Societe Generale v Statoil Asia Pacific Pte Ltd
[2000] SGHC 64

Case Number	: Suit 786/1999
Decision Date	: 20 April 2000
Tribunal/Court	: High Court
Coram	: S Rajendran J
Counsel Name(s)	: Sarjit Singh Gill SC with Suhaimi Lazim and Ng Yeow Khoon (Shook Lin & Bok) for the plaintiffs; Lawrence Quahe with S Suressh, Melanie Ho and Yeo Yen Ping (Harry Elias Partnership) for the defendants
Parties	: Societe Generale — Statoil Asia Pacific Pte Ltd

JUDGMENT:

Cur Adv Vult

1. The plaintiff, Societe Generale ("SOCGEN") is a banking corporation incorporated in France and having a branch office in Singapore. The defendant, Statoil Asia Pacific Pte Ltd ("STATOIL") is a Singapore incorporated company carrying on the business of selling petroleum and petroleum-related products. STATOIL is a wholly-owned subsidiary of Den Norske Stats Oljeselskap A.S. ("DNS") which is the national oil company of Norway. DNS (and STATOIL) had a strict corporate policy of entering into trades only on a secured basis. The other company that features in this trial is Siam United Services Public Co Ltd ("SUSCO"), a public-listed company in Thailand which is in the business of distributing petroleum products including gasoil through its own network of gas stations and through other dealers in Thailand.

2. SOCGEN, which had a good business relationship with DNS in Europe, had been attempting for some years, without success, through its Singapore branch, to extend its services to STATOIL. In early 1996, on learning that STATOIL's sales were being adversely affected by STATOIL's policy of trading only on a secured basis, SOCGEN offered what is termed as its Payment Confirmation with Invoice Discounting facility ("the facility") to STATOIL as a means of securing payments. The facility would be available only in respect of counterparties of STATOIL acceptable to SOCGEN.

3. As SOCGEN would confirm all payments that were due, STATOIL formed the view that this method of obtaining payments was sufficiently secure and agreed to try it out. The first counterparty of STATOIL accepted by SOCGEN under this method was a Thai company called Paktai Chueplerng Public Co Ltd ("Paktai"). The transactions concerning Paktai went through without incident. In July 1996, STATOIL asked SOCGEN to consider a similar arrangement in respect of SUSCO. SOCGEN undertook a credit evaluation of SUSCO and on 10 October 1996 informed STATOIL that SUSCO was acceptable.

4. It is convenient to now explain how the facility was meant to operate. When a shipment of gasoil was to be effected, SUSCO would give an irrevocable undertaking to SOCGEN that upon SOCGEN presenting to it the shipping documents, SUSCO would, on the due date under STATOIL's invoice, which was 180 days after the invoice date, pay to SOCGEN the amount under the invoice. This undertaking by SUSCO was termed the **Payment Undertaking**. SOCGEN would, upon receipt of the Payment Undertaking signed by SUSCO and the receipt of the shipping documents and commercial invoice from STATOIL, undertake, for a non-refundable upfront risk commission, to pay to STATOIL, not later than 7 days of the date payment is due, the payment due from SUSCO. This document was termed the Payment Confirmation. The Payment Confirmation, as a matter of legal analysis, was simply a guarantee.

5. The Payment Confirmation was coupled with an invoice discounting arrangement under which SOCGEN would, at a stipulated rate, discount STATOIL's invoice to SUSCO for a period of 150 days. Unfortunately, the scope the parties' obligations under the Invoice Discounting scheme, and in particular, the conditions, if any, under which the money discounted could be recovered by SOCGEN, were not precisely defined in the Payment Confirmation form, and this created some confusion which will become apparent later.

6. The facility forms initially used for the gasoil shipments to SUSCO were similar to the forms used in respect of Paktai. It would be useful to set out the terms of the Payment Confirmation form in full:

"We refer to the payment undertaking letter dated _____ issued by Siam United Services Public Co Ltd and covering shipment of _____ of GASOIL by vessel _____.

Unit Price : _____

Delivery Date : _____

We, Societe Generale Singapore Branch ('the Bank') hereby undertake to pay you, up to an amount of USD_____ not later than 7 working days after the due date the sum to you under the above-mentioned payment undertaking and upon receipt of your certified true copy by Statoil Asia Pacific Pte Ltd ('Statoil') of related documents including sales contract, bill of lading, invoice issued by Statoil specifying payment term not exceeding 180 days from Bill of Lading date and funds to be paid to account of Statoil with Societe Generale, Singapore Branch.

The Bank shall not be under any obligation or liability whatsoever in the event of failure by you to perform any of your obligations under the relevant contract for the shipment by you to Siam United Services Public Co Ltd of _____ ("Contract") and our guarantee herein shall become null and void if payment from Siam United Services Public Co Ltd is not made on due date because of a commercial dispute or for any other reasons whatsoever including without limitation, circumstances where the documents and/or drafts and/or their presentation thereof are not accepted by Siam United Services Public Co Ltd as being strictly in accordance with the Contract.

In consideration of our guarantee herein you hereby undertake:

i) not to accept any variation, change or amendment which could change the nature of our commitment herein whatsoever of the Contract without our prior written approval;

ii) to forward to us certified true copies by Statoil of relevant documents required under the Contract.

iii) to promptly pay to the Bank the confirmation as mentioned below.

In the event of the Bank making a payment under this guarantee, you hereby undertake:

a) promptly upon the receipt of our request to transfer and/or assign in

our favour all your rights, title and interests under the Payment Undertaking, the underlying Contract and all other relevant documents;

b) to do or procure to be done each and every act or thing and execute and procure the execution of each and every document which the Bank may from time to time require to be done or executed for the purpose of securing to the Bank the full benefit of the above assignment and/or transfer, including without limitation to take all steps and initiate proceedings in your name.

c) to promptly pay to the Bank any moneys received directly by you under the Payment Undertaking, to hold these moneys on trust for the Bank.

This guarantee is valid until _____ after which date our liability hereunder shall cease absolutely.

You shall pay us upfront a non-refundable risk commission of _____ per annum from date of payment undertaking to payment due date based on the invoice value. We will also cover you for the discounting of the proceeds at _____ per annum over SIBOR for 150 days from Bill of Lading date.

This letter is governed by and shall be construed in accordance with the laws of Singapore and you hereby irrevocably submit to the non-exclusive jurisdiction of the Singapore courts.

In the event you breach any of your obligations herein, the Bank shall be entitled to terminate this letter forthwith whereupon the Bank's liability hereunder shall immediately cease absolutely and at the Bank's request, you shall pay to the Bank on demand such amounts as may be necessary in the Bank's opinion to compensate the Bank for such breach."

This Payment Confirmation form was used by SOCGEN until May 1997. From then on, the two paragraphs after the space for the delivery date were amended to read as follows:

"We hereby confirm that at your request we have added our *silent confirmation* to the above Payment Undertaking. We therefore undertake to pay you the sum due to you under the Payment Undertaking up to the aggregate amount of USD_____ not later than 7 working days after the due date of the sum due to you under the Payment Undertaking and upon receipt of your certified true copy of related documents including sales contract, bill of lading, invoice issued by yourselves specifying payment term not exceeding 180 days from bill of lading date and showing funds to be paid to your account with Societe Generale, Singapore Branch, ***PROVIDED that*** *the Counterparty has failed to perform its payment obligations under the Payment Undertaking and such a failure i s* ***only and directly*** *due to the following circumstances*:

I) *the decision by or under the authority of any*

government having jurisdiction over the Counterparty to declare a moratorium on payment by the Counterparty due to political reasons; or

II) *the Counterparty has become* ***insolvent****, liquidated or wound-up*.

The Bank shall not be under any obligation or liability whatsoever in the event of failure by you to perform any of your obligations under the Payment Undertaking or any relevant contract for the shipment by you to the Counterparty and *our guarantee herein shall become null and void if payment from the Counterparty is not made on due date by reasons other than specified in (I) and (II) above*, a commercial dispute, circumstances where the documents and/or drafts and/or their presentation thereof are not accepted by the Counterparty as being strictly in accordance with the Payment Undertaking or the Contract terms or for any reasons whatsoever."

The words highlighted in italics reflect the material changes effected under the revision. I shall refer to the highlighted portion beginning with the words "*PROVIDED that*" in the first paragraph as "the proviso".

7. On 15 October 1996, STATOIL entered into a contract with SUSCO for regular shipments of gasoil over a stipulated term (the 1st contract). Payment was to be by means of the facility described above. The contract entered into was in the un-revised form, ie it did not include the proviso. When the term of the 1st contract expired, STATOIL, with the knowledge and concurrence of SOCGEN, entered into another term contract with SUSCO for the regular supply of gasoil from 1 May 1997 to 31 October 1997 (the 2nd contract). The same method of payment was to be used. However, the form of Payment Confirmation used was the revised form. On 9 October 1997, STATOIL, with the concurrence of SOCGEN, entered into a 3rd contract with SUSCO for the continued shipment of gasoil, on the existing payment terms, for a further term of one year commencing 1 November 1997.

8. Shipments from STATOIL to SUSCO under the 2nd contract began on 4 June 1997 and carried on until 11 October 1997. There were 12 shipments in all. The intervals between the shipments were somewhat erratic, but on average the time between each shipment was 11 days. During that period, SUSCO provided SOCGEN with 12 corresponding Payment Undertakings, one for each shipment. For the most part, the Payment Undertakings were issued by SUSCO a few days after shipment date. Payment under the first Payment Undertaking was due on 1 December 1997. Payment on the final Payment Undertaking was due on 7 April 1998. The due dates for the intervening 10 Payment Undertakings fell between these two dates. Upon receipt of each Payment Undertaking, SOCGEN issued a corresponding Payment Confirmation and also discounted the STATOIL invoice pertaining to that shipment.

9. On 3 November 1997, SOCGEN received a Payment Undertaking from SUSCO in respect of the first cargo of gasoil shipped under the 3rd contract. As per her usual practice, Miss Denise Tan, a Vice-President of SOCGEN, forwarded the request for confirmation and discounting to her supervisor, Mr Philippe Fournier, for his approval. Mr Fournier, however, informed Miss Tan that in view of the deteriorating state of the Thai economy, SOCGEN would no longer extend the facility to STATOIL in respect of STATOIL's shipments to SUSCO. This decision was relayed to STATOIL.

10. STATOIL was taken aback by this turn of events, particularly since STATOIL had so recently,

with SOCGEN's concurrence, entered into the 3rd contract with SUSCO on similar payment terms. In these proceedings, STATOIL had, at first, counterclaimed against SOCGEN for failing to honour its obligation to extend the facility to the 3rd contract. SOCGEN's defence to the counterclaim was that there was no committed line to SOCGEN in respect of the SUSCO transactions and as every Payment Confirmation was an independent contract entered into on a case-by-case basis, SOCGEN was at liberty, at any time, to unilaterally refuse to give its Payment Confirmation. It would appear from the fact that STATOIL withdrew its counterclaim that STATOIL accepted this line of defence.

Default by SUSCO.

11. As stated above, the due date for the first Payment Undertaking given in respect for the first shipment made under the 2nd contract was 1 December 1997. SUSCO, however, failed to effect the necessary payment to SOCGEN. On 3 December 1997, SOCGEN issued a letter of demand to SUSCO which read:

> "We refer to your Payment Undertaking dated 6 June 1997 ("the Payment Undertaking") issued by you in favour of ourselves and issued in respect of your purchase of 2,014.297 metric tonnes/15,063 barrels of gasoil from Statoil Asia Pacific Pte Ltd ("Statoil").
>
> We also refer to the Notice of Assignment given to you wherein you will note that Statoil has assigned to us all its rights, benefits and interests in the Payment Undertaking and the monies payable thereunder.
>
> Payment to us of US$390,583.59 (principal amount) plus interests under the Payment Undertaking was due and payable on 1 December 1997.
>
> We regret to inform you that as of today we have still not received the sum of US$390,583.59 (principal amount) plus interests which was due and payable on 1 December 1997.
>
> We hereby demand the payment to us the outstanding principal sum of US$390,583.59 plus interests calculated up to the date of final payment by **4 p.m., 4 December 1997.** Interest at 1% per annum above SIBOR continues to accrue on the said outstanding sum.
>
> If you fail to comply with this demand, we shall take such further action as we deem fit to recover all the outstanding sums and interests thereon due to us without further reference to you and all costs and expenses incurred thereon (including legal costs and expenses) shall be borne by you."

Not receiving any response, SOCGEN, on 5 December 1997, asked SUSCO to provide a written explanation for the reasons for the non-payment. There was still no response. On 15 December 1997, SOCGEN issued another letter of demand to SUSCO. This letter was necessitated by the fact that SUSCO had defaulted on its next Payment Undertaking, given on 1 July 1997, to pay a sum of US$351,632.97 on 12 December 1997. The second letter of demand was also ignored by SUSCO. To-date, SUSCO has made no payment to SOCGEN either in respect of its obligations under its Payment Undertakings that were the subject of the two letters of demand or any of the remaining Payment Undertakings relating to subsequent shipments.

12. When SOCGEN backed out of the arrangement, there was communication between SUSCO and

STATOIL on how STATOIL could nevertheless continue to supply gasoil to SUSCO under its 3rd contract. On 21 November 1997, Mr Fournier informed Mr Bertel verland (from DNS Norway) that SOCGEN would consider renewing the line if SUSCO could come up with tangible security in the form of a standby letter of credit from an acceptable bank to cover SOCGEN's exposure. Mr verland flew to Bangkok on 25 November 1997 and relayed SOCGEN's suggestion to SUSCO. Mr verland was not able to obtain any commitment from SUSCO to open such letter of credit. Instead, SUSCO requested Mr verland to speak to SOCGEN to roll over the outstanding balance to the next due date. This was reflected in a letter from SUSCO to STATOIL dated 8 December 1997:

> "According to our contract dated 9 October 1997 StatOil has committed to supply the oil to SUSCO and the terms of payment set at 6 months with interest at 1% above SIBOR, and for SUSCO to make payment directly to the Societe Generale Bank. Due to the recent Asian economic recession, Societe Generale Bank has been unable to continue the line of credit for StatOil to supply oil to SUSCO. This has had substantial impact on SUSCO since our contract with StatOil should continue until April 1998, as stipulated in the above mentioned contract.
>
> With reference to our meeting on Tuesday 25 November 1997 in order to find the solution to the problem mentioned above, you understood the problem and would like to continue to supply SUSCO's orders according to the terms and conditions as stated in our contract with the condition that the amount should not exceed each due payment and the outstanding balance *would be rolled over to the following due dates*.
>
> Please would you kindly let me know if you have been able to make such arrangements as soon as possible.
>
> We look forward to receiving your urgent response."

A copy of this letter was sent to SOCGEN. As will be seen later, SOCGEN relied on this letter as indicative that SUSCO did not honour its Payment Undertakings to SOCGEN, not because SUSCO was insolvent but because STATOIL had breached its contract with SUSCO.

13. On 10 December 1997, Mr verland broached the subject of rolling over SUSCO's outstanding balance with SOCGEN. SOCGEN, however, was not willing to consider any proposals from SUSCO until SUSCO paid up all outstanding sums under SUSCO's Payment Undertakings. Mr verland wrote to SUSCO on 12 December 1997 giving the following account of his discussions with SOCGEN:

> "First of all, let me thank you for all hospitality given by yourselves and your colleagues in connection with our meetings in Bangkok on Tuesday 25 November 1997. I am now back in Singapore and can therefore attend to our credit issues again.
>
> As mentioned in your fax dated 8 December 1997, it is correct that I would bring forward your proposal to Societe Generale (SocGen). I was in contact with SocGen (both Denise Tan and Philippe Fournier) last week on Thursday 4 December when I was in Norway, and I also tried to get in touch with you the same day.
>
> SocGen did not formally respond to your proposal because, as they explained, SUSCO were in a default situation with the bank by not making the payment that was due on 1 December 1997. According to SocGen, the default on payment to them constitutes a breach of contract and therefore make it impossible for them to consider new exposure. *It is therefore important in order to progress matters that immediate payment is remitted for the unpaid cargo and for all subsequent cargoes already shipped whenever they become due*.

Therefore, as mentioned in our meeting on November 25, it is suggested that all three parties involved gather for an urgent meeting in Singapore in order to discuss the situation.

If you concur with this approach, please advise me urgently so we can arrange for a suitable date and venue."

SUSCO's responded to that letter on 16 December 1997. A copy of the response was sent to SOCGEN. In the response SUSCO stated:

> "Thank you for your fax of 10 December 1997, responding to our letter of 8 December 1997. As you know the *economic situation has caused serious liquidity problems for companies in Thailand*. However, according to our contract dated 9 October 1997 StatOil has committed to supply the oil to SUSCO and the terms of payment set at 6 months with interest at 1% above SIBOR, and for SUSCO to make payment directly to the Societe Generale Bank. *Because of the recent Asian economic recession, Societe Generale Bank has been unable to continue the line of credit for StatOil to supply oil to SUSCO causing StatOil to default on their commitment for supply. This has had a substantial negative impact on SUSCO since we have made our operation plan based on StatOil supply to be continued until April 1998, as stipulated in the above mentioned contract*.
>
> If StatOil cannot continue with their arrangements with Societe Generale for a further commitment on their funding then other alternatives should be sought. In the event that further funding cannot be achieved from other sources may we suggest that StatOil provide their own funding support. In this way StatOil would be able to continue their commitment for supply of oil to SUSCO according to the terms and conditions stated in our contract. SUSCO would then make due payments, according to the terms suggested in our letter of 8 December 1997, until the debt with Societe Generale has been cleared and subsequent due payments would be made directly to StatOil.
>
> Please would you kindly let me know as soon as possible whether such arrangements will be made.
>
> We look forward to receiving your urgent response."

SOCGEN also relied on this letter as indicating that SUSCO's default under the Payment Undertaking was attributable to STATOIL's breach of its obligations to SUSCO under the 3rd contract.

14. On 19 December 1997, SOCGEN wrote to STATOIL stating in effect, that since the reason SUSCO had not honoured its Payment Undertakings to SOCGEN because STATOIL had stopped shipments under the 3rd Contract, SOCGEN was not under any liability to STATOIL under its Payment Confirmations. The letter stated:

> "We understand from the letters dated 8 December 1997 and 16 December 1997 from SUSCO to yourselves (copied by SUSCO to ourselves) that you have stopped supplying SUSCO with oil pursuant to your contract with SUSCO dated 9 October 1997 *and for that reason*, SUSCO has delayed payment on the Payment Undertakings which fell due on 1 December 1997 and 12 December 1997.
>
> Please note that our obligations under the various Payment Confirmations extend to the failure by

SUSCO to perform its payment obligations under the Payment Undertakings and that such failure is only and directly due to the circumstances specified in paragraphs (I) and (II) of the Payment Confirmations.

Please also note that we are not under any obligations or liability whatsoever in the event of failure by you to perform any of your contractual obligations under the Payment Confirmations or any relevant contract for the shipment by you to SUSCO and that our *Payment Confirmations become null and void if payment from SUSCO is not made on due date by reasons other than as specified in paragraphs (I) and (II) of the Payment Confirmations*.

We therefore reserve all our rights against yourselves under the terms and conditions of the Payment Confirmations."

The reference in the above letter to the Payment Confirmation becoming null and void if payment from SUSCO was not made on the due date by reasons specified in paragraphs (I) and (II) of the Payment Confirmations is a reference to the proviso that was included in all Payment Confirmations when the form was revised by SOCGEN in May 1997.

15. Although the proviso introduced a substantial limitation to SOCGEN's liability under the Payment Confirmation, SOCGEN had, at the time it revised the form, not specifically drawn the revision to the attention of STATOIL. STATOIL claimed that they were not aware that SOCGEN had, from May 1997, inserted the proviso into the Payment Confirmation form. It was STATOIL's original case that it was never a term that SOCGEN's liability under the Payment Confirmation would be so limited.

16. SOCGEN did not deny that it had not specifically drawn STATOIL's attention to the modifications effected to the form in May 1997. SOCGEN's explanation for this omission, as given by Miss Tan, was that from the very inception it had been explained to STATOIL, several times, that the risks that SOCGEN covered under its guarantee were insolvency and political risks. It was Miss Tan's evidence that since STATOIL had been informed so often of this limitation, it was not necessary, when SOCGEN revised its forms, to draw STATOIL's attention to the amendments. In her words: "the revision merely ensured that the documentation would now accurately reflect SOCGEN's agreement with STATOIL".

17. The fact that SOCGEN's liability to pay STATOIL under its Payment Confirmations was limited to situations where SUSCO's default was "only and directly" due to the two circumstances described in the proviso was, as Miss Tan readily agreed, an important matter. If it had indeed been a term of the agreement from the very beginning, one would have expected that there would have been some reference thereto, if not in the original Payment Confirmation form, then at least in the correspondence between the parties at that time. The absence of any such reference in the original form or in the correspondence supports STATOIL's denial that there had been any such limitation.

18. STATOIL's claim of ignorance of the limitations was, however, complicated by the fact that STATOIL had signed its acceptance of the terms and conditions in the revised form, not just once or twice, but in all the Payment Confirmations issued from May 1997 onwards. In the light of this difficulty, Counsel for STATOIL, Mr Lawrence Quah, indicated to the court that STATOIL would proceed on the basis that they had in fact accepted the amended terms. I therefore do not have to delve further into the matter but I would, in passing, say that SOCGEN, at least as a matter of commercial integrity and etiquette, should have drawn STATOIL's attention to the somewhat substantive amendments that they were making to their routine documentation. The officers of SOCGEN, on their part, should not have been so ready to sign the Payment Confirmations on the assumption that SOCGEN would not have amended its standard form without prior notice.

The Claim.

19. The total amount paid by SOCGEN to STATOIL on the 12 discounted invoices was US$4,408,599.73. In May 1999, SOCGEN commenced this present suit against STATOIL claiming the return of the US$4,408,599.73. The basis of the claim was that SOCGEN had a right of recourse against STATOIL for return of the monies paid under the Invoice Discounting scheme if two conditions, namely:

(a) SUSCO fails in its obligations to pay under their Payment Undertakings; and

(b) SOCGEN's obligations under the guarantee contained in the Payment Confirmation was not triggered;

were fulfilled.

20. As I indicated earlier, the conditions under which payments were made to STATOIL under the Invoice Discounting scheme were not set out in the Payment Confirmation and Invoice Discounting form. STATOIL's initial stance taken in their Defence was that the Invoice Discounting scheme was provided on a without recourse basis and therefore SOCGEN had no right to recover the monies paid under the discounted invoices under any circumstances. However, during the trial, STATOIL abandoned that position and instead pleaded (vide paragraph 13 of the amended Defence filed on 16 November 1999) as follows:

"…The Defendant avers that the Payment Confirmation with Invoice Discounting service, inclusive of the invoice discounting thereunder, was provided on an unconditional *without recourse* basis subject to the Two Provisos".

The last five underlined words were additions to the original Defence. In view of this amended plea, the question whether payments made under the Invoice Discounting scheme was or was not on a without recourse basis merged into the question whether SOCGEN was liable to STATOIL under the guarantee contained in the Payment Confirmation.

21. Given this new position by STATOIL, the main issue in this case is whether SUSCO was insolvent during the relevant period (which is 1 December 1997 to 7 April 1998) and, if so, whether the failure by SUSCO to pay the amounts due to SOCGEN under SUSCO's Payment Undertakings was, to use the words of the proviso "only and directly" due to SUSCO having become insolvent. SOCGEN's case was that SUSCO was not insolvent when they defaulted on their Payment Undertakings and that, in any event, the direct reason for SUSCO's failure to pay was not its insolvency but the commercial dispute between SUSCO and STATOIL arising from STATOIL's breach of its 3rd contract. It was submitted on behalf of SOCGEN that, even if SUSCO was insolvent, the failure to pay was not "only and directly" due to the insolvency.

22. STATOIL's position was that there was no commercial dispute between it and SUSCO and that the direct and only reason SUSCO defaulted was because SUSCO, at that time, in common with numerous other companies in the region, had serious liquidity problems and was unable to pay its debt because of its insolvency. SOCGEN was therefore, under the Payment Confirmations, liable to STATOIL for the amounts guaranteed and had no right of recourse to the monies paid under the discounted invoices.

23. SOCGEN also took a further position that as no one from SUSCO was in court to testify on SUSCO's financial affairs at the relevant time, this court was not in a position to make a finding of fact adverse to SUSCO that SUSCO was insolvent. The short answer to that submission is that the central question before me is one of construction of the contract entered into between SOCGEN and SUSCO. A determination on the meaning of the word "insolvent" used in that contract and whether, on the evidence adduced, SUSCO was solvent or insolvent within that meaning, were matters clearly within this court's purview. The court cannot refuse to address the matter simply because SUSCO was not before the court. In any event, as SUSCO was not a party to these proceedings, the finding of this court on the insolvency or otherwise of SUSCO would not affect SUSCO in any way.

Insolvency

24. I now turn to consider SUSCO's solvency at the relevant time. The first question that arises is: what is the meaning to be ascribed to the word "insolvent" in the context of the proviso?

25. For SOCGEN, Mr Singh drew attention to the case of *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161. In that case, Grimberg J had rejected an argument raised that a company could only be said to be solvent if it was able to pay its debts "out of its own money". Mr Singh also cited the following passage from the judgment of Chao Hick Tin JC (as he then was) in *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393 at 400:

> "Proof that a creditor`s debt has not been paid per se does not establish an inability to pay debts within the meaning of s 254(2)(c). The conclusion of insolvency, generally speaking, ought not to be drawn simply from evidence of a temporary lack of liquidity."

Mr Singh relied on that passage as establishing that inability to meet current demands was indicative only of a temporary lack of liquidity and was not a sufficient circumstance from which to conclude that the company was insolvent and that the true test was whether the total liabilities of the company exceeded the total assets of the company.

26. For STATOIL, Mr Quahe, in support of the proposition he canvassed that insolvency would be established if it can be shown that the company was unable to meet its current liabilities from its current assets, cited the decision of the Court of Appeal in *Re Sunshine Securites (Pte) Ltd* [1978] 1 MLJ 57 (CA). In that case, the company had failed to respond to a statutory demand (under s 218(2)(a) of the then Companies Act) issued by the petitioner. The trial judge found the company to be insolvent and ordered it to be wound-up. The company appealed and one of the grounds was that the learned judge erred in fact and in law in finding that "the company was clearly insolvent and unable to pay its debts" when there was evidence on record that the company held a property the value of which was far in excess of the debt due to the petitioner. In dismissing the appeal, Rajah J, giving the decision of the Court of Appeal, said:

> "With regard to the first appellant's contention that the learned judge was wrong in finding that the company was unable to pay its debts, it is to be observed that the petition is based on the company's failure to pay or give security for the debt of which a statutory demand has been made. The law is clear and is as in *Buckley* on the Companies Acts, 13th Edition, at page 460 as follows:-
>
> > 'The particular indications of insolvency mentioned in paragraphs (a), (b) and (c) are all instances of *commercial insolvency*, that is of the company

being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound; this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.' "

A similar approach was adopted by the Privy Council (in an appeal from Singapore) in the case of *Malayan Plant (Pte) Ltd v Moscow Naroday Bank Ltd* [1980] 2 MLJ 53.

27. In Mcpherson's *The Law of Company Liquidation*, 3rd Ed, the learned author states at page 54:

"The phrase 'unable to pay its debts' which appears in s 364(2)(c) (the equivalent of our s 254(2)(c)) is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning of the phrase is insolvency in the commercial sense – that is, inability to meet current demands, irrespective of whether the company is possessed of assets which, if realized, would enable it to discharge its liabilities in full.

From this it follows that insolvency in this form is principally a question of fact, and one which may be established in any number of ways."

This passage was adopted by Chao Hick Tin JC in *Re Sanpete Builders (S) Pte Ltd*. Mr Quahe relied on *Re Sanpete* and on the passage in Mcpherson in further support of his submission that inability to meet current demands was sufficient evidence of insolvency.

28. Mr Quahe also submitted that as SUSCO had, to-date, failed to respond to the two formal letters of demand issued by SOCGEN on 3 December 1997 and on 15 December 1997, a presumption arose under s 351(2)(a) of the Companies Act (which is identical to s 254(2) except that it applies to an unregistered company) that SUSCO was unable to pay its debts and was therefore insolvent.

29. In response, Mr Singh submitted that in the two letters of demand: (i) SUSCO was not given the statutory period of 3 weeks to make payment of the sum demanded; (ii) there was no warning to SUSCO of an impending winding-up petition in the event that the plaintiff's demand is not met; and (iii) there was no reference to section 351 of the Companies Act in the notice and consequently the presumption under s 351(2)(a) could not arise. In support of this submission, Mr Singh relied on the Malaysian cases of *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108; *Re Beauty Word Enterprise Sdn Bhd* [1997] CSLR XX [6094] and *Hongkong and Shanghai Banking Corpn Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370.

30. The cases cited by Mr Singh were reviewed by the Supreme Court of Malaysia in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 and the court took the view that the 3-week period was not a period that needed to be specified in the notice as the period within which the demand was to be satisfied but that it referred to the period of neglect by the debtor to pay the debt after receipt of the formal notice. To quote from the judgment:

"In other words, the *three weeks refer to the period of neglect to pay before the said*

presumption of inability to pay debts arises under the said section, and is not a requirement relating to the notice of demand itself."

Item (i) of Mr Singh's list of non-compliance was therefore not sustainable. As for items (ii) and (iii), whilst there is some references in the cases cited that it is usual for these matters to be included in the notice, s 254(2)(a) does not in terms contain any such requirement.

31. An analysis of the authorities under s 254(2)(a) and s 351(2)(a) of the Companies Act can, however, be only of limited assistance in resolving the issues in this case. Here we are not concerned with the winding-up of a company under the provisions of the Companies Act. What we are concerned with is the meaning to be ascribed to the word "insolvent" as used in the Payment Undertaking entered into between STATOIL and SOCGEN. That would be purely a matter of construing that word in the context of the agreement. However, in construing a word such as "insolvent" in a commercial arrangement, the broad context in which the word is generally understood and used, would be a factor. To that extent, the fact that a company that continues to default on its debt after a formal demand has been made can be wound up on grounds of insolvency, is relevant. As stated by R.M. Goode in *"The Concept of Corporate Solvency"*:

"Where a company defaults in payment of an undisputed debt after demand has been made, that is sufficient evidence that it is unable to pay its debts as they fall due, and if it persists in its failure to pay it will be taken to be unable to pay its debts even if it in fact it appears to be solvent. This salutary rule reflects the view that a company which is able to pay an undisputed debt and chooses not to do so has only itself to blame if the inference is drawn that it is not able to pay."

32. Considering the factual matrix in which the contract between STATOIL and SOCGEN was entered into, I accept the submission of Mr Quahe that what the parties intended to cover by the use of the word "insolvent" in the Payment Undertaking was commercial insolvency in the sense used by Mcpherson (and Buckley) in the passages above quoted, namely, an inability to meet current demands irrespective of whether the company was possessed of assets which, if realized, would enable it to discharge its liabilities in full. I would also, for the purposes of this case, adopt what Mcpherson stated in the next paragraph of the passage from his book quoted above, namely:

"From this it follows that insolvency in this form is principally a question of fact, and one which may be established in any number of ways."

If, on the evidence, it is established that SUSCO was in fact insolvent (in that commercial sense), then the further question would arise whether the failure by SUSCO to pay the amounts due under its Payment Undertakings to SOCGEN were due solely to its insolvency.

Evidence of insolvency

33. SOCGEN, in support of its claim that SUSCO was not insolvent (ie solvent), relied on the expert evidence of Dr Virach Aphimeteetamrong ("Dr Virach"), the Dean of the Faculty of Commerce and Accountancy of the Chulalongkorn University in Thailand. Dr Virach was an authorised auditor and a member of the Institute of Certified Accountants and Auditors of Thailand from 1967. He based his view on a study of (i) audited financial statements of SUSCO for the years ended 31 December 1997 and 1996; 31 December 1998 and 1997; (ii) audited financial statements of SUSCO for the years ended 31 December 1998 and 1997; and (iii) the interim financial statements of SUSCO for the first

quarter of 1999 and 1998 and concluded that during the relevant period (1 December 1997 to 7 April 1998), SUSCO was solvent.

34. It is relevant to note that, at the very beginning of his report, Dr Virach stated:

> "I must state at the outset that the period in respect of which this opinion relates to coincided with the Thai economic crisis which began in July 1997. During the crisis, a lot of companies in Thailand experienced financial difficulties brought about by the collapse of financial institutions as well as the devaluation of the Thai Baht."
>
> In his report Dr Virach accepted that the inability of a company to pay its debts when they are due and payable was one of the criteria that could be applied in determining whether a company was insolvent. He, however, went on to say that that was not the only criterion and that taking into account all relevant criteria, namely:
>
> (a) Examination of the cash flow of the company;
>
> (b) Current ratio;
>
> (c) Debt to equity ratio; and
>
> (d) Total assets to total liability ratio.
>
> SUSCO was not insolvent at the relevant time.

35. I will not here set out the details of the analysis Dr Virach made under each of these heads. I would, however, highlight the following:

> (1) The current ratio of SUSCO for the year ended 31 December 1997 and for the first quarter of 1998 were well below one. Dr Virach conceded that a current ratio of less than one indicated that the company would have difficulties meeting its current liabilities as and when they fell due. He, however, discounted that possibility by emphasising that even where the ratio is below one, the company may be able to make arrangements with its bankers and other creditors for indulgence to be granted.
>
> (2) After analysing the cash flow of the company, Dr Virach again adverted to the "need for continued support from the banks and its major shareholders."
>
> (3) Dr Virach found that the total assets value of SUSCO, based on book value, exceeded its total liabilities.
>
> (4) Dr Virach appears not to have factored into his consideration the foreign exchange crisis in Thailand and in the region and the effects of the crisis on SUSCO.

36. STATOIL, on its part, called John Malcolm Perrins, a chartered accountant and a partner in the Financial Advisory Services Department of Pricewaterhouse Coopers FAS Ltd in Bangkok, as its expert to testify on the financial health of SUSCO. Mr Perrins had specialised in insolvency and corporate re-construction and recovery services since 1974. In conducting his review of the finances of SUSCO, Mr Perrins looked at the audited financial statements of SUSCO as at 31 December 1997, 31 March 1998 and as at 31 December 1998.

37. The approach that Mr Perrins took, as stated in the commencement of his report, was as

follows:

> "From an insolvency practitioners viewpoint, I consider a company is solvent if, the company is able to pay all its debts, as and when they become due and payable.
>
> A company which is not solvent must be insolvent.
>
> The issue of whether a company is able to pay its debts when they become due and payable is subjective and may be determined by reference to a number of factors including, but not limited to:
>
> (a) available cash balances;
>
> (b) total assets compared to total liabilities;
>
> (c) current assets compared to current liabilities (current ratio);
>
> (d) whether creditors are being paid in accordance with normal trading terms; and
>
> (e) in the absence of immediate cash resources, the availability of alternative sources of funding."

Mr Perrins noted that the quantum of total assets (taken at book value) exceeded the quantum of total liabilities. He, however, took the view that for solvency purposes (ie ability to pay debts as and when they fell due) it was more relevant to consider the current ratio.

38. Mr Perrins found a deterioration in the current ratio which in his view indicated that

> "… SUSCO will likely have experienced severe difficulty in paying its debts as and when due in the period 1 December 1997 to 7 April 1998."

In this respect, Mr Perrins's conclusion was similar to that of Dr Virach except that Mr Perrins did not take into account possibilities of creditor and shareholder support which may help SUSCO tide over its difficulties. Mr Perrins also noted that even before taking into consideration losses resulting from the floating of the Baht in July 1997, SUSCO, in most quarters throughout 1997 and 1998, recorded loss from operations.

39. Mr Perrins touched in some detail on the detrimental effect on SUSCO of foreign exchange movements during that period. He pointed out that the floating of the Baht in July 1997 produced, over the succeeding 8 months to February 1998, significant movements in its value against major world currencies and particularly against the US dollar. This, he stated, would have had a severe adverse effect on SUSCO. To quote from his report:

> > "The Baht rate per US dollar moved from 25.8 prior to the float, to 47.6 at 31 December 1997 and a high of 55 in late January 1998. The devaluation has had material adverse effects on the level of foreign currency denominated liabilities of companies in Thailand, and substantially increased the effective cost of sales in trading companies which rely on imported products. The impact is enhanced if revenues of the organisation are domestically sourced. SUSCO is one such organisation. The impact of the devaluation of the Baht to SUSCO would have included the following:

- US dollar borrowings of USD 7.6 million are recorded in the balance sheet of SUSSO at 31 December 1997. The Baht equivalent of these loans increased from approximately Baht 196 million at 30 June 1997 to approximately Baht 361 million at 31 December 1997, an increase of approximately 84%. Related interest payments would have increased proportionaly;

- The purchases of oil from STATOIL were denominated in US dollars, with payments due 180 days after shipment. Accordingly payments due to be made in the period 1 December 1997 to 7 April 1998 would relate to shipments made 180 days earlier, during the period 1 June 1997 to 7 October 1997. Attached as Annexure '5' is a schedule indicating movements in the exchange rate during these periods. Accordingly the liability accruing by SUSCO for its purchase during the period June to October 1997 would in Baht terms have increased substantially by the time the payments were due to be made in the period December 1997 to April 1998.

The impact of the above on a business such as SUSCO's whose revenues are substantially Baht denominated would have been severe."

Mr Perrins concluded at the end of his report that SUSCO was insolvent during the relevant period (1 December 1997 to 7 April 1998). He based his view on the following factors:

(a) It did not pay its obligations to SOCGEN as and when due during the period, and has still not paid these debts;

(b) It had other liabilities that were disclosed as being overdue during the period;

(c) It had a severe deficiency in current assets compared with current liabilities;

(d) It was incurring operating losses during the period."

40. Mr Perrins's approach to what constitutes insolvency was similar to that taken by the Court of Appeal in *Re Sunshine Securities* and would fall within what Mcpherson in the passage I have referred to earlier termed "commercial insolvency". Dr Virach gave more weight to the ratio of total assets to total liabilities. To adopt Dr Virach's approach would, in my view, place too high a burden on STATOIL and would not have been what was reasonably in the contemplation of the parties when the Payment Undertakings were entered into. Further, Dr Virach's assertions that the shareholders, bankers and other creditors of SUSCO would grant indulgence to SUSCO in coping with the financial crisis that SUSCO was facing can, in the absence of direct evidence, be treated only as conjecture. I therefore reject Dr Virach's testimony that SUSCO was solvent and had no difficulty in accepting the evidence of Mr Perrins that it was more than likely that SUSCO was insolvent at the relevant time.

Was insolvency the only reason for the default?

41. In view of the very stringent conditions that SOCGEN introduced into the Payment Confirmations in May 1997, SOCGEN would be liable to STATOIL under the Payment Confirmations if, and only if, the failure to pay was "only and directly" due to the insolvency of SUSCO. When SOCGEN suddenly withdrew the facility, STATOIL could no longer offer that method of effecting payments to

SUSCO. To that extent STATOIL was unable to honour its commitments to SUSCO. SOCGEN argued that this inability of SUSCO to honour the terms agreed to in the 3rd contract was the reason, or partly the reason, why SUSCO failed to honour its Payment Undertakings to SOCGEN. It is therefore necessary to consider if, despite SUSCO being insolvent at the relevant time, the reason or part of the reason why SUSCO failed to pay was because of a commercial dispute between SUSCO and STATOIL over the terms of the 3rd contract.

42. The best way for SOCGEN to prove this claim would have been to get someone from SUSCO to testify. SOCGEN was, however, unable to get any assistance from SUSCO. SUSCO did not even respond to SOCGEN's letter to them of 5 December 1997 asking for a written explanation for the non-payment. SOCGEN therefore had to rely on whatever material that they could find in the correspondence between SUSCO and STATOIL to substantiate their claim.

43. Looking through the correspondence (which I have mostly set out in the earlier part of this judgment), it appears to me that whilst SUSCO was upset by the fact that STATOIL, in view of SOCGEN having withdrawn its facility, was not able to extend to them the payment terms envisaged under the 3rd contract, SUSCO did not as a result of this become acrimonious towards STATOIL. To the contrary, SUSCO admitted that "the economic situation has caused serious liquidity problems for companies in Thailand" and had (through STATOIL) even asked SOCGEN to roll over the outstandings to the next due date. Not getting a positive response from SOCGEN, SUSCO had discussions with STATOIL to vary the terms of the 3rd contract. STATOIL, in these re-negotiations, was prepared to accommodate SUSCO by reducing its premium if SUSCO could arrange payments by letters of credit. SUSCO was, however, unable to get its bankers to issue such credits (no doubt because of its critical financial situation at that time). It is relevant to note that when the re-negotiations were unsuccessful, SUSCO did not insist on holding STATOIL to the terms of the 3rd contract but instead cancelled a shipment of gasoil that was due to be shipped to it by STATOIL and thereafter gave no further shipping instructions. It would, in the circumstances, appear that SUSCO had decided not to insist on its contractual rights but opted to treat the 3rd contract as cancelled.

44. On the evidence before me, I am not persuaded that SUSCO's failure to make payments to SOCGEN under its Payment Undertakings was due, in any way, to any commercial dispute between SUSCO and STATOIL. It seems to me that the direct and only reason that SUSCO failed to pay was because SUSCO was, at that time, insolvent.

45. In the light of the above findings, I dismiss the plaintiffs' claim with costs.

S. RAJENDRAN

Judge