Bakery Mart Pte Ltd (In Receivership) v Sincere Watch Ltd
[2003] SGCA 36

Case Number : CA 142/2002

Decision Date : 02 September 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Gabriel Peter (Gabriel Law Corporation) for appellant; Ismail Atan (Gabriel Law Corporation) for appellant; Philip Ling (Wong Tan & Molly Lim LLC) for respondent

Parties : Bakery Mart Pte Ltd (In Receivership) — Sincere Watch Ltd

Civil Procedure – Summary judgment – Leave to defend – Whether defence bona fide – Whether defendant ought to be granted unconditional instead of conditional leave to defend

Delivered by Chao Hick Tin JA

1 This was an appeal by the defendant against a decision of the High Court affirming a decision of the Assistant Registrar granting the defendant conditional leave to defend the action, the condition being the provision of a banker's guarantee for the full amount of the claim in the action. We heard the appeal on 24 July 2003 and allowed it, granting the defendant unconditional leave to defend. We now give our reasons.

The facts

2 The defendant, Bakery Mart Pte Ltd ("Bakery"), is a private limited company in the business of distributing baking and confectionery materials. Bakery is wholly owned by Hup Wing Pte Ltd ("Hup Wing"). All the shares of Hup Wing, except one, are owned by Mr Charles Ng ("Ng") who manages and controls Bakery.

3 The plaintiff, Sincere Watch Ltd ("Sincere"), is a public listed company and is in the business of retailing fine watches. Two officers of Sincere played a key role in the present dispute with Bakery: Mr Tay Liam Wee ("Tay"), its managing director, and Mr Soh Gim Teik (Soh), its director.

4 In late 1999, Bakery and Sincere agreed to cooperate and embark on a business venture by equally acquiring all the shares in Culina Pte Ltd ("Culina"), a company then owned by the Hai Sun Hup Group ("Hai Sun Hup"). Culina dealt in the supply and distribution of fresh and frozen foods, pastry products and wines. For this venture, Sincere acted through its wholly owned subsidiary, Avante Investment Pte Ltd ("Avante"). However, as Bakery lacked funds to pay for half of the shares in Culina, the same was provided by Sincere and an arrangement, by way of an option deed, was entered into under which Sincere was given an option, within two years thereof, to subscribe for 300,000 shares in Bakery at the price of $500,000. The deed also provided that upon subscription to the shares of Bakery, Sincere would give a loan of $100,000 to Bakery. For reasons which will be apparent later, Sincere did not exercise the option but it did, on the same day on which the option deed was executed, make a pre-payment of $500,000 to Bakery, plus the further loan of $100,000.

5 The purchase of Culina was completed on 30 November 1999 and, as agreed, Ng became its Managing Director.

6 About a year later, both parties thought that it would best advance their business venture if they undertook a corporate restructuring through the setting up of a holding company. They started negotiations on that. The parties had planned to bring under the umbrella of the proposed holding

company ("HC") three companies: Culina, Bakery and Food Resources Pte Ltd ("Food Resources"), the latter being a company owned by Tay and Soh and was involved in the business of importing ice-cream from Australia. In fact, earlier in September 2000, Ng was appointed a director of Food Resources.

7 By April 2001, it was agreed that Sincere would have 70% of the shareholding of the HC, and Bakery, 30%. Draft agreements drawn on this basis were put up by their respective solicitors. As part of the restructuring plan, 299,999 shares in Food Resources were transferred to Ng at a nominal value and he was to hold the shares in trust for Tay and Soh. Another one share of Food Resources was held by Ng's sister, Ng Sock Cheng, on a similar trust. This transfer of shares of Tay and Soh in Food Resources to Ng and his sister was because of a perceived conflict of interest situation arising.

8 Ng said that in arriving at the 70/30 shareholding ratio in the HC by Sincere and Bakery, account was taken of the advance of $600,000 given by Sincere to Bakery, the amount that was paid to Hai Sun Hup for the acquisition of the shares of Culina and the amounts which were contributed by Sincere in the purchase of a property at No. 24 Senoko Way ("Senoko property"). It was the understanding of all parties that the Senoko property would be used for the purposes of the group's operations.

9 Ng also said that it was further understood that all the moneys advanced by Sincere to Bakery need not be repayable by Bakery as they had become Sincere's investment in the group and it was on this basis that Sincere was allocating 70% of the shareholding in the HC. Accordingly, the character of the moneys paid over to Bakery had been altered and they were no longer pure loans, repayable upon demand. It was also understood that the loans granted to acquire the Senoko property would only be repaid if the HC should eventually be listed on the stock exchange. It was because of the restructuring of the various companies under a HC that made it unnecessary for Sincere to acquire 300,000 shares in Bakery, as originally envisaged under the option deed.

10 However, in December 2001, the relationship between the parties turned sour because Sincere had asked for an increase in the percentage of its shareholding in the HC from 70%, as previously agreed, to 85%. Furthermore, Sincere planned to sell much of this 85% shareholding in the HC to another public listed company. Bakery disagreed with Sincere's proposal to change the proportion of Bakery's shareholding in the HC. Because of these differences, Sincere sought to remove Ng as the Managing Director of Culina which in turn led to a separate action by Bakery to restrain Culina and Avante from so removing Ng as the Managing Director.

11 All in all, from late 1999 when Bakery and Sincere started business cooperation, the sums advanced by Sincere to Bakery are the following:-

(i) $500,000 paid by Sincere to Bakery as prepayment for the 300,000 shares of Bakery which under the option deed Sincere was entitled to exercise within two years thereof;

(ii) a loan of $100,000 given by Sincere to Bakery pursuant to clause 5 of the option deed even though Sincere never exercised its option to subscribe for 300,000 shares in Bakery;

(iii) an advance of $450,000 given by Sincere to Bakery which was acknowledged by the latter on 30 November 1999;

(iv) a further advance of $80,000 given by Sincere to Bakery which was acknowledged on 8 March 2000.

(v) another advance of $800,000 made by Sincere to Bakery on 8 December 2000, but credited to the account of Culina.

12 The present action is instituted by Sincere to claim for the repayment of all the aforesaid sums, amounting in total to $1.93 million.

13 In relation to the two advances made pursuant to the option deed, it is true that there was a letter dated 26 November 1999 from Bakery, wherein it was recorded that the parties agreed that the total sum of $600,000 would be repayable on demand should Sincere decide not to exercise the option. But Ng said that this arrangement was superseded by the new arrangement involving the setting up of a HC, where Sincere would obtain 70% of the shares.

14 As regards the other three sums amounting to $1.33 million, Bakery admitted receiving the same and claimed that, except for the $80,000, they were for the purpose of purchasing the Senoko property. Bakery said that the $80,000 was for the closure of the operations of Culina Sdn Bhd in Kuala Lumpur and had been taken into account in determining the 70:30 proportions of Sincere and Ng's shareholdings in the HC. However, Sincere alleged that this sum was also given to enable Bakery to purchase the Senoko property. Be that as it may, we did not think this minor difference as to the object of that payment was in any way critical.

15 In support of his averment that the various sums advanced to Bakery were, on account of the restructuring, treated as payments towards acquiring equities in the HC, and that by then there was a firm agreement between the parties on it, Ng referred to the fact that on 8 December 2000, Sincere undertook to give a corporate guarantee to the Industrial & Commercial Bank ("ICB") for the sum of $2,780,000 in relation to the credit facilities granted by ICB to Bakery for the acquisition of the Senoko property and for Bakery's operational requirements. Bakery said that this also showed that there was already an agreement between the parties.

Our decision

16 In the light of the averments of Ng, it seemed to us that the advances made by Sincere to Bakery did merit further investigation. The true intention of the parties could only be ascertained at trial. Sincere is a public listed company. It is not a financial institution. Neither is it in the business of money-lending. Moreover, why would Sincere undertake to give a corporate guarantee to ICB in relation to the credit facilities granted by the latter to Bakery unless there was already in existence some agreement between Bakery (and Ng) and Sincere.

17 It is of interest to note that when there was a slight delay in Sincere giving the formal guarantee to ICB, one Wilfred Teo from Bakery on 15 January 2001 wrote to ICB (which was copied to Soh), asking for indulgence and explaining the problems as follows:-

> "Initially, Sincere Watch through its 100% subsidiary Avante Investment Pte Ltd has an option to subscribe for 50% paid up capital of Bakery Mart and once Avante exercises the option, Charles Ng and Sincere Watch will own Bakery Mart equally.
>
> In mid December last year, we have discussed to restructure the group by incorporate (sic) a 70% (Sincere Watch) and 30% (Charles Ng) New Company which will own 100% of both Bakery Mart Pte Ltd and Culina Pte Ltd, the proposed New Company paid up capital is S$2,000,000. This restructuring exercise is expected to complete by end of January 2001. Sincere Watch will sign the corporate guarantee, as Bakery Mart is a subsidiary of Sincere Watch.

I am meeting with Mr Soh Gim Teik of Sincere Watch this afternoon to finalize the proposed new group structure and will request him to write and explain to you as requested."

18 In a note of 5 February 2001 to Soh and Tay, Wilfred Teo stated that "the total fund injected by Sincere at various periods of past 12-13 months amounting to $3,492,500 (include the options in Bakery Mart $500,000 …) has an estimated average return of more than 10.5% to Sincere …".

19 Equally interesting is this note of 21 February 2001 from Wilfred Teo to Soh and Tay:-

"NB: I have started communicating with banks (BEA, MayBank & Keppel Tatlee) that we are subsidiaries of Sincere Watch, as per our last meeting on 16.2.2001, on the new bank line restructuring. As per your promise, we should have the final proposal from you latest today between shareholders (Sincere Watch and Charles), as I have taken the assumption that Culina, BM & FR are subsidiaries of Sincere Watch; for your information, I have restructured the store & distribution by centralizing the three companies as ONE in order to improve productivity and cost saving for the GROUP."

20 Concurrently, steps were also taken to reserve a name for the HC and the Registry of Companies had given approval for the same.

21 In relation to the present appeal, there was no need for us at this stage of the proceedings to make a definitive finding on any of the aforesaid matters. Suffice it for us to say that there appeared to be circumstances which indicated to us that this was not a straightforward case of a loan which had to be repaid on demand. Indeed the judge below seemed to have recognised that there should be a trial when he said, "this is not a case where judgment should be entered for the plaintiff without a trial." There was nothing "shadowy" or "dubious" about what Bakery alleged. The contemporaneous correspondence amply bore that out.

22 In granting conditional leave, the judge below seemed to have placed great emphasis on the fact that the written agreement contemplated was never signed between the parties. However, where negotiations are protracted the court is entitled to look at all the circumstances and apply an objective test to determine whether the parties had reached an agreement as far as the essential terms are concerned, or whether the parties intended to reserve their rights pending a formal agreement: *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399.

23 In *Fieldrank Ltd v E Stein* [1961] 1 WLR 1287, Devlin LJ said (at 1289):-

"I think that any judge who has sat in chambers to hear summonses under O 14 has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, he is nevertheless left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is no grave hardship on the defendant being made to pay money into court."

24 In the present case, we did not think there was really any doubt as to the good faith of Bakery's defence. Moneys were expended towards setting up the HC. The Senoko property was purchased. There was part-performance. It appeared that there was a last minute change of mind on the part of Sincere which unravelled everything. In all the circumstances, the defence of Bakery that the sums advanced were no longer repayable upon demand, was not a point that was made without foundation even though a formal agreement setting out the arrangements was never executed and the HC was never incorporated. If the restructuring had been successfully concluded, Sincere would have got shares in the HC in return for its investment. Even if it did not, as in the present case, does it

necessarily follow that Sincere is entitled to ask for all moneys back forthwith though moneys had been expended towards that object? In our view, there are issues to be tried. Moreover, we would add that even if precise issues could not be identified, but bearing in mind the very involved dealings between the parties, this is a case where there ought, "for some other reasons", to be a trial (see O 14 r 3(1) of the Rules of Court).

25 We would also add that the accounts of Bakery indicated that it would not be in a position to meet the condition imposed to enable it to defend the action, i.e., furnishing a guarantee for the amount claimed. The order below would be tantamount to granting summary judgment.

26 For all the aforesaid reasons, we gave Bakery unconditional leave to defend.

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