customer information only if the proceedings come within item 3 or 4 of Part I of the Sixth Schedule in the first place.

My Decision

22. DPM's speech in Parliament did not indicate whether a change was intended on the point in issue before me.

23. I was of the view that whether a change was intended or not, the scheme under the current s 47 was to have a general, as opposed to a limited, prohibition from disclosure with the exceptions stated in the Sixth Schedule.

24. I came to this conclusion from the wider words used to define 'customer information' as well as the speech of DPM.

25. Firstly, as I have set out, 'customer information' means 'any information relating to … an account of a customer of the bank' [emphasis added]. True, the definition is not in the same terms as the Malaysian statutory duty mentioned in Bank Confidentiality by Francis Neate i.e where the provision prohibits disclosure of 'any information or document whatsoever relating to the affairs or account' of a customer [emphasis added]. However, I was of the view that the omission of the words I have emphasized do not mean that the prohibition is as limited as was argued by Mr Omar. In my view, 'information' includes documentary information and so long as the information sought relates to an account of a customer, then, prima facie disclosure by the bank is prohibited.

26. Secondly, the speech by DPM reflects the scheme that there should first be a general prohibition from disclosure by banks to ensure confidentiality. This is then subject to exceptions stated in the Sixth Schedule. If any further exception is to be made, then this should be done by amending the Sixth Schedule and not by narrowly construing 'customer information'.

27. On the facts before me, the second category of documents related to the account of KEB's customer or customers.

28. I also agreed that under the current s 47(3), the question of the court making such further orders as are necessary to preserve confidentiality comes into play only if item 3 or 4 of the Sixth Schedule apply. The current s 47(3) does not enable a court to order disclosure from a bank if none of the exceptions apply in the first place.

29. It may well be that the present case calls for further amendments to be made to the Act to include an exception which allows disclosure in litigation between a bank and the beneficiary of an

instrument issued by the bank. Indeed, there are many instances of banks issuing instruments like guarantees, performance bonds and letters of credit. It seems to be incongruous that where there is litigation between, say, a bank and a surety relating to the banking transaction of a customer, discovery of relevant documents pertaining to 'customer information' is allowed but yet where a beneficiary sues a bank on any of the instruments I have mentioned, such disclosure is not allowed. Since the dispute between the beneficiary and the bank relates to an instrument which must have been issued at the request of the customer, the customer should not be in a position to complain if information relating to his account is disclosed so long as it satisfies the test of relevance in the litigation. In addition, the current s 47(3) can be expanded to allow the court to make such directions and orders it thinks fit to ensure confidentiality where this exception, if available, applies.

30. As an aside, it seems to me that the current s 47(3) is too narrow in that it should not be confined to items 3 and 4. This is because there are other exceptions which may require the court's assistance to ensure confidentiality, for example, items 6 and 7 of the Sixth Schedule which pertain respectively to garnishee proceedings and a court order pursuant to Part IV of the Evidence Act.

31. However, it is for Parliament to decide whether any further exception to banking secrecy or confidentiality is required and whether the current s 47(3) should be expanded.

32. As for the argument that it would be anomalous to allow one category of documents to be disclosed and not another, I accepted that there was some force in that argument. It seemed to me that either both categories should have been disclosed or not at all. However, that was the decision below and there was no appeal by KEB.

33. In the circumstances, I dismissed PSA's appeal with costs.

Sgd:

WOO BIH LI
JUDICIAL COMMISSIONER

Copyright © Government of Singapore.