Indian Bank *v* Green Mint Pte Ltd and others

[2021] SGHC 265

Case Number	: Suit No 349 of 2021 (Registrar's Appeal No 285 of 2021)
Decision Date	: 25 November 2021
Tribunal/Court	: General Division of the High Court
Coram	: Philip Jeyaretnam J
Counsel Name(s)	: Namazie Mirza Mohamed and Tay Jing En (Mallal & Namazie) for the plaintiff; Satwant Singh s/o Sarban Singh (Satwant & Associates) for the first and second defendants; The third defendant in person.
Parties	: Indian Bank — Green Mint Pte Ltd — Gupta Vaibhav — Arvind Sharma

Contract – Illegality and public policy – Contracts procured by bribery

Civil Procedure – Summary judgment – Leave to defend

Credit And Security – Guarantees and indemnities – Enforcement of guarantee procured by bribery

25 November 2021

Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 A bank lends money to a company on the personal guarantee of its directors. Upon default, the bank sues, seeking summary judgment. The borrower and the guarantors allege that they obtained the loan by bribing the bank's officers. If true, would that amount to a defence to recovery of the loan and enforcement of the guarantee, such that, if the allegation is credibly made, it raises a triable issue?

Facts

The parties

2 The plaintiff is a bank carrying on business in Singapore.[note: 1] I shall refer to it as the bank. The first defendant is a company incorporated in Singapore, and was a customer of the bank.[note: 2] I shall refer to it as the borrower. The second defendant is a director and shareholder of the borrower.[note: 3] The third defendant was a director of the borrower.[note: 4] Together the second and third defendants gave a joint and several guarantee to the bank.[note: 5] I shall refer to them collectively as the guarantors.

Background to the dispute

3 By a letter of offer issued 1 August 2019, and accepted by the borrower, the bank granted banking and trading facilities to the borrower.[note: 6] This was secured by a pledge of US$1,100,000 held in an interest-bearing fixed deposit account ("the fixed deposit").[note: 7]

4 The facilities were renewed and varied by a letter of offer issued on 7 December 2020,

accepted by the borrower on 9 December 2020.[note: 8] The second defendant signed on behalf of the borrower and both the guarantors countersigned in their capacity as such. On the same day, 9 December 2020, they also signed the joint and several personal guarantee that the bank had required for the renewal and variation of the facilities, in addition to the security of the fixed deposit.[note: 9]

5 The borrower defaulted on the payment of sums outstanding to the bank, and the bank's solicitor issued notices dated 1 March 2021 to the borrower and the guarantors demanding payment.[note: 10]

6 As no response was received, the bank uplifted the fixed deposit by way of partial set-off and satisfaction of what was outstanding. The bank then issued fresh notices of demand dated 22 March 2021, demanding payment of the sum of US$546,920.78 certified as due and owing as at 11 March 2021 under a certificate of conclusiveness[note: 11] issued pursuant to clause 28 of the bank's general terms and conditions set out in the letter of offer.[note: 12]

Procedural history

7 The bank issued a writ on 15 April 2021. On 10 May 2021, the first and second defendants filed a defence and counterclaim, while the third defendant filed a defence. The bank requested particulars of all defendants and these were provided by the first and second defendants on 6 July 2021, and by the third defendant on 9 and 21 July 2021.

8 The borrower's counterclaim concerned a payment of US$750,000 made upon a cheque signed by the second defendant. The borrower claimed that there were "standing instructions" to call the second defendant before making payment.[note: 13]

9 The bank filed an application on 21 July 2021 for summary judgment, as well as to strike out the borrower's counterclaim. The defendants filed applications to amend their defences. On the part of the first and second defendants, this included clarifying and making more explicit their allegations of gifts made to the bank's officers to obtain the facilities as giving rise to the defence of illegality.[note: 14]

The parties' cases

10 The defendants did not dispute that the facility letter had been accepted by the borrower and countersigned by them as guarantors. They also accepted that they had signed the guarantee.[note: 15] They accepted that monies had been drawn down on the facility and that, save for two issues raised by them, the borrower was indebted to the bank as certified. The two issues raised were first that the monies were not recoverable because the facility had been obtained by them by bribes, and secondly that the bank had breached its mandate by paying out US$750,000 on a particular cheque signed by the second defendant, apparently signed by him in blank and then, according to his counsel at the hearing before me, wrongly filled in as to payee by an employee of the borrower. The second defendant claimed that he had a standing instruction with the bank that the bank would call him first before honouring any draw down above US$5,000.[note: 16]

11 The bank's principal contention was that the evidence offered by the defendants was vague, belated and inconsistent, such that the court could safely conclude that the allegations of bribes and of a standing instruction to call the second defendant were not put forward in good faith.

Decision below

12 On 13 October 2021, the assistant registrar ("the AR") held that the allegation of bribery disclosed a triable issue of illegality and granted unconditional leave to defend. However, he did strike out the borrower's counterclaim, holding that it was unsustainable as there was no proper plea of how the bank might be bound by the alleged standing instruction. He granted leave to the defendants to amend their respective pleadings.

13 The only part of these decisions appealed is the AR's order granting unconditional leave to defend.

Issues to be determined

14 As the borrower's counterclaim has been struck out and no appeal filed against that decision, it is hard to see how the borrower can pursue before me the issue of the US$750,000. In any case, there was no evidence sufficient to raise a triable issue of any standing instruction as alleged. Generally, there is no room in a banking context for such collateral arrangements. A bank has to know on whose signature it is both entitled and obliged to act. The cheque was signed by the second defendant who was the authorised signatory, and even if the employee had defrauded the borrower as suggested, this was a matter between the borrower and the employee. Thus, the question on appeal was whether the allegations of gifts and bribes gave rise to a triable issue of illegality. This question divides into whether these allegations are credible, and, whether, if they are true, they would found a defence of illegality. I will deal with the legal aspect first. I formulate the issues as follows:

(a) Is a borrower who obtains a loan from a bank by bribing the bank's officer entitled to resist recovery of the loan on the ground of illegality?

(b) Is a guarantor of such a loan entitled to resist enforcement on the ground of illegality?

(c) If the answer to either of these questions is yes, is there credible evidence of the alleged bribes?

Issue 1: Is a borrower who obtains a loan from a bank by bribing the bank's officer entitled to resist recovery of the loan on the ground of illegality?

15 The borrower accepted that the contract of loan was not unlawful. Rather, it contended that its bribing of the bank's officer in the formation of the contract of loan tainted the contract with illegality. It recognised that it would benefit from having committed the offence if the loan was thereby rendered irrecoverable but contended that it was arguable that at trial the court might hold that refusing to enforce the contract of loan was a proportionate response, required by the wider public interest in discouraging bribery and corruption. The doctrine of illegality has been comprehensively elucidated and restated by the Court of Appeal in two decisions, namely *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 and *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*").

16 As stated in *Ochroid* at [64], the court will first ascertain whether the contract is prohibited either pursuant to a statute or an established head of common law public policy. The bank is licensed to lend money in Singapore. The purpose of the loan was wholly lawful and unobjectionable. The loan was made to finance the borrower in its ordinary business, including trading. There was no suggestion whatsoever that the contract was entered into with the object of committing any illegal act, or that

the performance of the contract entailed any legal wrong or unlawful conduct. Consequently, the doctrine of illegality is not engaged, and the question of the proportionate response to such illegality is not raised.

17 A contract to pay a bribe is unenforceable as it is a contract for the commission of a crime. A contract that has been procured by a bribe stands on a different footing. It is a situation dealt with under principles of equity and most often arises in the context of the law of agency. It is considered under the law of equity together with secret profits and commissions. The typical case in which a contract is procured by a bribe involves one party to the contract providing a gratification, whether or not financial, to an agent or employee of the other party with a view to influencing the other party's decision to enter into the contract. That other party, perhaps a government or large corporation, typically knows nothing of the bribe, and has relied on its agent or employee to act in its best interests in connection with the entry into the contract. The payment of the bribe deprives that other party of the loyal service of its agent or employee. It is that other party which is the victim of the briber's conduct. It has potential remedies against the bribe-taker within its ranks. It also, as the innocent party, has the option to avoid the contract procured by a bribe, either by rescission from inception of the contract, if counter-restitution is possible, or for the future: see *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515. However, it also has the option to continue with the contract. Further, it may lose the right to avoid the contract through waiver or inaction after discovery of the bribe. If the contract is not avoided by the innocent party, then both parties are held to its terms.

18 In so far as the borrower suggests that the bank should be taken to have known of the bribes, there is no evidence sufficient to raise any triable issue that the bank knew of any allegations of bribery before these proceedings began, let alone at the time of entry into or renewal of the facilities. Moreover, I do not consider that the state of mind of a bribed employee can be attributed to his employer in the context of proceedings between the employer and the briber (or between the employer and the bribed employee). This is because the briber is necessarily an accomplice to the bribed employee's breach of duty to his employer. The employer is the victim of both the briber and the bribed individual. The UK Supreme Court has recently held in *Aquila Advisory Ltd v Faichney and others (Crown Prosecution Service intervening)* [2021] 1 WLR 5666 at [77]–[81] that where a company brought civil proceedings against its directors to recover the proceeds of crime which the directors had acquired in breach of their fiduciary duty, the unlawful acts and dishonest state of mind of those directors could not be attributed to the company, and accordingly the company could not be said to have acted illegally nor its claim barred by the defence of illegality.

19 As I have noted, contracts procured by bribery are ordinarily addressed in the context of the law of agency. Nonetheless, in recent years, that a contract has been procured by bribery has sometimes been raised as a possible new category of contracts against public policy. The bank cited two English cases concerning enforcement of arbitration awards arising from contracts said to have been procured by bribery. In both cases, the court held that there was no English public policy requiring a court to refuse to enforce a contract procured by bribery: see *Honeywell International Middle East Ltd v Meydan Group LLC (formerly known as Meydan LLC)* [2014] EWHC 1344 (TCC) at [184]; *National Iranian Oil Company v Crescent Petroleum Company International Ltd and another* [2016] EWHC 510 (Comm) at [49(2)].

20 I consider that there is similarly no Singaporean public policy requiring the court to refuse to enforce a contract procured by bribery. Rather, the innocent party has the option to avoid the contract upon discovery of the bribe.

21 In my view, it would be quite wrong to extend the categories of public policy to prevent the

victim of a bribe enforcing the contract if it so chooses. This case is a good example of how wrong it would be to do so. If the payment of bribes to obtain a loan from a bank enabled the borrower to stop the bank from recovering monies disbursed, such a result would reward the wrongdoer and punish the victim. There are other examples. Take infrastructure projects. The *Public Sector Standard Conditions of Contract for Construction Works* (Building and Construction Authority, 8th Ed, July 2020) is a standard form adopted by the public sector for construction projects. It has been developed and refined over many years. It provides by clause 31.1(2)(b) that bribery by the contractor is a ground for termination of the contract by the government. This both adds a contractual right of termination to the common law right of rescission available where a bribe has been paid in connection with procurement and also applies that right of termination to a broader range of situations, including for example an offer of a bribe during the performance of the contract. That termination is an option and not mandatory reflects the reality that a government may still want the bribing contractor to complete performance of the contract. It may be more expensive or incur too much delay to change the contractor. Even if the contract were not terminated or avoided, there would remain other sanctions such as the criminal law.

Issue 2: Is a guarantor of such a loan entitled to resist enforcement on the ground of illegality?

22 The second defendant was, on his own account, the person giving bribes to the bank's officers. Consequently, he is in no position to rely on this allegation as a reason to avoid liability under the guarantee. If he is being truthful in his accusations, he is at least the accomplice if not the instigator. The third defendant however claims that he knew nothing about the alleged gifts until the second defendant told him about them by WhatsApp on 21 April 2021.[note: 17] The third defendant did not suggest that he would not have signed the guarantee if he had known of the gifts, nor make any argument as to how knowing about them would have made a difference to his willingness to be guarantor.

23 Where the guarantor knows nothing of the loan being procured by a bribe, then he is not an accomplice to the bribed employee's breach of duty to the employer. Conceivably, such a guarantor may in an appropriate case be able to demonstrate both that he would not have agreed to have become a guarantor if he had known about the bribes and that he was misled not just by the borrower but also by the lender. However, no such defence has been pleaded or even raised in argument by the third defendant. From the evidence presented there is no basis for any such argument.

Issue 3: Is there credible evidence of the alleged bribes?

24 The bank has denied that any gifts or bribes were received, and the bank officer who dealt with the borrower's account (and who it is alleged received the gifts) has denied receipt.[note: 18]

25 Moreover, the allegations were not made until these proceedings were filed, notwithstanding numerous opportunities to do so, including in response to the notices served by the bank. There was no mention of it in a very detailed e-mail that the borrower sent to the bank's head office in Chennai on 8 March 2021, and re-sent on 12 March 2021.[note: 19] When the allegations were finally made in the course of these proceedings, initially as gifts to unnamed individuals, there were inconsistencies, repeated revisions and a general lack of clear supporting evidence.

26 In my assessment, the defendants' allegations of bribery barely reach a threshold of minimal credibility. It is striking that they were not put forward before the proceedings began, although one

possible explanation for this delay is that the second defendant was concerned that his doing so would incriminate himself. The pleadings have already been amended twice. This is a case where the old-fashioned parlance of a defence being shadowy is in fact accurate.

27 If I had decided that the defendants should have leave to defend instead of taking the view that I have done of the applicable law, I would have concluded that justice would be served by requiring the defendants to demonstrate their commitment to the defence of the action. I would have imposed as a condition that the defendants pay into court the amount outstanding as of 11 March 2021, namely US$546,920.78.

Conclusion

28 It is no defence to a claim made to recover a loan for the borrower to allege that it had procured the loan by bribing employees of the lender. Accordingly, making such allegations does not raise a triable issue that would justify granting leave to defend. While a guarantor who does not know about the bribes could potentially raise the defence that he would not have given the guarantee if he had known of the bribes, in this case one of the guarantors was personally involved in making the bribes (if any were made) and the other neither pleaded nor argued that, had he known of the bribes allegedly made by the borrower, he would not have signed the guarantee. Accordingly, neither guarantor has raised any triable issue.

29 I allow the appeal and give judgment to the bank in the sum of US$546,920.78 against both the borrower and the guarantors. I will hear counsel on interest and costs.

[note: 1]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 10.

[note: 2]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 11.

[note: 3]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 12.

[note: 4]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 13.

[note: 5]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 19.

[note: 6]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 14.

[note: 7]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 16.

[note: 8]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at pp 44 to 52.

[note: 9]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at pp 53 to 56.

[note: 10]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at pp 59 to 60 (for the borrower) and pp 62 to 63 (for the guarantors).

[note: 11]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at pp 67 to 69 (for the borrower) and pp 70 to 71 (for the guarantors).

[note: 12]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at p 50.

[note: 13]Defence of the first and second defendants (Amendment No 2), at para 23.

[note: 14]Defence of the first and second defendants (Amendment No 2), at paras 38 and 41.

[note: 15]Affidavit of Gupta Vaibhav filed on 12 August 2021, at paras 23 to 26.

[note: 16]Affidavit of Gupta Vaibhav filed on 12 August 2021, at paras 37 to 39; Affidavit of Gupta Vaibhav filed on 4 October 2021, at p 26.

[note: 17]Affidavit of Arvind Sharma filed on 11 August 2021, at paras 7 and 8.

[note: 18]First affidavit of Upadhyay Rajesh filed on 21 July 2021, at para 37.

[note: 19]Appellant’s Bundle of Documents, at pp 139 to 142.