Banque Cantonale Vaudoise v Fujitrans (Singapore) Pte Ltd
[2006] SGHC 217

Case Number : Suit 542/2002, RA 260/2006

Decision Date : 29 November 2006

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Kenneth Lie, Angela Yap and Chow Sy Han (Joseph Tan Jude Benny) for the appellant; Toh Kian Sing and Alvin Looi (Rajah & Tann) for the respondent

Parties : Banque Cantonale Vaudoise — Fujitrans (Singapore) Pte Ltd

Civil Procedure – Discovery of documents – Appellant seeking discovery of documents, several categories of which had been considered in prior discovery application – First discovery application dismissed as fishing expedition or attempt to discover irrelevant documents – Whether appellant showing how circumstances had changed to warrant court taking different view from judge in first application – Whether all categories of documents sought relevant to appellant's defences – Order 24 r 5 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

29 November 2006

Tan Lee Meng J

1 The appellant, Fujitrans (Singapore) Pte Ltd ("Fujitrans"), which was sued by the respondent, Banque Cantonale Vaudoise ("BCV"), appealed against the dismissal of their application for discovery of documents by the Assistant Registrar, Mr Yeong Zee Kin. I affirmed the Assistant Registrar's decision and now set out the reasons for my decision.

Background

2 The suit by BCV, a Swiss bank, against Fujitrans, a Singapore company that provides warehousing facilities, has its roots in an alleged fraudulent scheme perpetrated on a number of banks in Europe and in Singapore by the officers of RBG Resources Plc ("RBG"), an international metals merchant with a broad spectrum of global clients. These banks had either purchased metals from RBG or advanced money to RBG on the security of metals allegedly stored in warehouses. It was alleged that Fujitrans was involved in RBG's wrong-doing by sending fraudulent warehouse attornments for non-existent cargoes to BCV, who relied on them to provide financing to RBG. The alleged fraud in Singapore was perpetrated by Fujitrans' former warehouse manager, Mr Lim Tau Hee. BCV asserted that it would not have disbursed monies to RBG's seller if it had known that the attornments were false and that the metal cargoes did not exist and claimed that Fujitrans was vicariously liable for Mr Lim's acts or was itself negligent in the provision of warehouse services.

The First Discovery Application in 2004

3 It is pertinent to note that six out of the seven categories of documents sought in the present discovery application had been considered by Woo Bih Li J in 2004 ("the first discovery application"). In that year, BCV applied for summary judgment against Fujitrans, who applied for discovery of several categories of documents. The first discovery application was dismissed by the Assistant Registrar on 10 June 2004 save for one category relating to BCV's Loans and Securities Manual. Fujitrans' appeal against the Assistant Registrar's decision was dismissed by Woo J, who had

no doubt after considering at length the categories of documents sought that Fujitrans had embarked on a fishing expedition or had sought discovery of documents that were not necessary for the conduct of its case: see *Banque Cantonale Vaudoise v RBG Resources Plc* [2004] 4 SLR 856.

4 Fujitrans' appeal against Woo J's decision was dismissed by the Court of Appeal.

The Assistant Registrar's Decision

5 As has been mentioned, in the present discovery application ("the second discovery application"), Fujitrans sought discovery of seven categories of documents, six of which had already been considered by Woo J in the first discovery application in 2004.

6 BCV's counsel, Mr Toh Kian Sing, submitted that in regard to these six categories already considered by Woo J in the first discovery application, the matter was res judicata and it was an abuse of the process of the court to try and re-open the issue without any further development to justify this. As for the seventh category, Mr Toh asserted that the documents were irrelevant to the trial.

7 The Assistant Registrar heard Fujitrans' second discovery application on 28 August 2006 and dismissed it on two grounds. First, in regard to the categories already considered by Woo J in 2004, he found that there was issue estoppel. He stated as follows in his Notes of Evidence:

> As the facts and basis for application are substantially the same as those presented before Woo J, I am of the view that issue estoppel applies…. I have studied Woo J's judgment in *BCV v RBG Resources* [2004] 4 SLR 856 and although Woo J commented on the proper procedures and the motives of the Defendant's application, when Woo J dealt with the discovery application, he dealt with it substantively and did not qualify that he was considering it only for the summary judgment appeal.

8 Secondly, the Assistant Registrar found that Fujitrans had not demonstrated a substantial change in the circumstances to warrant that he come to a different view from Woo J. He explained as follows:

> I am mindful that discovery is an ongoing obligation, but having applied on a set of facts, the Defendant has to show in a subsequent application that circumstances have substantially changed to justify another application for the same classes – or in this case, two expanded classes - of documents.

The Appeal

9 Order 24 rule 5 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) gives the court a discretion to order the discovery of documents at any time. The documents in respect of which discovery may be ordered are as follows:

(a) a document on which the party relies or will rely;

(b) a document which could –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

10 That O 24 r 5 is not intended to cover what is essentially a "fishing expedition" by an applicant has been reiterated by the courts on innumerable occasions. In *O Co v M Co* [1996] 2 Lloyd's Rep 347, 351, Colman J, while considering the corresponding English position, rightly frowned on "discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation on the off-chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn". He added that the document or class of documents must be shown by the applicant "to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it".

11 In *Tan Chin Seng & Ors v Raffles Town Club Pte* Ltd [2002] 3 SLR 345, 351, Chao Hick Tin JA, who delivered the judgment of the Court of Appeal, said that one of the essential preconditions to be satisfied before discovery will be ordered is that of relevance. As for the principle of "train of inquiry", which is incorporated in O 24 r 5 of the Rules of Court, he pointed out that it is necessary for a party seeking discovery of documents to show in what way the requested document may lead to the relevant document. He added that whether a document would affect a party's case or adversely affect the other party's case or support another party's case must depend on the issues pleaded in the action.

The six categories of documents previously considered by Woo J

12 It is appropriate at this juncture to consider the six categories of documents in the second discovery application that mirrored or were wider than those sought in the first discovery application considered by Woo J.

The first category of documents

13 The documents sought in category 1 of the second discovery application, which are identical to those sought in the first discovery application, are as follows:

Account Statements for all Allied Deals (and later) RBG Resources PLC accounts from 1 September 1998 to until 31 May 2002 (or from the opening of the account facilities until their closure or inactivity, whichever period is greater) including but not limited to Current and Deposit Accounts and in particular the US$ Overdraft Account numbered 959.94.71.

14 In relation to this category of documents, Woo J stated in his judgment at [40] as follows:

The very wide ambit of the category sought itself suggested that Mr Palmer was hoping to find some evidence to lend credence to his suspicion, a suspicion which was not based on anything

more than his belief that an overdraft facility was a most unusual method of financing. His suspicion itself was couched in vague terms. *In my view, this request was a fishing expedition*. [emphasis added]

The second category of documents

15 Like the documents in category 1, the documents sought in category 2 of the second discovery application are identical to those sought in the first discovery application and are as follows:

> All Term Sheet and Loan Approval Documentation sent to Allied Deals/RBG in respect of the business relationship with BCV for the period 1 September 1998 to May 2002.

16 In his judgment, Woo J stated as follows at [42] in relation to category 2:

> This category was very wide and demonstrated that Mr Palmer was hoping to find an omission on the part of BCV to follow a procedure. It seemed to me that *this request was also a fishing expedition to try and uncover something to be used against BCV*. [emphasis added]

The third category of documents

17 The range of documents sought in category 3 in the second discovery application is even wider than that rejected by Woo J in the first discovery application. The wider category is for the following documents:

> All approval forms (also known as Offering Tickets) for authorized signatory approval for the release of funds on an overdraft basis on account of Allied Deals/RBG in respect of the 75 open positions referred to in Schedule 1 of the Plaintiff's Re-Re-Amended Statement of Claim dated 16 January 2006.

18 When dealing with the narrower category in the first hearing, Woo J said at [43] and [44] of his judgment as follows:

> 43 Paragraph 72 of [the first affidavit of Fujitrans' expert, Mr Palmer], stated that these offering tickets would guide him as to the basis upon which BCV operated its normal prudent checks (if any) for each release of funds and against which security they did so.
>
> 44 I found the relevance of this justification to be vague. For example, supposing it was known which security funds were released against, what would that demonstrate? *In my view, this request was a fishing expedition*. [emphasis added]

The fourth category of documents

19 Category 4 of the documents sought in the second discovery application, which relates to the Securities Register, need not be considered any further because Fujitrans had decided not to proceed with its application for this category of documents, which Woo J had thought was irrelevant to whether BCV should have ascertained the creditworthiness of the buyers.

The fifth category of documents

20 Category 5 in the second discovery application, which is identical to that considered by Woo J in the first discovery application, concerns the following:

All communications (including but not limited to emails, memoranda, records of telephone conversations and faxes) between the Line Supervisor in BCV's Head Office in Lausanne, Switzerland, to Francois Greiner relating to the operation of the overdraft account (No 959.94.71) and any other temporary overdraft facilities granted to RBG.

21 In dismissing the application for this category of documents in the first discovery application, Woo J said as follows in his judgment at [49] and [50]:

> 49 At para 77 of his First Affidavit, [Fujitrans' expert, Mr Palmer] said:-
>
> > It is most unlikely in my experience that … Greiner as Head of BCV's trade finance department would have the ability to agree to an overdraft facility of US$19 million. It is most likely that this was agreed internally between Francois Greiner and his director/general manager in charge of the trade finance department….My opinion is that these communications would reveal the real purpose behind the utilization of an overdraft facility, contrary to prudent banking practice, for so much in so short a space of time and would clarify whether BCV actually were aware of the financial loss they were facing. My experience tells me that they must have been aware of problems to utilize the overdraft facility in the first place.
>
> 50. To me, this was again a vague justification and a *fishing attempt*. How did BCV's awareness of the financial loss they were facing address the issues? [emphasis added]

The sixth category of documents

22 The documents in category 6 in the second discovery application are identical to those sought in the first discovery application and are as follows:

> All communications (including but not limited to emails, memoranda, records of telephone conversations and faxes) between Allied Deals PLC/RBG and the designated account manager at BCV.

23 Woo J, who refused to allow the discovery of the documents in category 6 during the first discovery application, explained in his judgment as follows at [52]:

> I did not see how the duty of an account manager to keep the head of the department informed would enable Fujitrans to establish that BCV was not being prudent, as no specific breach by the account manager was cited. Seeing how RBG was able to convince BCV to continue financing was also irrelevant because of its vagueness. *This was yet another fishing exercise*.

No new developments since the first discovery application

24 It is understandable that BCV's counsel, Mr Toh, contended that the present discovery application is effectively an attempt to re-argue the first discovery application and amounts to a collateral attack on the decision of Woo J and that of the Court of Appeal. Fujitrans' counsel, Mr Kenneth Lie, urged the court to reject BCV's argument and emphasized that the first discovery application in 2004 was made for the purpose of O 14 proceedings and that the second application was for the purposes of the trial.

25 It is unnecessary for me to consider whether there was issue estoppel for if circumstances had changed since 2004 to warrant the discovery of the documents in question, Fujitrans deserves an

opportunity to explain to the court how the altered conditions warranted the discovery of documents previously denied to it.

26 At this juncture, it is worth noting that BCV's claim against Fujitrans, as presently pleaded, is even narrower than that pleaded when the first discovery application was heard in that the claim has since been limited to attornments in relation to non-existent goods. BCV's case is that it relied on attornments received by them on Fujitrans' letterhead before it advanced monies on RBG's account for non-existent metals allegedly stored in Fujitrans' warehouse. If the attornments had been genuine and the metals were, as had been represented by Fujitrans, within the confines of its warehouse, BCV would have constructive possession of the metal cargoes therein. It is equally important to note that no new defences have been pleaded by Fujitrans since the hearing of the first discovery application. In its amended defence, Fujitrans pleaded the following defences:-

(a) BCV did not rely on the warehouse attornments sent on Fujitrans' letterhead;

(b) BCV did not act with due diligence; and

(c) BCV caused its own loss by its own acts or omissions.

27 None of the categories of documents sought in the second discovery application pertain directly to the reliance by BCV on warehouse attornments on Fujitrans' letterhead or how, by relying on these attornments, BCV caused its own loss. Indeed, the evidence adduced by Fujitrans in support of the second discovery application is either identical to the evidence adduced during the first application or is not related to the defences pleaded. In support of the second discovery application, Fujitrrans relied on the view of their expert, Mr Howard Palmer, a trade finance banker, whose evidence drew support from three reports concerning BCV that have absolutely nothing to do with the claims being pursued by BCV in the present action.

28 Two of the reports that Fujitrans sought to rely on to justify the second discovery application were readily available when the first discovery application was heard. These are the Report of the Parliamentary Commission of the Canton of Vaud (the "Canton Report") and the Basel Committee Guidelines of 1997.

29 The Canton Report relates to an investigation by the Swiss Canton of Vaud in 2002 when BCV underwent a re-capitalization exercise. It focused on the involvement of Vaud, the biggest shareholder of BCV in the supervision of the bank. Whatever the Canton Report may have stated, almost nothing was said about trade financing or the day-to-day operation of the trade finance banking practices of BCV at the material time. While Mr Palmer cited numerous passages in the affidavits filed for the hearing of the second discovery application, what is deafening is his silence on how these passages relate to Fujitrans' defence that BCV did not rely on its attornments and to the relevance of the documents it is seeking discovery of. It is worth noting that this report was available on 2 June 2004 and it was not mentioned at all in Mr Palmer's fourth affidavit of October 2004. I accept BCV's assertion that the introduction of this Report at this late stage is a ploy to introduce some evidence to justify the second discovery application.

30 As for the Basel Committee's Guidelines of 1997, Mr Palmer alleged that BCV has failed to comply with these guidelines but failed to show how these guidelines relate to Fujitrans' defences and to the relevance of the categories of documents in the second discovery application. Furthermore, although the Basel Guidelines were laid down in 1997, Mr Palmer made no references to them in his numerous affidavits in support of the first discovery application heard by Woo J. Undoubtedly, his belated reliance on these Guidelines in the second discovery application is a desperate bid to adduce

some evidence to explain why in the face of Woo J's decision in the first discovery application, the second discovery application should be considered. Significantly, Fujitrans' counsel admitted that he did not even refer to the Basel Guidelines in his written submissions to the Assistant Registrar at the hearing below.

31 As for the third report, the Bernasconi Report of January 2003, Fujitrans asserted that it shows the internal dysfunction of BCV during the period of investigation from 1996 to 1998. According to Fujitrans' counsel, the report gave background information relating to BCV's entry into trade finance, which it was not familiar with at that time. Mr Palmer had taken the view in his second affidavit that "it appears that in an attempt to gain quick cash flow for a bank caught in a trap of failing assets and inadequate provisions that the bank turned to international trade finance as a fee and commission in order to improve its overall balance sheet". This "opinion" had already been considered by Woo J in the first discovery application and is not a licence to fish even at this stage of the proceedings for information to confirm one man's suspicion or unsubstantiated opinion.

32 It is regrettable that although Fujitrans was essentially seeking to discover the same or an expanded category of documents as those considered by Woo J and the Court of Appeal in the first discovery application, it failed to show how circumstances have changed to warrant this court taking a different view from that of Woo J, who had given detailed reasons as to why he thought that the first discovery application was essentially a fishing expedition or an attempt to discover irrelevant documents.

The seventh category of documents

33 I now turn to the documents in category 7, the only category of documents not sought in the first discovery application. These documents are described as follows:

> Documents/correspondence relating to each of the underlying commercial transactions received from and/or sent to RBG, including but not limited to sales and purchase contracts, sellers' and RBG's invoices, packing list, bill of exchange, swift messages, transfer instructions from RBG to BCV, stock releases from BCV to the Defendants and correspondence between BCV to the Defendants and correspondence between BCV and RBG) **in respect of the other 54 open positions referred to in Schedule 1** of the Plaintiffs' Re-Re-Amended Statement of Claim dated 16 January 2006.

34 BCV's counsel, Mr Toh, pointed out that the documents in category 7 are irrelevant to the trial. BCV's claim only concerns warehouse financing and the documents sought under the seventh category do not concern warehouse financing, at all but relate to other types of financing. Evidently, the appellant hoped to find some evidence from these documents unrelated to BCV's claim that would show that BCV was not very careful in its business dealings. This is clearly a fishing exercise and like the Assistant Registrar, I was not convinced that these documents are necessary for the trial.

Conclusion

35 In this second discovery application, Fujitrans sought, without justification, to discover almost all the documents pertaining to BCV's banker-customer relationship from 1998 to 2002. This was a blatant attempt to empty BCV's filing cabinets for fishing purposes. For the reasons stated, Fujitrans' appeal against the decision of the Assistant Registrar was dismissed with costs.