

Anthony Wee Soon Kim v UBS AG
[2002] SGHC 206

Case Number : Suit 834/2001, SIC 1595/2002
Decision Date : 07 September 2002
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Anthony Wee Soon Kim in person; Hri Kumar with Gary Low (Drew & Napier LLC) for the defendant; Ronald Choo (Rajah & Tann) for ABN Amro Bank; Audrey Ng (Khattar Wong & Partners) for Citibank N A
Parties : Anthony Wee Soon Kim — UBS AG

Judgment

GROUNDS OF DECISION

1. This is an appeal by the plaintiff against my order granting the defendant's application for orders under section 175 of the Evidence Act to be issued to Bangkok Bank Ltd, ABN Amro Bank, Citibank N.A. and Development Bank of Singapore Ltd. The second and third banks were represented by counsel at the hearing but did not take part in the arguments. The other two banks were not represented although they were also served with the application.

2. The defendant is a bank, and the plaintiff was a customer of the bank. The plaintiff engaged in foreign exchange transactions through the bank and incurred substantial losses. He commenced this action against the defendant for fraudulent or negligent misrepresentation, breach of contractual duty of care, breach of duty in tort, breach of fiduciary duty, breach of contract, mandate or instructions.

3. He alleged that he was not properly advised by the defendant's officers on the transactions that he made and in particular, that they did not advise him on "swap points" that may be imposed. The defendant however, asserted in its defence that

(T)he plaintiff has shown himself to be an experienced and/or sophisticated investor in the foreign exchange market who understood that the concept of "swap points" as reflecting the interest rates differential between US\$ and the MYR for a given period and would have been aware that the trading of the 12-month forward hedge was affected by "swap points".¹

4. The plaintiff on the other hand maintained that his experience was in investments in equities.²

5. Consequently, the defendant applied that the plaintiff gives discovery under Order 24 of the Rules of Court of "(a)ll documents, including without limitation, any and all statements, correspondence, confirmation notes, confirmation advice, facility letters and documents of any other description whatsoever, showing the date, nature and value of all Transactions effected by or on behalf of the Plaintiff through the following entities for the period January 1987 to December 1997" with the first three of the aforementioned banks and with "(a)ny other bank and/or financial institution and/or financial intermediary and/or brokerage and/or any similar entity, whether situate in Singapore or elsewhere in the world." The transactions were defined as "(a)ll investments in and/or purchase and/or sale of listed and unlisted securities, bonds, mutual funds, unit trusts, options, futures contracts, currencies, commodities, derivatives and/or investments and financial instruments of any other description whatsoever."

6. The application was heard in the first instance by an Assistant Registrar on 15 Feb 2002. The application was opposed by the plaintiff. After hearing counsel for both parties the Assistant Registrar granted the application.

7. The plaintiff appealed against this order. When the appeal came for hearing before me the matters and issues including the relevance of the documents were comprehensively addressed in the course of arguments on 26 and 27 Feb. After hearing and considering the merits of the

submissions, I dismissed the appeal. The plaintiff did not appeal against my decision.

8. However, he did not give discovery of the documents. He deposed in an affidavit on 5 March that the documents were not in his possession, custody or power and he was unable to locate them despite extensive efforts because they had been moved to different premises on four occasions.

9. The defendant then sought to get the same records from the banks. It applied for and served writs of subpoenas on the Bangkok Bank Ltd, ABN Amro Bank, Citibank N.A. and Development Bank of Singapore Ltd for them to produce the documents.

10. The ABN Amro Bank was concerned that compliance with the subpoena may breach the obligation of confidentiality under section 47 of the Banking Act. It applied by summons-in-chambers No. 920 of 2002P for a determination whether it was precluded by s 47 from complying with the subpoena.

11. When the application came on for hearing before me on 29 April, counsel for the defendant submitted that s 175 of the Evidence Act operated as an exception to s 47. I directed that the defendant apply under s 175 for the bank to make the disclosures.

12. In compliance with the direction, the defendant filed summons-in-chambers No. 1595/2002/F that the four banks allow the defendant's solicitors to inspect and take copies of the documents pursuant to s 175 from the same documents covered by the order of court of 15 Feb.

13. While writing these grounds of decision, it occurred to me that the plaintiff may not have done enough to get those documents. Even if he did not have those documents with him, the banks would have them, and he could get them from the banks.

14. I refer to *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, a decision of the House of Lords. In this case, the plaintiff Lonrho wanted discovery of documents in the possession of the defendant Shell Petroleum's subsidiary companies in Rhodesia and South Africa. The subsidiary companies refused to disclose the documents on the grounds that they cannot do that without ministerial licence.

15. The question was raised whether the documents were in Shell Petroleum's power for the purposes of O.24 of the Rules of the Supreme Court, which is similar to O.24 of our Rules of Court.

16. Lord Diplock who delivered the judgment of the court stated at p 635

(In the context of the phrase "possession, custody or power" the expression "power" must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party.

and held that the documents were not in Shell Petroleum's power because Shell Petroleum could not have access without the ministerial licence.

17. In the present case, the plaintiff, as a customer or former customer of the banks, would have a right to the documents, subject to the payment of copying and other related charges.

18. In the event the plaintiff who did not take steps to get the documents from the banks opposed the defendant's efforts to get them from the same source.

The provisions in question

19. Section 47(1) and (2) of the Banking Act provide that

(1) Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act.

(2) A bank in Singapore or any of its officers may, for such purpose as may be specified in the first column of the Sixth Schedule, disclose customer information to such persons or class of persons as may be specified in the second column of that Schedule, and in compliance with such conditions as may be specified in the third column of that Schedule.

20. The Schedule provided that disclosure can be made when "[It] is necessary for compliance with an order of the Supreme Court or a Judge thereof pursuant to the powers conferred under Part IV of the Evidence Act (Cap. 97)."³

21. Section 175(1) of the Evidence Act (which is in Part IV) provides that

On the application of any party to a legal proceeding the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

and "bankers' book" is defined in s 170 –

"Bankers' books" includes ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank.

The plaintiff's objections

22. The plaintiff opposed the defendant's application. The grounds of opposition were

- (1) The application is not in compliance with Part IV of the Evidence Act.
- (2) The application is made in bad faith and is a fishing expedition for evidence to bolster the defence.
- (3) The application is made for the collateral and improper purpose of seeking the court's sanction to violate s 47.
- (4) The documents are not necessary under O.24 r 7 of the Rules of Court.
- (5) The documents are not bankers' books.

The defendant's submissions

23. Mr Hri Kumar counsel for the defendant stated that the documents sought under this application were the same documents in the Assistant Registrar's order of 15 Feb which I affirmed on 27 Feb.

24. He submitted that the issue of the relevance of the documents had been dealt with then, and the only issue left to be dealt with is whether the court has the power to order the banks to give discovery of the documents. He argued that the court has the power because s 47 allows banks to comply with orders issued under s 175. He contended further that the documents referred to were bankers' books under s 175.

The application is not in compliance with Part IV of the Evidence Act

25. The plaintiff submitted that

It is plain as night follows day that the Writs of Subpoena referred to in the Schedule in SIC 1595 are not "court orders" made pursuant to said s.174. In short, the Writs of Subpoena are of no legal effect whatsoever as they do not come within purview of the legal requirements as aforesaid and therefore the present SIC 1595 must fail *in limine*.⁴

26. The schedule in summons-in-chambers No. 1595 of 2002 does not refer to any writs of subpoena.

27. The defendant had caused the subpoenas to be issued before making the present application. It then filed the application when it realised that an order under s 175 may be necessary before a bank can comply with the subpoenas.

28. The plaintiff has misunderstood the application. The defendant was not proceeding on the basis that a subpoena is a court order. It was seeking a court order to ensure that a bank will not contravene with s 47 if it complied with the subpoena.

The application is made in bad faith and is a fishing expedition

29. The defendant had at the outset stated that it wanted to have access to the documents. It applied for and obtained an order for discovery and inspection despite the plaintiff's objections.

30. The issue of the relevance of the documents to the proceedings was determined in that application. The defendant then sought from the banks the same documents that the plaintiff should have supplied. There is no basis for impugning bad faith on the application.

The application is made for the collateral and improper purpose of seeking the court's sanction to violate s 47⁵

31. The plaintiff submitted that

(T)he Plaintiff has categorically stated in his Affidavit that his "bank accounts are not relevant to the issue of 'swap points' in a forward foreign exchange contract".

In the circumstances, it is evident that the present application is also a reckless attempt by the Defendants to "get behind the affidavit" of the Plaintiff and so eschew one of the essential safeguards provided under Part IV section 175 of the Evidence Act.⁶

32. The defendant does not have to accept the plaintiff's averment on the bank accounts. It is entitled to apply to court to have discovery of them.

33. The plaintiff's complaint that the defendant was seeking the court's sanction to violate s 47 has no substance shorn of the emotional hyperbole. A court will not sanction any violation of the law. Section 47 is not violated when an order of court under s 175 is obtained. A court will not make an order without careful consideration, but there is no violation of s 47 when an order is made. The plaintiff, on the other hand asserts that he has lost possession of the documents for which he was ordered to give discovery, but he would not obtain them from the banks himself, and seeks to prevent the defendant from getting them from the banks directly.

The documents are not necessary within Order 24 r 7 of the Rules of Court

34. This was an issue in the application for discovery and inspection. It was argued before the Assistant Registrar and on appeal, before me. There being no further appeal, it has been determined conclusively that those documents are relevant to the action.

The documents in the application are not bankers' books

35. The plaintiff submitted that

The facts as presented ... by the bank's senior legal officer, casts the drag net far and wide to include letters from the Plaintiff to the Bank and vice versa including contracts of all shapes and form so to speak. The expression 'bankers' books' has to be interpreted "ejusdem generis" with the other documents listed. It is, therefore, submitted that, correspondence, confirmation notes, confirmation advice and facility letters cannot be considered as being of the same genre as *ledgers, day books, cash books and account books*. The documents required by the Defendant are not book entries in the ordinary meaning intended by the Act and, consequently, they are as different as a mouthful of chalk and cheese.⁷

36. The plaintiff referred to *Williams v Williams* [1988] 1 QB 161 which dealt with an application to inspect unsorted cheques and paying-in slips in the possession of a bank. He quoted Sir John Donaldson M.R.'s judgment where he stated at page 168

I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an "entry" in those records. Putting the matter in another way, "other records" in the new definition has, I think, to be construed ejusdem generis with "ledgers, day books, cash books and account books" and unsorted bundles of cheques and paying-in slips are not "other records" within the meaning of the Act.

Relying on this, he submitted that "if cheques and paying-in slips do not come within the meaning of 'bankers' books', then *a fortiori*, neither do correspondence, confirmation notes, confirmation advice and facility letters."⁸

37. The plaintiff would have understood the judge better by reading the paragraph in its entirety -

In this situation Mr Ryder, appearing for the applicant, has to submit, and does submit, that the bundles of cheques and paying-in slips constitute bankers' books within the modern definition and that addition each cheque or paying-in slip to the bundle constitutes making an entry in those books. Whilst I would be prepared to accept that the cheques constitute part of the bank's records used in the ordinary business of the bank (*Reg. v. Jones (Benjamin)* [1978] 1 W.L.R. 195, a case concerned with a bill of lading put in evidence under the Criminal Evidence Act 1965), I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an "entry" in those records. Putting the matter in another way, "other records" in the new definition has, I think, to be construed ejusdem generis with "ledgers, day books, cash books and account books" and unsorted bundles of cheques and paying-in slips are not "other records" within the meaning of the Act.

38. The judge made a distinction between unsorted cheques and paying-in slips, which he did not regard as entries in bankers' books, and sorted cheques which he was prepared to accept as part of a bank's records.

39. In the same light the documents referred to in the application are not unsorted documents. Correspondence, confirmation notes, confirmation advice and facility letters are documents a bank would file and keep in the course of its ordinary business. It is necessary for a bank to maintain such records, and to refer to from time to time, for example, to ensure that facilities are not exceeded or that instructions are carried out. Such records are bankers' books even if they are not in use every day, so long as they are referred to when necessary – see *The Asylum for Idiots v Handysides* (1906) 22 TLR 573. None of the banks served with the application have stated that they do not keep such records. In any event it is open to the banks to object or seek clarification on any document if any dispute or uncertainty should arise whether

it forms part of a banker's book.

40. Having examined the plaintiff's objections and finding no merits in them, I granted the defendant's application.

Sgd:

Kan Ting Chiu

Judge

- 1 Para 36, Re-amended Defence
- 2 Notes of Evidence pages 380, 500, 544, 598
- 3 Sixth Schedule, Part 1, item 7
- 4 Plaintiff's Written Submissions para 3
- 5 Plaintiff's Written Submissions, para 7
- 6 Plaintiff's Written Submissions, paras 35-6
- 7 Plaintiff's Written Submissions, para 46
- 8 Plaintiff's Written Submissions para 47