Empire International Holdings Ltd v Mok Kwong Yue and Another
[2004] SGHC 221

Case Number : Suit 52/2004, RA 168/2004

Decision Date : 28 September 2004

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Goh Kok Yeow (De Souza Tay and Goh) for plaintiff / respondent; Andrew Ee (Andrew Ee and Co) for first defendant / appellant

Parties : Empire International Holdings Ltd — Mok Kwong Yue; Subbarao Pinamaneni

Contract – Consideration – Promise to advance additional funds – Whether amounting to consideration for guarantor's promise to guarantee repayment of debts already incurred and future advances

Credit and Security – Guarantees and indemnities – Guarantor – Whether guarantor entitled to ask for account of shares pledged as security for credit facilities prior to discharge of guarantor's obligations under guarantee

Credit and Security – Guarantees and indemnities – Whether guarantor's right to rely on set-off or counterclaim as defence to claim under guarantee may be excluded by terms of guarantee

Credit and Security – Money and moneylenders – Illegal money-lending – Respondent an investment and holding company – Respondent an investor in appellant's company – Whether loans by respondent to appellant's company amounting to illegal moneylending transactions – Section 2 Moneylenders Act (Cap 188, 1985 Rev Ed)

28 September 2004

Tan Lee Meng J:

1 The appellant, Mr Mok Kwong Yue ("Mok"), appealed against the summary judgment entered against him by the assistant registrar with respect to a claim on a continuing guarantee executed by him in favour of the respondent, Empire International Holdings Limited ("Empire"), an investment and holding company incorporated in Mauritius. I dismissed his appeal and now give the reasons for my decision.

Background

2 The facts in this case are as follows. Mok and one Mr Subbarao Pinamaneni ("Subba") wanted to use their company, Subba Mok LLC, to acquire a majority stake in International Microelectronics Products Inc ("IMP"), a NASDAQ-listed company based in California that makes and sells electronic products for the semiconductor business. They negotiated a stock purchase agreement with IMP on 8 June 2002 and looked for investors who were prepared to pay various amounts for the purchase of IMP shares.

3 Empire was one of the interested investors. On 27 June 2001, a memorandum of understanding ("MOU") was entered into between Empire and Subba Mok LLC. Pursuant to the terms of the MOU, Empire advanced a loan of US$1m to enable Subba Mok LLC to acquire a controlling interest in IMP. In June 2002, Empire injected further funds into the project. On 30 November 2002, Mok and Subba executed a comprehensively drafted continuing guarantee ("the Guarantee") in favour of Empire with respect to loans already advanced by Empire for the acquisition of a majority stake in

IMP as well as for future loans. The Guarantee was a standard form bank guarantee commonly used by banks in Singapore and elsewhere. It is pertinent to note that by 30 November 2002, Empire's loan account with the principal borrowers reached US$8,998,763.78 and this fact was acknowledged in writing by Mok.

4 Empire's relationship with Mok and Subba soured thereafter and on 14 June 2003, Empire issued a letter of demand to the principal debtor as well as Mok and Subba to repay the loans in question. On 12 December 2003, another letter of demand was sent to the principal debtor and to Mok and Subba to settle the loan account. When the loans were not repaid, Empire instituted the present proceedings against Mok and Subba in January 2004.

5 Empire sued Mok and Subba as guarantors of the principal debtor. It relied on cl 1 of the Guarantee dated 30 November 2002, which provides as follows:

> The Guarantor hereby unconditionally and irrevocably guarantees and undertakes, as a continuing obligation, to pay to Empire upon first written demand by Empire all amounts and discharge all obligations and liabilities which are now or shall at any time or times be owing or repayable by the Borrower to Empire …

6 Empire also relied on cl 17 of the Guarantee, which provides as follows:

> As a separate, additional and continuing obligation, the Guarantor unconditionally and irrevocably undertakes with Empire that, should the Guaranteed Amounts not be recoverable from the Guarantor under Clause 1 for any reason whatsoever (including but without prejudice to the generality of the foregoing, by reason of any provision of any documents relating to the Guaranteed Amounts being or becoming void, unenforceable or otherwise invalid under any applicable law) then, notwithstanding that that may have been known to Empire, the Guarantor will, as original, primary and independent obligor, upon first written demand by Empire under Clause 1, make payment of the Guaranteed Amounts by way of a full indemnity in such currency and otherwise in such manner as Empire may specify by notice to the Guarantor and that the Guarantor will indemnify Empire against all losses, costs, charges and expenses to which it may be subject or which it may incur whilst acting in good faith under or in connection with the Guaranteed Amounts or this Guarantee.

7 On 4 June 2004, Empire's application for summary judgment against Mok pursuant to O 14 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) was heard by the assistant registrar who entered judgment against Mok for US$8,998,763.78, the sum owed by the principal debtor to Empire as at 30 November 2002. Mok appealed against the assistant registrar's decision.

The appeal

8 At the hearing of the appeal, no evidence was tendered to contradict Mok's written acknowledgment of the amount owed to Empire as at 30 November 2002. When asserting that Empire was not entitled to summary judgment, Mok relied on four main arguments. The first was that the Guarantee executed by him on 30 November 2002 was unenforceable because Empire did not furnish any consideration for the obligation that he assumed under the said guarantee. Secondly, even if the Guarantee was enforceable, summary judgment should not have been entered against him because he was entitled to a set-off against Empire's claim. Thirdly, Empire was not entitled to recover the loans in question because the loans to the principal debtor were illegal moneylending transactions that were

prohibited by the Moneylenders Act (Cap 188, 1985 Rev Ed). Finally, summary judgment should not have been entered against him because Empire had not accounted for shares handed over by him, Subba and Subba Mok LLC as security for credit facilities.

9 Mok's assertion that the Guarantee could not be enforced by Empire, because consideration was not furnished by the latter for his promise to guarantee the principal debtor's loans, will first be considered. As the Guarantee was a continuing guarantee, this assertion did not rest on solid ground. That a promise to advance additional funds may be consideration for a promise to guarantee the repayment of debts already incurred as well as future advances, has been reiterated on innumerable occasions. In *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393, Karthigesu JA, who delivered the judgment of the Court of Appeal said at [28] as follows:

> We note that in Malaysia, the courts have consistently held that as continuing guarantees cover past as well as future facilities granted, they have valid consideration. … This is correct. As continuing guarantees secure past as well as future grants of facilities, the guarantor does get something which he had received before, ie the grant of future facilities. Therein lies the valid consideration.

10 In the present case, there was no doubt that a continuing guarantee was envisaged. The preamble to the Guarantee provided that the guarantee was given:

> In consideration of Empire agreeing to grant, granting and/or continuing to grant loans or advances and/or otherwise giving or continuing to give credit or other facilities … and/or providing any other services or facilities from time to time to such extent and for so long as Empire may think fit to … Subba Mok LLC …

As such, the question of lack of consideration did not arise.

11 Mok also tried to attack the validity of the Guarantee by pointing out that although there was a promise of future advances, there were no such advances. As far as this argument is concerned, it is worth noting that in *Overseas Union Bank v Lew Keh Lam* ([9] *supra*), Karthigesu JA answered such an assertion in the following comprehensive terms at [29]:

> [T]he respondent also raised the argument that the consideration was illusory or a sham because there was no actual grant of new facilities. We disagreed. The consideration was not illusory for there was an exchange of promises, namely the promise to 'make or continue to make advances or loans or otherwise give credit or other banking facilities'. It was the promise itself that constitutes the consideration and not the subject matter of the promise. The fact that the bank had not actually granted any new facilities was only relevant to the issue of the performance of the contract and not the validity of the consideration. The respondent has confused performance with consideration in making this argument.

12 Mok's alleged right of set-off will next be considered. It is his case that his right of set-off arose from, among other things, IMP's delivery of US$2.2m in cash and products to Empire. Whether Mok had a right of set-off must be considered in the light of cl 20 of the Guarantee, which provided as follows:

> All payments by the Guarantor under this Guarantee whether in respect of principal, interest, fees or any other items, shall be made in full *without restriction, condition, set-off or counterclaim* … [emphasis added]

13 It is trite law that a guarantor's right to rely on a set-off or counterclaim as a defence to a claim under the guarantee executed by him or her may be excluded by contract. Such an exclusion clause was considered and upheld by the English Court of Appeal in *Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou* (*The Fedora*) [1986] 2 Lloyd's Rep 441, a case which was endorsed by the Court of Appeal in *PH Grace Pte Ltd v American Express International Banking Corp* [1986] SLR 128 at 136, [20], where L P Thean J, as he then was, cited with approval the following passage from Parker LJ's judgment in *The Fedora* at 445:

> [H]ere the parties have specifically provided both in the loan agreement and the guarantees that payment should be made free of any set off or counterclaim. It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated.

14 In the present case, the terms of the Guarantee clearly provided that Empire was entitled to be paid without being vexed by any alleged set-off. As such, the general rule that a debtor is entitled to set off amounts allegedly owed to him by the creditor had been excluded. It follows that Mok had no right of set-off and was required to pay the amount claimed by Empire, a sum that he acknowledged in writing as owing to Empire by the principal debtor.

15 Mok's assertion that Empire carried out moneylending transactions prohibited by the Moneylenders Act will next be considered. This assertion had no merit whatsoever. For a start, the said Act does not apply to the transactions presently being considered because no loans were made in Singapore: see *Mak Chik Lun v Loh Kim Her* [2003] 4 SLR 338. In any case, the question of moneylending did not arise because Mok accepted that Empire, an investment and holding company, was an investor in Subba Mok LLC and IMP. Empire had invested in the business venture because it wanted to retain equity in IMP to the extent of the funds furnished by it after the price of IMP reached US$1 per share. The MOU specifically provided as follows:

> The pledge and guarantees will be released once the following are met:
>
> 1. Either the stock price of IMP Inc will reach in the NASDAQ US$1.00 per share (on the basis of total shares of 38,147,560, meaning a market cap of US$38.15 Million or US$1.00 adjusted for any further splits/reverse splits and dilution), after the successful completion of the terms and conditions of the Stock Purchase Agreement; or
>
> 2. [Subba Mok LLC] repays all the funds that have been arranged, including letters of credit by Empire to Empire along with costs.

16 As it turned out, IMP shares were thinly traded. According to Empire, the average daily volume of IMP shares traded was only a few hundred shares and the price ranged between US$0.50 to US$0.60. This was clearly below Empire's expectations when it agreed to invest in that company. In view of these circumstances, Empire asserted that even if the Moneylenders Act was applicable, it was in a position to rely on the exception in s 2(c) of the said Act which makes it clear that a moneylender is not "any person bona fide … carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money".

17 It follows from the above discussion that Mok clutched at straws when he relied on the provisions of the Moneylenders Act to avoid liability to Empire under the continuing guarantee

executed by him in November 2002.

18 Finally, attention will be focused on Mok's assertion that summary judgment should not have been entered against him because Empire had not given him an account of the shares that he, Subba and Subba Mok LLC handed over as security for the credit facilities. This assertion need not be considered in detail for the simple reason that Mok had agreed from the very start to pledge Subba Mok LLC's IMP shares to Empire as security for the required credit facilities. Having not paid the amount that he guaranteed, the question of asking for an account of the said shares did not arise. In any case, cl 14 of the Guarantee specifically provided as follows:

> The Guarantor undertakes with Empire, from the date of this Guarantee until all his liabilities under this Guarantee have been fully and unconditionally discharged:
>
> …
>
> (c) the Guarantor shall not be entitled to share in any security held or money received or receivable by Empire or to stand in the place of Empire in respect of any security or money …

19 To sum up, as Mok failed to substantiate his assertion that the decision of the assistant registrar was wrong, his appeal against the summary judgment entered against him for the sum of US$8,998,763.78 was dismissed.

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