Malayan Banking Bhd v Lauw Wisanggeni
[2003] SGHC 208

Case Number : OS 329/2003

Decision Date : 15 September 2003

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Sarjit Singh Gill, SC and Pradeep Pillai (Shook Lin & Bok) for the plaintiffs; Tan Lee Cheng and Yeo Yen Ping (Harry Elias Partnership) for the defendant

Parties : Malayan Banking Bhd — Lauw Wisanggeni

Civil Procedure – Originating processes – Mode of commencement – Originating summons – Whether court should order originating summons converted to writ

Contract – Consideration – Deed of undertaking – Whether party seeking to rely on deed of undertaking had provided consideration – Whether forbearance to sue is consideration – Whether necessary that consideration must move from promisee to promisor

1. The plaintiffs, Malayan Banking Berhad ("MBB"), commenced this originating summons to obtain an order that the defendant, Wisanggeni Lauw ("Lauw"), comply with a Deed of Undertaking executed by the latter on 3 July 2002. Lauw, who did not deny that he signed the Deed of Undertaking, contended that the rights of the parties can only be properly determined after a cross-examination of the persons involved in the preparation and signing of the Deed of Undertaking. As such, he sought to have the originating summons converted to a writ. After hearing the arguments of both counsel, I made the order sought by MBB and now set out the reasons for my decision.

2. The facts in this case, shorn of details, are as follows. MBB granted banking facilities to a number of companies, namely Eurocar Pte Ltd, Alps Investments Pte Ltd, Conic Heavy Equipment Pte Ltd and Victory Electronic Pte Ltd, which were owned or controlled by one Mr Kang Hwi Wah ("Kang'). These companies owed MBB a large amount of money. As Kang had financial problems, he arranged for Lauw to secure banking facilities offered by MBB to his companies by furnishing security to the bank.

3. Lauw explained that he agreed to help Kang because he felt that the latter had useful business contacts and a certain standing in the Chinese community in Singapore. In his own words, he "wished to cultivate Kang as a business contact". As such, on 3 July 2002, he entered into a Deed of Undertaking with MBB. This Deed outlined the undertakings provided by him in relation to a Memorandum of Charge of the same date, under which E-Infohigh Limited ("E-Info"), a company wholly owned by him, executed a first fixed charge over its 30 million shares in United Fiber System Limited ("UFS") in favour of MBB as security for the amount owed by the companies to the bank.

4. Clause 2.2 of the Deed of Undertaking provides as follows:

> In the event that the value of the shares falls below the minimum threshold value at any time during the security period, the obligor shall, within 15 days of being so requested by the Bank in writing:
>
> (a) provide to the bank additional security having a value (as may be determined by the bank in its absolute discretion) of not less than the shortfall and in the form acceptable to the bank (the "additional security") and/or
>
> (b) purchase from the bank all or part of the shares at the price of $0.17 per share.

5. The term "shares" in clause 2.2 of the Deed of Undertaking referred to "the 30 million UFS shares held by E-Info which are the subject of the security created under the Memorandum" while the term "minimum threshold value" in that clause was defined to mean "$5,100,000 calculated on the basis of $0.17 per share".

6. On 17 December 2002, MBB's solicitors informed Lauw in writing that the share value of the UFS shares had fallen below the minimum threshold value and that the bank, relying on clause 2.2 of the Deed of Undertaking, required him to furnish additional security with a value of not less than the shortfall, which amounted to $4,050,000 as at 16 December 2002. On 10 January 2003, Lauw's solicitors replied, stating that his obligation to comply with clause 2.2 of the Deed of Undertaking only took effect one year from the date of the Deed, a claim that was not supported by the terms of the Deed.

7. On 10 February 2003, MBB issued a fresh demand to Lauw to comply with clause 2.2 of the Deed of Undertaking. On 7 February 2003, the shortfall in respect of which security had to be furnished rose to $4,200,000. On that date, the last transacted price of the shares was $0.03 per share. As Lauw failed to comply with MBB's demand, the latter instituted these proceedings to have clause 2.2 of the Deed of Undertaking enforced.

8. Lauw claimed that MBB's originating summons ought to be converted to a writ because there are important facts which are disputed. In contrast, MBB's case was that this action primarily concerned the construction of Clause 2.2 of the Deed of Undertaking and as there were no complex issues of law or fact, the dispute between the parties should be dealt with without having the originating summons converted to a writ. I agreed with the bank and proceeded to consider whether or not Lauw's defences to the bank's claim rested on solid ground.

9. Although Lauw did not deny that he signed the Deed of Undertaking relied upon by MBB, he contended that the bank's claim ought to be dismissed for two reasons. First, he asserted that MBB cannot rely on the Deed of Undertaking because no consideration was furnished by the bank for it. Secondly, he contended that MBB cannot rely on the Deed of Undertaking in the absence of consideration because it was not sealed.

10. Lauw's contention that the bank furnished no consideration for the Deed of Undertaking will first be considered. He put his position as follows in paragraphs 17 and 18 of his affidavit dated 10 April 2003:

> 17. The Charge was used to secure facilities granted by the plaintiffs to four companies which I believe are owned or controlled by Kang…. I have no connection with these four companies.
>
> 18. I should add that I arranged for the Charge to be executed on behalf of E-Infohigh, and I signed the Undertaking purely pursuant to the Ex Gratia Agreement, and purely to help Kang….. I gained no benefit at all for executing the Charge, and, for myself, I gained no benefit as a result of signing the Undertaking. It can be seen from the Undertaking that the plaintiffs do not even purport to confer any benefit on, or be subject to any obligation at all to me … as a result of my allegedly giving the undertakings set out therein.

11. Lauw clutched at straws when he claimed that the bank furnished no consideration for his Deed of Undertaking. It is well established that a forbearance to sue, even for a short time, may, in appropriate circumstances, be consideration for a promise (see *Alliance Bank Ltd v Broom* (1864) 2 Dr & Sm 289). Lauw admitted that Kang, who was then in financial trouble, persuaded him to provide credit support by furnishing security to the bank. There is no doubt that MBB furnished consideration

for Lauw's Deed of Undertaking by giving more time to Kang to repay his outstanding debts. Lauw, who had his own reasons for helping Kang, knew about the benefit that Kang would receive if E-Info's UFS shares were forwarded to the bank. In paragraphs 5 and 11 of his affidavit dated 10 April 2003, he stated as follows:

> 5. Sometime in June 2002, a business acquaintance of mine, one Kang Hwi Wah … approached me and asked me to transfer 57,630,000 shares of United Fiber System Limited ("UFS") to provide credit support by charging these shares….
>
> 11. …. Kang told me that [MBB] might require the value of the shares to be guaranteed, and he asked me to agree to this as he needed a year to settle his financial difficulties.
>
> (emphasis added)

12. After having executed the Deed of Understanding for his own reasons to enable Kang to have more time to settle the amount owed by the latter to the bank, Lauw is in no position to argue that the Deed of Undertaking is unenforceable on the ground of absence of consideration. His assertion that he did not benefit from signing the Deed of Undertaking does not alter the position. It is trite law that while consideration must be furnished by a party seeking to enforce a contract not under seal, the consideration offered need not move to the promisor. Anson's Law of Contract 28th ed states the position in the following clear terms at p 95:

> A party to a contract who wishes to enforce the contract must furnish or have furnished consideration for the promise of the other party. It is not, however, necessary that it should have been intended to benefit the other party. It must move from the promisee but it need not move to the promisor.

13. This is a fairly straightforward action by a bank to enforce their unchallenged rights under a contract and as I have held that the bank furnished consideration for the Deed of Undertaking, it is not necessary for me to consider whether or not it is enforceable in the absence of consideration. As the Deed of Undertaking is enforceable, Lauw is required to purchase from the bank all or part of the 30 million shares in UFS charged by E-Info to the bank at the price of $0.17 per share and the bank is entitled to rely on other rights conferred as a result of the execution of the Deed of Undertaking. MBB are entitled to costs.