Premium Funding Singapore Pte Ltd v SHC Capital Ltd (China Construction-Hock Chuan Ann JV Pte Ltd, Third Party)
[2005] SGHC 196

Case Number : Suit 676/2004

Decision Date : 18 October 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Kenneth Koh Tee Huck (UniLegal LLC) for the plaintiff; Sean Lim Thian Siong and Tan Aik How (Hin Tat Augustine and Partners) for the defendant; Ronald Choo and Wilma Cheng (Rajah and Tann) for the third party

Parties : Premium Funding Singapore Pte Ltd — SHC Capital Ltd — China Construction-Hock Chuan Ann JV Pte Ltd

Insurance – Premium funding arrangement – Insurer consenting to terminate policies upon lender's notice -Insurer subsequently endorsing policies to third party – Lender terminating policies for non-payment by borrower – Whether lender entitled to terminate notwithstanding intervening endorsement of policies to third party – Whether lender entitled to terminate without consent of other parties insured – Whether lender entitled to refund of premiums notwithstanding prior claims under policies

Insurance – Premium funding arrangement – Lender extending loan to borrower for payment of premiums – Insurer subsequently endorsing policies to third party – Lender terminating insurance policies for borrower's non-payment – Whether insurer entitled to indemnity from third party against premiums refunded to lender

18 October 2005 *Judgment reserved.*

Kan Ting Chiu J:

The background

1 Hock Chuan Ann Construction Pte Ltd ("HCA") was the main contractor for a building construction project, and Tripartite Development Pte Ltd ("Tripartite") was the developer.

2 Under the terms of its agreement with Tripartite, HCA had to secure insurance cover in the form of, *inter alia*, a Contractor's All Risk Policy ("CAR policy"), and a Workmen's Compensation Policy ("WC policy").

3 HCA needed financial assistance to pay the premiums for the two policies. It entered into a Premium Funding Agreement ("PFA") on 23 August 2003 with the plaintiff, a company which provides financing for such purposes, and is aptly named Premium Funding Singapore Pte Ltd.[note: 1]

4 Under the PFA, the plaintiff agreed to lend to HCA the insurance premiums for the policies. Clause 6 of the PFA provided that:

> The Borrower shall ensure that the Insurer agrees to the Lender's terms and conditions for the grant of the Loan to the Borrower herein and endorse the Lender's interest on the Insurances and agree to cancel the Insurances on the instructions of the Lender and refund the premiums for the unexpired portion of the Insurances and any refunds thereto to the Lender.

and HCA was to repay to the plaintiff $533,250 by instalment payments scheduled to be completed in April 2004.

5 On 22 August 2003, Nanyang Insurance Co Ltd ("Nanyang") issued a CAR policy and a WC policy covering HCA as contractor, "Tripartite Developers and its Consultants as Principal and its Sub-Contractors FTRR&I [for their respective rights and interests]". The premiums for the two policies were payable within 60 days.

6 On 26 September 2003, HCA issued a Letter of Authorisation ("LoA") to Nanyang, to which Nanyang endorsed its acknowledgment and consent. The LoA read:

> We hereby give you notice that by an agreement (the "Agreement") made between Premium Funding Singapore Pte Ltd (the "Lender") and ourselves, the Lender has extended a loan to us to pay for the premiums under the Policy.
>
> We hereby confirm that we shall at all times remain liable to perform our obligations as insured under the Policy and the Lender does not assume any duties to perform the obligations imposed on us as insured thereby.
>
> We hereby irrevocably authorise and instruct you to act as follows:
>
> (a) You shall ensure that the Lender is given at least seven (7) days' prior written notice of your cancellation/termination of the Policy for any reason whatsoever;
>
> (b) With the exception of any of the Policy having a prohibition or restriction on the termination of that Policy, you shall allow the Lender to terminate the Policy at any time so long as seven (7) days' prior written notice has been served on you;
>
> (c) Whether the Policy is cancelled/terminated/amended, you shall repay to the Lender within thirty (30) days a rateable proportion of the premium for the unexpired term of the Policy unless the Policy is terminated on grounds of a total loss; and
>
> (d) You shall repay to the Lender within thirty (30) days all refund premiums.
>
> Please sign the duplicate copy of this letter and forward it to Premium Funding Singapore Pte Ltd at 165 Telok Ayer Street, Singapore 068617.

and the acknowledgment and consent read:

> We hereby acknowledge receipt of the above Letter of Authorisation dated 26 September 2003 from the Borrower in respect of the Loan granted by you to them for the funding of the premium for the above Policy and confirm that we undertake to comply with the aforesaid terms and further undertake to act accordingly.

7 On 26 September 2003, the plaintiff paid Nanyang the premiums for the two policies.

8 On 3 December 2003, the defendant SHC Capital Ltd acquired the general business of Nanyang, and it became a party to this action instead of Nanyang for this reason.

9 HCA was unable to continue as main contractor for the project. It entered into negotiations with China Construction (South Pacific) Development Co Pte Ltd ("CCD") for CCD to participate in the

project. The negotiations resulted in a joint venture between the companies, and the incorporation of a joint venture company, China Construction-Hock Chuan Ann JV Pte Ltd ("CCHCA"), the third party in this action, to continue with the project. CCD paid HCA $500,000 for the transfer of the policies to CCHCA[note: 2] although that amount had come from the plaintiff under the PFA.[note: 3] A deed of novation was entered into between HCA, CCHCA and Tripartite on 25 May 2004 whereby CCHCA took over HCA's rights and liabilities.

10 HCA did not inform the plaintiff of these developments although it notified Nanyang of the novation and requested Nanyang to transfer the WC and CAR policies to CCHCA.

11 Nanyang agreed and issued endorsements to the policies which stated that the name of the insured was amended to CCHCA as contractor, Tripartite Developers Pte Ltd and its consultants as principal and its sub-contractors, and that all other terms and conditions remained unchanged.

12 HCA's financial problems persisted. Payments due to the plaintiff under the PFA were not made. On 18 June 2004, the plaintiff gave notice to HCA of the cancellation of the loan, and gave notice to Nanyang that:

> In accordance with authority given to us by the captioned Borrower in the Letter of Authorisation dated 26th September 2003, a copy of which is enclosed for your reference, we hereby serve you with a 7 days notice of cancellation of the Policy. If you do not hear from us within the next 7 days, please proceed to cancel the Policy.
>
> In the event that the Policy is cancelled, we look forward to you fulfilling your obligation as provided for in the said Letter of Authorisation which was acknowledged by you.

13 On 28 June 2004, the plaintiff informed the defendant that as HCA had not made payments, pursuant to its letter of 18 June 2004 the policies were to be terminated on 26 June 2004.

14 The initial reaction of the defendant is revealing. It did not raise any issue with the plaintiff. Instead, it wrote to CCHCA on 16 July 2004:

> We refer to the endorsement of both the WC and CAR above in your favour with effect from 25 May 2004.
>
> As you are aware, Hock Chuan Ann Construction Pte Ltd had previously obtained loan facilities from Premium Funding Singapore Private Limited ("Premium Funding") to pay the premiums due under both the WC and CAR.
>
> Pursuant to the terms of the arrangement (which terms you take subject to rider the Deed of Novation), Premium Funding had given us a written notice to terminate both the WC and CAR by way of their letter to us dated 18 June 2004. We understand that Hock Chuan Ann Construction Pte Ltd has also being notified by them of this notice of termination.
>
> In the circumstances we confirm that both the WC and CAR have been terminated with effect from 26 June 2004. A copy of each of the letter from Premium Funding to us and the letter from Premium Funding to Hock Chuan Ann Construction both dated 18 June 2004 are now enclosed for your reference.
>
> In the circumstances, we are no longer at risk under both the WC and CAR with effect from 26 June 2004.

If you require coverage for the duration of the project that you have undertaken, please kindly contact our Susan Ong at [xxx] for assistance.

15 CCHCA replied the next day to protest, stating:

As mentioned by you in your letter, the above WC and CAR policies have already been endorsed by the insurance company to China Construction – Hock Chuan Ann JV Pte Ltd with effect from 25 May 2004 upon the novation of the contract by Tripartite Developers Pte Ltd.

We are not aware of the loan facilities obtained by Hock Chuan Ann Construction Pte Ltd from Premium Funding Singapore Pte Ltd to pay the premiums due under the WC and CAR.

As far as we are concerned, the premiums under the policies have already been fully paid to you and we do not have any involvement in the financing arrangement between Hock Chuan Ann Construction Pte Ltd, insurance company and the finance company.

We therefore object to your notification to us that the above policies have been terminated with effect from 26 June 2004 (3 weeks ago?).

We deem that the policies are still effective and we do not accept the termination.

16 Thus the defendant found itself in the unenviable position of being faced with the plaintiff's notice to cancel the policies and refund the premiums and CCHCA's objection to the termination of the policies. It wrote to CCHCA on 2 August 2004 to withdraw its letter of 16 July 2004, and at the same time, refused to comply with the plaintiff's request to terminate the policies and refund the premiums. This impasse led to this action.

The action

17 The plaintiff's claim against the defendant was pleaded in plain terms. It referred to the LoA executed by HCA and Nanyang's acknowledgement and consent. It further referred to the premiums it paid to Nanyang and its letter of 18 June 2004 giving notice of termination, and sought a declaration that the WC policy and CAR policy were deemed to have been terminated on 25 June 2004, and the refund of the rateable portion of the premiums paid for the two policies, or damages, and interest and costs. (The date of termination was wrongly stated. As the plaintiff had asked for the policies to be terminated on 26 June 2004, the plaintiff should stay with that date.)

18 The defendant disputed the plaintiff's claim, and raised the following issues in its closing submissions:

(a) there was no consideration furnished by the plaintiff in respect of the acknowledgment and consent sufficient in law to support the plaintiff's claim[note: 4] ("the consideration issue");

(b) the plaintiff's right to terminate the two policies was subject to the terms in the policies prohibiting or restricting termination and there was a restriction in both policies that required the plaintiff to obtain the prior consent of all parties having an interest in the policies, which the plaintiff had not obtained[note: 5] ("the consent issue");

(c) Nanyang's acknowledgment and consent was given under a mistake of fact that HCA had obtained the consent of all other insured parties under the two policies before asking Nanyang to sign the acknowledgment and consent[note: 6] ("the mistake issue");

(d) it is an implied term of the WC policy and/or custom of the insurance trade that there shall be no rateable refund of premiums on the early termination of the WC policy once a claim has been made under the policy, and claims had been made under the policy[note: 7] ("the implied term issue").

19 The defendant claimed against CCHCA:

(a) a declaration that in the event that it is found that the policies have been terminated, CCHCA be bound by the finding that the policies are terminated;

(b) an order that CCHCA repay to the defendant the payments it had paid out in respect of claims under the policies; and

(c) CCHCA pay to or indemnify the defendant against any pro-rated premiums that the defendant has to refund to the plaintiff.

The statement of claim against CCHCA did not state the cause of action on which the claims were based.

20 CCHCA pleaded in its Defence that it had no knowledge of the LoA and the acknowledgment and consent. It also pleaded that HCA had not informed CCD of the PFA and the loan and that the defendant had a duty to inform CCHCA of the LoA, and had breached the duty by not informing CCHCA of it.

21 CCHCA also pleaded that the endorsements to the policies constituted new policies between the defendant and CCHCA and contended that the LoA was only valid and effective while HCA was the insured party under the policies.

Evaluation of the defence

The consideration issue

22 The defendant's argument was that the policies were issued on 22 August 2003, and that the PFA was executed on 23 August 2003. When the plaintiff made payment of the premiums on 26 September 2003, the plaintiff was merely fulfilling its obligation under the PFA, and the payment did not qualify as consideration.

23 This argument implies that the premium payments were made solely on the basis of the PFA. That is not the complete or correct position. Clause 6 of the PFA obliged HCA to ensure that Nanyang recognised the plaintiff's interest, and the premiums were not paid till 26 September 2003, the day Nanyang signed the acknowledgement and consent.

24 The milestones for the payment were the PFA, then the LoA and acknowledgment and consent, and then the duty to make the payment. The plaintiff did not have to make payment if Nanyang did not sign the acknowledgment and consent.

The consent issue

25 The defendant submitted:

Prior to the conclusion of the Premium Funding Agreement, the Defendants had already issued the

> Policies for "*HCA as contractor, Tripartite Developers Pte Ltd and its consultants as principal and its sub-contractors FTRR&I*" … For HCA to subsequently introduce the Plaintiffs by way of the LoA and the Acknowledgment as being a party having the authority to terminate the Policies would have impeached the rights and interests of the other parties insured under the Policies, unless the latter have given their consent.[note: 8] [emphasis in original]

26 There was no express requirement for their consent in the LoA. To the contrary, the LoA provided that Nanyang shall allow "the Lender" to terminate the policies. It was not pleaded in the Defence that there was an implied term in the LoA for the consent.

27 The defendant's letter of 16 July 2004 set out in [14] hereof indicated that consent was not considered by it to be necessary at that time. It is helpful to look at the developments up to that time. The plaintiff agreed to make a loan to HCA to pay the insurance premiums. That agreement was made with HCA alone. The plaintiff required HCA to issue the LoA to Nanyang and for Nanyang to confirm that it would comply with the terms of the LoA. Tripartite, its consultants and its subcontractors took no part in these agreements. It is unreasonable in these circumstances and in the absence of any express term, for the defendant to insist that when the plaintiff exercises its right under the PFA to cancel the policies it must obtain their consents.

The mistake issue

28 The defendant relied on unilateral mistake and common mistake. The mistakes relate to the consent of the other parties insured. First, it was submitted that:

> There was no endorsement on the Policies providing for the Plaintiffs to have the right to terminate the Policies. This was not done because the Defendants had the mistaken belief that the consent of the other parties under the Policies had been sought when they signed the Acknowledgement.[note: 9]

then, it was contended that:

> [B]oth the Plaintiffs and the Defendants were mistaken about the existence of prior consent from the parties insured under the Policies other than HCA. The Defendants were mistaken that prior consent from the other parties under the Policies had been obtained by the Plaintiffs and HCA before signing the Acknowledgment, and the Plaintiffs were mistaken that they do not require to obtain the prior consent since they were relying on the LoA and the Acknowledgment to purportedly assert their right to terminate the Policies.[note: 10]

and:

> [T]he mistake was a fundamental one for without the consent of the other parties insured under the Policies, it is questionable that the Plaintiffs would be entitled to terminate the Policies simply by giving written notice to that effect.[note: 11]

29 The first mistake was a unilateral mistake that the consent was obtained. It was not the defendant's case that the plaintiff was aware of this mistake, or that it was inequitable for the plaintiff to assert its rights to terminate the policies in view of the mistake. This cannot constitute a defence.

30 The common mistake described in the submissions is actually two unilateral mistakes. The first is the defendant's unilateral mistake just referred to. The second is a separate mistake on the

part of the plaintiff that the consent was not required, which cannot constitute a defence because there was no mistake as the consent was not required.

31 The whole mistake issue is a red herring in any event. If the consent is necessary, the plaintiff's claim must fail for the want of it. If the consent is not required, the mistakes are irrelevant.

The implied term issue

32 The defendant referred to Condition 9 of the WC policy:

> The Company may cancel this Policy by giving fourteen (14) days' notice by registered letter to the Insured at his last known address and in such event the Company will return to the Insured the premium paid less the actual premium payable for the period during which the Policy had been in force subject to a minimum premium payment of $50.00 by the Insured.
>
> This Policy may be cancelled at any time by the Insured by giving seven (7) days' written notice to the Company and *provided no claim has arisen during the period during which the Policy had been in force* the Insured shall be entitled to a return of premium subject to a minimum premium payment of $50.00 by the Insured and subject to any adjustment of premium required by the terms or conditions of this Policy.
>
> [emphasis added]

and the undisputed fact that prior to the endorsement of the policy, ten claims had been lodged. There is no equivalent condition in the CAR policy.

33 As the right of termination is subject to the prohibitions and restrictions in the policies (see [6] hereof), Condition 9 is actually an *express* term governing the rights and liabilities between the plaintiff and the defendant.

34 The plaintiff did not take issue with the application and effect of Condition 9. The plaintiff's claim with regard to the WC policy must fail.

The endorsement issue

35 This issue came about after I suggested to counsel that they examine the effect of the endorsements which substituted CCHCA as the insured party in place of HCA.

36 CCHCA took the position that:[note: 12]

> The endorsement on the WC and CAR Policies constitute more than a mere assignment. They create new and different insurance contracts. The endorsement of the WC and CAR Policies in [CCHCA's] name in substitution of that of HCA, constitutes new and different contracts between [Nanyang] and [CCHCA]. The Letter of Authorisation does not apply to the new contracts between Nanyang and [CCHCA] and cannot entitle the Plaintiff to terminate the WC and CAR Policies issued in favour of [CCHCA].

37 The defendant however took the view that:[note: 13]

> [T]he effect of the endorsement was to reflect a name change of one of the insured parties, that is, from HCA to the Third Party, which was a step consequential to the novation of the construction contract of the Project from HCA to the Third Party …

> [T]hat the endorsements did not bring about new insurance contracts in substitution of the Policies. There is no novation to speak of since novation of a contract must be consented to by all parties concerned and supported by consideration.

38 It is useful to consider the dealings and relationships between the parties. HCA, as the contractor of the development, was the party which negotiated and executed the policies with Nanyang, and it was the party to whom Nanyang looked to for the premiums due.

39 When its agreement with Tripartite was novated, HCA ceased to be involved in the project, and was replaced by CCHCA, a separate and distinct legal and commercial entity. By the novation, HCA ceased to have any insurable interest, and the endorsements recognised that by acknowledging CCHCA to be the party insured in place of HCA.

40 After the endorsements were made, HCA was not the party insured. Were the policies with CCHCA as the insured the same policies as the policies with HCA as the insured, or were they different policies?

41 Counsel for CCHCA referred to the decision of the Supreme Court of Canada in *Springfield Fire and Marine Insurance Co v Millie Maxim* [1946] SCR 604 in support of its submission.

42 In that case, Efrim Maxim owned a flour mill which he insured with two insurance companies in 1942. In 1943, Efrim Maxim transferred the mill to his wife Millie Maxim, who was a *bona fide* purchaser for value. After Efrim Maxim informed the insurance companies of the transfer, an endorsement was made on one policy that "now stands in the name of Mrs Millie Maxim" and on the other policy, that "this policy is held to cover in her name only".

43 In 1944, the property was destroyed by fire, and Millie Maxim made claims on the policies. It then came to light that Efrim Maxim had made misrepresentations when he applied for the policies that he never had a fire previously.

44 The insurers rejected the claims on the ground that the policies were void because of the misrepresentations. The defence succeeded at the first instance, but that decision was reversed on appeal. The insurers then appealed to the Supreme Court of Canada.

45 The main issue before the court was whether the contracts between Millie Maxim and the insurers were the same policies between Efrim Maxim and the insurers. If they were the same policies, they were voidable as a result of Efrim Maxim's misrepresentations.

46 The appeal came before five judges and was dismissed by a majority of three to two. The judgment of Rand J is the most helpful in the examination of the issue. He was one of the judges in the majority. He identified the issue to be whether the endorsements had the effect of assigning Efrim Maxim's interest in the policy to Millie Maxim or whether they created new contracts with the latter. He stated at 618:

> It is now beyond controversy that [a contract of fire insurance] is a personal contract of indemnity against loss or damage to the interest of the insured in specified property. It is insurance against certain risks, and among them, what is called the moral risk of the insured. It is limited also to the interest of the insured in the subject matter. To say of such a reciprocal relationship, that the insured could by his own act substitute a new party to the contract, and thereby change the moral risk and the interest in the subject matter insured is to misconceive

> the nature of the contract. It is perhaps unnecessary to remark that this form of transfer is wholly different from that of a mere right to receive moneys that may become payable: there the contract in its insurance aspects remains untouched.
>
> The essential difference between the two is indicated by the fact that ordinary assignment is a matter between assignor and assignee solely; but admittedly, and here by express terms, in such insurance it is a condition that there be assent by the company. And the reason is obvious; after a transfer of interest in the subject matter, the insured cannot recover because he suffers no loss, and the assignee, because he is not insured. The effect of that assent is, in some form, to substitute the assignee as the person insured in relation to his newly created interest in the subject matter.

and concluded that with the approvals of the assignments and the endorsement of the policies, new contracts of insurance were formed with Millie Maxim which were not affected by Efrim Maxim's misrepresentations. The reasoning can be applied to the WC and CAR policies.

47 Reverting to the present case, the question is whether the insurance policies were between Nanyang and HCA or between Nanyang and CCHCA after the endorsements. When HCA pulled out of the project, it had no further WC or CAR risks to insure against, whereas CCHCA needed insurance cover against those risks. When this was made known to Nanyang and the endorsements to the policies were made, new policies were formed to replace the earlier policies.

48 That being the case, the defendant cannot impose terms for the termination of the policies which Nanyang had already terminated without notice to the plaintiff.

The third party claim

49 As I have noted, no course of action was pleaded in the defendant's case against CCHCA. In its closing submissions, it argued:[note: 14]

> If this honourable Court finds for the Plaintiffs and holds that the Policies have been terminated, recourse must be had against the Third Party who challenged the Plaintiffs' right to terminate the Policies. It must also mean that the endorsements only amounted to an assignment of the Policies by which the Third Party would be entitled to enjoy the benefits of the Policies but subject to the equities of the Plaintiffs.
>
> In this connection, the Defendants respectfully submit that the Defendants ought to be entitled to an indemnity from the Third Party of the Plaintiffs' cost of this proceeding and the interest accruing on the pro-rated premiums to be refunded to the Plaintiffs since *the Third Party had wrongfully disputed the Plaintiffs' right to terminate the Policies.*
>
> [emphasis added]

50 There is a fallacy in the defendant's assertion set out in the words in italics in that the plaintiff was seeking to terminate the policies with HCA, not those with CCHCA, and CCHCA was not wrong in disputing the plaintiff's or defendant's right to terminate the policies with CCHCA.

51 Can the defendant look to CCHCA for redress? The defendant will suffer a loss if it has to refund the premiums for the CAR policy issued to HCA, and is unable to terminate the CAR policy issued to CCHCA. HCA is the party which benefited from these dealings. It obtained from CCD $500,000 for the transfer of the policies, but did not pay the plaintiff. CCHCA has not obtained any

unfair benefit as its shareholder CCD paid HCA for the policies. The plaintiff also does not profit as HCA defaulted on its repayments.

52 This may explain the defendant's omission or failure to state its cause of action against CCHCA; it has no claim against CCHCA. It was looking to the wrong party when it brought CCHCA into the proceedings, and its claim must fail.

Conclusion

53 I find that the plaintiff is entitled to give notice to terminate the CAR policy and that it is entitled to a rateable portion of the premiums for the unexpired term of the CAR policy as at 26 June 2004 with interest from 26 July 2004 (as the refund is payable 30 days after termination) at 3% per annum to the time the amount of the refund is fixed, and costs. The plaintiff and the defendant will work out the amount of the refund, and if they cannot agree, they are to refer the question back to me for my determination. After the amount is fixed, I will decide whether the costs shall be taxed on the High Court, District Court or Magistrate's Court scale.

54 The defendant's claim against the third party is dismissed, with costs to be taxed on the same scale that is to be applied to the costs for the plaintiff.

[note: 1]The date was described as 21 August 2003 in the Statement of Agreed Facts, although the PFA was executed by the plaintiff on 23 August 2003

[note: 2]Statement of Agreed Facts para 11

[note: 3]AB29

[note: 4]Defence para 15

[note: 5]Defence paras 6, 7and 13

[note: 6]Defence para 14

[note: 7]Defence paras 19 and 20

[note: 8]Defendants' Closing Submissions para 17

[note: 9]Defendants' Closing Submissions para 22

[note: 10]Defendants' Closing Submissions para 25

[note: 11]Defendants' Closing Submissions para 26

[note: 12]Third Party's Closing submissions para 12

[note: 13]Defendants Closing Submissions paras 35 and 36

[note: 14]Defendants' Closing Submissions paras 54 and 55