Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd
[2003] SGHC 72

Case Number : Suit 20/2002

Decision Date : 31 March 2003

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Tan Cheng Yew and Zarina Sani (Tan JinHwee, Eunice & Lim ChooEng) for plaintiff; Vinodh Coomaraswamy and David Chan (Shook Lin & Bok) for defendant

Parties : Daewoo Singapore Pte Ltd — CEL Tractors Pte Ltd

Contract – Payment of default interest – Whether there was an agreement between the parties that the buyer has to pay default interest to the seller on overdue invoices.

1 In the present action, the Plaintiff, Daewoo Singapore Pte Ltd, is claiming contractual interest for late payment of heavy machinery and equipment parts ("the goods") sold and delivered to the Defendant, Cel Tractors Pte Ltd. According to the Plaintiff, the Defendant defaulted in its obligation to pay for the goods within "30 days from invoice date" or "180 days after sight" ("the principal debt") so much so that interest for late payment ("default interest") amounting to US$274,687.72 was incurred and payable to the Plaintiff.

2 The Plaintiff's pleaded case is that by Clause 2 of its Confirmation Orders, the Defendant as buyer is required to pay interest on any late payment from the date the amount is due for payment to the date of full payment received by the Plaintiff as seller at the rate of 20% per annum or at the enforceable maximum legal rate of interest applicable in the buyer's country if such legal rate is less than 20%. In the present action, the Plaintiff is claiming default interest at the rate of 10.5% per annum.

3 On 3 November 2000, the Plaintiff sued the Defendant for the principal debt in the sum of US$432,996.01 due and owing as at 1 November 2000. This principal debt was later compromised in a Scheme of Arrangement sanctioned by the High Court on 2 March 2001 and affirmed on appeal by the Court of Appeal on 20 August 2001. It is the Plaintiff's case that default interest is still claimable in this action as it is outside the scope of the Scheme of Arrangement. It is said that there was an agreement to defer payment of default interest until the principal debt had been paid.

4 The Defendant's contention is that there was no binding and enforceable agreement to pay default interest and at the particular rate of interest claimed. Neither was there any agreement to pay default interest after the principal debt had been paid. It is the Defendant's case that even if there was an agreement to pay default interest, such a claim has been discharged by the Scheme of Arrangement. Alternatively, if the Scheme of Arrangement has not discharged the Plaintiff's claim, the Plaintiff is precluded by an estoppel by representation from bringing the present claim.

5 The primary issue is whether there was an agreement to pay default interest on overdue invoices. If the primary issue is answered in the affirmative, then the second issue is whether there was an agreement to defer payment of default interest until the total outstanding principal debt had been paid.

6 On the primary issue, Counsel for the Plaintiff, Tan Cheng Yew, submits that the basis to charge default interest is Clause 2 of the Plaintiff's Confirmation Order. Mr. Tan argues that the transactions in question were subject to the same terms and condition as those accompanying the two respective Confirmation of Order dated 1 October 1993 and 17 April 1995. He argues that the Defendant had

many years of dealings with the Plaintiff in the capacity of a distributor of Daewoo heavy machinery and parts and was aware of the company's standard terms conditions including Clause 2, which were incorporated into the transactions in question. Consequently, default interest is payable by the Defendant.

7 Counsel for the Defendant, Mr. Vinodh Coomaraswamy, contends that there was no term in the transactions regarding interest for late payment. There was also no agreement on the applicable rate of interest. The evidence, in my judgment, supported Counsel's contentions, as did the events disclosed in the course of correspondence.

8 It is not in dispute that the sales under the two Confirmation Orders adduced in evidence have been settled. Lim Chee Seng ("Lim"), the Defendant's Managing Director, was aware of the interest condition in Clause 2. But Lim's knowledge of itself would not take the matter further. The two witnesses who testified on behalf of the Plaintiff have no personal knowledge of the terms of the sale between the Plaintiff and Defendant and thus were unable to challenge the Defendant's evidence that (i) no Confirmation of Order was issued for the transactions that have given rise to this claim for interest and, (ii) only tax invoices were issued without attaching any standard terms and conditions. The relevant tax invoices are invoice nos. HE 97024, HE 97026, HE 97034, HE 97035, HE 97049 and HE 97053. On the relevant tax invoices, there is neither express stipulation for payment of default interest nor any reference to the standard terms and conditions.

9 Park Min Yang ("Park") was the Plaintiff's Deputy General Manager from March 1998 to January 1999. His association with the Defendant began in February 1998 when he came to Singapore until he was transferred back to Korea in January 1999. Park testified that the Defendant had agreed to pay interest on the principal debt. He gave no details of the agreement or how it came about. I accept the Defendant's submission that Park's testimony is inadmissible as it offends the hearsay rule. Park admitted that he has no personal knowledge of the agreement to pay interest, having heard about it from his predecessor, Mr. Chun.

10 In my judgment, the Plaintiff has not established that, through a course of dealings between the parties, Clause 2 was incorporated into each sale as a term. The events disclosed in the course of correspondence equally support my conclusion.

11 Whilst it is said that the basis to charge interest is Clause 2, the claim for interest at the rate of 10.5% per annum has not been explained in the Plaintiff's pleadings or the evidence. If the Defendant is required by Clause 2 to pay default interest at the rate of 20% per annum, it is completely illogical for the Plaintiff to sue for default interest at a reduced rate. Mr. Tan interprets the correspondence to be nothing more than the Plaintiff's effort at giving concessions to the Defendant i.e. a reduction in amount of interest. Mr. Tan's submission on that point is unconvincing. It is also premised first and foremost on a finding of a contractual basis to charge interest under Clause 2.

12 It is clear from the course of correspondence that the Plaintiff was not asserting a right under Clause 2. In reality, the Plaintiff sought to unilaterally impose interest after the conclusion of the transactions that have given rise to this claim for interest. Nowhere in any of the correspondence was reference made to Clause 2. In fact no one alluded to this Clause. As far as I can see, the first time it was referred to was in the Statement of Claim. When payment of default interest was first raised with the Defendant, it was not at the rate of 20% per annum stipulated in Clause 2. The rate of interest the Plaintiff sought to impose was 22% per annum. On 21 January 1998, the Plaintiff informed the Defendant that its Korean bank would impose that rate of interest and the Plaintiff would pass the same interest charge to the Defendant. On 9 February 1998, the Defendant was asked to confirm that it would "pay actual interest charges which shall be imposed by Daewoo Corporation and

Daewoo Heavy Industry in Korea in addition to above principal amount". Again no reference was made to Clause 2.

13 In another fax dated 31 March 1998, the Plaintiff reminded the Defendant that the payment term of the goods sold was 30 days from invoice date by TT remittance and the company has been "absorbing huge interest rate in the past". Again no reference was made to Clause 2 or the Defendant's contractual obligation to pay interest at the rate of 20% per annum. Instead, the Defendant was informed that with effect from 1st April 1998, the Plaintiff would charge interest at the rate of 22% per annum for both outstanding and new invoices. Lim rejected on 2 April 1998 this unilateral attempt to impose default interest at the rate of 22%. On 15 April 1998, the Defendant was asked to pay in respect of overdue invoices the sum of US$100,000 per month from April 1998 to July 1998 as well as the actual amount of interest imposed by the Plaintiff's bank. The Defendant in reply wrote: "…. if interest was chargeable, it should be based on local rate." It is clear from the Defendant's choice of words in response that the issue of default interest was yet to be agreed.

14 Park testified that after the Plaintiff received the Defendant's fax of 17 April 1998, he and J K Lee, the Plaintiff's Managing Director, had a meeting with Lim who agreed at the meeting to pay default interest and at the rate of 10.5% per annum. Lim has denied that there was any such agreement. This crucial piece of evidence was not mentioned in Park's affidavit evidence-in-chief nor was this meeting and agreement pleaded in the Statement of Claim. In my view, the deficiency in the affidavit of evidence-in-chief and pleadings seriously undermines the credibility of the Plaintiff's claim. No attendance note or minutes recording the outcome of the meeting was produced in evidence. This is despite Park's evidence that he would accompany J K Lee to meetings and would usually take notes. I can only conclude that it was a story made up by the witness in the witness stand.

15 On 26 May 1998, the Plaintiff imposed conditions on further supply of goods. If the Defendant paid US$100,000 every month starting from April 1998 and May 1998 and default interest every month at the rate of 10.5% per annum starting May 1998, the Plaintiff would continue to sell to the Defendant what it wanted in its purchasing plan dated 24 March 1998. Whilst it is understandable that the Plaintiff was anxious that the indebtedness be reduced, what the Plaintiff appeared to be doing was to secure an agreement from the Defendant to pay default interest at the rate of 10.5% per annum starting May 1998. There was no need for the Plaintiff to do that if Clause 2 was a contractual term or there was an agreement with Lim as alleged by Park to pay default interest and at that particular rate.

16 Lim replied by fax the same day agreeing only to pay US$100,000 per month. There was, however, no acceptance of the condition to pay interest every month and at the rate of 10.5% per annum. Lim explained that because of financial difficulties caused by the regional economic crisis, the Defendant was unable to pay interest and asked that the matter of interest be discussed after the repayment of the principal sum. Mr. Tan submits that Lim's fax of 26 May 1998 stating that " we are unable to service the interest" implies strongly that interest is payable in the first place. He argues that the Defendant has never said interest was not payable. He reasons that because of that it was never an issue whether or not interest was payable. The issue was when and how to pay the same. I do not find Mr. Tan's submissions convincing. The written communications do not furnish confirmation of the Plaintiff's contentions.

17 Under cross-examination Lim said: "As a businessman, I was prepared to discuss [default interest]. As to whether I will pay [default interest] will depend on whether it is reasonable or not. .... He [J K Lee] did not know how much would be charged….. At that time, I didn't want to say no straightaway. I was prepared to be open about it." I accept Lim's testimony which is understandable from a businessman's point of view. The Defendant was indebted to the Plaintiff and needed the Plaintiff's

indulgence on instalment payments to clear the principal debt. The Defendant also has an on-going business relationship with the Plaintiff. J K Lee was the newly appointed Managing Director and it would not have been prudent to offend or alienate him by rejecting outright his proposal to pay default interest.

18 On 3 June 1998, the Plaintiff noting that the Defendant had not paid US$100,000 for the month of April and the May portion of default interest of US$10, 237.53 based on 10.5% per annum wrote: "May we remind you that it is in our agreement that your company is obligated to pay the principal amount with interest for the current month". J K Lee was not called as a witness and this agreement was not explained or proven by Park or the Plaintiff's Finance Manager, Lee Young Kwon ("Lee") who gave evidence at the trial. Lim responded on 4 June 1998 and referred, inter alia, to his earlier fax of 26 May 1998 where it was suggested that the matter of interest be discussed after payment of the principal debt.

19 On an objective consideration of the external events, it is apparent from the Defendant's covering letter enclosing his personal guarantee to the Plaintiff on 20 August 1998 that payment of default interest was not as yet agreed. Lim wrote "The [personal guarantee] is meant to cover only the amount of US$1,244,192 (as at 30.06.98) plus any interest to be mutually agreed upon at 10% per annum and it is strictly meant for formality purpose only." The personal guarantee was also not to cover the spare parts account.

20 I digress for a moment to touch on the spare parts account. The Defendant similarly rejected the Plaintiff's demand for default interest at the rate of 22% per annum. In a fax dated 15 September 1998, Lim said " We are not agreeable to your interest charge of 22% per annum as this is not in line with your parts policy." That comment is consistent with Lim's evidence that Clause 2 was not incorporated as a term of the sales in question. There were further communications where the Plaintiff had sought to impose interest at a reduced percentage rate. By way of illustration, on 30 June 1999, the Plaintiff wrote complaining that after one year the Defendant had not settled its overdue payments for spare parts and advised that interest chargeable would be at a rate of 9.5% per annum for the overdue amount of US$249,459 which was later corrected to US$252,101. In the same fax, the Defendant was asked to settle this overdue amount plus interest at 9.5% per annum by 15 July 1999. On 13 July 1999, the Plaintiff wrote that the total amount payable, after taking into consideration spare parts that were returned to the Plaintiff, was US$180,616.99 including chargeable interest. On 31 December 1999, the Plaintiff submitted a tax invoice for interest chargeable to the Defendants for overdue payments from October 1997 to April 1998. On that occasion, the interest charge was at the rate of 10% per annum.

21 Returning to the claim for default interest on late payment of invoices for the supply of heavy machinery, the Plaintiff's lawyers, M/s Hee Theng Fong & Co, on 28 September 1998, demanded settlement of the principal sum of US$1,538,739.54 (machine US$1,244,192 plus spare parts US$294,547.54) and interest for late payment based on a rate of 10.5% per annum. In that demand letter, M/s Hee Theng Fong & Co alluded to the Defendant's agreement to pay monthly interest effective from 1 August 1998. No evidence was led during the trial to prove the existence of this alleged agreement to pay interest from 1 August 1998 and at a rate of 10.5% per annum.

22 Park sent a fax to Lim on 27 October 1998 where he wrote: "Meanwhile, upon our agreement with you, you should pay us delay interest based on 10.5% per annum month by month, but so far never done (sic)." In the Plaintiff's fax of 27 October 1998, interest claimed was from July 1998 which contradicted an earlier stand taken on 31 March 1998 that interest was due from 1 April 1998 at the rate of 22% per annum. Following on from that, there was then a claim for interest from May 1998 at 10.5% and finally M/s Hee Theng Fong's letter dated 28 September 1998 that alleged that the

Defendant had agreed to pay interest at the rate of 10.5% per annum from 1 August 1998.

23 No explanation was offered by Park or Lee as to why the percentage rate of interest per annum unilaterally vacillated from 22%, 10.5%, 10% and back to 10.5% and, in the case of spare parts from 22 %, 9.5%, 10% and now 10.5% in the present action. Mr. Tan's submission that the discrepancy in interest rates was due to the different entities of the Plaintiff taking charge of the heavy equipment and equipment parts separately is clearly unfounded.

24 I am unable, on the testimony of the witnesses, to find as a fact that there was at all material time a common and accepted understanding between the Plaintiff and Defendant to pay default interest and at the rate of 10.5% per annum. It is quite impossible to draw from the documents taken as a whole a clear and unambiguous conclusion that default interest was by agreement payable and the rate of interest was 10.5% per annum.

25 Subsequent events also assist in determining the question whether there was a binding and enforceable agreement to pay default interest. In Suit no. 927 of 2000, the Plaintiff sued for the principal sum of US$432,996.01 outstanding as at 1 November 2000. At the same time, the Plaintiff claimed interest pursuant to s12 of the Civil law Act (Cap. 43). Although, there is no entitlement to s12 interest as of course, what is significant is that s12 interest is not applicable if there is an agreement to pay interest: s12(2)(b) Civil Law Act (Cap.43). I consider the averment for s12 interest in Suit 927 of 2000 to be inconsistent with the Plaintiff's contention of an agreement to pay contractual interest.

26 Overall, on the evidence, I find that there was no agreement to pay contractual default interest, whether as an ancillary obligation to the obligation to pay the principal debt or a separate and independent agreement, and at any particular rate of interest.

27 Having decided in favour of the Defendant on the primary issue it is not strictly necessary for me to consider the second issue. However, I will consider the second issue should a different view be taken on the primary issue. The second issue is whether there was an agreement to defer the matter of interest until payment of the principal debt. Mr. Coomaraswamy submits that the Defendant's correspondence of 27 October 1998 cannot constitute an agreement to pay interest to the Plaintiff after the principal debt has been paid.

28 Park in his oral testimony said that there was a meeting between J K Lee and Lim on or about 26 May 1998 where it was agreed that interest would be discussed after payment of the principal. As pointed out by Mr. Coomaraswamy, this agreement was never referred to in Park's affidavit of evidence-in-chief. Park in cross-examination contradicted his written testimony when he said he had never accepted the Defendant's proposal to discuss interest until the principal sum was paid.

29 In fact, the exchanges of correspondence showed that the Defendant's proposal was rejected. On 27 October 1998, the Plaintiff sent a chaser for payment of default interest. Lim responded on the same day asking that the matter of interest be discussed after payment of principal. But the Plaintiff said no. This was on 30 October 1998. According to the Plaintiff, interest would just accumulate and add up to US$200,000 even if the monthly instalment payment of US$50,000 to reduce the principal debt were paid on time and without any default. In the same fax, the Plaintiff threatened legal action if default interest was not paid.

30 The Plaintiff's second witness, Lee, admitted that he has no personal knowledge of the agreement to defer the question of interest until after the principal sum has been resolved. He heard about it from J K Lee.

31 In addition, there is Park's answer to Mr. Coomaraswamy's question whether assuming full payment of the principal sum had been paid, would the Plaintiffs have sued for the interest. He said: "I don't know. That is not my decision."

32 Having rejected Lim's proposal, it would seem from the evidence of Lee that at a later stage, the Plaintiff decided not to chase the Defendant for payment of interest as the priority was to concentrate on recovering the principal debt. Lee's testimony is that as the Defendant was defaulting on the principal debt, it was better for the company to concentrate on recovering the principal debt. This decision was not conveyed to Lim and it is not known when this decision was reached. Lee said: "We decided to postpone [the] question of interest and not to mention it to Cel Tractors." Mr. Tan submits that the Plaintiff was mislead by the Defendant into thinking that interest would be paid by keeping quiet about interest to avoid the Plaintiff bringing the issue up. I do not find that a telling point, seeing that the Defendant's proposal to defer discussion on interest was officially rejected and the Plaintiff's subsequent in-house decision was not communicated to the Defendant. Lee's testimony exposes the fallacy in the Plaintiff's excuse that it did not reserve its right to claim interest because of the alleged agreement to defer interest until after payment of the principal debt.

33 In all demands sent to the Defendant for payment of the principal debt, the Plaintiff or its legal advisers did not reserve its right to claim interest. Mr. Coomaraswamy contends that the Plaintiff also did not raise the matter of a claim for interest when the latter had every opportunity to do so in four separate pieces of litigation. They are:

a. Suit no. 927 of 2000 where the Plaintiff sued for the principal debt alone.

b. Originating Summons no. 600115 of 2001 (injunction staying suit no. 927 under s210(10) of Companies Act.

c. Originating Summons no. 600261 of 2001 (sanction of the Scheme); and

d. Civil Appeal no. 60031 of 2001.

34 At the creditors' meeting convened to consider the proposed Scheme of Arrangement, Mr. Lee and his superior made no reference to the Plaintiff's claim for interest or reserved its right even though they were told that if the Scheme was approved, the Defendant would not be faced with an interest burden. Subsequently, Lee on behalf the Plaintiff executed a Certificate of Balance confirming the amount due and owing by the Defendant to the Plaintiff as at 27 February 2001 was US$ 432,051.33, a figure slightly less than the principal amount claimed in the action.

35 Given my finding that there was no agreement to pay contractual interest, whether as an ancillary obligation to the obligation to pay the principal debt or a separate and independent agreement, the question whether or not the interest claim was discharged by the Scheme of Arrangement is irrelevant. Such a consideration would have involved a construction of the Scheme of Arrangement. The background matrix of facts would be relevant when interpreting the Scheme and deciding whether the parties intended the compromised sum to be in full satisfaction of all the Plaintiff's claims against the Defendant.

36 There is no need for an estoppel by representation as I have held that the Defendant succeeds in the primary issue. If on the other hand the Defendant had failed on the two issues outlined in paragraph 5 above, then the factual basis for an estoppel by representation would have been undermined.

37 For these reasons, the Plaintiff's action is dismissed with costs.

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