S Y Technology Inc v Pacific Recreation Pte Ltd
[2007] SGHC 39

Case Number : CWU 68/2006

Decision Date : 21 March 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Foo Maw Shen and Ong Wei Chin (Yeo Wee Kiong Law Corporation) for the plaintiff; Joseph Yeo and Nigel Pereira (KhattarWong) for the defendant

Parties : S Y Technology Inc — Pacific Recreation Pte Ltd

Conflict of Laws – Choice of law – Contract – Security for financial assistance given by way of letter of indemnity and deed of indemnity executed under seal – Deed not specifying governing law – Whether deed legally enforceable – Applicable principles for determining governing law of deed

Credit and Security – Guarantees and indemnities – Security for financial assistance given by way of letter of indemnity and deed of indemnity executed under seal – Difference between indemnity and guarantee

21 March 2007

Judith Prakash J

1 On 7 November 2006, after this originating summons was heard, I made an order that the defendant, Pacific Recreation Pte Ltd ("PRPL"), be wound up. Immediately after that, I made an order that the defendant in CWU 69/2006, Pacific Association Pte Ltd ("PAPL"), also be wound up. Both PRPL and PAPL, whom I shall hereafter sometimes refer to as "the defendants", have appealed against the orders that I made. These grounds of decision contain my reasons for making those orders in respect of both the defendants, which were sister companies. The grounds of the two petitions presented against the defendants and my reasons for winding up both of them were identical. These grounds will therefore serve as the grounds of my decision in CWU 69/2006 as well.

Background

2 The plaintiff in both proceedings is S Y Technology Inc, a company incorporated in the United States of America. One Mr John Shih is a director and the sole shareholder of the plaintiff and he is the person who made the affidavits supporting the applications to wind up the defendants.

3 One Mr Lee Chong Ming who currently resides in Canada is the managing director of both the defendants. He is the person who set up first, PAPL, then a company called Shanghai Pacific (Singapore) Pte Ltd which later changed its name to Laien Holdings Pte Ltd ("Laien"), and, lastly, PRPL. When Laien was first incorporated, its shares were held by PAPL, PRPL and Mr Lee himself. Subsequently, 20% of the shares was transferred to 3 unrelated parties.

4 Laien is the parent company of Shanghai Pacific Club Co Ltd ("Shanghai Pacific"), a company incorporated in the People's Republic of China. Shanghai Pacific is involved in the development of a club in Shanghai ("the project"). Being a Chinese company, Shanghai Pacific acts through its legal representative who has the authority to bind Shanghai Pacific in any transaction by affixing that company's seal to the relevant documents. In this case, the legal representative is Mr Lee.

5 Sometime prior to January 2003, Mr Lee was introduced to the plaintiff by one Mr Wellington Yu, a director of one of Laien's shareholders, who knew that Shanghai Pacific required additional financing in order to complete the project. There were negotiations between Mr Shih and Mr Lee and the plaintiff thereafter agreed to provide the required financial assistance. The terms of the assistance were contained in a contract executed between the plaintiff, Shanghai Pacific and Mr Lee dated 21 January 2003 ("the 2003 contract"). Subsequently, five supplementary agreements between the same parties were made between September 2003 and June 2004. Security for the assistance was given by way of, *inter alia*, a letter of indemnity from Mr Lee signed in February 2003 and a deed of indemnity ("the Deed") executed under seal by each of the defendants and Mr Lee in favour of the plaintiff and dated 22 September 2003.

6 By the terms of the 2003 contract, the plaintiff agreed to procure the issue of standby letters of credit having a total value of US$6m as security for a loan to be extended to Shanghai Pacific by the Industrial and Commercial Bank of China ("ICBC Shanghai") for the purpose of completing the project. It should be noted here that by a supplemental agreement made in September 2003, the original agreement in the 2003 contract to provide US$6m by way of standby letters of credit had been varied to allow for that amount to be provided instead by way of two standby letters of credit (in the respective sums of US$4m and US$1m) and a cash loan of US$1m paid into an escrow account. As security for the letters of credit, the defendants and Mr Lee agreed to pledge their shares in Laien to the plaintiff. Clause 7 of the 2003 contract provided that any dispute arising from the contract should be resolved by the parties through consultation but that if consultation failed, the dispute should be referred to the China International Economic and Trade Arbitration Commission ("CIETAC") for resolution through arbitration.

7 Pursuant to the agreement to pledge shares, the defendants and Mr Lee transferred their shares in Laien to the plaintiff in October 2003. The plaintiff, for its part, provided the following to enable Shanghai Pacific to obtain the said loan facility:

1) a guarantee in the form of a standby letter of credit for US$4,000,000 issued by U.S. Bank National Association ("US Bank") of Portland Oregon, U S A, in favour of ICBC Shanghai, for loans to be granted by ICBC Shanghai to SPSH;

2) a guarantee in the form of a standby letter of credit for US$1,000,000 issued by US Bank in favour of ICBC Shanghai for loans to be granted by ICBC Shanghai to SPSH; and

3) a direct loan of US$1,000,000 via an escrow account.

8 On 25 June 2004, the plaintiff was informed by US Bank that ICBC Shanghai had presented documents in order to draw down US$1m under the standby letter of credit issued for that amount and that US Bank had duly paid ICBC Shanghai the principal sum of US$1m. Subsequently, on 12 August 2004, US Bank informed the plaintiff that ICBC Shanghai had presented documents under the other letter of credit to draw down US$4m and had been paid that sum. According to a subsequent letter from ICBC Shanghai, the loan of RMB7.85m extended to Shanghai Pacific had been due and payable on 15 June 2004 and, as Shanghai Pacific was not able to raise the funds to pay that loan on its due date, ICBC Shanghai had made a demand under the standby letter of credit and had received the sum of US$999,975 thereunder on 25 June 2004. The letter further stated that repayment of another loan of RMB30m was due from Shanghai Pacific on 18 August 2004. ICBC Shanghai confirmed that it had made a demand on US Bank for this amount as it expected that Shanghai Pacific would not be able to pay the amount when due and that, on 16 August 2004, it had received the sum of US$3,999,995 under the second standby letter of credit. The proceeds of both letters of credit were used by ICBC Shanghai to repay the principal and interest due from Shanghai

Pacific and the balance remaining after settlement was remitted abroad. The plaintiff was required to reimburse US Bank in the sum of US$5m which it duly did.

9 In one of his affidavits filed in support of the winding up petition, Mr Shih confirmed that although the sum of US$5m in total had been drawn down by ICBC Shanghai under the two standby letters of credit, ICBC Shanghai had subsequently returned a sum of US$404,435.57. From the plaintiff's point of view, however, the net amount returned to it was only US$376,000.03 because it had paid bank charges to procure the extension of the standby letters of credit and in relation to the call on the standby letters of credit. Thus, the plaintiff averred that the net amount paid by it by reason of the call on the standby letters of credit was US$4,623,999.97.

10 On 24 April 2006, the plaintiff's solicitors M/s Yeo Wee Kiong Law Corporation sent a statutory letter of demand pursuant to s 254(2)(a) of the Companies Act (Cap 50, Rev Ed) ("the Act") to both PRPL and PAPL demanding payment from each of the total sum of US$4,623,999.97. The material parts of this letter read as follows:

> 1. We act for S.Y. Technology Inc ("our clients").
>
> 2. We are instructed that pursuant to a Deed of Indemnity entered into in 2003 ("the Deed"), each of you and Mr Lee Chong Ming had jointly and severally undertaken to our clients, to inter alia, fully and effectively indemnity our clients in respect of all liabilities, claims, damages, costs, charges and expenses to which our clients may inter alia, suffer as a consequence, or in connection with the Standby Letters of Credit, as defined in the Deed. Our clients have paid out the principal sums of US$4 million (on 21 January 2003) and US$1 million (on 15 September 2003) under the Standby Letters of Credit.
>
> 3. In the premises, each of you (together with Mr Lee Chong Ming) is jointly and severally liable to pay to our clients, the total sum of US$4,623,999.97 ("the Principal Sum"). The Principal Sum is arrived at after deducting a sum of US$376,000.03 (received from the bank) from the total figure of US$5 million (as referred to at paragraph 2 above).

No payment was received from either PRPL or PAPL within the period of three weeks specified in the letter. On 9 June 2006, the plaintiff filed the respective applications to wind up the defendants which I subsequently granted.

11 In the meantime, on 15 May 2006, Mr Lee submitted a request for arbitration to CIETAC asserting that because the 2003 contract had not been registered as required by Article 40 of the "Interim Measures on the Management of Foreign Debts", a Chinese law that had been enacted in April 2005, the 2003 contract was not legally binding on Shanghai Pacific and the obligations imposed on the guarantors of Shanghai Pacific had also been discharged. On 15 May 2006, CIETAC accepted Mr Lee's request. The next day, the defendants' Singapore solicitors informed the plaintiff's Singapore solicitors of the commencement of the arbitration proceedings and stated that as the outcome of the arbitration would have an impact on the defendants' liability under the Deed, it was premature for the plaintiff to pursue its claim under the Deed until after the arbitration had been concluded. In their view, the plaintiff's statutory letters of demand were premature and any application for winding up based on such demand would be irregular.

The application

12 The plaintiff's claims against both PAPL and PRPL rested squarely on the terms of the Deed. The material provisions of this document are as follows:

To S.Y. TECHNOLOGY INC

Dear Sirs

SHANGHAI PACIFIC CLUB CO LTD ("SPSH")

Whereas:-

A. SPSH is wholly-owned by Shanghai Pacific Singapore Pte Ltd ("SPS"). *(sic)* We, Pacific Associates Pte Ltd, Pacific Recreation Pte Ltd and Lee Chong Ming, are shareholders of SPS holding an aggregate of 20,000,000 ordinary shares representing 80% of the issued share capital of SPS.

B. SPSH is undertaking a project for the establishment and construction of a club in Shanghai (the "Project").

C. At our request, you have arranged for two standby letters of credit (the "Standby Letters of Credit") to be issued by a US bank in favour of the Shanghai branch of the Industrial and Commercial Bank of China ("ICBC Shanghai") to facilitate the extension of a US$6 million loan by ICBC Shanghai to SPSH for purposes of completing the Project.

D. Additional funding of up to US$2 million is being or will be sought from ICBC Shanghai to complete the Project and it is anticipated that another standby letter of credit will be arranged by you or by a third party procured by you (the "New Party").

In consideration of your arranging for the issue of the standby letters of credit, we hereby jointly and severally agree and undertake as follows:

1. we shall irrevocably and unconditionally continue with the pledge of our entire interest in SPS comprising 20,000,000 shares, to you as security for the Standby Letters of Credit and hereby further agree that you may at any time register such shares in your name;

2. we shall at all times keep you fully and effectively indemnified and hold you harmless from and against any and all liabilities, claims, damages, costs, charges and expenses to which you may be exposed or which you may incur, suffer, sustain or for which you may render yourself legally liable as a consequence of or in connection with the Standby Letters of Credit and against all actions, suits, proceedings, claims, demands of any nature whatsoever which may be taken, made or threatened against you or incurred or become payable by you or which may arise directly or indirectly by reason of any act, deed, matter or thing done or permitted or omitted to be done by you in connection with the Standby Letters of Credit and all other costs, charges and expenses in connection therewith, including legal costs on a fully indemnity basis;

…

If and to the extent that any part or provision in this Letter of Indemnity is invalid, illegal or unenforceable, it shall not affect the validity, legality or enforceability of any other part or provision and this Letter of Indemnity shall be interpreted and construed to give it the fullest possible effect in law.

13 The plaintiff contended that PAPL and PRPL were indebted to it because their liability to indemnify it under the Deed had arisen and despite the statutory letters of demand sent out in April

2006, neither company had met the demand either in full or at all. As more than three weeks had passed since the letters of demand had been sent out, the statutory presumption of insolvency under s 254(1)(e) of the Act had arisen and the plaintiff was entitled to winding up orders against both companies. The plaintiff further submitted that there was no dispute that it had incurred liability in connection with the standby letters of credit as substantiated by the documentary evidence of payments made to US Bank contained in the affidavits supporting the applications. PRPL and PAPL had not disputed that these payments had been made and therefore they had to indemnify the plaintiff against the same in accordance with the provisions of the Deed.

The defendants' contentions

14 The defendants did not at any point in the proceedings deny that ICBC Shanghai had called upon the standby letters of credit and received payment thereunder. They did not deny either that the plaintiff had been obliged to make payment to US Bank of the amounts drawn under the standby letters of credit. Thirdly, they did not disagree that, taken at face value, the provisions of the Deed obliged each of them to indemnify the plaintiff in respect of the payment to US Bank. They took the stand that, nevertheless, there was a substantial and *bona fide* dispute as to whether they were liable to pay the plaintiff the amount demanded and that therefore the winding up applications could not be granted. This stand was based on the following arguments:

(a) that the 2003 contract was not legally binding because it had not been registered with the relevant Chinese authorities and that under Chinese law, as the 2003 contract was not valid, all guarantees and indemnities given pursuant to this agreement, including the Deed, would also be invalid;

(b) even if the Deed was subject to Singapore law and not Chinese law, as a collateral contract founded on or springing from an illegal contract, the Deed would itself be illegal and void;

(c) there was an on-going arbitration before CIETAC which would decide on the legality of the 2003 contract and as the validity of the Deed would be determined by that decision, the proper course that the plaintiff should take was to proceed with the arbitration before proceeding with the applications to wind up; and

(d) the plaintiff had not given the defendants credit for the value of the shares pledged to it as it should have done in order to determine whether after that value had been set off against the debt owing, there was any balance still due and payable.

15 The first argument related to the effect of the possible invalidity of the 2003 contract on the validity of the Deed. Both parties produced legal opinions from China. The opinion of the defendants' Chinese legal expert was that the regulations passed in April 2005 required all foreign exchange debts and loans to be registered if they were to be recognised as valid. As it was not disputed that neither the 2003 contract nor the Deed had been so registered, the defendants' expert opined that those agreements were invalid. The plaintiff's expert on the other hand gave an opinion that neither the 2003 contract nor the Deed had been invalidated because:

(a) the obligation to register lay with the debtor and the creditor could not be prejudiced by the debtor's failure to act;

(b) at the time when the standby letters of credit were issued, there was no need to complete the foreign debt registration formalities;

(c) the regulation relied on by the defendants was an administrative rule and not a compulsory provision stating that a contract should come into effect only upon completion of registration formalities and therefore the contract would not be null and void even if the registration formalities were not completed;

(d) invalidating the main contract would not invalidate the Deed; and

(e) there was no time limit specified for registration and these formalities could still be followed if desired.

16 It appeared to me that if the matter were to turn on Chinese law then I would not be in a position to decide whether the 2003 contract and the Deed were valid under Chinese law since the legal opinions from both sides were simply exhibited in the affidavits that the parties filed and there was no cross-examination of either expert. Foreign law is a question of fact and where there is a dispute of fact, this can only be resolved after cross-examination and full submissions on the evidence. If it had been required for my decision that I make a finding on Chinese law then I would have adjourned the hearing of the applications so that the necessary examination of witnesses could have taken place. After hearing the arguments, I was, however, persuaded that Chinese law was not relevant to my decision.

17 The main issue before me was whether the Deed was legally enforceable. The basis of the defendants' argument that it was not, was that it was governed by Chinese law. The Deed itself did not specify a governing law. I therefore had to determine, using Singapore law conflict of law principles, whether there was an implied choice of law or, if not, with which system of law the Deed had the most substantial connection. The defendants' stand was that Chinese law had to be the governing law because the Deed had been made pursuant to the 2003 contract which was expressly governed by Chinese law and the whole object of the transaction was for the plaintiff to obtain standby letters of credit in favour of a Chinese bank so that that bank would make a loan in Chinese currency to a Chinese company to develop a club in China. The defendants argued that there was hardly any connection between the Deed and Singapore and the fact that the defendants were both companies incorporated in Singapore was not enough to make Singapore law the governing law. In any case, when the defendants executed the Deed, they had done so in Canada and not in Singapore so the Singapore connection was minimal.

18 It could not be denied that the nationality of the defendants was the only direct connection between the Deed and Singapore. There were, however, several factors that pointed against Chinese law being the governing law. First, whilst the 2003 contract and the various supplements and amendments to that contract were written in Chinese, the Deed was drafted in English. Second, all the other documents had an express choice of law clause stating Chinese law to be the governing law. The Deed was silent on this point. Third, as far as enforcement of the Deed was concerned, it would have to be enforced outside China because the defendants were Singapore companies and Mr Lee, the other indemnifier, was a US citizen then resident in Canada and therefore as against him enforcement action under the Deed would have to be taken in either of those two countries rather than in China. Fourth, the beneficiary of the Deed was the plaintiff, a US company. Fifth, the currency of payment under the Deed was US dollars and the obligation against which the plaintiff was indemnified was an obligation owed to a US bank in the United States in US dollars. Sixth, and this is important, the legal concepts embodied in the Deed are not known to Chinese law. In this regard, the defendants' position was that there was no concept of indemnity under Chinese law and that Chinese law did not distinguish between a guarantee and an indemnity. Further, it was not disputed that the whole idea of a deed itself is a common law concept used only in common law jurisdictions like Singapore and the United States.

19 In this connection, it is relevant to refer to a Canadian case, *Sharn Importing Ltd v Babchuk* 21 D.L.R. (3d) 349, decided in 1971 in the British Columbia Supreme Court. In that case, a guarantee was given by the defendant of certain debts incurred by a corporation of which he was principal shareholder and controlling director. Although the defendant's home was in Vancouver, he alleged that he had travelled to Alberta where his corporation carried on its business and where the debts guaranteed arose, in order to execute it. When the plaintiff tried to enforce the guarantee in the courts of British Columbia, the defendant pleaded that the guarantee was invalid because it did not comply with the legislation applicable in Alberta. The court held that, even assuming that the guarantee had been executed in Alberta, the proper law of contract was that of Quebec where the guarantee would have to be honoured by payment and that the invalidity of the guarantee by the law of Alberta was sufficient reason, given the defendant's testimony that he had intended to be bound by his signature, for the court to prefer, as the proper law, a system of law in which the shared intention of the parties would have been effective. No evidence having been offered on the law of Quebec concerning the validity of such a guarantee, it was presumed to be the same as the law of British Columbia by which the defendant was bound.

20 Similarly in this case, the parties must have intended the Deed to be valid when they signed it and therefore they could not have intended it to be governed by a system of law that did not recognise such documents or the concept of indemnity. Neither of the defendants gave any evidence that they did not intend the Deed to be binding at the time they signed it in September 2003. Further, whilst the underlying transaction that the Deed was executed to support was a transaction that took place in China, the Deed itself related to matters which would take place outside China, *i.e.*, the procuring of the standby letters of credit and the creation of the plaintiff's obligation to reimburse any amounts that were drawn down under the standby letters of credit. It was also clear that the Deed would have to be enforced outside China in view of the nationality of the indemnifiers and that must have been the reason that it was drafted in English and not made subject to Chinese law.

21 Whilst I was satisfied that the defendants' contention that the Deed was governed by Chinese law could not be accepted, I was also not very happy with the plaintiff's submission that Singapore law was the governing law. No doubt the Deed would have to be enforced in Singapore *vis-à-vis*, the defendants, but they were not the only parties to the Deed. There was also Mr Lee, and if the choice of law were to depend on where the Deed was to be enforced, then it seemed to me that there was an equally strong argument for saying that it should be governed by Canadian law, specifically the law of British Columbia, where Mr Lee resided. In view of the fact that enforcement would have to take place in different jurisdictions depending on who was being sued, I considered the defendants' place of incorporation, Singapore, not to be the determinative factor. When I examined the Deed and all the surrounding circumstances as indicated (at [18]) above, I concluded that the system of law with which the Deed had the closest connection, was that of the United States, since that was where the plaintiff was incorporated, where US Bank was located and the standby letters of credit were issued, and where Mr Lee had his citizenship. Additionally, the currency of the obligation was the currency of the US and the obligation of the plaintiff to US Bank which was the subject of the indemnity must have been governed by the law of the US generally or the law of one of its states. Whilst I found US law to be the governing law, no evidence was given by either party of any way in which US law or the law of any relevant state thereof differed from Singapore law in relation to the validity and construction of deeds of indemnity. Accordingly, I had to presume that US law on this point was the same as Singapore law and I therefore applied Singapore law to determine the validity of the Deed.

22 Under Singapore law, an indemnity is in the nature of a primary obligation and a creditor may still recover the relevant losses in the event of the principal transaction being defective. *Ellinger's Modern Banking Law* (4th Ed, Oxford University Press) states at 846:

> A guarantee is distinct from an indemnity, which is an undertaking by 'one party to keep the other party harmless against loss' arising from particular transactions, or events, and is not dependent on the continuing liability and default of the principal debtor. An indemnity is thus in the nature of a primary rather than a secondary obligation. Unlike a guarantee, it is not required to be in writing, or evidenced in writing, and is usually unaffected by the fact that the obligation indemnified is void or [un]enforceable. Additionally, certain types of conduct of the creditor will discharge a guarantor but not an indemnifier.

23 The above statement of principle is also reflected in the following passage from the English Court of Appeal decision in *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 where one of the issues was whether a defendant who had given an indemnity in respect of a loan transaction was still liable to make good on that indemnity when it was found that the loan itself was unenforceable by virtue of non-compliance with the relevant money-lending legislation. Orr LJ who delivered the judgment of the court stated:

> (3) Is the defendant's promise in cl. 1(D) of the agreement to indemnify the plaintiffs against any loss which they may have suffered by reason of their having given the guarantee itself a guarantee or an indemnity?
>
> The differences between an indemnity which does not constitute a guarantee and one which does were clearly stated in the following passage from the judgment of Lord Justice Pearce (as he then was) in *Yeoman Credit v. Latter*, [1961] 1 W.L.R. 828, at p. 830:
>
> > In its widest sense a contract of indemnity includes a contract of guarantee. But in the more precise sense used in various cases dealing with section 4 of the Statute of Frauds, 1677 (and used in the arguments in this case), a contract of indemnity differs from a guarantee. An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily responsible to the promisee.
>
> The essential differences are, therefore, that a guarantee gives rise to a secondary, whereas an indemnity gives rise to a primary obligation and that there are, therefore, three parties to a guarantee, the creditor, the debtor and the guarantor, who promises to answer for "the debt, default or miscarriage of another", whereas there are only two parties to an indemnity and if it is a promise to indemnify a debtor it is owed to the debtor only, and not because he has failed to perform his obligation, but because he has performed it. Applying these tests, and bearing in mind also that the defendant could, as, in our judgment, Mr. Stamler rightly claimed, be liable under cl. 1(D) to pay more to the plaintiffs (for instance, the costs of legal proceedings by Laytons against the plaintiffs on the guarantee) than the plaintiffs under the same clause were liable to pay to Laytons, we have no doubt that Mr. Justice Mocatta was right in holding the obligation imposed on the defendant by cl. 1(D) to be one of indemnity and not of guarantee; and applying the same test, we have equally to doubt that the obligation imposed on the defendant under cl. 9 was, as it is expressed to be, a guarantee.

24 The language of the Deed makes plain that it was intended to be an indemnity rather than a guarantee. There were two parties to the Deed: the plaintiff and the indemnifiers (the defendants and Mr Lee). The indemnifiers were not promising to answer for the default of another but were promising to protect the plaintiff against loss by reason of his performance of an obligation that they had requested him to undertake. I had no doubt of the nature of the Deed and, to be fair, the defendants did not argue that, under Singapore law, the Deed should be construed as a guarantee rather than an indemnity. They concentrated their attack on the status of the Deed under Chinese law.

25 I therefore found that on the facts before me, there was no *bona fide* dispute to the letter of demand issued by the plaintiff. The arbitration proceedings before CIETAC were irrelevant to the obligations of the defendants under the Deed. It may be worth pointing out that the parties to the arbitration were the parties to the 2003 contract, *i.e.*, the plaintiff, Shanghai Pacific and Mr Lee. They were the parties who were bound to arbitrate disputes under that contract. The defendants were not parties to the 2003 contract and their obligations to the plaintiff arose under a completely separate contract. They were not involved in the arbitration and could not be affected by its outcome if the Deed was not subject to Chinese law.

26 I can deal with the other argument about the quantum of the debt briefly. It would be recalled that the defendants pledged their shares in Laien as security for Shanghai Pacific's obligations. As a result of this pledge, the plaintiff became registered as the holder of those shares. The defendants contended that the plaintiff had exercised rights as legal and beneficial owner of the shares and therefore must give credit for their value. As such, the plaintiff was not entitled to claim that the whole amount stated in the statutory letters of demand was due and the defendants had a *bona fide* dispute on the quantum of the debt. I did not agree. Rather, I accepted the plaintiff's submission that despite the change in the registered shareholder, the documents showed that there was no change in beneficial ownership of the shares and that the pledge had not been enforced. Simply procuring its registration as the holder of the shares did not amount to an enforcement of the pledge. Enforcement would have encompassed either selling or charging the shares or taking other action to indicate that the plaintiff was asserting the rights of a beneficial owner of the shares. The plaintiff pointed out that at a recent extraordinary general meeting of Laien it had not cast any votes as holder of the pledged shares. The plaintiff was not obliged to enforce its security before calling on the defendants to meet their liability under the Deed.

27 I found, therefore, that the plaintiff had established its case and that the defendants had not been able to show that the debt claimed was disputed on *bona fide* and substantial grounds. Accordingly, I granted the applications.