Terrestrial Pte Ltd *v* Allgo Marine Pte Ltd and another
[2013] SGHC 252

Case Number : Suit No 827 of 2011 (Registrar's Appeal No 101 of 2013)

Decision Date : 20 November 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Chin Ren Howe Edgar and Tan Yi Yin Amy(Kelvin Chia Partnership) for the respondent/plaintiff; Govindarajalu Asokan (Gabriel Law Corporation) for the appellants/defendants.

Parties : TERRESTRIAL PTE LTD — ALLGO MARINE PTE LTD — KOH LIN YEE

Civil Procedure – Summary Judgment

[LawNet Editorial Note: The appeals to this decision in Civil Appeals Nos 98 and 157 of 2013 were dismissed by the Court of Appeal on 21 August 2014. See [2015] SGCA 6.]

20 November 2013

Andrew Ang J:

Introduction

1 Registrar's Appeal No 101 of 2013 ("RA 101/2013") was an appeal by Allgo Marine Pte Ltd ("the First Defendant") and Koh Lin Yee ("the Second Defendant") against an order of the assistant registrar ("the AR") in Summons No 418 of 2013 ("SUM 418/2013") granting summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court") in favour of Terrestrial Pte Ltd ("the Plaintiff") with respect to a loan agreement between the parties.

2 At the hearing on 19 July 2013, I was informed by counsel for the Second Defendant, Mr Govindarajalu Asokan ("Mr Asokan"), that he had no instructions to represent the First Defendant. I heard Mr Asokan's arguments on behalf of the Second Defendant in RA 101/2013 and dismissed the appeal at the conclusion of the hearing. At a further hearing on 22 October 2013, Mr Asokan advanced the same arguments on behalf of the First Defendant and I dismissed the First Defendant's appeal.

3 I now set out the grounds for my decision.

Factual background

4 The Plaintiff commenced Suit No 827 of 2011 against the Defendants for moneys owing under a loan agreement dated 3 January 2011 ("the Loan Agreement"). Pursuant to this agreement, the Plaintiff had advanced a sum of $350,000 to the First Defendant. The Second Defendant was a director of the First Defendant and the guarantor under the Loan Agreement. The recitals to the Loan Agreement stated as follows:

> A. By an agreement dated 25 May 2009 and entered into between the [Plaintiff] and the [First Defendant] ("the Contract") the [First Defendant] agreed to sell to [the Plaintiff] a flat top

barge ("Barge No 11") at the price of S$1,200,000 ("Purchase Price"), which barge should be delivered within 16 weeks from the date of the Contract ("Date of Completion/Delivery").

B. The [Plaintiff] has paid the [First Defendant] the Purchase price in full.

C. The [First Defendant] has, in breach of its obligations under the Contract, failed to deliver the barge to the [Plaintiff] on the Date of Completion/Delivery and it continues to be in default in making such delivery due to the [First Defendant]'s failure to pay its barge builder, Pacific Marine & Shipbuilding Pte Ltd of 200 Jalan Sultan #03-29 Textile Centre, Singapore 199018 (the "Builder") the outstanding balance of the price of S$350,000.00 (the "Outstanding Sum").

D. The [First Defendant] desires to borrow from the [Plaintiff] and the [Plaintiff] has agreed to lend to the [First Defendant] [S$350,000.00] against the guarantee of the [Second Defendant] for the purposes of enabling the [First Defendant] to pay the Builder the Outstanding Sum, upon and subject to the terms and conditions herein.

E. The [Second Defendant] is the director and registered and beneficial owner of all but one share in the [First Defendant] and has agreed to unconditionally guarantee the due payment of all money payable under this Agreement as well as the performance of the [First Defendant]'s obligations under this Agreement and to enter into certain other obligations with the [Plaintiff] hereto.

5 On 31 January 2011, the Plaintiff provided an additional loan of $56,000 to the First Defendant ("the Additional Loan"). This loan was to enable the First Defendant to discharge the remaining sum owed by them to the shipbuilder in relation to another vessel purchased by the Plaintiff from the First Defendant, *viz*, Barge No 12. The Additional Loan became due and payable on 2 March 2011.

6 It was not disputed between the parties that the First Defendant did not repay any part of the moneys disbursed under the Loan Agreement or the Additional Loan.

7 At the hearing of SUM 418/2013 on 18 March 2013, the AR granted summary judgment in favour of the Plaintiff against the Defendants for the moneys owed under the Loan Agreement and the Additional Loan. Dissatisfied, the Defendants brought the present appeal in RA 101/2013.

The law

8 The principles relating to a summary judgment application under O 14 of the Rules of Court are well-settled. As stated by Judith Prakash J in *Associated Development Pte Ltd v Loong Sie Kiong Gerald (administrator of the estate of Chow Cho Poon, deceased) and other suits* [2009] 4 SLR(R) 389 at [22]:

> … Suffice it to say that in order to obtain judgment, a plaintiff has first to show that he has a *prima facie* case for judgment. Once he has done that, the burden shifts to the defendant who, in order to obtain leave to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence. (See *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32.) …

My decision

Whether the Defendants had a fair or reasonable probability of raising a real or bona fide

defence

9 Since it was not disputed between the parties that the Defendants did not repay any part of the moneys disbursed under the Loan Agreement or the Additional Loan, I was satisfied that the Plaintiff had established a *prima facie* case for summary judgment. Therefore, the burden fell on the Defendants to establish a fair or reasonable probability that they had a real or *bona fide* defence. Mr Asokan sought to do this by raising the following arguments.

Whether the Defendants had a fair or reasonable probability of raising the defence of equitable set-off

10 It was first argued by Mr Asokan that the Defendants had a right of equitable set-off arising from the Plaintiff's alleged breach of a separate contract in relation to the sale and purchase of a tug ("the Tug Contract"). However, in my judgment, the Defendants failed to establish that this was a real or *bona fide* defence because cl 12.2 of the Loan Agreement excluded any set-off or counterclaim from being raised:

> All payments to be made by the [First Defendant] or the [Second Defendant] to the [Plaintiff] under this Agreement shall be made:
>
> (a) without set-off, counterclaim or condition, and
>
> (b) …

11 Mr Asokan then argued that cl 12.2(a) of the Loan Agreement did not specifically exclude *equitable* set-offs and therefore the clause was not effective to exclude the Defendants' counterclaim based on an equitable set-off. He relied on *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643 ("*Pacific Rim*") for the proposition that a clause must expressly exclude equitable set-offs in order to effectively exclude a defence based on an equitable set-off. I was unable to agree with Mr Asokan's interpretation of *Pacific Rim*. The wording of the relevant clause in *Pacific Rim* expressly provided for a particular contractual set-off but did not exclude the right to any set-off. That led the Court of Appeal to conclude that the clause did not expressly exclude equitable set-off (at [38]):

> We now revert to the facts in the instant case. We find that all the essential ingredients were present for the purchasers to avail themselves of the equitable set-off as a form of self-help. First of all, the agreement did not exclude the right of set-off in equity. Counsel for the vendors relied on cl 3(1)(i)(bb), *ie* the words in parenthesis in that clause: "(***after any deduction has been made in accordance with cl 18 hereof and for moneys owing to the purchaser***)", and argued that the purchasers were only entitled to set off the amount of liquidated damages against the 8% of the purchase price payable on the issue of the "certificate of statutory completion" which would normally take place after completion. ***In our view, although this clause made provision for a contractual set-off at or after the completion stage, it did not expressly exclude equitable set-off against any of the payments prior to completion .*** … [emphasis added in bold italics]

In contrast, cl 12.2 of the Loan Agreement clearly states that payments shall be made "without set-off". This must be construed to include equitable set-off because it was not limited to *contractual* set-off. *Pacific Rim* was therefore of no assistance to the Defendants. As pithily put by the AR, "[i]f one excludes the hydra, one excludes all its heads regardless the number of the variety". In *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 1 QB 600 ("*Stewart Gill*"), which Mr Asokan cited for a

different proposition dealt with at [16] to [23] below, Stuart-Smith LJ was clearly of the view that a clause which excluded the right of set-off also excluded equitable set-off (at 608).

Whether s 4(13) of the Civil Law Act applied to preclude the Defendants from raising the defence of equitable set-off

12 Mr Asokan raised a second argument. He argued that the defence of equitable set-off operated as a rule of equity and prevailed over any rule of the common law citing s 4(13) of the Civil Law Act (Cap 43, 1999 Rev Ed) which provides:

> **Cases of conflict not enumerated, equity to prevail**
>
> (13) Generally in all matters not particularly mentioned in this section, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

13 This argument was misconceived. First, it is well-settled that the defence of equitable set-off may be expressly excluded by contract (see *Pacific Rim* at [36]). It will suffice if the contract contained clear words which excluded the right of set-off, either expressly or by necessary implication (see *Hiap Tian Soon Construction Pte Ltd v Hola Development Pte Ltd* [2003] 1 SLR(R) 667 at [17]).

14 Second, there was simply no conflict between a rule of equity and a rule of the common law. After a comprehensive review of cases establishing the defence of equitable set-off, the Court of Appeal in *Pacific Rim* made the following observations regarding certain exceptions to the application of the defence of equitable set-off (at [37]):

> Thirdly, there are exceptions, and they include claims for freight in voyage charters, actions on dishonoured bills of exchange and certain actions on bank guarantees: *Sim v Rotherham Metropolitan Borough Council* ([34] *supra*) at 413. In these instances, ***equity seems to have followed the common law*** by recognising the exceptions to common law abatement. [emphasis added in bold italics]

These exceptions were recognised for "reasons of public policy arising out of the commercial exigencies of the transactions in question" (see *Sim v Rotherham Metropolitan Borough Council* at [1987] 1 Ch 216 at 259). Therefore, as observed by the Court of Appeal in *Pacific Rim*, equity seems to have followed the common law and I did not think that there was, in fact, any conflict between a rule of equity and a rule of the common law in the present case.

15 Moreover, nothing in s 4(13) of the Civil Law Act prohibits the contractual exclusion of the defence of equitable set-off. It was conceptually fallacious for Mr Asokan to assume that the contractual exclusion of the defence of equitable set-off somehow gave rise to a conflict between the rules of equity and the common law. Mr Asokan failed to identify the specific rule of the common law that the defence of equitable set-off was allegedly in conflict with. Nor did Mr Asokan explain how there was a conflict between the rules of equity and the common law. In the circumstances therefore, I did not think that s 4(13) of the Civil Law Act prevented the Plaintiff from excluding the defence of equitable set-off in the Loan Agreement.

Whether cl 12.2 was an unfair contract term under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA")

16 Mr Asokan further argued that cl 12.2 should be struck down as an unfair contract term

pursuant to the UCTA because it excluded the defence of set-off (see *Stewart Gill*). In addition, he argued that although *Gao Bin v OCBC Securities Pte Ltd* [2009] 1 SLR(R) 500 ("*Gao Bin*") distinguished *Stewart Gill* and held that the UCTA did not apply to a similar clause excluding the defence of set-off, *Gao Bin* was a High Court decision and was not binding on this court.

17 In *Stewart Gill*, the plaintiff agreed to supply and install an overhead conveyor system at the defendant's premises. The plaintiff sought summary judgment against the defendant to recover the final 10% of the contract price for the conveyor system. The defendant resisted the application on the basis that it had a valid counterclaim for the plaintiff's breaches of the contract and that any restriction on its right of set-off imposed by cl 12.4 of the plaintiff's general conditions of sale, to which the contract was subject, was rendered ineffective by the Unfair Contract Terms Act 1977 (c 50) (UK) ("UK UCTA"). Clause 12.4 of the general conditions of sale stated as follows (at 604C):

> The customer shall not be entitled to withhold payment of any amount due to the company under the contract by reason of any payment credit set off counterclaim allegation of incorrect or defective goods or for any other reason whatsoever which the customer may allege excuses him from performing his obligations hereunder.

Section 3 of the UK UCTA provides:

> (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term—
>
> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (b) claim to be entitled—
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

It was not in dispute that the contract between the parties was on the plaintiff's written standard terms of business set out in the general conditions of sale; the requirement in s 3(1) was therefore satisfied. However, that aside, cl 12.4 did not fall within s 3 of the UK UCTA as it did not in terms (a) "exclude or restrict any liability" of the plaintiff for any breach of contract; or (b) seek:

> " (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, … "

within the meaning of s 3(2) of the UK UCTA. Nevertheless, s 3 was held to be relevant to a consideration of s 13 of the UK UCTA (although not there referred to in express terms) the effect of

which was to extend the scope of s 3 so that it applied to any contract term which excluded or restricted liability in any of the ways more particularly spelt out in s 13.

18 Section 13(1) of the UK UCTA (*in pari materia* with s 13 of the UCTA) provides:

> **Varieties of exemption clause**
>
> (1) To the extent that this Part prevents the exclusion or restriction of any liability it also prevents—
>
> (a) making the liability or its enforcement subject to restrictive or onerous conditions;
>
> (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
>
> (c) excluding or restricting rules of evidence or procedure;
>
> and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

After examining the provisions of the UK UCTA, Lord Donaldson of Lymington MR held (at 606C) that cl 12.4 came within the scope of s 13(1)(*b*) of the UK UCTA because it excluded the defendant's right to set off its claims against the plaintiff's claim for the contract price and further excluded the remedy of set-off which the defendant would otherwise have had against the plaintiff. He further held that cl 12.4 fell within the scope of s 13(1)(*c*) of the UK UCTA because it excluded or restricted the procedural rules relating to set-off.

19 Having decided that cl 12.4 came under the scrutiny of the UK UCTA, Lord Donaldson MR went on to examine its reasonableness. He stopped short of opining on the reasonableness of that part of cl 12.4 which excluded or restricted a right of set-off but nevertheless held that the clause was unreasonable as a whole because (a) that part of cl 12.4 which precluded the defendants from withholding payment by reason of any "payment" having been made by the defendants or any "credit" owing by the plaintiff to the defendants was unreasonable; and (b) the impugned part was not severable from the rest of cl 12.4 (at 606F):

> … whatever the reasonableness of a clause which excludes or restricts a right of set-off, nothing could *prima facie* be more unreasonable than that the defendants should not be entitled to withhold payment to the plaintiffs of any amount due to the plaintiffs under the contract by reason of a "credit" owing by the plaintiffs to the defendants and, *a fortiori*, a "payment" made by the defendants to the plaintiffs. In this context "payment" must I think mean overpayment under another contract and credit mean "credit note" or admitted liability again under another contract, because otherwise it would be doubtful whether it could be said by the plaintiffs that any amount was due to them under the contract. Mr Joseph, appearing for the plaintiffs, did not seriously gainsay this, but he submitted that as the defendants were not seeking to rely upon a payment or credit, this part of the clause could be ignored. In support of my view that clause 12.4 as a whole completely fails the test of reasonableness, I gratefully adopt the additional considerations based upon its concluding words and Schedule 2 to the [UK UCTA] discussed in the judgment of Stuart-Smith LJ which I have read in draft.

20 The opposite conclusion regarding the applicability of the UCTA was reached in *Gao Bin.* In that case, the plaintiff maintained several securities accounts with the defendant. The plaintiff brought

claims against the defendant for breach of contract and negligence. In response, the defendant applied for an order of summary judgment for sums outstanding in the securities accounts. The plaintiff resisted the application on the ground that it had a right of equitable set-off against the counterclaim and that cl 6(*c*) relied upon by the defendant violated the UCTA. This clause was part of the defendant's standard terms and it provided (at [12]) as follows:

> The payment of monies by you to us hereunder shall be made in immediately available and freely transferable funds, without set-off, counterclaim or other deductions or withholdings of any nature whatsoever and shall be made free and clear and without deduction for any present or future taxes.

The High Court held that the UCTA did not apply to cl 6(*c*). In its view, a key prerequisite for the application of the UCTA was that a contractual term must be one which excludes or restricts liability. This was missing because cl 6(*c*) did not purport to restrict any liability on the defendant's part nor did it have any "bearing whatsoever on the defendant's liability" (at [14]). In addition, the court distinguished *Stewart Gill* because it regarded the words "payment" and "credit" in *Stewart Gill* as a reference to a crystallised or admitted liability. In contrast, cl 6(*c*) in *Gao Bin* did not have the words "payment" or "credit" and thus the court held that the purported liability referred to in cl 6(*c*) was disputed and related to a liquidated claim. The court then suggested at [13] that "it might be possible to construe 'any liability' under the UCTA to include a crystallised or admitted liability under another contract or transaction" but not where the liability was disputed.

21 With due respect to the learned judge, I find myself unable to agree with the suggestion. In my view, such a construction put on the word "liability" an unwarranted qualification that it be "crystallised" or "admitted". Lord Donaldson MR in *Stewart Gill* considered the words "payment" and "credit" when determining the *reasonableness* of the clause in question (see [19] above) and not in the context of deciding whether the UK UCTA was applicable. Therefore, in deciding whether the UCTA applied to cl 6(*c*), I did not think it entirely *apropos* to draw a distinction between admitted and disputed liabilities based on Lord Donaldson's reasoning in connection with the words "payment" or "credit". It was also unnecessary in my view to restrict the phrase "any liability" in s 3 of the UCTA to a "*crystallised or admitted* liability".

22 Be that as it may, in my judgment, the UCTA did not apply to cl 12.4 in the case before me. In order for s 3 of the UCTA to apply, the Defendants had to show that one of the parties was dealing as a "consumer or on the other's written standard terms". However, the Defendants failed to lead any evidence on this issue and therefore did not satisfy this requirement which is an important prerequisite to the applicability of ss 3 and 13(1) of the UCTA.

23 In view of my decision that the UCTA did not apply, there was no need for me to examine the reasonableness of cl 12.2 of the Loan Agreement. For completeness however, I would like to make some brief observations. On the facts at hand, I thought that cl 12.2 satisfied the requirement of reasonableness under the UCTA. Although the guidelines in the Second Schedule of the UCTA were stated to be applicable only to ss 6(3), 7(3) and 7(4) of the UCTA, I considered them to be of wider application to the facts at hand (see *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 169 and *Flamar Interocean Ltd v Denmac Ltd (The Flamar Pride and Flamar Progress)* [1990] 1 Lloyd's Rep 434 at 438–439). With these guidelines in mind, I observed that the Plaintiff did not induce the Defendants to enter into the Loan Agreement and the Defendants were free to borrow money from any other company or financial institution in order to pay its debt owed to the shipbuilder. In addition, the Defendants knew of, or ought reasonably to have known of, the existence of cl 12.2 because such clauses were (and still are) a common feature in loan agreements. Even if the Defendants had borrowed money from a bank instead, a clause similar to cl 12.2 would

almost invariably have been included in the loan documentation. In the circumstances, I did not consider it unreasonable that the Plaintiff, as a condition of its voluntarily making a loan to the First Defendant, would wish for the Defendants' obligation for repayment of the same to be unequivocal and not subject to any set-off or counterclaim.

Whether the Plaintiff took advantage of its own wrong

24 The High Court held in *Cheung Yong Sam Investments Pte Ltd v Land Equity Development Pte Ltd* [1992] 3 SLR(R) 533 at [40] that:

> It is a well established principle of the law of contract that a party to a contract who by his own act brings about the occurrence of a certain event cannot rely on such event to escape from his contractual obligations. This principle is cogently set out in an oft-quoted paragraph from the judgment of Lord Atkinson in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1. At 9 of the report, his Lordship states:
>
> > It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.

Mr Asokan argued that the Defendants' impecuniosity was caused by the failure of the Plaintiff to take delivery of a tug pursuant to the Tug Contract and that the Plaintiff could not rely on this "wrong" in pursuing its claim on the Loan Agreement. I was unable to accept Mr Asokan's argument. The principle that one may not take advantage of one's own wrong had no application on the present facts. The principle only prohibits a party from relying on an event brought about by his own act or omission to escape its obligations *under the same contract*.

25 On the present facts, the Tug Contract was a separate agreement from the Loan Agreement. The Loan Agreement also made no mention of the Tug Contract. Since the Plaintiff was not relying on its alleged breach of the Tug Contract to escape its obligations thereunder, the principle had no application on the facts. In any case, the Tug Contract had not been signed by the Plaintiff and there was considerable doubt over whether the Tug Contract was valid and enforceable.

26 Assuming *arguendo* that the Tug Contract was valid and enforceable and that the Plaintiff had breached its obligations thereunder, the alleged breach would not allow the Defendants to escape their obligations under the Loan Agreement. The Loan Agreement was signed on 3 January 2011 while the Tug Contract was dated 22 December 2009 (without the Plaintiff's signature). It would have been absurd to allow the Defendants to escape their contractual obligations under the Loan Agreement on the basis of a prior breach of the Tug Contract which they would have been fully cognisant of at the time of signing the Loan Agreement.

Conclusion

27 Since the Defendants failed to establish a fair or reasonable probability that they had a real or *bona fide* defence, I dismissed the Defendants' appeal and awarded costs of $7,500 in the appeal to the Plaintiff.

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