Nitine Jantilal *v* BNP Paribas Wealth Management
[2010] SGHC 264

Case Number : Suit No. 1048 of 2009/D (Summons No. 3613 of 2010/Z)

Decision Date : 01 September 2010

Tribunal/Court : High Court

Coram : Tan Sze Yao AR

Counsel Name(s) : Manjit Singh s/o Kirpal Singh and Sree Govind Menon (Manjit Govind & Partners) for the plaintiff; Sim Wei Na and Ng Chun Ying (Rajah & Tann LLP) for the defendant.

Parties : Nitine Jantilal — BNP Paribas Wealth Management

Civil Procedure

[LawNet Editorial Note: The appeal to this decision was allowed and the orders of the assistant registrar were set aside by a judge of the High Court in chambers on 16 September 2010 with no written grounds of decision rendered.]

1 September 2010

Tan Sze Yao AR:

Introduction

1 This was a claim for a summary order for account under Order 43 Rule 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) by a private banking customer against a bank. The accounts sought were in respect of certain transactions that took place in relation to the customer's bank accounts with the bank.

Facts

2 The plaintiff is an Indian national. Sometime in 2002, the plaintiff opened an account ("Account 1") with the defendant bank. In or around late 2005, the plaintiff submitted his application for permanent residence in Singapore for himself and his family under the Financial Investor Scheme ("FIS").

3 The FIS was introduced by the Monetary Authority of Singapore ("MAS") to attract foreign individuals of considerable net worth to park their assets with financial institutions in Singapore. In return, these individuals would be granted permanent residency status in Singapore. Under the terms of the FIS, each applicant must, among other things, place financial assets worth at least S$5 million in a financial institution regulated by the MAS. These assets must be held in a designated account under the FIS for a continuous period of 5 years commencing from the date of issuance of the applicant's Entry Permit. (In all probability the plaintiff had already been in Singapore for some time before Account 1 was opened.)

4 Account 1 was the designated account for the purposes of the plaintiff's permanent residency application under the FIS. With more than S$5 million in assets already deposited in Account 1 at the time the application was made, the plaintiff qualified for permanent residency under the FIS. He was

granted Singapore permanent residency status on 3 April 2006.

5 Subsequently, the plaintiff grew unhappy with the defendant bank's services. In April 2009, the plaintiff opened a second account ("Account 2") with the defendant bank. His purported intention was to transfer the financial assets from Account 1 to Account 2 in the hope of having a fresh start with the bank. However, for reasons that are unclear at this point, the assets were only transferred on 7 July 2009. Frustrated with what he perceived as the defendant bank's incompetence, the plaintiff gave instructions for the transfer of the financial assets in Account 2 to a separate bank account held with Credit Suisse ("the Credit Suisse account") on 15 July 2009. Both Account 1 and Account 2 were then closed on 21 July 2009.

6 In his submissions, the plaintiff alleged that the original sum of more than S$5 million had been depleted to approximately S$3.9 million by the end of 2008. The plaintiff also alleged that following the transfer of the assets to the Credit Suisse account, their total value had fallen even further to approximately S$3.6 million. Not convinced by the defendant bank's explanation that the losses were entirely attributable to fluctuations in the market, the plaintiff brought this application for an order for account and payment under O 43 r 1.

Law and application

Theory

7 Order 43 relates to a specialised form of accounting inquiry commonly ordered in administration actions, partnership actions and actions for specific performance. It is not usually applied for in the context of banker-customer relations.

8 Upon hearing an application under O 43 r 1,

> the Court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.

The key concept here is that of the "preliminary question". Counsel for the defendant submitted that there were several – for instance, whether the defendant was actually a fiduciary of the plaintiff, whether the assets had been held in cash or in other instruments, whether unauthorized third parties had dealt with the plaintiff's assets in Account 1 and Account 2, and how it came to be that the plaintiff's assets in those accounts had suddenly become emaciated in 2008, and even more so in their subsequent transfer to the plaintiff's Credit Suisse account.

9 To my mind, these questions relate to substantive matters that should properly be canvassed at trial. All that had to be shown by the plaintiff here, to qualify for relief under O 43 r 1, was simply that the defendant was "under a duty to render true accounts" (see *Mascom (M) Sdn Bhd & Anor v Kamawang Enterprise Sdn Bhd & Anor* [2006] 6 MLJ 701 ("*Mascom*")), and that "the defendant must be an accounting party, whatever the outcome of the trial" (see *The Supreme Court Practice 1993 Volume I* (Sweet & Maxwell, 1993) at [43/1/4] ("the English White Book"), addressing the English version of O 43 r 1, which is *in pari materia* to ours).

10 *Mascom* was a partnership case which concerned allegations of fraud. It was held there that so long as there was an undisputed partnership in existence, the respondent partners would be entitled to an account. The various issues relating to the broader overarching matter of fraud were

not preliminary questions to be tried before the taking of an account could be ordered. This was a sensible approach to take, because the claim to an account in *Mascom* was one not founded on questions of fact relating to the main cause of action, but rather *on the duty of partners in any event to render true accounts*.

11 This principle can be extended. In our case, there is not a partnership to speak of but simply a bank, cast with certain duties to its customers. It has long been established that the banker and customer relationship is one of debtor and creditor, and not of trusteeship (see generally *Foley v Hill* (1848) 2 H.L. Cas. 28). Accordingly, the plaintiff's bare assertion that the bank owes the plaintiff an account based on a pre-existing fiduciary relationship must fail, for this issue, at this juncture, on this application. Any establishment of fiduciary duty on the bank's part involves extraneous questions of fact that must be decided at trial, and therefore cannot be used to overcome the preliminary requirements of the summary procedure under O 43 r 1.

12 However, it is both commonsensical and intuitive that there must nonetheless be an implied contractual term that a bank must provide accurate statements of account to its customers. A bank is a debtor to its depositing customers (who, naturally, are its creditors). How else are these customers to know the precise quantum owed them, and the extent of their right to recall, if proper accounts are not kept by the debtor bank, the party to whom monies are paid and who assumes ownership of the same monies? Indeed, in the present case the defendant bank was to have, according to the terms of the FIS, "booked and managed" the plaintiff's assets in Account 1 and Account 2.

13 To be sure, the accounting duty for a bank – so as to render intelligible the customer's right of recall – is not an onerous one. The bank simply has to indicate (1) when monies – including any interest – were paid in or paid out, (2) by whom, and (3) what currently stands as the existing account balance. Indeed this is a service we have all come to take for granted when we go to the automated teller machine, or when we have our passbooks updated at the local branch. The plaintiff's situation here – with allegedly losses of millions at stake – is merely the everyday writ large. In J Milnes Holden, *The Law and Practice of Banking (Volume 1: Banker and Customer) 5th Ed* (Pitman Publishing, 1991), the author observes candidly at [2-132] - [2-133] that

> [t]here is probably an implied term in the contract between banker and customer that the banker will supply his customer either with a passbook or with statements containing a copy of the customer's account with the banker. … The banks maintain a high standard of accuracy in their bookkeeping and in the writing up of passbooks or the preparation of statements.

In *Lloyds Bank v Brooks* [1950] Journal of the Institute of Bankers, Vol LXXII 114, Lynskey J states at pp 121-2:

> It seems to me in this case there was a duty on the bank to keep the defendant correctly informed as to the position of her account, and there was a duty on the bank not to over-credit her statement of account …

In our present case, the concern is with over-debiting, but it is easy to surmise that the general principle is common to both.

Practice

14 The hypothetical objector now pipes up: surely the process of discovery would suffice for reckoning the proper state of the plaintiff's account? Surely there must have been statements of

account that were auto-generated by the defendant bank and sent to the plaintiff at regular intervals? Unfortunately, this point is far from clear at this juncture. The plaintiff alleged that it had received nothing, and that it even had to ask MAS for annual reports (that were actually only due to be submitted to MAS) to ascertain the state of his own bank account. The defendant, on the other hand, maintained that there had been a hold mail arrangement with the plaintiff in place until February 2009, pursuant to which the plaintiff's bank statements would not be mailed to the plaintiff, but rather would be held for the plaintiff at the bank. According to the defendant, under its terms and conditions it retained the prerogative to shred mail that remained uncollected for more than 2 years.

15 These issues, like those highlighted by the defendant at [8] above, are therefore factual matters strictly for determination at trial. Discovery, consequently, might or might not have been sufficient.

16 In any case, this preference for discovery has its grounding in practical concerns, not legal ones. When we consider the issue of practicality for applications of the present variety, it appears that much falls in favour of their grant. To begin with, a summary order for account might end these kinds of disputes conclusively at an early stage of proceedings, saving parties and the courts both costs and time. Indeed, O 43 r 1 provides the court with discretion for ordering payment relief upon the taking of an account. The English White Book sets out the following at [43/1/4]:

> If the taking of accounts will end the dispute between the parties, the Order should direct payment of the balance declared due and of any consequential costs.

17 Secondly, even if the payment remedy is not ordered outright, the account itself, once taken, will certainly help narrow the arguable issues for trial. In cases such as the present one, the taking of accounts is almost certainly an inevitable eventuality; an earlier focus might help streamline subsequent proceedings at trial. In this regard, the preceding excerpt from the English White Book provides some implied sanction. The passage (and necessarily O 43 r 1 itself) contemplates a middle ground where accounts are ordered without concomitant payment. There must be some rationale for this discretion, and to my mind the rationale would include the practical benefits just enunciated.

18 In *Goh Say Hun v Ooi Chit Lee & Anor* [1994] 1 SLR(R) 958 ("*Goh Say Hun*"), this middle ground was precisely employed. The appellant brought an action in the High Court against two respondents, her daughter and son-in-law, asserting that they had wrongly received and used money belonging to her. This money had been placed in several bank accounts jointly operated by her and her daughter. The appellant sought a full and proper account of these expenditures, and eventually took out an application for a summary order that accounts be taken under O 43 r 1. The Assistant Registrar hearing her application made an order that an account be taken in respect of withdrawals and expenditure of any money from the relevant joint bank accounts by the daughter, but *did not make a n order that any amount found due upon taking the account be paid to the appellant*. At the hearing for the taking of accounts, it was found that the daughter had received a total of S$963,100.43 belonging to the appellant, of which sum S$338,142.91 could not be accounted for. On appeal, it was held that this latter sum was properly accountable by the daughter to the appellant, since it was not disputed that the daughter was a trustee of the appellant in respect of the money.

19 Two points are worth observing from *Goh Say Hun*. One, the middle ground approach was indeed employed in that case, although the Court of Appeal eventually decided that the Assistant Registrar ought to have made the order for payment concurrently. This fact, however, does not prejudice the general *approach*. In *Goh Say Hun*, the question of trusteeship could be settled at the accounting stage because it was not disputed. Accordingly, payment ordered at that stage, as indicated by the Court of Appeal, would not have been improper. In the present case, parties are

disputing everything – from whether there was any trustee relationship at all, to the nature of the assets actually deposited in the two accounts, to the identity of the party or parties who ultimately effected the allegedly unauthorized transactions in (primarily) Account 1. Given all of this, the only issue that may be settled at this pre-accounting stage is the question of the bank's duty to account: and to my mind the bank *has* an implied duty to account to the plaintiff as customer, as has already been discussed above at [12]-[13]. Accordingly the *quantity* and *quality* of assets that had been in Account 1 and Account 2, along with the agents of their alteration, ought to be made clear by the defendant bank. Aside from this, it would be premature to countenance any further arguments on payment.

20 Two, an order for account is not a procedure as summary as one might think – there is every possibility of a court-ordered hearing for the taking of accounts. *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) sets out the following at [43/1/1]:

> Accounts and inquiries may deal with purely formal matters (such as computing the interest payable on completion in a specific performance action), or they *may be indistinguishable from a full trial with witnesses*. For this reason there is no standard procedure laid down in the rules. [emphasis added]

Accordingly, the defendant bank in the present case suffers no prejudice from having this aspect of the matter dealt with at this point in time. The label for O 43 r 1 has it as a "summary" order for account, but there will be every opportunity for the defendant (and plaintiff) to iron out issues relating to an accurate taking of the accounts.

Conclusion

21 As far as I could see, the threshold requirements for activating O 43 r 1 were met in the context of the present case. Every bank has an implied contractual duty to maintain and provide accurate accounts for its customers. Additionally, the practical benefits of ordering an account here warranted, to my mind, the court's exercise of its discretion.

22 There might be some worries that banks will be faced with onerous duties. I do not see the merit in this concern. A bank, in the business of lending and owing, necessarily has to maintain accurate accounts of its customers' accounts. (The defendant bank here in fact claimed that it did.) An order for account under O 43 r 1, therefore, will usually not have to be resorted to by its customers. The situation that came before the court here presented something unique, since the receipt of regular statements of account by the plaintiff from the defendant was and is still disputed. Accordingly, it would appear that the floodgates remain safely shut.

23 In light of the foregoing, I granted the plaintiff's prayer for an account of all sums due from the defendant bank to the plaintiff in respect of Account 1 and Account 2. As outlined above at [13] and rationalized at [19], these accounts should indicate *only* (1) when monies (including interest) were paid in or paid out of Account 1 and Account 2, (2) by whom, and (3) the amount transferred out of Account 2, before its closure, into the Credit Suisse account. There is no necessity or legal basis for any further detail at this interlocutory stage.

24 All other prayers, save for costs, were dismissed.