Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd
[2000] SGCA 58

Case Number : CA 50/2000

Decision Date : 27 October 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Yang Ing Loong and Christopher Tan (Allen & Gledhill) for the appellants; Alfonso Ang and Nicholas Chan (A Ang Seah & Hoe) for the respondents

Parties : Capital Realty Pte Ltd — Chip Thye Enterprises (Pte) Ltd

Contract – Privity of contract – Loan agreement – Developers making payment pursuant to loan agreement to main contractors who in turn made payment to main sub-contractor – Whether the main contractors or the main sub-contractors were the borrowers

(delivering the grounds of judgment of the court): This was an appeal against a decision of the High Court which dismissed the appellants` claim against the respondents for repayment of interest free loans which they had allegedly made to the respondents. The court below held that the loans were not made to the respondents but to a third party. Having heard counsel for the parties, we allowed the appeal with costs. We now give our reasons.

The background

The appellants were the owners and developers of a condominium and bungalow housing project at Tanglin Hill/Ridley Park. It was also known as `the Tanglin Hill Project` (hereinafter referred to as `the project`). The respondents, a construction company, were the main contractors for the building of the project (under a contract dated 8 July 1994) and they sub-contracted the entire building contract to a company called Articon Construction Pte Ltd (`Articon`), except in relation to the appointment of nominated sub-contractors under the main contract. The person in the appellants who was primarily in charge of the project was their director, Mr Ang Poon Soon (`APS`), who had passed away on 14 June 1998.

One of the two persons managing Articon was Mr Lee Chin Kian (Lee), who was a shareholder (holding 26.67% of the shares) and director. Though Lee was neither a shareholder nor a director of the respondents, there was clear evidence that Lee also managed the project on behalf of the respondents. It was not in dispute that Lee had a close personal relationship with APS, as the former was, at some point in time earlier, the Chinese tutor of the latter. Furthermore, Lee was also during a period working for companies related to the appellants.

Sometime in 1996 an oral arrangement was made between APS and Lee whereby the appellant company would loan sums of money to be used to pay the sub-contractors of the project (`the loan arrangement`). The loan given amounted in total to $1.4m. The loans were made in the form of four cash cheques drawn on the appellants` bank account. They were issued on four separate dates during the period November 1996 to May 1998. Each of the cheques was handed by APS to Lee, who then deposited it into Articon`s bank account. During that period, three repayments were made from time to time in the form of cheques drawn on Articon`s account. The outstanding balance, which was the subject of the present action, was $500,000.

For ease of reference, we set out below a table showing how chronologically the loans were taken and repayments made:

Date	Amount Loaned by Appellants	Amount RepaidTo Appellants	Amount Outstanding
20 Nov 1996	$500,000	-	$500,000
4 Dec 1996	-	$200,000	$300,000
25 Jan 1997	$500,000	-	$800,000
12 Feb 1997	-	$300,000	$500,000
28 Apr 1997	-	$400,000	$100,000
16 Jun 1997	$200,000	-	$300,000
13 May 1998	$200,000	-	$500,000

The only issue before the court below, as it was also before us, was the identity of the borrower. Was it the respondents or Articon? It was unfortunate that at the time of the trial both the main ***persona dramatis*** were not before the court to testify as to the events that occurred, APS having passed away and Lee having gone missing.

The appellants` case

It was the appellants` case that the loans were made by them to the respondents and that Lee had acted on behalf of the respondents when he made the loan arrangement with APS. They relied on various indirect documentary evidence to substantiate their claim. Primary reliance was placed on an audit confirmation signed by the respondents` managing director, Phay Gi Mo (`Phay`), on 24 February 1998 stating that as at 31 December 1997 the respondents were indebted to the appellants in the sum of $300,000. The appellants also relied on various contemporary payment vouchers prepared by them on the occasions when each of the cash cheques was issued, and the receipts issued by them when repayments were made. Reference was also made to their ledgers for the years 1996, 1997 and 1998 where the entries showed that the payments were loans made to the respondents.

The respondents` case

The position taken by the respondents was that the loans were not made to them but to Articon. The action should have been brought against Articon. The respondents` explanation was that Articon was really the party which was interested in the project but was not able to tender for it as they did not possess the requisite CIDB (Construction Industry Development Board) rating. Because of that, Articon approached the respondents, who held the necessary CIDB rating, to tender for the project. The understanding was, if the respondents` tender were successful, the respondents would sub-contract the whole project to Articon, who would be, for all intents and purposes, the main contractor for the project. It was Articon who needed funds to carry out the project. The respondents did not and would not require such funds since they had assigned their obligations to Articon.

To substantiate that assertion, the respondents relied heavily on the fact that the cheques issued by the appellants were deposited into Articon`s account and repayments were made by cheques drawn

on Articon`s account, not the respondents`. Moreover, it was pointed out that Lee was a shareholder and director of Articon only; he was not a shareholder or director of the respondents. Lee was not authorised by the respondents to obtain any loan from the appellants.

The decision below

The learned trial judge dismissed the appellants` claim on the ground that they had failed to prove, on a balance of probabilities, that the loans were made to the respondents. He found that there was ample evidence showing that the loans were made to either Lee or Articon. He noted that the benefits of the moneys loaned went to Articon, and Articon had also assumed the responsibility of making repayments and had, in fact, done so. The trial judge felt, in view of the fact that the main contract for the project had been sub-contracted by the respondents to Articon, this had vastly diminished the respondents` benefits, liabilities and responsibilities under the main contract with the appellants. He thought it was more probable that the loans were requested by Lee on behalf of Articon since the loans had effectively benefited Articon and indirectly, Lee himself. The respondents, on the other hand, did not appear to have gained anything from the loans.

Although the trial judge stated that the audit confirmation relied on by the appellants provided strong prima facie evidence of a debt owing from the respondents to the appellants, he accepted the explanation given by Phay, that he initially did not want to sign the audit confirmation but he eventually did because he was assured by one Kwek Teng Pheow (Kwek), another director of Articon, that the audit confirmation was only a formality for official auditing purposes and, in any case, the appellants were holding a retention sum of more than $500,000, which would be sufficient to cover the $300,000 stated in the audit confirmation to be a loan owing from the respondents to the appellants.

The appeal

Before us, as in the court below, the single issue was the identity of the borrower. The two persons most able to shed light on the arrangement were, for different reasons, not before the court. The court was then left with the task of making a finding based on the available contemporaneous documents in the light of the surrounding circumstances. The fact that the cash cheques were received by Lee and were then deposited into Articon`s (where Lee was shareholder and director) bank account would, in the absence of other evidence, suggest that the loans were made to Articon. However, in this case, there were indeed other circumstances, including an audit confirmation executed by the respondents, which amply showed that the borrower was the respondent-company and not Articon. We shall now proceed to examine those relevant circumstances and indicate where, in our respectful view, the learned judge below erred.

Payment vouchers and receipts

Chronologically, the first lot of documents which were relevant in this regard were the payment vouchers of the appellants, the receipts issued by the respondents on receipt of the cheques and the receipts issued by the appellants in respect of the repayments made. There were four vouchers in question, three of which stated that each payment was a loan to the respondents. In respect of the second sum loaned of $500,000, the voucher stated it to be an `advance payment` to the respondents but it also stated that the respondents were a `debtor`. On each of these vouchers the payee was stated to be `Chip Thye Enterprises Pte Ltd`, the respondents, and not Articon.

As regards the receipts given by the respondents in respect of the cash cheques given by the appellants, only three were tendered in evidence as one could not be found. In all the three receipts, the respondents stated that the sum in question was `Advance progress payment for Tanglin Hill Project`. A significant point to note here was that if the `loan` or `advance` was indeed given to Articon, why did the respondents issue the receipts? If the assertion by the respondents was true, the receipts should have been issued by Articon. Yet, each of the three receipts was signed by Phay on behalf of the respondents.

Next, there were the receipts issued by the appellants when the three repayments were made. In each instance the appellants stated that the sum was received from `Chip Thye Enterprises (Pte) Ltd` in payment of `loan`.

The respondents relied upon the receipts they issued to contend that the `advance` was, in fact, made to Articon which was, after all, the party carrying out the project. If that were so, why were the receipts not issued by Articon? In our view, the fact that the receipts were issued by the respondents rather than by Articon clearly demolished their assertion that the moneys paid by the appellants were not for the respondents but for Articon. The vouchers and the receipts issued (in respect of repayments made) by the appellants further confirmed that the arrangement was one between the appellants and the respondents. We think, with respect, that the learned trial judge failed to give sufficient consideration and weight to these essentially contemporaneous documents. Instead, he had given undue significance to the fact that the four cash cheques issued by the appellants were deposited into the bank account of Articon. Such depositing did not necessarily mean that Articon was the borrower. It does not follow that, under a loan arrangement, the money disbursed must go into an account of the borrower. The borrower is entitled to pass the money over to whomsoever he likes in accordance with his own objective. As stated by the High Court in the case **Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd & Anor** [1995] 3 SLR 268 (at p 272):

> *Where the lender agrees to lend a sum of money to the borrower the loan money may be paid by the lender to a third party with the authority of the borrower instead of paying it direct to the borrower himself.*

Thus, the fact that eventually the cheques were deposited into the bank account of Articon was neither here nor there. Indeed, viewed in the light of those contemporaneous documents, the inference was irresistible that the loans were made to the respondents, which in turn, and pursuant to their understanding with Articon, deposited the money into the account of Articon. Phay could not conceivably deny that he knew the position. He signed the receipts for the moneys received from the appellants. He signed the cheques of Articon (being an authorised signatory of Articon`s account) to repay the appellants.

The learned trial judge thought that the loan arrangement did not really benefit the respondents. This was a factor he took into account in arriving at his decision. With respect again, we were unable to agree. Firstly, the respondents were a substantial shareholder of Articon (holding 35.33%) and were therefore entitled to share in the profits of Articon. Secondly, the respondents allowed their name to be used by Articon to tender for the project as Articon did not have the required rating under CIDB to tender for such a large project. The reason the appellants specified such a rating must necessarily be because they wanted the tenderers to have the necessary experience and financial backing to undertake the project. In the light of the close relationship existing between the respondents and Articon (elaborated in the next paragraph), it was obvious that there must have been some

understanding between the respondents and Articon on why they tendered and sub-contracted the entire job to Articon. The respondents would have their own reasons, whether commercial or otherwise, why they chose not to tender for and carry out the work themselves. According to Phay, Articon had agreed to pay $150,000 to the respondents for their efforts in tendering. Thirdly, being the main contractor, the respondents remained liable under the contract should Articon fail to carry out the works satisfactorily.

The following facts illustrated the close and special relationship between the respondents and Articon, and in turn, Phay with them. The respondents held 35.33% of the shareholding in Articon. As stated above, Phay was the managing director of the respondents. The other shareholders in Articon were Lee, who held 26.67%, one Pey Ciew Chang (Pey), 16.67%, and Kwek, 21.33%. Lee is a brother-in-law of Phay. Pey is a nephew of Phay. Kwek had, for a period of three to four years, worked for the respondents, and thus for Phay. While Phay did not hold any shares in Articon, and held no formal appointment there like a director, he clearly had an informal position there and this could be seen from the fact that he was a signatory to the bank account of Articon. Another fact which attested to the special relationship was the assistance given by the respondents to Articon in obtaining overdraft facilities from the Overseas Union Bank (OUB) by their executing a deed of assignment, of the payments due under the main contract, in favour of OUB and by undertaking to indemnify OUB for any losses suffered, should Articon become liquidated before completion of the project. It was clear that the respondents and Articon were collaborating very closely in the project.

In this regard, we wish to make some observations on one other finding of the court below. The learned judge felt that `given the closeness of the relationship between several of the personalities` in the appellants, the respondents and Articon, it was improbable that the appellants did not know of the sub-contract. While the relationship between the respondents and Articon was close, and APS probably knew of that relationship, it did not necessarily follow that APS would be aware of the precise contractual relationship existing between the respondents and Articon in relation to the project. In any event, even assuming that APS did come to know of the scope of the sub-contract between the respondents and Articon, the fact that there was no contract of novation; the fact that all the documentary evidence relating to the loan was in the name of the respondents; and the fact that the minutes of site meetings did not reflect at all the presence of Articon, only go to show that, as far as the project was concerned, the appellants intended to deal with the respondents only and no one else. The respondents could not, by their arrangement with a third party (like Articon), alter their contractual relationship with the appellants.

The audit confirmation

We now turn to another important part of the documentary evidence: the audit confirmation of 24 January 1998 which was signed by Phay stating that, as at 31 December 1997, the respondents were indebted to the appellants in the sum of $300,000. The amount stated thereon was consistent with the amount that was owed to the appellants under the loan arrangement at that material time (see table in [para] 5 above). In our judgment, the execution by Phay of the audit confirmation further attested the appellants` claim that the loans were granted to the respondents and not to Articon.

The law on case stated was enunciated by Lord Cave in **Camillo Tank SS Co Ltd v Alexandria Engineering Works** [1921] 38 TLR 134 at p 143 as follows:

> *The expression `account stated`, as Mr Jowitt pointed out in his able argument, has more than one meaning. It sometimes means a claim to payment made by one party and admitted by the other to be correct. An account stated in this sense is no more than an admission of a debt out of court; and while it is no*

doubt cogent evidence against the admitting party and throws upon him the burden of proving that the debt is not due, it may, like any other admission, be shown to have been made in error. This is the plain result of the authorities, such as ***Perry v Attwood*** *6 El & Bl 691 and* ***Laycock v Pickles*** *4 B&S 497. Where the transaction is of this character, it makes no difference whether the account is stated to be stated or to be `stated and agreed`, the so-called agreement is without consideration and amounts to no more than an admission. There is a second kind of account stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. This is called by Mr Justice Blackburn, in* ***Laycock v Pickles*** *(supra), a `real account stated`.*

It is in connection with an account stated of this character that the equitable doctrine of `settled accounts` has to be considered; but in the present case there were no such mutual accounts and this doctrine therefore has no application. But there is a third class of stated or agreed accounts comprising cases where a claim has been made by one party, and the other party has for valuable consideration agreed to accept it as correct. The consideration may be a reduction of the claim, a consent to wait for payment, or any other matter involving a consideration for the agreement to pay. This is a real agreed account, and according to English law cannot be reopened except for fraud or on some other ground which would enable a party to an agreement to have it set aside.

The current edition of 9 ***Halsbury`s Laws of England*** (4th Ed) at para 698 has adopted this passage as a correct statement of the law. In the instant case, the audit confirmation clearly falls within the first category mentioned by Lord Cave.

The learned trial judge quite rightly observed that the audit confirmation constituted strong prima facie evidence of a debt. Where we differed from him was in respect of the explanation given by Phay as to why he signed the audit confirmation, which was accepted by the court below. It will be recalled that Phay said that he eventually signed the audit confirmation, though it was not the respondents who owed the money, because (i) he was assured by Kwek that signing the audit confirmation was only a formality to confirm the advance payment made by the appellants to Articon; and (ii) he was also assured by Kwek that the appellants were holding a retention sum of about $542,000 which would be more than sufficient to offset the sum stated in the audit confirmation as being owed to the appellants.

We would at this juncture like to point out that there were, in fact, two other audit confirmations. Evidence was adduced on them. The first was dated 15 February 1997 and signed by someone (signature illegible) who stated his position in the respondents to be `Accounts Manager`. There the audit confirmation confirmed that, as at 31 October 1996, the respondents owed the appellants $300,000. Phay, in his affidavit, deposed that he could not recognise the signature on that audit confirmation and neither did the respondents have an `Accounts Manager`. The second AC (in fact, should be the third, the second being the one signed by Phay) was dated 13 March 1999, stating that as at 31 December 1998, the respondents were indebted to the appellants in a sum of $500,000. However, this confirmation was not signed. Phay`s explanation for this refusal was because the respondents did not owe the appellants any money.

In our opinion, there was clear inconsistency in the explanation of Phay as to why he signed the audit confirmation of 24 February 1998 and not that of 13 March 1999. The reasons he gave for not signing the latter audit confirmation - that the respondents did not owe the appellants any money - applied

also to the 1998 audit confirmation. Surely the fact that the appellants still held a retention sum in excess of $500,000 was wholly irrelevant. The reasons Phay gave for signing the 1998 audit confirmation were just as good for the 1999 audit confirmation and yet he refused. Phay did not mention that at the time of the 1999 audit confirmation the appellants were no longer holding on to the retention sum. But what was clear was that by the time of the 1999 audit confirmation, APS had already passed away. Was Phay`s refusal to acknowledge at that point a pure coincidence or was it an opportunity seized by the respondents to deny something as the main person behind the appellants was no longer around? For our present purposes, we need not have to answer that question. But we were clearly of the view that the reasons given by Phay for signing the 1998 audit confirmation were astonishing. If the debts were in fact those of Articon, Articon could and should have signed it. We could not see any sense why Phay should assume a debt and sign it unless the debt was really that of the respondents and we did so find. The two explanations given by Phay were extraordinarily lacking in credibility. Phay was not a novice in business. He had been in the construction business for some 20 years.

We now move on to consider that aspect of Phay`s explanation that the payments from the appellants were actually advance progress payments to Articon for the project. But on the respondents` receipts issued to the appellants it was stated that the moneys were given to the respondents as advance progress payments for the project. Thus, on the respondents` own documents, which were signed by no less than Phay, we could see that, even if the moneys were such advances, they were not made to Articon. This again debunked the assertion that the payments were to Articon.

So the question was, were the payments to the respondents truly in the nature of loans or advances? If they were intended to be advances then one would have expected the appellants to deduct the advance before making payment under the progressive payment certificates issued by the architects. Yet, it was not in dispute that payment was made by the appellants in full in respect of each progress payment certificate. Repayments were made subsequently by separate cheques. When Phay was cross-examined about this, his only response was that he was `not aware of that`. We would add that the fact that the repayment cheques were issued by Articon was neither here nor there. The fact that the respondents arranged with Articon to make the repayment could not alter the respondents` own basic liability. A creditor`s basic interest is to get paid and not to query where the funds are coming from.

Viewing the entire circumstances, it seemed to us probable that the phrase `advance progress payments` was coined and used by the respondents even though the arrangement was, in reality, a loan transaction because appearance- wise, it would be better to state it as such - taking a loan would reflect on the financial soundness of the company whereas taking an advance would probably not.

The case **Re Ice-Mack Pte Ltd** [1989] SLR 876 [1990] 1 MLJ 79 relied upon by the respondents was, in our opinion, wholly inapplicable to the circumstances of the present case. There, the Official Receiver rejected the proof of debt filed by the creditor against the company because the creditor and the company were associated companies, both being under the control of V. The evidence put forward to support the claim of debt included, inter alia, an audit confirmation signed for the company by V just before the company was wound up. It was held by Yong Pung How J (as he then was) at [1989] SLR 876, 879; [1990] 1 MLJ 79, 80-81, that:

> *In anything resembling an arms-length situation, an audit confirmation would of course be strong evidence against a party of the correctness and the credit or debit balance which it has confirmed.*

Clearly, in ***Re Ice-Mack Pte Ltd*** , the court had viewed the evidence, including the audit confirmation, with suspicion due to the close relationship between the debtor company and the creditor. Such close relationship did not exist between the appellants and the respondents, even though APS and Lee might be close friends. More importantly, the 1998 audit confirmation was not signed by Lee but by Phay. None of them was simultaneously in charge of both the appellants and the respondents/Articon.

The authority of Lee

It was common ground that Lee made the loan arrangement with APS. Even though he was neither a shareholder nor a director of the respondents, it was clear that he was authorised by the respondents to deal on their behalf. In fact, he was designated the `Project Manager` by the respondents when they confirmed to the Quantity Surveyors, Davis Langdon & Seah, that Lee was authorised to so act for the respondents. There was evidence that Phay knew or approved of that authorisation as Phay`s name and signature also appeared on that document. Phay tried to explain away the authorisation by saying that, when he signed it, Lee`s name had not been inserted. If this was the only document which indicated Lee`s involvement in the project, we would perhaps have had some reservations. But Lee had in fact signed various documents (and most of the sub-contracts) relating to the project on the respondents` behalf. He had also attended site meetings representing the respondents, including the first and second site meetings. At the second site meeting, Phay was present with Lee. The minutes of the site meetings reflected all that. The minutes did not show the presence of Articon at all.

The respondents sought to allege that Lee signed the documents on the respondents` behalf without any authorisation. To make good that claim, Phay lodged a police report on 6 August 1999 to that effect. That was after the appellants had made demands for repayment. In our view, it was absurd for Phay to say that he did not know of what Lee did when Lee was involved actively in the project from day one. Lee was representing the respondents from the first site meeting. The documentary evidence referred to earlier (particularly the receipts issued by the respondents) demonstrated beyond any doubt that Phay knew of the arrangement made by Lee with APS for the loan. The police report, made at that moment, was essentially a self-serving document.

The documentary evidence further showed that during the course of the project the respondents and Articon did not draw a clear distinction between themselves. Letters addressed to one would be responded to by the other. Payments for invoices directed at the respondents would be settled by Articon and vice versa.

In the light of the foregoing, we had no hesitation in rejecting any claim of ignorance on the part of Phay as to the acts of Lee in relation to the project. Neither could we accept Phay`s assertion that Lee was not authorised to raise loans on behalf of the respondents. The objective facts spoke in favour of the appellants.

Obviously, something must have gone wrong in the relationship between Phay, Lee and Kwek which had caused them to fall out. In the meantime, Articon had also gone into liquidation.

Judgment

We, therefore, held that the payments made by the appellants were, in fact, loans given by the appellants to the respondents. The 1998 audit confirmation executed by Phay further substantiated that. The evidence, in the totality, convincingly supported the appellants` claim.

In the result, we allowed the appeal with costs, here and below. Judgment was entered in favour of the appellants against the respondents in the sum of $500,000. The security for costs (with any accrued interest) was ordered to be refunded to the appellants or their solicitors.

Outcome:

Appeal allowed.