

Thomson Rubbers (India) Pte Ltd v Tan Ai Hock
[2011] SGHC 256

Case Number : Suit No 228 of 2011(Registrar's Appeal No 259 of 2011)
Decision Date : 29 November 2011
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Low Chai Chong - counsel instructed (Rodyk & Davidson LLP) and Wu Yu Liang (Wu LLC) for the plaintiff; Chenthil Kumarasingam (Lawrence Quahe & Woo LLC) for the defendant.
Parties : Thomson Rubbers (India) Pte Ltd — Tan Ai Hock

Bills of Exchange And Other Negotiable Instruments – Dishonour

Bills of Exchange And Other Negotiable Instruments – Legal Proceedings – Summary Judgment

Bills of Exchange And Other Negotiable Instruments – Consideration – Sufficiency

29 November 2011

Lai Siu Chiu J:

1 This was an appeal by Thomson Rubbers (India) Private Limited (“the plaintiff”) in Registrar’s Appeal No 259 of 2011 (“the Appeal”) against the decision of the Assistant Registrar in granting Tan Ai Hock (“the defendant”) unconditional leave to defend the plaintiff’s claim instead of awarding the plaintiff summary judgment in the sums of S\$709,065 and S\$616,698 (“the two sums”). I allowed the Appeal, reversed the decision of the court below and granted summary judgment to the plaintiff on its claim. As the defendant has appealed (in Civil Appeal No 116 of 2011) against my decision, I now set out the grounds for my decision.

The facts

2 The plaintiff commenced this suit claiming the aforementioned two sums which were the subject of two cheques issued to the plaintiff by the defendant that were dishonoured upon presentation.

3 The defendant was a shareholder and director of a company called Third Wind Rubber Pte Ltd (“Third Wind”). The defendant’s wife, Tan Heok Tze (“Mdm Tan”), was the only other shareholder of Third Wind. The plaintiff entered into three contracts (“the Thomson Rubbers Contracts”) with Third Wind on 18 August 2010, 25 August 2010 and 7 September 2010. Pursuant to the Thomson Rubbers Contracts, Third Wind was to supply a total of 504 metric tonnes (“MT”) of natural rubber to the plaintiff between September 2010 and October 2010. The plaintiff intended to use the 504 MT of natural rubber, supplied by Third Wind, to fulfil obligations to its own customers. An advance payment of US\$559,641.60 (“the advance payment”) was to be paid by the plaintiff to the defendant under the Thomson Rubbers Contracts, and was paid.

4 The supply of natural rubber which Third Wind intended to rely upon to fulfil its obligation under the Thomson Rubber Contracts was to be provided by an Indonesian company called PT Mas Mulia

Crumb Rubber Factory ("PT Mas Mulia"). Pursuant to contracts entered into between Third Wind and PT Mas Mulia, the latter was to supply 504 MT of natural rubber to Third Wind by October 2010. However, according to the defendant, PT Mas Mulia failed to make good its end of the bargain and did not deliver the shipment of 504 MT of natural rubber. As a consequence, Third Wind was unable to perform the Thomson Rubbers Contracts.

5 In an attempt to resolve matters amicably, the defendant met with an agent of the plaintiff, one Le Thi Bich Tram ("Miss Anna"), on 2 December 2010 in Ho Chi Minh City, Vietnam, at Miss Anna's office. At this meeting, the defendant signed a letter of undertaking and a settlement agreement. Pursuant to the letter of undertaking, in consideration for the plaintiff's forbearance in commencing legal proceedings against Third Wind, the defendant undertook to repay the plaintiff the advance payment plus damages. The parties agreed upon an exchange rate, and the sum payable pursuant to the letter of undertaking was US\$559,641.60 (equivalent to S\$709,065). The settlement agreement detailed the damages suffered by the plaintiff arising from the defendant's breach of the Thomson Rubber Contracts, and quantified the same at US\$483,305.74 or S\$616,698.

6 Upon his return to Singapore on the same day, the defendant issued to the plaintiff two cheques, No 543714 for the sum of S\$709,065 and No 543715 for the sum of S\$616,698 (hereinafter referred to collectively as "the two cheques"), both drawn upon the bank POSB in Singapore. The two cheques were post-dated to 20 December 2010 and 28 February 2011 respectively. However, when the two cheques were presented for payment by the plaintiff, they were dishonoured. Despite due notices of dishonour from the plaintiff's solicitors, the defendant did not pay the sums in the two cheques.

The plaintiff's case

7 The plaintiff's case was founded on the Bills of Exchange Act (Cap 23, 2004 Rev Ed) ("the Act"). Section 73(1) of the Act defines a cheque to be "a bill of exchange drawn on a bank payable on demand". It is incontestable that the two cheques fall within this definition. Section 47 of the Act defines dishonour of bills and prescribes consequences of such dishonour:

Dishonour by non-payment

47.—(1) A bill is dishonoured by non-payment —

(a) when it is duly presented for payment and payment is refused or cannot be obtained; or

(b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

8 Upon dishonour of a bill, the holder is entitled to recover damages quantified in accordance with s 57 of the Act:

Measure of damages against parties to dishonoured bill

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be a liquidated amount, shall be as follows:

(a) the holder may recover from any party liable on the bill, and the drawer who has been

compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser...

(i) the amount of the bill;

(ii) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

(iii) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest;

(b) where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

The law on summary judgment

9 Before I address the defendant's purported defences to the plaintiff's claim, it is apposite to first consider the law on summary judgment applications under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"). It is trite law that in order to obtain summary judgment, a plaintiff must demonstrate that he has a *prima facie* case. Upon doing so, the burden shifts to the defendant to establish a fair or reasonable probability that he has a bona fide defence in order to obtain leave to defend the claim: *Associated Development Pte Ltd v Loong Sie Kiong Gerald (administrator of the estate of Chow Cho Poon, deceased) and other suits* [2009] 4 SLR(R) 389 at [22].

10 In *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 ("*Goh Chok Tong*"), the Court of Appeal made it clear that leave to defend will not be granted based upon "mere assertions" by defendants (at [25]):

It is a settled principle of law that in an application for summary judgment, the defendant will not be given leave to defend based on mere assertions alone: *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray and Christopher John Walters* [1984] 1 Lloyd's Rep 21 at 23. The court must be convinced that there is a reasonable probability that the defendant has a real or *bona fide* defence in relation to the issues. In this regard, the standard to be applied was well-articulated by Laddie J in *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580, where he said at 593 to 594 that:

[I]t is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendants and ... look at the whole situation. The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief.

11 In respect of applications for summary judgment pertaining to dishonoured cheques specifically, the authors of *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (Sweet &

Maxwell, 17th Ed, 2009) ("*Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes*") opined (at p 235, para 4-010):

...Where an application is made by a claimant for summary judgment against a defendant in respect of a claim on a bill of exchange, cheque or promissory note, the general rule is that the court will give summary judgment for the claimant save in exceptional circumstances.

12 With the relevant principles in mind, I turn now to the defences raised by the defendant in the court below and in his pleadings.

The defences

Duress

13 The defendant first alleged that the cheques were issued as a result of duress by the plaintiff and its representatives. The details of the purported duress, as set out in the defendant's affidavits were as follows. On 16 October 2010, Miss Anna allegedly went to the defendant's home in the latter's absence. On this occasion, Miss Anna supposedly "verbally abused" the defendant's daughter and threatened to cause the defendant to be arrested.

14 The defendant further deposed that Miss Anna and Mannamplackal Thomas Thomas ("Thomas"), the managing director of the plaintiff visited the defendant's home in his absence on several occasions in October and November 2010. During those visits, Miss Anna and Thomas allegedly threatened and scolded Mdm Tan as well as the defendant's daughter. In addition, Miss Anna and Thomas allegedly threatened to hold Mdm Tan personally liable to the plaintiff.

15 The defendant also alleged that Miss Anna had, over the course of several telephone calls with Mdm Tan in October and November 2010, threatened to harm the defendant and his family unless the plaintiff received payment.

16 The final act of duress, prior to issuance of the two cheques, alleged by the defendant supposedly occurred during the meeting on 2 December 2010 (at [5] above). The defendant alleged that during the meeting, he saw three men standing outside Miss Anna's office. The three men supposedly stared at the defendant throughout the meeting, thereby causing the defendant to sign the letter of undertaking and the settlement agreement out of fear.

17 Would the defendant's allegations of duress (at [13] – [16] above) justify the granting of leave to defend the plaintiff's claim? In *Goh Chok Tong*, the Court of Appeal emphasised the need for a defendant to particularise defences in order for courts to determine whether a real or *bona fide* defence exists. Significantly, and most relevantly to the present proceedings, the Court of Appeal discussed the need for a defence of duress to be pleaded with specificity (at [29]):

There was no merit to this argument. Without sufficient particulars, the court would be unable to assess if the defendant has a real or *bona fide* defence. The law requires a defence of duress to be specifically and carefully pleaded, regardless of whether the plaintiff makes a demand for particulars. Order 18 r 8 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) expressly states that:

(1) *A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -*

- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.

[emphasis added]

The commentary on this provision is set out at para 18/8/12 of *The Supreme Court Practice 1999, Vol 1* (London, 1998) as follows:

Duress - A claim or defence raising duress must be specifically and carefully pleaded. It should contain full particulars of the facts and circumstances relied upon as to where, when, by whom and over whom and in what way such duress was exercised...

18 Other than the requirement of specificity in pleading a defence of duress, the defendant is further subject to the requirement in O 14 r 2(8) of the Rules of Court that affidavits filed in support of his defence must contain sufficient evidence necessary to oppose the plaintiff's claim. O 14 r 2(8) of the Rules of Court reads:

An affidavit or affidavits for the purpose of this Rule must contain all necessary evidence in support of or in opposition (as the case may be) to the claim..

19 I should point out that Miss Anna and Thomas filed affidavits that categorically denied the defendant's allegations (at [13] - [16] above). Notwithstanding the diametrically opposite positions adopted by the parties, I found the defendant's allegations of duress to be seriously wanting for the following reasons. First, the defendant alleged that various threats were made to Mdm Tan and his daughter. Indeed, those threats purportedly constituted the gravamen of the duress exercised upon the defendant. Yet, the defendant failed to file any affidavits from Mdm Tan or his daughter to corroborate his allegation. In fact, the affidavits filed by the defendant did not even indicate the name and age of his daughter. As a result, his allegations *vis-à-vis* the threats made against Mdm Tan and his daughter were unsubstantiated. Second, I considered the defendant's conduct on his own evidence to be wholly inconsistent with that of a person under duress. The defendant and his family had purportedly been threatened on many occasions in October and November 2010. Instead of seeking police assistance, the defendant saw it fit to leave Singapore and visit the plaintiff's office in Vietnam in December 2010. It is unimaginable that a person who is in fear would have acted as the defendant did. Third, the defendant's allegation of having been coerced into signing the letter of undertaking and settlement agreement did not impact upon the voluntary issuance of the two cheques. This was because the defendant issued the two cheques only upon his return to Singapore when there was no longer any operative duress if indeed it existed in the first place.

The cheques were issued without consideration

20 The defendant then claimed that a triable issue arose in respect of whether the plaintiff furnished adequate consideration for the two cheques. The defendant framed the issue as whether "the plaintiff's alleged forbearance from suing Third Wind [was] sufficient consideration in light of the undisputed fact that Third Wind was set up to protect the defendant and his wife from the economic risks of trading rubber". This argument was completely devoid of merit and can be dealt with summarily by referring to *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (at p 248 at para 4-021):

By way of introduction it should be recalled that, as a general rule in the law of contract, the mere existence of an antecedent debt due from the promisor to the promisee is no consideration for a promise since it amounts only to past consideration. *However, if the creditor (the promisee) in return for the promise agrees to forbear to enforce his claim to the debt, even temporarily, then there is consideration and the promise is binding.*

[emphasis added]

21 The letter of undertaking clearly stated that the defendant acknowledged receipt of the advance payment as well as Third Wind's failure to perform its obligations under the Thomson Rubber Contracts. Crucially, clause 5 of the letter of undertaking read:

In consideration of [the plaintiff's] forbearance in commencing legal proceedings against Third Wind [the defendant] undertake[s] to pay [the plaintiff] the sum of US\$559,641.60 plus damages.

22 It is clear, that the defendant's argument in respect of sufficiency of consideration failed *in limine*.

The cheques were issued with an express condition

23 The defendant's final argument was that the cheques were issued to the plaintiff with the express condition that the latter was to give notice to the defendant prior to presenting the two cheques for payment. This allegation was denied by the plaintiff. The defendant's argument failed *in limine* in the light of s 3 of the Act which expressly defines a bill of exchange as an "*unconditional order in writing*" [emphasis added]. The requirement for a bill of exchange to be unconditional was succinctly stated in *Carlos v Fancourt* (1794) 5 T.R 482, 485, 487 which was quoted in *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (at p 25 at para 2-009):

The reason is (and it is equally applicable to all negotiable instruments) that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit, circulation, and negotiability, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons, to whom they were offered in negotiation, were obliged to enquire, when those uncertain events would probably be reduced to a certainty. And hence, the general rule is, that a Bill of Exchange always implies a personal general credit, not limited or applicable to particular circumstances and events, which cannot be known to the Holder of the Bill, in the general course of its negotiation".

Conclusion

24 In the final analysis, the defendant had failed to demonstrate that he had a real or *bona fide* defence to the plaintiff's claim on two dishonoured cheques. Consequently, I allowed the Appeal and entered final judgment for the plaintiff on the two cheques in the sums of S\$709,065 and S\$616,698 with interest and costs.

Copyright © Government of Singapore.