Oversea-Chinese Banking Corp Ltd v Daewoo Singapore Pte Ltd and Another
[2000] SGHC 104

Case Number : Suit 1477/1999

Decision Date : 05 June 2000

Tribunal/Court : High Court

Coram : Lim Teong Qwee JC

Counsel Name(s) : Herman Jeremiah (Helen Yeo & Partners) for the plaintiffs; Tan Cheng Yew (Tan Cheng Yew & Partners) for the defendants

Parties : Oversea-Chinese Banking Corp Ltd — Daewoo Singapore Pte Ltd; Another

Contract – Discharge – Frustration – Debtor and guarantor claiming frustration of contract – Whether situation fundamentally different from that existing when contract made

: The plaintiff (`OCBC` or `bank`) is a Singapore company which carries on banking business at OCBC Centre in Singapore and elsewhere. The first defendant (`Daewoo (Singapore)` or `borrower`) is also a Singapore company. It is the wholly owned subsidiary of the second defendant (`Daewoo (Korea)` or `guarantor`) which is a South Korean corporation. Daewoo (Singapore) is a customer of OCBC.

Daewoo (Singapore) is indebted to OCBC. It was granted a short term loan of US$7m on the terms of a facility letter from OCBC dated 10 March 1999. The loan is repayable on demand and by letter dated 31 August 1999 OCBC demanded payment of US$7,014,104. 51 which included interest then due.

The loan is secured by a guarantee given by Daewoo (Korea) dated 15 March 1999 and by letter also dated 31 August 1999 OCBC gave notice of default on the part of Daewoo (Singapore) and demanded payment from Daewoo (Korea).

Neither Daewoo (Singapore) nor Daewoo (Korea) has made any payment and the indebtedness remains outstanding. On 13 October 1999 this action was commenced to recover the amount of the loan and interest due. The defendants entered appearance and an application was made for judgment under O 14. An assistant registrar gave unconditional leave to defend and OCBC appealed. I heard the appeal and allowed it. I gave judgment for OCBC as claimed. Daewoo (Singapore) and Daewoo (Korea) have both given notice of appeal and these are my written grounds. [The appeal was withdrawn - Ed.]

The defence of both defendants was filed before the summons for judgment was issued. Paragraph 5 of the defence states:

> *The defendants would aver that the performance of the defendants` obligations under the facility and/or the guarantee has become impossible and/or has otherwise been frustrated and that the defendants are discharged from further performance. Alternatively, performance by the defendants has been suspended by reason of impossibility and/or frustration.*

This is followed by particulars of frustration which I shall consider later.

Daewoo (Singapore) has borrowed US$7m from its bank. It has defaulted in repayment. Daewoo (Korea) has guaranteed repayment of the loan. It has been given notice of default. It has defaulted in payment under the guarantee. Daewoo (Singapore) and Daewoo (Korea) now say that `performance of [their] obligations ... has become impossible and/or has otherwise been frustrated and that [they]

are discharged from further performance`. They do not have to make any payment at all if they are right. Not surprisingly counsel`s researches have not uncovered any authority to support this contention. However Mr Tan referred to **Re North Otago Dairy Co Ltd, ex p JB MacEwan & Co** [1905] 24 NZLR 748 and **King v Michael Faraday & Partners Ltd** [1939] 2 All ER 478.

In ***Re North Otago Dairy Co Ltd*** , a company entered into a contract to employ MacEwan for three years and MacEwan agreed to advance the company certain moneys and to act as its agent and adviser. For this MacEwan was to receive each year a stated commission on the gross output of the company. Before the expiry of the period of three years the company owing to bad seasons and strong competition by another company was carrying on business at a loss and was forced to sell its business to the other company. In order to carry out the sale, which was advised and carried through by MacEwan, it was necessary to go into voluntary liquidation. MacEwan who was a shareholder of the company voted for the resolutions. Later he sought to prove in the winding up of the company for damages for breach of the contract to employ him. Williams J said at p 750:

> *It was therefore an implied term of the agreement not that the company would carry on business under all circumstances, but that it would not by its own act or default incapacitate itself from carrying on business and would not do any voluntary act which would make it impossible that the business should be continued. If, however, the power of the company to carry on business is taken away by something for which the company is not responsible the agreement is not broken.*

He held that the company was not in breach of the contract.

The contract was discharged where the power of the company to carry on business was taken away by something for which the company was not responsible. The company could not continue its business by reason of losses. MacEwan himself advised the sale of the business to the other company and voted his shares to wind up the company. Upon any reasonable construction of the contract the parties could not have agreed that the contract was to continue in these circumstances where there was no more power to carry on any business and no output on which MacEwan`s commission was based.

In ***King v Michael Faraday & Partners Ltd*** the debtor was the managing director of a company under an agreement which guaranteed his appointment until 1941 but required him to devote his whole time to the work of the company and placed the usual restrictions upon him after he should leave the company. In 1933 judgment was obtained against him for some Â£34,000. To avoid proceedings upon this judgment the debtor assigned to the creditor absolutely certain life assurance policies which had a surrender value then of about Â£15,000 and also assigned to him Â£1,000 per annum to be paid out of his salary for ten years. His salary was then Â£3,000 per annum. Upon completion of these ten annual payments the judgment was to become satisfied. In 1938 after payments had been made for five years the company was obliged to reduce the debtor`s salary to Â£1,000 per annum and at about the same time a receiving order was made against the debtor. The trustee in bankruptcy allowed the debtor to retain his salary of Â£1,000 per annum for the maintenance of himself and his family. Atkinson J said at p 485:

> *... I do not want to go too much into authorities, but it seems to me that this case comes within **Metropolitan Water Board v Dick, Kerr & Co** [1918] AC 119, where Lord Dunedin said, at p 127:*

> *`... I shall content myself with one quotation from the opinion of one of the majority [in **Tamplin`s** case] [1916] 2 AC 397. Earl Loreburn points out that in all cases it must be said that there is an implied term of the contract which excuses the party, in the circumstances, from performing the contract, and then continues [p 404]: "It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted. "`*
>
> *I cannot help feeling that the only reasonable view here is that the condition on which that contract was made was that there should be a salary out of which the Â£1,000 should be paid, and a salary at least big enough to provide Â£1,000 and enough for the man to live on as well.*

The contract came to an end as regards the annual payment of Â£1,000.

In ***Re North Otago Dairy Co Ltd*** the contract was executory in respect of the mutal promises of both the employer and the agent in respect of the uncompleted term of three years. In ***King v Michael Faraday & Partners Ltd*** the continuing payment of the yearly sums became impossible but the debt was not discharged. The creditor proved for the balance in the bankruptcy. In both cases payment had been agreed to be made from a stated source which was no longer available. I am unable to see how these cases assist the defendants. In this case there is nothing further to be done by the bank. The borrower has taken the money. There is no agreement and no agreement has been alleged by either defendant that payment by either of them was to be made from any source.

In **British Movietonews Ld v London and District Cinemas Ld** [1952] AC 166 Viscount Simon said at p 185:

> *The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.*

and later at p 186:

> *But there are, of course, many other examples where the court has to put an interpretation on the agreement made, not with the result that the contract is brought to an end by frustration, but with the result that the contract goes on and continues to bind the parties according to its true construction.*

It is a question of construction of the contract whether the contract is brought to an end by frustration or continues to bind the parties.

I come now to the particulars of frustration alleged.

As regards Daewoo (Korea)

`On or about end 1997, the defendants were severely affected by the Asian financial crisis (`crisis`), which resulted in a sharp devaluation of the Korean Won against the United States Dollar. Such crisis was completely impossible to predict and outside the contemplation of the plaintiffs and the defendants at the time of the signing of the facility and the guarantee and hence created an event of frustration preventing the defendants from complying with their obligations under the facility and/or the guarantee.

Clause 1 of the guarantee provides that Daewoo (Korea) will pay OCBC on demand `all sums of moneys or liabilities which are now or shall hereafter from time to time be due or owing or shall remain unpaid to [OCBC]`. The obligation is in fact expressed much more comprehensively but this is sufficient for the present purpose. It is not disputed that it covers the claim now made against Daewoo (Korea).

Counsel has not pointed to any provisions of the guarantee relevant to the guarantor`s liability in the event of the `sharp devaluation of the Korean Won against the Unite States Dollar` alleged but cl 27 provides:

> *[Daewoo (Korea)`s] payment obligation hereunder shall be in the currency in which the aforesaid facilities are accorded or granted by [OCBC] to [Daewoo (Singapore)] (`stipulated currency`) and shall not be discharged by an amount paid in a currency other than the stipulated currency whether pursuant to a judgment or otherwise to the extent that the amount so paid on prompt conversion to the stipulated currency under normal banking procedures does not yield the amount in the stipulated currency.*

The stipulated currency is US Dollar. Daewoo (Korea) may pay in some other currency but the liability is only discharged to the extent of the amount in the stipulated currency on conversion. Any `loss` arising out of the conversion is to be borne by the guarantor and such `loss` will depend on the exchange rate and the exchange rate will vary from time to time. If there is a gain on conversion the benefit belongs exclusively to Daewoo (Korea).

Counsel has not demonstrated that the situation created by the sharp devaluation of the Korean Won is fundamentally different from that when the guarantee was given. As provided for in cl 27 the parties clearly contemplated changes in the exchange rate and all that has emerged as alleged by Daewoo (Korea) is the sharp devaluation. Changes in the exchange rate can be and are expected and the parties to a loan transaction and guarantee such as the bank, the borrower and the guarantor in this case enter into the transaction on the basis that they accept the risks associated with such changes.

In my judgment on the materials before the court the alleged sharp devaluation of the Korean Won against the US Dollar has not brought about a situation that is fundamentally different from that in which the guarantee was given. Nothing in the terms of the guarantee or of the underlying loan shows that the bank and the guarantor never agreed to be bound in the event of such devaluation as alleged or in the event of any fluctuation in the rate of exchange between the stipulated currency

(US Dollar) and any other currency.

`Further and/or in the alternative by reason of the government of the Republic of Korea`s policy guidelines and/or directives to Korean Chaebols including [Daewoo (Korea)] to reduce debt equity ratios from over 500% to 200% by the end of 1999 [Daewoo (Korea)] [was] faced with short term liquidity problems. `

Mr Lee Young Kwon the administration manager of Daewoo (Singapore) produced a copy of the government of Korea`s press release together with an English translation. The statement sets out among other things the `need to restructure five chaebol groups` and the `principles to apply`. One of these principles is the `faithful performance of five primary objectives` and one of these objectives is `financial structure improvement` by:

> *Inducing new money through sales of non-core businesses or issue of new shares focusing upon viable corporations within a chaebol in order to improve the financial structure.*
>
> *Through achieving the above, the average debt ratio to be improved down to the international level (200%) by the end of the year 1999.*

The statement does not evidence any guideline or directive to Daewoo (Korea) to reduce the debt to equity ratio to 200% as alleged. Reduction of the debt to equity ratio is a consequence (desirable and much hoped for no doubt) of carrying out a number of measures including sale of non-core businesses and raising new equity capital. The debt to equity ratio is also reduced by paying offthe debts or a combination ofthese measures.

There is no evidence that Daewoo (Korea) has attempted any of the measures. The statement was issued in 1998 and when the loan was granted and the guarantee given the situation created by the terms of the statement would already have been in place. There has been no change in the situation. The situation at the time when Daewoo (Korea) was called upon to pay under the guarantee was no different from that when the guarantee was given and it is no different today.

`On or about 25 June 1998, 210 Korean financial institutions entered into a Corporate Restructuring Accord (`the Accord`) to provide a framework for an out of court rehabilitationof companies in the Republic of Korea with financial difficulties. `

`On or about 26 August 1999, [Daewoo (Korea)] [was] placed under a corporate workout programme pursuant to the Accord. `

`By reason of the corporate workout programme pursuant to the Accord and with a view to complying with the government of the Republic of Korea`s policy guidelines and/or directives to reduce debt equity ratios to 200% by the end of 1999, [Daewoo (Korea)] [is] unable to pay [OCBC] for the entire period in which [Daewoo (Korea)] [is] under a corporate workout programme, such payment being impossible and/or contradictory to the terms and spirit of the corporate workout programme and the policy guidelines and/or directives given by the government of the Republic of Korea. `

Mr Kweon Soon Wook, themanager of the finance department of Daewoo (Singapore), produced a copy of the Accord together with an English translation. It appears to be an agreement entered into by financial institutions. Article 1 provides that the purpose of the agreement is `to promote the

soundness of the assets of the financial institutions by devising the improvement of corporate restructuring of lending institutions` and art 2 defines `corporate restructuring` as the `process by which to make sound the financial structure of the relevant company`. A `relevant company` is a debtor of a financial institution which it wishes to `engage in restructuring` under the terms of the agreement. I think `corporate restructuring of lending institutions` in art 1 refers to corporate restructuring of relevant companies by creditor financial institutions.

Daewoo (Korea)`s allegation is that on or about 26 August 1999 it was `placed under a corporate workout programme pursuant to the Accord`. Mr Kweon said in his affidavit that `in order to prevent a total collapse of the Daewoo Group a decision was made to enter into the workout programme`. Having regard to the terms of the Accord I think what is really alleged is that Daewoo (Korea) was `engaged` by its creditor financial institution in restructuring under the terms of the Accord. Daewoo (Korea) is required by its creditor financial institution to undertake `corporate restructuring`.

There is no evidence of any process of `corporate restructuring` that Daewoo (Korea) was `engaged` by its creditor financial institution to undertake or has undertaken and it is impossible to say that a fundamentally different situation has now unexpectedly emerged. The Accord was entered into in June 1998 and although Daewoo (Korea) was `engaged` in August 1999 it cannot be said that the situation whether different or not had emerged ***unexpectedly*** . It was a risk which Daewoo (Korea) must have expected since the Accord was entered into.

When the guarantee was given by Daewoo (Korea) the terms of the statement in the press release of the government of Korea were already in place. The Accord had already been entered into. I have considered the terms of the guarantee and the underlying loan and the circumstances prevailing when these transactions were entered into. Counsel has not shown how it can be said that on the true construction of the contractual arrangements between the parties they do not apply in the situation prevailing at the time when the guarantee was called upon or at any subsequent time. I am unable to see that any situation has emerged that is fundamentally different or that the parties never agreed to be bound in any such situation.

As regards Daewoo (Singapore)

`[Daewoo (Singapore] would further aver that at all material times it is a solvent company and a wholly owned subsidiary of [Daewoo (Korea)] and wholly dependent on [Daewoo (Korea)] for funds for its operations. `

`[Dawoo (Korea)] currently [holds] funds due to [Daewoo (Singapore)] and by reason of the above matters, [Daewoo (Korea)] [is]unable to effect payment to [Daewoo (Singapore)]and consequently [Daewoo (Singapore)] [is] discharged from further performance of the facility for the duration in which [Daewoo (Korea)] [is] involved in the said corporate workout programme. `

The case as pleaded as far as I can make out comes to this. Daewoo (Singapore) is entirely dependent on Daewoo (Korea) for funds. Daewoo (Korea) holds funds which are due to Daewoo (Singapore) and since Daewoo (Korea) cannot pay Daewoo (Singapore) because it is involved in the `corporate workout programme`, Daewoo (Singapore) is discharged from liability to repay money it has borrowed from OCBC. I should be surprised indeed if this is the law but counsel has not come up with any authorities to support it and I am content to say that this raises no reasonable or probable ground of defence. The evidence however is not that Daewoo (Korea) holds funds due to Daewoo (Singapore). Mr Kweon said that the US$7m was lent by Daewoo (Singapore) to Daewoo (Korea). This adds nothing to the defence. In any case there is no evidence that Daewoo (Korea) cannot pay to its

wholly owned subsidiary money which is due to it.

Finally it is alleged that the defendants are discharged `by reason of impossibility of performance and/or frustration in that any payment of any sum to the plaintiffs, whether principal or interest, while the defendants are under the or subject to the regime of the corporate workout programme pursuant to the Accord, would amount to undue preference in favour of the plaintiffs over other creditors`. The only evidence of this `undue preference` is Mr Kweon`s statement in his affidavit. He said:

> *`With [Daewoo (Korea)] participating in the Accord, [Daewoo (Korea)] [was] unable to repay the same pursuant to the said corporate workout programme. This would be considered an `undue preference` to [Daewoo (Singapore)] and/or [OCBC] as all creditors of [Daewoo (Korea)] should receive similar treatment. `*

The Accord contains no such provision.

Counsel was not able to assist as regards the `undue preference` alleged. Daewoo (Singapore) is a company incorporated in Singapore and carries on business in Singapore. Daewoo (Korea) is a corporation that is registered as a foreign company in Singapore and has a place of business or carries on business in Singapore. Neither of them is in liquidation in Singapore and there is no likelihood of their being in liquidation which will be deemed to have commenced at any time before down to the date of hearing of this appeal. There is no evidence as regards any foreign law that may be relevant and touching upon `undue preference`.

There is no issue or question in dispute that ought to be tried and there is no other reason for a trial of the claim or any part of it. There will be judgment for the bank as claimed.

Outcome:

Appealallowed.

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