Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch
[2002] SGHC 268

Case Number : OS No 772 of 2002, RA No 201 of 2002

Decision Date : 15 November 2002

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Ronald Choo (Rajah & Tann) for the plaintiff; Stanley Lai (Allen & Gledhill) for the defendant

Parties : Beckkett Pte Ltd — Deutsche Bank AG Singapore Branch

Banking – Secrecy – Scope of confidentiality clause in share pledge agreement

Civil Procedure – Discovery of documents – Pre-action discovery – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 24 r 6 – Applicable principles

Judgment

GROUNDS OF DECISION

1. The plaintiff Beckkett Pte Ltd applied for pre-action discovery against the defendant Deutsche Bank Aktiengesellschaft Singapore Branch ("the bank"). The application was for the bank to give discovery of:

> a. a complete list of all securities/guarantees realised or exercised by the Defendant in connection with the loan granted by the Defendant to PT Asminco Bara Utama;
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> b. In respect of each security/guarantee realised or exercised:
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> > (i) the date when the security/guarantee was realised/exercised;
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> > (ii) the amount realised from the exercise of the security/guarantee;
> >
> > (iii) in the case of the pledges of shares, a copy of the valuation report(s) in respect of the shares that were realised;
> >
> > (iv) the identity of the purchaser of the pledged shares;
> >
> > (v) details of the manner of sale of the pledged shares (whether by private treaty or auction);
> >
> > (vi) in the case of sale by private treaty, details of the negotiations leading to the sale;
> >
> > (vii) details of steps taken to ensure that your client obtained the best reasonable price for the pledged shares.

After the application was granted over the bank's objections, the matter came before me on the bank's appeal.

Background

2. The plaintiff is an investment company incorporated in Singapore. It held 74.2% of the issued share capital of an Indonesian company known as PT Swabara Mining and Energy ("SME"). SME in turn held 99.8% of the issued share capital in PT Asminco Bara Utama ("Asminco"). Prior to 15 February 2002, Asminco held 40% of the issued share capital of PT Adaro Indonesia ("Adaro") and PT Indonesia Bulk Terminal ("IBT").

3.. Asminco entered into a loan agreement with the bank to borrow US$100 million. In consideration of the loan, the plaintiff's shares in SME, SME's shares in Asminco, Asminco's shares in Adaro and IBT ("the pledged shares") were pledged to the bank. The plaintiff also issued a guarantee for the repayment of all amounts owing by Asminco to the bank. The loan agreement and the guarantee were specifically stated to be governed by English law whereas the share pledge agreements are governed by Indonesian law.

4. When Asminco failed to repay the loan the bank exercised its rights as pledgee and sold the plaintiff's shares in SME for US$800,000 and the other pledged shares. The bank gave notice to the plaintiff that Asminco still owed US$86,696,304.10 and demanded payment of the outstanding amount from the plaintiff.

5. On 8 April 2002, the plaintiff's solicitors wrote to the bank's solicitors to request for the following information:

> a. the date when the security/guarantee was realised/exercised;
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> b. the amount realised from the exercise of the security/guarantee;
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> c. in the case of the pledges of shares, a copy of the valuation report(s) in respect of the shares that were realised;
>
> d. the identity of the purchaser of the pledged shares;
>
> e. details of the manner of sale of the pledged shares (whether by private treaty or auction);
>
> f. in the case of sale by private treaty, details of the negotiations leading to the sale;
>
> g. details of steps taken to ensure that your client obtained the best reasonable price for the pledged shares.

6. On 26 April the bank's solicitors replied that

> (a) As your clients are fully aware, our clients granted a bridge loan facility dated 24 October 1997 ("the bridge loan") to PT Asminco Bara Utama. Security for the bridge loan was in the form of, *inter alia*, corporate guarantees issued by your clients and PT Swabara Mining and Energy, and pledges of shares owned by PT Asminco Bara Utama, PT Swabara Mining and Energy, and your clients, in various companies.
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> (b) Our clients have realised your clients' shares in PT Swabara Mining and Energy on 15 February 2002. Your clients' shares in PT Swabara Mining and Energy were realized for US$800,000.00. A copy of the valuation report on the shares in PT Swabara Mining & Energy is enclosed.
>
> (c) The purchaser of your clients' shares in PT Swabara Mining & Energy is PT Mulhendi Sentosa Abadi.

> (d) The shares were sold to PT Mulhendi Sentosa Abadi by way of private treaty.
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> (e) Quite apart from the Indonesian authorities approving the sale of the shares, a valuation of the shares owned by your clients in PT Swabara Mining & Energy was secured, to ensure that the true market value of the shares was determined. All reasonable steps were therefore taken to ensure the best possible price was obtained in respect of your clients' shares in PT Swabara Mining and Energy.

7. This was followed by a further reply on 13 May that:

> We reiterate our clients' stand that the information you have sought in relation to negotiations is irrelevant, and that your clients are, in any event, not entitled to this information. Similarly, as to the issue regarding confirmation that our clients have released or agreed not to claim against PT Swabara Mining and Energy, your clients are not entitled to this information. Further, we do not see how the information can be relevant to a proper valuation of the shares in PT Swabara Mining and Energy, and to the issue of whether our clients have taken reasonable steps to obtain the true market value of the pledged shares.

8. Besides stating that "reasonable steps" were taken, neither letter disclosed the steps taken.

The bank's duties

9. When a creditor sells property it holds as security, the debtor's interests must be taken into account. A bank which exercises its right of sale under a pledge must take care that the sale is a provident sale, see *The Odessa* [1916] 1 AC 145, and *Malayan Banking Berhad v Hwang Rose* [1997] 2 SLR 1. Where there is a guarantor, the duty extends to him as he has an interest in the sale as he is also liable for the debt remaining after the sale, see *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, *The Bank of East Asia v Tan Chin Mong Holdings (S) Pte Ltd* [2001] 2 SLR 193, *Goh Chin Soon v Vickers Capital Ltd* [2001] SLR 728, and *Bank of Credit and Commerce International Societe Anonyme (Licensed Deposit Takers) v Aboody* (30 Sept 1987, Queen's Bench Division, unreported).

10. When the bank decided to sell the pledged shares, it owed a duty to the plaintiff as the pledgor of the SME shares and guarantor of Asminco's borrowing to take reasonable steps in effecting the sale.

The application

11. In the face of the bank's negative response, the plaintiff applied for pre-action discovery. An affidavit was affirmed by Arthur Ling Ping Sheun, a director of the plaintiff in support of the application. He deposed that:

> 13. The Plaintiff believes that the Defendant has sold the Pledged Shares at below their true value. The Plaintiff believes that Asminco's shares in Adaro and IBT alone should have realised more than enough proceeds to repay the entire amount outstanding under the Bridge Loan with a surplus remaining. Had the Defendant obtained the true value for the shares in Adaro and IBT, there would have been no need to sell the shares in Asminco and SME, nor to call on the Guarantee provided by the Plaintiff.
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> Particulars
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> a. The Defendant valued Asminco's 40% shareholding in Adaro and IBT at

approximately USD300 million in late 1997 when the Bridge Loan was advanced.

b. The investment bank Salomon Smith Barney had valued PT Kaltim Prima Coal (an Indonesian company with the next highest coal production after Adaro) at USD889 million in December 2001 (this would translate to a valuation of approximately USD350 million for Asminco's shares in Adaro). …

c. An article which appeared in the Australian Financial Review on 15 March 2002 mentioned that analysts had put an approximate value for Adaro alone at A$1 billion (which translates to a value of approximately USD200 million for Asminco's shares in Adaro). …

14. Despite requests from the Plaintiff, the Defendant has not provided any particulars or details on the valuation or the sale of shares in Asminco, Adaro and IBT. Until discovery is given by the Defendant, the Plaintiff cannot ascertain whether the Defendant had obtained a proper valuation of Asminco, Adaro and IBT before it sold the Pledged Shares. Further, the Defendant has not confirmed whether it has released SME from liability under its guarantee to the Defendant. This is relevant to the valuation of the shares of SME.

15. In the circumstances, the Plaintiff has taken out this application for an order compelling the Defendant to disclose all relevant information concerning the realisation of securities in connection with the Bridge Loan.

Possible Action to be taken by the Plaintiff

16. As mortgagee of the Pledged Shares, the Defendant owes certain equitable duties to the Plaintiff (as surety of Asminco). These include:

a. A duty to use its mortgagee powers only for proper purposes (ie. securing repayment of the Bridge Loan) and to act in good faith; and

b. A duty, if the mortgagee exercises its power of sale over any of the Pledged Shares, to take reasonable care to obtain the true value of the security.

17. The Plaintiff has been advised that the Defendant owes the Plaintiff a duty to take reasonable steps to obtain the best price reasonably obtainable for the Pledged Shares when it exercised its right of sale under the various pledges so as to reduce the Plaintiff's liability to the Defendant under the Guarantee.

The law

12. The plaintiff's application was made under Order 24 rule 6 of the Rules of Court. Rule 6 (3) requires that an application for pre-action discovery be supported by an affidavit which must state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be a party to subsequent proceedings in court.

13. The Court of Appeal set out the law governing pre-action discovery under the Rules of the Supreme Court 1990 in *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169. The law is not changed under the Rules of Court.

14. The Court ruled that:

> 1. an applicant for pre-action discovery has to set out the substance of his claim to enable the potential defendant to know what the essence of the complaint against him is,
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> 2. the applicant should state the cause of action but it is not necessary to give particulars of it so long as he states the facts sufficiently and explain why pre-action discovery is necessary, and
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> 3. the applicant need not name each and every document sought to be disclosed so long as he describes the type or class of documents with reasonable precision, and the documents are relevant to the cause or intended cause of action.

15. In that case, the applicants, the minority shareholders of a company engaged the respondents, a firm of accountants, to undertake a valuation of the shares of the company. After the respondents produced the valuation, the applicants sold their shares at the valuation price to the majority shareholders. Subsequently, the applicants obtained a valuation from another accounting firm which valued the shares at a higher price. The applicants requested the respondents to disclose the basis of their valuation, but the respondents refused. The applicants then applied for discovery of documents and working papers that the respondents had referred to or used in their valuation to enable them (the applicants) to decide whether there was a breach of contract or negligence on the part of the respondents.

16. The application was granted but the respondents appealed successfully against the decision. The applicants then appealed to the Court of Appeal.

17. In allowing the appeal, the Court noted at para 33 that

> The appellants also referred to the valuation report obtained from KPMG Peat Marwick, compared it with the valuation of the respondents' and stated that there was a substantial difference. They had also stated the potential causes of action against the respondents. As such we were of the view that the appellants had sufficiently stated the grounds for the application and the material facts pertaining to the intended proceedings. We were also satisfied that the respondents appeared 'likely to be' parties should proceedings subsequently be commenced for negligence or breach of contractual duty in valuation.

and at para 42 that

> The appellants had obtained another valuation from a reputable firm, KPMG Peat Marwick, which had placed the value of the shares between $3.17 and $3.26 per share, compared to the respondents' valuation of $2.15 per share. There was a significant disparity between the two valuations. Moreover, KPMG Peat Marwick had also given reasons for the basis of their valuation. We are of the view that the appellants had shown that there was a reasonable basis for their allegations. Moreover, the appellants had shown that this was sufficient to raise a cause of action, albeit not necessarily a good cause of action.

The Court also added a note of caution at para 50 that

> (T)here must be some grounds for seeking pre-action discovery, bearing in mind that the provision should not be used for fishing expeditions, and that the normal course is to get 'ordinary discovery' after commencement of proceedings.

18. Reverting to the facts of the present application, Arthur Ling had made two complaints over the price at which the shares were sold and the process of sale. On the former, he asserted that the bank had valued Asminco's 40% shareholdings in Adaro and IBT at approximately US$300 million in late 1997, that the investment bank Salomon Smith Barney had valued a company known as PT Kaltim Prima Coal at US$889 million in December 2001, and that an article in the Australian Financial Review of 15 March 2002 stated that analysts had put an approximate value for Adaro at A$1 billion.

19. The plaintiff did not have the SME shares or the other pledged shares valued. It relied on the bank's valuation in late 1997 of Asminco's share holding in Adaro and IBT, which valuation was outdated when the shares were sold in March 2002. The Salomon Smith Barney valuation of P T Kaltim Prima Coal, a company apparently unconnected with Asminco, Adaro or IBT, cannot be relied upon as indication of the value of the pledged shares. The Australian Financial Review article is the only potentially current and relevant point of reference. However, the price reference is in a single sentence that "The Soul Pattinson annual report does not ascribe a value to the Adaro mine, but analysts put a rough price of $1 billion on the asset." Neither the identities of the analysts nor the basis on which they have come to the rough price were disclosed.

20. The Court of Appeal has stated there must be some grounds for seeking pre-action discovery and that this relief should not be used for fishing expeditions. Does the plaintiff's application in respect of the valuation satisfy this requirement?

21. In effect, the plaintiff is saying that it feels the SME shares and the pledged shares were worth more than they were sold for. But its belief was founded on insubstantial, incomplete, irrelevant and out-dated sources, without obtaining a proper valuation of its own. Can it be said in these circumstances that the plaintiff has established a reasonable basis of its complaint? I think not, and I note that in *Kuah Kok Kim v Ernst & Young*, the fact that the applicants obtained their own valuation was a significant factor in the Court of Appeal's decision. I therefore find that the plaintiff had not established a proper basis for the application for pre-action discovery in relation to the valuation of the shares on the basis of the belief that the pledged shares were sold below their true value.

22. There is the other complaint over the mode of sale. This stands apart from the sale prices obtained. A pledgee's duty is to obtain the best price available in the circumstances. A pledgor or guarantor is entitled to be informed of the manner in which the pledged property is sold. This applies even when the sale is at the valuation price because a higher price may be obtained if the sale is properly conducted.

23. The plaintiff's solicitors asked for the "details of the manner of sale of the pledged shares (whether by private treaty or auction)." The reply that it received was that the shares were sold to PT Mulhendi Sentosa Abadi by private treaty, that "all reasonable steps were therefore taken to ensure the best possible price was obtained" and that "the information you have sought in relation to negotiations is irrelevant, and that your clients are, in any event, not entitled to this information."

24. The plaintiff, as pledgor and guarantor has an interest in the sale of the shares and the bank has a duty to take reasonable steps to obtain the best price for them. The steps taken by the bank to secure a buyer and arrive at a price for the shares are matters that are within the bank's knowledge. It was the party the plaintiff should obtain the information from. When the bank refused to supply it the plaintiff is justified in seeking pre-action discovery to ascertain whether the bank acted properly in the sale.

25. In giving discovery of the steps taken, any valuation report obtained or relied on shall have to be disclosed as steps taken in the sale. In the end there will be discovery of valuation reports on the second ground although they do not come under the first ground.

26. The bank also relied on restraints placed on it which prevent it from giving discovery. The first is the duty of confidentiality arising from the share pledge agreements, and the second is the duty to protect banking secrets under Indonesian law.

Confidentiality

27. Wolfgang Topp, Managing Director, Credit Risk Management of the bank, deposed an affidavit that

> Clause 13 of the Share Pledge Agreement states that the Defendant may not disclose any information about the shareholder (ie SME or Asminco as the case may be) and its subsidiaries and their financial condition to any third party without

the consent of the shareholder (such consent not to be unreasonably withheld) and unless such third party executes and delivers to the shareholder a confidentiality undertaking.

28. Clause 13 reads

> Disclosure
>
> The Bank shall be entitled to disclose to its head office, any branch office, any representative office, any of its affiliates or any potential assignee or to any person with whom it may wish to enter into contractual relations in connection with this Share Pledge Agreement such information about the Shareholder and its subsidiaries and their financial condition as shall have been made available to the Bank hereunder together with such other information as the Bank shall consider appropriate. The Shareholder hereby consents to the disclosure of any and all such information but, except in the case of any disclosure to persons outside the group of companies made up of Deutsche Bank Aktiengesellschaft, Deutsche Morgan Grenfell (Singapore) Limited and their respective subsidiaries, holding companies, affiliates and related companies and as may be required by law or regulation or pursuant to any request made by any applicable regulatory agency, the Bank may not disclose any such information to any third party without the consent of the Shareholder (such consent not to be unreasonably withheld) and unless such third party executes and delivers to the Shareholder a satisfactory confidentiality undertaking.

29. In response to that, counsel for the plaintiff pointed out that clause 13 did not prevent the bank from disclosing the information sought because it applies specifically to "such information about the Shareholder and its subsidiaries and their financial condition as have been made available to the Bank hereunder" and prohibits the bank from disclosing such information to third parties without the consent of the Shareholder.

30. There is merit in the argument. The information sought about the sale of the pledged shares does not come within the provision, and furthermore, in respect of the plaintiff's SME shares, disclosure of the information to the plaintiff is not disclosure to a third party.

Indonesian law

31. The bank pleaded that it was prohibited by Indonesian law, specifically Law No. 7 of 1992 regarding the Banking System ("the Banking Law") as amended by Law No. 10 of 1998. It submitted that Article 40 of the Banking Law prohibited it disclosing the information sought. It relied on the opinion of its Indonesian law consultant, Prof. Loebby Loqman which contains English translations of the relevant provisions of Indonesian law.

32. Article 40 of the Banking Law provides that "Bank is obligated to keep secret information relating of Depository Customer and his deposit …" and Art.1(28) provides that "Bank Secrecy is all that relates to information on depository customer and his deposit." A depository customer is a customer who places a deposit in a bank.

33. Besides the Banking Law, the Regulation of Bank of Indonesia No. 2/19/PBI/2000 ("BI Regulation") also regulates the disclosure of information by a bank. Art. 1(6) of the BI Regulation states that "Banking Secrecy is all that relates to information on Depository Customer and Deposit of a Customer" and Art. 1(4) of the BI Regulation defines a Depository Customer as a customer which places its funds in the form of a deposit. Art. 2(2) on the other hand, provides that "Information related to customer other than Depository Customer not classified as information that obligated to keep confidential by bank".

34. Prof Loebby was of the opinion that by the definition of bank secrets in the BI Regulation bank secrecy is not restricted to the information relating to deposits of a depository customer, but it also covers information of the customer unrelated to its deposits.

35. The plaintiff relied on the opinions of two Indonesian law consultants, namely Stefanus Haryanto and Kartini Muljadi. Both of them were of the opinion that under the Banking Law and the BI Regulation banks are only obliged to maintain secrecy on the deposits of depository customers.

36. After careful reading of the opinions of the three consultants, I find difficulty with Prof Loebby's conclusion. I am unable to see how the BI Regulation could extend the scope of banking secrecy beyond information relating to customers' deposits.

37. In any event, the efforts that the bank took to sell the pledged shares is the information of the bank. The information relates to the process by which the pledged shares were sold, and has nothing to do with its depository customers and their deposits. It is not a matter of banking secrecy which has to be maintained for the protection of the depositor.

Conclusion

38. The plaintiff is entitled to pre-action discovery on the steps taken by the bank in the sale of the pledged shares. The bank will make discovery of the documents relating to the steps taken when it sold the shares, including documents relating to the valuation of the shares. The appeal is dismissed with costs.

Sgd:

Kan Ting Chiu

Judge