IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 56

Suit No 364 of 2021
(Summons No 5043 of 2021)

Between

PT Bank OCBC NISP Tbk

… *Plaintiff*

And

Emerging Asia Real Estate
Fund Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Striking out]
[Civil Procedure — Pleadings — Amendment]
[Contract — Breach]

TABLE OF CONTENTS

PT Bank OCBC NISP Tbk
v
Emerging Asia Real Estate Fund Pte Ltd

[2022] SGHC 56

General Division of the High Court — Suit No 364 of 2021 (Summons No 5043 of 2021)
Kwek Mean Luck JC
28 January 2022

15 March 2022

Kwek Mean Luck JC:

Introduction

1 The plaintiff appealed, in RA 237/2021 ("RA 237"), against the decision of the Assistant Registrar in SUM 3004/2021 ("SUM 3004") to strike out the plaintiff's action in S 364/2021 ("S 364") for not disclosing a reasonable cause of action pursuant to O 18 r 19(1)(*a*) of the Rules of Court (2014 Rev Ed) ("ROC").

2 The plaintiff concurrently applied to amend its Statement of Claim (the "original SOC") in SUM 5043/2021 ("SUM 5043"). I allowed the plaintiff's application to amend its SOC in part. The defendant has appealed against this decision. I set out my grounds of decision below.

Background

Facts

3 The plaintiff, PT Bank OCBC NISP Tbk, is a company in the business of banking and finance incorporated in Indonesia.[1] The defendant, Emerging Asia Real Estate Fund Pte Ltd, is a Singapore incorporated company involved in fund management.[2] On or around 9 June 2016, the plaintiff entered into a Facility Agreement with a borrower, PT Brewin Mesa Sutera ("PT Brewin"), for the sum of IDR 833,000,000,000 ("Facility Agreement").[3] The defendant is a 49% shareholder in PT Brewin.[4] As a show of support for PT Brewin, in connection with the Facility Agreement, the defendant and three other parties entered into a Deed of Undertaking with the plaintiff dated 9 June 2016 ("Deed").[5] Under the Deed, the defendant and the three other parties are referred to as "Support Parties".[6]

4 The plaintiff alleged that around 27 October 2020, PT Brewin defaulted on its loan payment obligations under the Facility Agreement. The plaintiff issued notices to PT Brewin to pay, with the 7 December 2020 notice seeking the payment of IDR 409,958,159,313.[7] With no response from PT Brewin, the plaintiff issued a demand letter on 15 December 2020 to the defendant for

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1 1st Affidavit of Alvin Tanna dated 16 June 2021 ("Tanna's 1st Affidavit") at para 4.

2 Tanna's 1st Affidavit at para 5.

3 Tanna's 1st Affidavit at para 6.

4 Defence at para 2.

5 1st Affidavit of Patrick Yeo Boon Ping dated 28 June 2021 ("Yeo's 1st Affidavit) at para 6.

6 Yeo's 1st Affidavit at p 75.

7 Tanna's 1st Affidavit at para 8.

payment.[8] The plaintiff's case is that the defendant has failed to make payment in the sum of IDR 207,075,657,485 ("claimed sum") and it seeks this sum from the defendant in S 364.

Procedural background

5 In the original SOC, the plaintiff relied only on Clause 3.3 of the Deed ("Clause 3.3"), which provides that:[9]

> 3.3. Interest payment and repayment obligations
>
> If for any reason the Borrower does not make payment of any interest payable by the Borrower under clause 8 (*Interest*) of the Facility Agreement by the time, on the date, in the currency or otherwise in the manner specified in the Facility Agreement, *each Support Party shall* severally, within twenty-one (21) Business Days of a request from the Lender or Borrower, *make available to the Borrower (directly or indirectly)* in its Agreed Percentage *additional equity contributions and/or subordinated indebtedness to the Borrower as is necessary to enable the Borrower to meet its interest payment obligations under the Finance Documents*.
>
> [emphasis added]

6 The plaintiff's claim in the original SOC was based on the premise that Clause 3.3 made the defendant a guarantor for the debt owed by PT Brewin to the plaintiff. The claimed sum was the percentage of that debt for which the plaintiff alleged the defendant was liable as guarantor.[10]

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8 Tanna's 1st Affidavit at para 11.

9 Tanna's 1st Affidavit at pp 73–74.

10 Statement of Claim dated 19 April 2021 ("Original SOC") at paras 5 and 10.

7 On 5 November 2021, the plaintiff applied to amend the original SOC. There were three key amendments that the plaintiff proposed:[11]

(a) the inclusion of Clause 3.1 of the Deed ("Clause 3.1");

(b) the inclusion of an alternative claim for misrepresentation; and

(c) the inclusion of damages to be assessed as alternative relief.

8 Clause 3.1 provides that:[12]

> 3.1. Completion Undertaking
>
> *Each Support Party* severally irrevocably and unconditionally *undertakes* and agrees with the Lender *to provide to the Borrower all necessary assistance and support to ensure that Completion will occur no later than 31 March 2020* but so that, with respect to those parts of the obligations of any Support Party under this Clause 3,1 which can be quantified in monetary terms, the aggregate amount of such monetary obligations of that Support Party shall be its Agreed Percentage of all funds required by the Borrower (which are not to be funded by the Facilities) to ensure that Completion will occur no later than 31 March 2020.
>
> [emphasis added]

9 Clause 3.1 was not pleaded in the original SOC. Nor was it mentioned in the plaintiff's written submissions before the Assistant Registrar. It was first raised in the course of the hearing on 11 August 2021 before the Assistant Registrar.

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11 Plaintiff's submissions dated 1 November 2021 ("Plaintiff's submissions") at pp 75–85.

12 Tanna's 1st Affidavit at p 73.

10 On 9 November 2021, the defendant wrote to court to adjourn the hearing of RA 237. This was to allow the defendant to respond by way of affidavit to the plaintiff's application to amend the SOC in SUM 5043 and to prepare the necessary arguments in relation to it. The defendant subsequently filed an affidavit and supplemental written submissions opposing SUM 5043, which was heard concurrently with RA 237.

11 At the hearing on 28 January 2022, I allowed the plaintiff's application in respect of the proposed amendments to the SOC to include Clause 3.1 and alternative relief of damages to be assessed. I did not allow the plaintiff's proposed amendment to include an alternative claim of misrepresentation. For ease, I will refer to the amendments that I ultimately allowed as the "proposed amendments". The alternative claim of misrepresentation will be dealt with separately.

Decision

12 The law on amendment of pleadings is well established and was common ground between parties. In *Wright Norman and another v Overseas-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 ("*Wright Norman*"), the Court of Appeal held at [6] that:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise… This is so even though the omission was caused by carelessness or the application for amendment was made very late in the day...

13 The defendant cited *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 ("*Ng Chee Weng*"), where the Court of Appeal reiterated the

principle set out above in *Wright Norman* (at [22]). In particular, the defendant relied on the court's remarks in *Ng Chee Weng* at [106] that "[e]ven if an amendment is in order, the court will not allow the amendment if it is obvious that the amended claim would be struck out at trial."[13]

14 The following principles from *Ng Chee Weng* were also relevant:

(a) The court should be extremely hesitant to punish litigants for mistakes they make in the conduct of their cases, by deciding otherwise than in accordance with their rights: [24].

(b) A judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations: [26].

(c) There is a difference between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage. To allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence: [26].

15 In this regard, I note that the defendant here is a corporate litigant. This was also the plaintiff's first application to amend the SOC. Furthermore, the application was made at an early stage of the proceedings, long prior to trial. In the course of the oral hearing, the defendant referred me to *EA Apartments Pte Ltd v Tan Bek and others* [2017] 3 SLR 559 at [50], where the court held that it

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13 Defendant's submissions dated 24 January 2022 ("Defendant's supplementary submissions") at paras 63–64.

would not be just to allow the plaintiff a further opportunity to amend its pleadings given all the previous opportunity afforded to it. This was based on the guiding principle that the court has the power and responsibility to prevent abuses of process. However, these comments were made in the context of the plaintiff seeking another opportunity to rectify pleadings in further arguments, after the court had heard the initial application to amend and found that the draft amended SOC was defective. As such, I did not find this applicable to the present case.

16 The defendant's main objection was not that the proposed amendments would cause it injustice or injury which could not be adequately compensated by an appropriate costs order. Instead, the defendant's objection to the proposed amendments was that the SOC was inherently defective and incapable of being cured by the proposed amendments.[14]

Contractual interpretation

17 The defendant first argued that the plaintiff's claim was inherently defective as a matter of contractual interpretation.[15]

18 Unfortunately, the bulk of the defendant's submissions in this regard was based on a misunderstanding of the effect of the proposed amendments. The defendant did not address the fact that, through the proposed amendments, the plaintiff's claim was no longer premised on the defendant being a guarantor for PT Brewin's debts. By including Clause 3.1, which contains a direct undertaking from the defendant to the plaintiff, and including damages to be

14 Defendant's supplementary submissions at para 61.

15 Defendant's supplementary submissions at para 70.

assessed as alternative relief, the plaintiff had now framed its claim as one of breach of a primary obligation owed to it by the defendant. In other words, a key part of the plaintiff's case was no longer anchored on there being any form of a guarantee in the Deed. Any submissions made by the defendant which characterised the plaintiff's claim as one based on a guarantee therefore did not address the effect of the proposed amendments.

19 Under Clause 3.1 (see [8] above), there is clearly an obligation on the defendant as a Support Party to provide assistance and support to PT Brewin to ensure "Completion" by 31 March 2020.

20 Certainly, Clause 3.1 does not render the defendant (as a Support Party) directly liable to the plaintiff for the specific sum of IDR 198,143,289,709 (or any portion of it), which is what PT Brewin allegedly owes the plaintiff under the Facility Agreement. In this respect, I agreed with the defendant's submissions that the Deed does not make it a guarantor for PT Brewin's debt.

21 However, while the Deed may not make the defendant a guarantor, it does create obligations that are owed by the defendant to the plaintiff. For example, Clause 3.1 provides the plaintiff with a cause of action against the defendant where the defendant has failed to provide such assistance and support to ensure "Completion" by the set date. If the defendant is in breach of such obligations, the plaintiff has a claim against the defendant.

22 In oral arguments, the defendant argued that there were insufficient particulars of any such alleged breach for it to found a reasonable cause of action. However, because the obligation in Clause 3.1 is for the defendant to provide "all necessary assistance and support to ensure that Completion will

occur by 31 March 2020", I found the simple fact, that Completion did not take place by then, to be sufficient particulars of the breach such that the claim was not obvious to be struck out. Of course, this finding does not preclude a future application for further and better particulars by the defendant, if necessary. Such an application would have to be separately assessed on its merits.

23 In similar vein, I find that there could also be a reasonable cause of action in respect of the defendant's alleged breach of Clause 3.3. Clause 3.3 imposes an obligation on the defendant to make available to PT Brewin additional equity contributions as necessary to enable PT Brewin to meet its interest payment obligations. PT Brewin did not meet its interest payment obligations.

24 Accordingly, I found that the proposed amendments, particularly the inclusion of damages to be assessed as alternative relief, did "enable the real issues between the parties to be tried", per *Wright Norman* at [6]. Taking into consideration *Ng Chee Weng* at [106], I did not find this to be a situation where "it [was] obvious that the amended claim would be struck out at trial".

The effect of the Homologation Judgment

25 At the hearing, counsel for the defendant recognized that there is an obligation under Clause 3.1, which could potentially provide the plaintiff with a cause of action. The defendant then argued that the plaintiff's claim was inherently defective because of a judgment that had been obtained by PT Brewin in Indonesian restructuring proceedings, which deferred PT Brewin's payment obligations under the Facility Agreement.[16]

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16 Defendant's supplementary submissions at paras 50–60.

26 The restructuring proceedings in Indonesia will be referred to as the PKPU Proceedings. The plaintiff was the petitioner in the PKPU Proceedings. On 22 June 2021, judgment was given by a court in Indonesia to approve a composition agreement for PT Brewin (the "Homologation Judgment"). Pursuant to the Homologation Judgment, PT Brewin's obligations as principal debtor under the Facility Agreement were deferred until 14 June 2024.[17]

27 The defendant made three arguments pertaining to the effect that the Homologation Judgment had on the plaintiff's potential claim.

28 First, the defendant argued that the deferment of PT Brewin's payment obligations under the Homologation Judgment meant that the defendant's secondary obligations to the plaintiff as guarantor fell away. However, as mentioned above, this argument does not address the plaintiff's claim, taking into account the proposed amendments. I found that the proposed amendments gave the plaintiff a cause of action against the defendant that was not premised on the defendant being a guarantor for PT Brewin's debts.

29 To elaborate further, PT Brewin's obligations as principal debtor to the plaintiff under the Facility Agreement are separate and distinct from the defendant's obligations to the plaintiff under the Deed. Consequently, the obligations that were deferred pursuant to the Homologation Judgment and the obligations which the plaintiff now seeks to enforce under the Deed are very different:

(a) The Deed involves different parties from the Facility Agreement, which the Homologation Judgment relates to.

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17 Affidavit of Moh Rizah Khanafi at Tab 3-B.

(b) Under the Deed, the obligations are primary obligations owed by the defendant to the plaintiff. Under the Facility Agreement, the obligations are owed by PT Brewin to the plaintiff.

(c) The nature of the obligations under the Deed is also different from those under the Facility Agreement. PT Brewin's obligations under the Facility Agreement relate to its repayment of the loan from the plaintiff. The Homologation Judgment only deals with such obligations. This is in contrast to the obligations under the Deed.

30 For example, Clause 3.1 imposes an obligation on the defendant (and the other Support Parties) to provide all necessary support and assistance to ensure Completion by 31 March 2020. This obligation is wholly independent of PT Brewin's repayment obligations. It therefore cannot be affected by the default of PT Brewin and the Homologation Judgment. If breached, it was breached at latest on 31 March 2020, which is long before the PKPU Proceedings even begun. Contrary to the defendant's submissions, the obligation in Clause 3.1 is not contingent on there being debts presently due from PT Brewin to the plaintiff.

31 Second, the defendant submitted that because of the Homologation Judgment, there is no loss to the plaintiff. This is because under the Homologation Judgment, PT Brewin's obligations as principal debtor have only been deferred, and they remain owing to the plaintiff.

32 As highlighted above, this fails to recognise that the obligations under the Homologation Judgment, which arise from the Facility Agreement, are distinct from the obligations under the Deed. In addition, I accept the plaintiff's submission that there could have been loss suffered by the plaintiff arising from

the defendant's alleged breaches of the Deed. For example, this loss could include the cost incurred by the plaintiff in having to pursue the PKPU Proceedings.

33 Third, the defendant submitted that the Homologation Judgment changed the obligations in prior contracts such as the Deed. However, as stated above at [30], any alleged breach of Clause 3.1 predates the PKPU Proceedings. I did not see how the Homologation Judgment could have retroactively changed whether a breach of Clause 3.1 had occurred.

34 I therefore found that the Homologation Judgment did not affect the viability of the plaintiff's cause of action under either Clause 3.1 or Clause 3.3, on the evidence before the court. I did not find it obvious that the action would be struck out because of the Homologation Judgment, per *Ng Chee Weng* at [106].

The disallowed amendment

35 In contrast, I did not allow the plaintiff's application to amend the original SOC to include an alternative claim for misrepresentation. This is because the plaintiff did not indicate in its revised pleadings any false representations of fact that were made. The plaintiff's case was that the defendant's promise to provide assistance and support to PT Brewin to ensure "Completion" amounted to a misrepresentation, because the defendant ultimately did not do so. However, this is not a false representation of fact that legally founds an action for misrepresentation. It is instead a claim based on a promise made and allegedly not delivered on. That is not misrepresentation: *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [20]–[21].

36 As such, I did not allow this amendment per *Ng Chee Weng* at [106] because it was obvious that the misrepresentation claim would be struck out.

Conclusion

37 For the reasons above, I allowed the plaintiff's application in SUM 5043 to amend the SOC in part.

Kwek Mean Luck
Judicial Commissioner

Leo Cheng Suan, Lee Shu Xian and Teh Ee Don (Infinitus Law Corporation) for the plaintiff;
Nawaz Kamil and Alston Yeong (Providence Law Asia LLC) for the defendant.