

Transasia Private Capital Ltd (in its capacity as manager, for and on behalf of Asian Trade Finance Fund, a sub-fund of TA Asian Multi-Finance Fund) v Todi Ashish
[2021] SGHC 39

Case Number : Suit No 909 of 2020 (Summons No 531 of 2021)
Decision Date : 16 February 2021
Tribunal/Court : General Division of the High Court
Coram : Andre Maniam JC
Counsel Name(s) : Janice Han Jia Lin (Tan Peng Chin LLC) for the plaintiff; Defendant absent.
Parties : Transasia Private Capital Ltd (in its capacity as manager, for and on behalf of Asian Trade Finance Fund, a sub-fund of TA Asian Multi-Finance Fund) — Todi Ashish

Civil Procedure – Summary judgment

Civil Procedure – Inherent powers

16 February 2021

Andre Maniam JC (delivering the judgment of the court *ex tempore*):

Introduction

1 When a defendant defaults in entering appearance or in filing a defence, the court may, instead of entering default judgment, consider the claim on the merits and enter judgment accordingly. The court may do so at trial, or by granting summary judgment, as appropriate.

2 I find that the present claim should be considered on the merits, and that the plaintiff has proven its claim. Accordingly, I enter summary judgment on the merits in favour of the plaintiff.

Background

3 The plaintiff is an asset management firm acting as the manager of a fund. [\[note: 1\]](#) Canwell Commerce Pte Ltd (“Canwell”) was a customer of the plaintiff and maintained an account with the plaintiff. A revolving trade finance facility was granted by the plaintiff to Canwell on the terms of a facility agreement (“the Facility Agreement”). [\[note: 2\]](#) The defendant was a director and shareholder of Canwell, and signed a personal guarantee (“Guarantee”) guaranteeing Canwell’s obligations to the plaintiff under the Facility Agreement. [\[note: 3\]](#)

4 Canwell drew down three loans under the Facility Agreement (“the Loans”): [\[note: 4\]](#)

- (a) a sum of US\$3,571,664.22 on 20 June 2019 (“loan number ATFF-FA-1708-063-DD014”);
- (b) a sum of US\$1,005,077.47 on 21 June 2019 (“loan number ATFF-FA-1708-063-DD015”);
and
- (c) a sum of US\$1,989,826.08 on 10 September 2019 (“loan number ATFF-FA-1708-063-

DD016”).

5 Canwell failed to repay the plaintiff the Loans drawn down under the Facility Agreement. [\[note: 5\]](#) On 28 January 2020, and on 5 and 16 March 2020, the plaintiff demanded that Canwell repay the principal sum due plus interest and fees. [\[note: 6\]](#)

6 On 16 March 2020, the plaintiff also demanded payment from the defendant as guarantor. [\[note: 7\]](#) The plaintiff then made a statutory demand against the defendant in June 2020. [\[note: 8\]](#)

7 The plaintiff received no payment in response to these demands.

8 On 23 September 2020, the plaintiff sued the defendant for the sum of US\$7,744,971.79 as the principal sum due plus interest and fees, as set out in the plaintiff’s statement of account of the same date annexed to its statement of claim (“the SOC SOA”). [\[note: 9\]](#)

9 The plaintiff was granted leave to serve the writ and statement of claim on the defendant out of jurisdiction (HC/ORC 5500/2020 dated 6 October 2020). Attempts at personal service proved unsuccessful, and the court then allowed the plaintiff to effect substituted service (HC/ORC 6378/2020 dated 16 November 2020), which the plaintiff duly did by email to the defendant’s email address, and by leaving a copy of the relevant documents addressed to the defendant with the mail room receptionist of a condominium in Thailand which the defendant was known to be residing at.

10 The defendant had 21 days from 25 November 2020 (*ie*, until 16 December 2020) to enter an appearance, [\[note: 10\]](#) but he never did.

11 In the circumstances, the plaintiff was entitled to judgment in default of appearance (O 13 r 1(1) read with O 12 r 4(b) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“the ROC”). The plaintiff, however, wished to enforce any judgment obtained against assets of the defendant in India. The plaintiff was advised that under Indian law, if a foreign judgment has not been given on the merits of the case, it will not be regarded as conclusive. Accordingly, instead of seeking default judgment, the plaintiff applied for judgment on the merits: either on a summary basis (if the court was so satisfied), or by the matter being sent to trial.

The court’s power to consider a claim on the merits, where the defendant is in default of appearance or defence

12 The plaintiff invoked the court’s inherent power to consider a claim on the merits, in circumstances where default judgment could have been obtained instead.

13 It is well settled that the court may consider a claim on the merits instead of entering judgment in default of appearance. This has been accepted in Singapore in *Singapore Telecommunications Ltd v APM Infotech Pte Ltd* [2011] SGHC 147 (“*Singapore Telecommunications*”), *Indian Overseas Bank v Svil Agro Pte Ltd and others* [2014] 3 SLR 892 (“*IOB v Svil Agro*”), and *Seagate Technology International v Vikas Goel* [2016] SGHC 12. In a similar vein, the court can consider a claim on the merits instead of entering judgment in default of defence: *Panwell Investments Pte Ltd v Lau Ee Theow* [1996] 3 SLR(R) 73 at [24].

14 It is likewise accepted in England that the court can enter judgment on the merits instead of default judgment: see *Berliner Bank AG v Karageorgis and another* [1996] 1 Lloyd’s Rep 426 (“*Berliner Bank v Karageorgis*”), *Habib Bank Ltd v Central Bank of Sudan (formerly known as Bank of Sudan)*

[2007] 1 WLR 470 and *Trafigura Pte Ltd and another v Emirates General Petroleum Corporation* [2010] EWHC 87 (Comm).

15 Moreover, it has been recognised by the Indian courts that where the defendant is absent, the plaintiff may adduce evidence in respect of his claim, and the court may give a decision on the merits of the case after due consideration of the evidence: *Govidan Asari Kesavan Asari v Sankaran Asari Balakrishanan Asari* AIR 1958 Ker 203 (“*Govidan v Sankaran*”), affirmed by the Supreme Court of India in *International Woollen Mills v Standard Wool (UK) Ltd* [2001] 2 LRI 765 (“*International Woollen Mills*”). Both *Govidan v Sankaran* and *International Woollen Mills* were cited in *Singapore Telecommunications* (at [8]).

16 In *Singapore Telecommunications*, the court granted summary judgment after considering the merits of the case. In *IOB v Svil Agro*, the court granted judgment after a trial, whilst citing *Singapore Telecommunications* with approval (see *IOB v Svil Agro* at [25]–[33]). The court in *IOB v Svil Agro* expressly recognised that “the court has full discretion whether to proceed with the case and hear the merits or even give judgment without trial” (at [33]).

It is appropriate to consider this claim on the merits

17 The plaintiff adduced a legal opinion from Indian lawyers that under s 13 of the Code of Civil Procedure (Act No 5 of 1908) (India), a foreign judgment would not be considered conclusive if it has not been given on the merits of the case. [\[note: 11\]](#) The same point of Indian law was noted in *Singapore Telecommunications* ([13] *supra*) at [7]–[8], [20], and in *IOB v Svil Agro* ([13] *supra*) at [36].

18 In these circumstances, as Colman J stated in *Berliner Bank v Karageorgis* ([14] *supra*) (at 428):

[It is] inappropriate that the Court should decline to exercise its jurisdiction [to consider a claim on its merits] if there is material before it to suggest that a judgment obtained by the automatic method might well not be enforceable in foreign jurisdictions where the defendant is known to have assets or where there is a reasonable belief that he might have assets.

19 I agree that “there would be serious injustice to the plaintiff if the court refrained from exercising its inherent jurisdiction in the circumstances presented” (*Singapore Telecommunications* ([13] *supra*) at [20]; *IOB v Svil Agro* ([13] *supra*) at [37]–[38]).

Consideration of the claim on the merits

20 The plaintiff put forward evidence in the form of an affidavit from its chief operating officer Mark Andrew Glossoti (“Mr Glossoti”) dated 2 February 2021. Mr Glossoti deposed to the facts of the case and exhibited the necessary documents, including the plaintiff’s statement of account dated 23 September 2020 in the sum of US\$7,742,387.24 (“the Affidavit SOA”). [\[note: 12\]](#)

21 The SOC SOA was for a higher figure: US\$7,744,971.79 ([8] above). The difference between the SOC SOA and the Affidavit SOA is in relation to the figure for “other fees” (US\$13,166.49 in the SOC SOA and US\$10,581.94 in the Affidavit SOA). Counsel for the plaintiff explained that this difference was due to a deposit towards legal fees. In the event, the plaintiff seeks judgment for the lower sum of US\$7,742,387.24, as set out in the Affidavit SOA.

22 Clause 9 of the Guarantee signed by the defendant stipulated that: [\[note: 13\]](#)

A certificate or determination by the [plaintiff] as to the moneys and liabilities for the time being due, owing or incurred to the [plaintiff] by [Canwell], or incurred by the [plaintiff] on [Canwell's] behalf, or without limitation as to any other matter provided for in this Guarantee, shall (save in case of manifest error) for all purposes be conclusive and binding upon the [defendant].

23 I find that the plaintiff is entitled to rely on the Affidavit SOA as a "certificate or determination" by it within clause 9 of the Guarantee that is "conclusive and binding" upon the defendant. In any event, I am also satisfied on the evidence that the plaintiff is entitled to the sums comprised in the Affidavit SOA, as the principal sum due plus interest and fees.

24 As I am satisfied on the evidence that the plaintiff is entitled to judgment on the merits, I do not order the matter to proceed to trial.

25 As a matter of principle, a defendant who is in default of appearance cannot be in a better position (in terms of avoiding summary judgment) than a defendant who enters appearance and files a defence, but against whom summary judgment under O 14 of the ROC is then granted because there is no issue or question in dispute which ought to be tried, or other reason for trial. Moreover, the writ informs the defendant that if he fails to satisfy the claim or enter an appearance, the plaintiff may proceed with the action and enter judgment against him without further notice.

Conclusion

26 Having considered the evidence, I grant the plaintiff judgment on the merits against the defendant for:

(a) the sum of US\$7,742,387.24 (principal sum plus interest and fees as of the date of the writ, 23 September 2020);

(b) interest on the principal sum of US\$3,571,664.22 for loan number ATFF-FA-1708-063-DD014 ([4(a)] above) at the contractual rate of 17.25% per annum from 23 September 2020 to the date of payment;

(c) interest on the principal sum of US\$1,005,077.47 for loan number ATFF-FA-1708-063-DD015 ([4(b)] above) at the contractual rate of 17.25% per annum from 23 September 2020 to the date of payment;

(d) interest on the principal sum of US\$1,989,826.08 for loan number ATFF-FA-1708-063-DD016 ([4(c)] above) at the contractual rate of 16.75% per annum from 23 September 2020 to the date of payment; and

(e) costs and disbursements on an indemnity basis pursuant to clauses 3.4 and 11 of the Guarantee, to be fixed or taxed if not agreed.

[\[note: 1\]](#) Affidavit of Mark Andrew Glossoti ("Supporting Affidavit") at para 16.

[\[note: 2\]](#) Supporting Affidavit at para 19 and pp 41–62.

[\[note: 3\]](#) Supporting Affidavit at paras 18, 20 and pp 64–83.

[\[note: 4\]](#) Supporting Affidavit at para 22.

[\[note: 5\]](#) Supporting Affidavit at para 37.

[\[note: 6\]](#) Supporting Affidavit at para 38 and pp 201–209.

[\[note: 7\]](#) Supporting Affidavit at para 40 and pp 215–216.

[\[note: 8\]](#) Supporting Affidavit at para 41 and pp 218–222.

[\[note: 9\]](#) Statement of Claim at p 5 and Annex A.

[\[note: 10\]](#) Memorandum of Service dated 26 November 2020.

[\[note: 11\]](#) Plaintiff’s Written Submissions at para 12; Supporting Affidavit at para 13 and pp 32–34.

[\[note: 12\]](#) Supporting Affidavit at para 42 and p 231.

[\[note: 13\]](#) Supporting Affidavit at p 75.