Oversea-Chinese Banking Corp Ltd v Ang Thian Soo
[2006] SGHC 147

Case Number : Suit 556/2004, RA 254/2005

Decision Date : 15 August 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Hri Kumar and Wilson Wong (Drew & Napier LLC) for the plaintiff; Oommen Mathew (Haq & Selvam) for the defendant

Parties : Oversea-Chinese Banking Corp Ltd — Ang Thian Soo

Civil Procedure – Summary judgment – Defendant seeking leave to defend claim by plaintiff – Plaintiff granted summary judgment in separate proceedings against company – Defendant director of and guarantor for company – Proceedings against company closely related to proceedings against defendant – Whether defendant having separate and independent defence to plaintiff's claim from that of company – Whether such defence having likelihood of success – Whether conditional leave to defend should be granted

15 August 2006

Choo Han Teck J:

1 This was a claim by the plaintiff for $34,668,133.72 against the defendant on a contract of guarantee dated 4 August 1998 ("the guarantee") in favour of the Bank of Singapore Limited ("BOS"), but the amount was subsequently adjudged to be $29,906,748.68. The plaintiff became the successor-in-title of BOS. The guarantee was executed to secure a loan by BOS to Infocommcentre Pte Ltd ("the company"). The terms of offer can be found in the plaintiff's letter of offer dated 13 February 1998. The defendant was at all material times the director of the company and was managing its affairs.

2 The plaintiff commenced separate proceedings in Originating Summons No 456 of 2004 ("OS 456/2004") against the company. In those proceedings the plaintiff obtained summary judgment against the company. On appeal in Registrar's Appeal No 179 of 2004, V K Rajah J ordered that the defendant in the present suit be cross-examined in the appeal of the summary judgment in OS 456/2004. Ultimately, the company's appeal was dismissed. Its appeal to the Court of Appeal was also dismissed on 21 November 2005.

3 There was no dispute as to the terms of the guarantee itself. In so far as the verdicts of the High Court and the Court of Appeal in the OS 456/2004 against the company was concerned, it would be futile to dispute them. Mr Hri Kumar, counsel for the plaintiff in the present proceedings, submitted that the action against the defendant would be based on the facts alleged and found in OS 456/2004. What counsel meant was that the historical facts leading to the execution of the guarantee cannot now be denied or challenged in the light of OS 456/2004. Furthermore, he submitted that so far as the defendant was concerned, the court in OS 456/2004 found that he was not only the alter ego of the company, but was also an unreliable witness.

4 Mr Oommen Mathew, counsel for the defendant, submitted that a judgment against a principal does not bind the guarantor. He relied on *Ex parte Young, In re Kitchin* (1881) 17 Ch D 668. As a general proposition I think that that would be good law and the creditor has to prove his case against the guarantor. In such cases, in the absence of any genuine defence, the creditor could obtain summary judgment against the guarantor on proof of the contract of guarantee alone. Mr Mathew thus submitted that the present case involved complicated facts that raised issues that

require trial. It would be necessary to trace at least the broad outlines of the history of the guarantee to appreciate the issues raised by counsel.

5 In 1995, BOS granted a short-term loan of US$17m to the company which had intended to use it for the purposes of developing a piece of land at Tagore Avenue. However, there was no progress in respect of the development, and it appeared that BOS restructured the initial short-term loan into a Singapore-dollar overdraft facility in 1998 with the intention of giving further assistance to the company. The parties entered into a complex agreement evidenced in a letter of release dated 18 February 1998. It was argued on behalf of the defendant that in the absence of this crucial letter the company was compelled to accept the plaintiff's letters of offer in 2002 and 2003 (the plaintiff took over the rights and assets of BOS in October 2000). In the interim, the defendant subsequently signed the guarantee on 4 August 1998. It appeared that BOS was unable to explain or show what agreement it had concluded with the defendant. The company had misplaced its copy of the 18 February 1998 letter. The company's defence that the company was misled into accepting the plaintiff's letters of offer of 2002 and 2003 depended largely on its interpretation that BOS had promised to let it have 40,000 sq ft of saleable area in the project for which the facilities were given. It said that the failure to honour that promise caused, among other things, its main contractor to withdraw from the project. The plaintiff subsequently found the 18 February 1998 letter and produced it at the hearing before Rajah J. The implications of that letter were argued before Rajah J who rejected all the arguments of the company and found that the compromise agreements of 2002 and 2003 were valid. The company's appeal to the Court of Appeal was dismissed. This aspect of the case that was common to the company and the defendant had been taken as far as it could in the courts, and is exhausted.

6 Reverting to Mr Mathew's arguments on behalf of the defendant that he had in law a right to a separate defence as a guarantor, and that although Rajah J had found him an unreliable witness, another judge was entitled to take a different view. Counsel realised that the defendant would only be entitled leave to defend if he could persuade me that his defence was independent of that of the company. A contract of guarantee is a separate and independent contract from the principal contract and thus may have defences that might not be available or applicable to the principal contractor. Misrepresentation is a ready example. The guarantor might have been misled into providing a guarantee to the principal debtor even though the principal debtor may himself not be misled in any way. In the present case, the misrepresentation issues had been dealt with by Rajah J and the Court of Appeal. I do not think that there was any remaining issue of misrepresentation in this appeal before me that was not common with those dealt with by Rajah J.

7 The contention that the guarantee became effective only when $34m had been disbursed may be an issue not previously dealt with, but in my view, it ought to have been. I do not think that there was any agreement that the $34m was a condition precedent to the validity of the guarantee. The relevant clause (cl 2(a)) of the guarantee provided that:

> This guarantee shall be a continuing guarantee for the purpose of securing the whole of the monies and liabilities or ultimate balance in paragraph 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinafter mentioned provided always that the amount for which [the defendant] shall be liable under this guarantee shall not exceed [$34,000,000.00].

None of the conditions precedent averred to in the re-amended defence seemed to be applicable or relevant. In any event, I am of the view that there was no longer room to dispute the validity of the letters of offer. If I were to consider that the defendant had a separate and independent defence as a guarantor, I cannot ignore the connection between this case and that between the plaintiff and the

company. Counsel is right in saying that another judge might form a different opinion of the defendant as a witness but I am entitled, I think, to take Rajah J's findings into account in determining whether conditions ought to be imposed in granting leave to defend. In my view, in so far as the defence was based on the proper interpretation of agreements outside the clear terms of the documents, especially the guarantee, the oral testimony of the defendant would be important. Thus, the opinion of Rajah J is relevant and has to be given due respect until a judge has heard the defendant (at trial) and decided that he has a case; I would have to impose conditions before he may proceed with his defence. The question remaining, therefore, was what conditions ought to be imposed.

8 Ordinarily, where a court has determined that there is an issue that ought to be tried, but that the defence is a shadowy one, as I find to be the case here, it means that the court has strong doubts as to the likelihood of a successful defence. However, that is a circular proposition in that until the defence has been tested at trial, the court cannot make a final determination of the merits of that defence. Nonetheless, if the overall circumstances in law and the available evidence in such a case indicate that the likelihood of the defence succeeding is very small, the court would require the defendant to pay the money claimed into court or provide a banker's guarantee for the amount claimed. That would be a usual condition to secure the opportunity of proving that his defence was a valid one after all. In addition to that, the court may also require him to provide security for costs. The defendant had stated on affidavit that he was unable to provide security by payment of the amount claimed; Mr Hri Kumar for the plaintiff submitted that the defendant had not been forthright in telling the court the true account of his financial resources. He had not accounted for at least $9m that was paid into his personal account and that each time he was previously required to make payment, he was able to do so. The defendant denied all this and averred that he had given a full account.

9 Weighing the submissions of counsel on both sides, I am of the view that the defendant ought to make at least a payment of a substantial amount. I accept that an order for $34m may be too much. In my view, any amount less than $9m would be inadequate and unfair to the plaintiff. The true extent of the defendant's financial resources cannot be established without a full and proper inquiry. The onus lies with him to establish his means, and he has stated on oath that he is virtually impecunious. Since the amount involved in this case is an extremely large one, I was of the view that by ordering the payment of the full sum as a condition to leave to proceed I would effectively prevent the defendant from proceeding. Thus, balancing the interests of both sides, I ordered the defendant to provide security for $9m as part of the sum claimed, as well as $500,000 as security for costs on an indemnity basis. I informed Mr Mathew that because I was prepared to order a lower sum for the security of the sum claimed, I would not reduce the amount for security for costs estimated by the plaintiff's counsel unless I was of the view that it was ostensibly untenable. In the event, I was of the view that the sum of $500,000 on an indemnity basis was fair.