

Wong Chin Juan (trading as SE Automobile Investment) v Absolute Euromotors Pte Ltd and others
[2010] SGHC 1

Case Number : Suit No 686 of 2009 (Registrar's Appeal No 402 of 2009)
Decision Date : 05 January 2010
Tribunal/Court : High Court
Coram : Philip Pillai JC
Counsel Name(s) : Andrew Ang Chee Kwang (PK Wong & Associates LLC) for the plaintiff;
Sivanathan Wijaya Ravana (Sam & Wijaya) for the defendants.
Parties : Wong Chin Juan (trading as SE Automobile Investment) — Absolute Euromotors Pte Ltd and others

Civil Procedure – Summary Judgment

5 January 2010

Judgment reserved.

Philip Pillai JC:

1 This is an appeal by Mr Bae Joon Suk (the "Second Defendant") against the decision of the Assistant Registrar (the "AR") of the Supreme Court for Summons No. 4767 of 2009/Q given on 27 October 2009 ordering:

- (a) Final judgment against the Second Defendant for S\$450,000.00;
- (b) Statutory interest on the said sum of S\$450,000.00 at 5.33% per annum from the date of the writ to the date of judgment pursuant to Section 12 of the Civil Law Act; and
- (c) Costs and disbursements fixed at S\$11,000.00.

2 The AR ordered summary judgment in favour of the Plaintiff, based on the terms of the indemnity given by the Second Defendant to the Plaintiff dated 25 April 2009 (the "Indemnity"). The AR's reasons are, *inter alia*, as follows:

In my opinion, this defence is riddled with inconsistencies on the facts and documents before me. Based on the [affidavits] and the exhibits, it is clear to me that the transaction has always been and has always remained that of a loan and that [the Plaintiff] is merely taking steps to try and enforce his security. ... There is also no reason why in law [the Plaintiff] cannot be entitled to judgment for the unpaid loan although he has taken possession of the vehicles.

3 The Second Defendant appeals on the ground that the AR should not have ordered summary judgment on the basis of the Indemnity. One of the arguments raised concerned an Agreement for Floor Stock Financing (the "Financing Agreement"). Both counsel were then invited to provide supplementary written submissions to the Court to address the implications of summary judgment on the Indemnity in relation to a number of vehicles currently registered and held by the Plaintiff in accordance with the Financing Agreement.

4 The power to give summary judgment under O 14 r 3 and 4 of the Rules of Court (Cap 322, R 5,

2005 Rev Ed) is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay" (*Habibullah Mohamed Yousuff v Indian Bank* [1999] 3 SLR 650 at [21]). Leave to defend should be given where the defendant raises any substantial question of fact which ought to be tried or where there is a fair dispute to be tried as to the meaning of the document in which the claim is based (see *Singapore Civil Procedure 2007* (GP Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 14/4/7). Conditional leave to defend may be granted where the defence set up is a sham defence or shadowy (*Singapore Civil Procedure 2007* at para 14/4/12).

5 Prior to arriving at my judgment, I requested both counsel to provide for my consideration, further written submissions relating to the operation of the right of subrogation if the Indemnity were enforced.

6 The Second Defendant argues that the Indemnity is not akin to a performance bond payable on demand, but that its terms fall to be construed with and is inextricably twinned to the Financing Agreement. Accordingly, under this Financing Agreement, the Plaintiff is no longer the lender, but the owner, of the vehicles. In support of this argument, the Second Defendant refers to cl 5 of the Indemnity which reads:

All previous agreements and undertakings signed on behalf of Absolute Euromotors Pte Ltd, and by Mr. Bae Joon Suk and Mr. Tu Kye Chin on 27th Feb. '09 for the above floor stock facility shall remain in force and will not be affected or superceded by this agreement.

7 The Plaintiff argues to the contrary that the Indemnity is enforceable on its face and relies on cl 2 which reads:

Mr. Bae Joon Suk agreed to be personally liable for and will undertake to indemnify Mr. Wong Chin Juan if the above sum is not paid in full by the due date on 26th May 2009. The amount to indemnify Mr. Wong Chin Juan shall be based on the full amount plus a penalty of 10% per month for every month the principal sum remain unpaid, until the full amount, including all other costs incurred arising therefrom, have been fully paid.

8 The Second Defendant also argues that the legal nature of the Indemnity dated 25 April 2009 and whether it stands alone or is to be construed in relation to any underlying agreements are substantive issues to be tried. Clause 2 of the Indemnity remains to be construed to determine the question of whether its substantive effect is akin to that of an on-demand indemnity payable upon proof that the \$450,000 remained unpaid after 26 May 2009, or whether it is an indemnity only against the losses suffered by the Plaintiff arising out of the underlying Financing Agreement.

9 Where the Indemnity is in substance held to be a guarantee, the effect of a guarantor having paid to the creditor what is due under the guarantee is that the Second Defendant is entitled, unless he has waived them, to be subrogated to all the rights possessed by the Plaintiff in respect of the debt or default to which the guarantee relates (*Halsbury Laws of Singapore* vol 12 (Butterworths Asia, Reissue, 2007) at para 140.805). In the case where the Indemnity is held in substance to be an indemnity, a surety who pays is entitled to be indemnified by the principal debtor and to have the benefit of any security held by the creditor, and in addition has a right to a contribution from any other surety (see Timothy N. Parsons *Lingard's Bank Security Documents* (Butterworths, 4th Ed, 2006) at para 13.51).

10 As was observed in *Craythorne v Swinburne* (1807) 14 Ves 160; 33 ER 482 by Sir Samuel Romilly who was counsel for the plaintiff in that case,

...a surety will be entitled to every remedy, which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety; having a right to have those securities transferred to him; though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract but upon a principle of natural justice: the same principle, upon which one surety is entitled to contribution from another.

11 In short, in the event the Appeal were to be dismissed and the Indemnity enforced by the Plaintiff against the Second Defendant, the Second Defendant would be entitled to the security of the vehicles currently held for sale by the Plaintiff.

12 Having closely considered the text of the Indemnity and the Financing Agreement, I am of the opinion that the Second Defendant has not established either a substantial question of fact which ought to be tried or a fair dispute as to the meaning of the meaning of the document upon which the claim is based.

13 Having heard counsels' submissions as to costs and in the light of my decision, I would order costs of this appeal to be in favour of the Plaintiff and would award costs of S\$18,000.00.

14 Appeal dismissed.