Re Tararone Investments Pte Ltd
[2001] SGHC 37

Case Number : OP 16/2000

Decision Date : 28 February 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Chan Kia Pheng (Khattar Wong & Partners) for the applicants; Ronald Choo (Rajah & Tann) for the respondents

Parties : —

Credit and Security – Charges – Construction – Charge to secure third party's banking facilities – Whether charge secures debts incurred after termination of facilities

: This was an application by The Development Bank of Singapore Ltd (`DBS`) for leave to enforce a charge over money in a fixed deposit account maintained by Tararone Investments Pte Ltd (`Tararone`) with DBS. The charge was created on 18 March 1998 to secure Sogo Department Stores Pte Ltd`s (`Sogo`) debt to DBS. At the time when the charge was created Sogo owed DBS $18m. Under a facility letter dated 4 March 1998 Sogo agreed to reduce its indebtedness under a schedule of repayment which provided a payment schedule to discharge the debt by January 2001. Sogo and Tararone were both placed under interim judicial management on 19 July 2000. On 15 July 2000 DBS, through their solicitors, terminated the facilities to Sogo and demanded payment of the sum of $365,873.87 from Sogo as well as Tararone. Tararone had specifically been notified by DBS that they had terminated the facilities under the facility letter of 4 March 1998. On 17 July 2000 Mr Takeshi Tsujita, writing as the general manager of Sogo, told DBS that Sogo had not defaulted in its payments and that they would therefore hold DBS responsible if the bank dishonoured any of their cheques. This prompted a reply from DBS the next day (18 July), stating that by reason of the termination and recall of the banking facilities, the bank would not honour cheques issued by Sogo. However, in the very next paragraph of their letter DBS stated that:

> *However, without prejudice to the Letters of Demand and while reserving all our rights flowing from the termination and/or recall of the banking facilities, for the duration of the notice period under the said Letters of Demand ending at the close of business on 22 July 2000 we will subject to the following continue at our absolute discretion to honour specific cheques drawn on the loan accounts as well as permit certain deductions from such accounts which have now been terminated and/or recalled:*
>
> *(1) the said deductions or the amount drawn in these cheques do not result in the total outstanding due under the banking facilities from you exceeding the amount of security held by us.*

In the meantime, on 17 July, DBS paid out on a cheque drawn by Sogo in the sum of $2.5m from their current account with DBS. This brought their total debt to $2,794,411.42 as at 19 July 2000.

This present application by DBS was resisted by the judicial managers of Tararone. The judicial managers were of the view that DBS was entitled to only $365,873.87. It was not disputed that the sole issue before me concerned the construction of the charge - whether it secured the liabilities of Sogo after 15 July 2000. DBS took the position that the charge covered `all monies and liabilities

which may be owing to [them] from time to time` and was not subject to payment under the facility letter alone. This term was taken from cl 1(c) of the facility letter of 4 March 1998. Mr Chan on behalf of DBS therefore contended that the bank was entitled to the money charged up to the limit at the time, which was (under the repayment schedule), $3m. I do not accept this contention. The phrase relied upon by Mr Chan was taken out of context. When documents such as the charge and the facility letter are to be construed, the entire document must be examined to understand what it is the parties have created. In this case, the facility letter of 4 March 1998 was a specific overdraft facility with a limit of $18m. It does not say so explicitly but it was obvious from the wording of cl 1(b) and the repayment schedule that by the time the facility letter was written Sogo was already indebted to DBS by $18m. The facility letter was thus an offer to invite Sogo to accept a scheduled repayment schedule upon the terms set out in the letter. Those terms included the provision of security either in the form of a corporate guarantee or a fixed deposit of $18m. In the event, it was the latter that was chosen. Under the terms, the pledgor of the security was permitted to withdraw sums from the fixed deposit equivalent to the sums paid under the repayment schedule. In this way, by January 2001 the entire debt of $18m would be extinguished and the security of $18m likewise released and reduced in equal measure and approximate to the reduction of the debt. Clause 1(c) provided the context in which the security was created. It stated as follows: `The above facility together with all monies and liabilities which may be owing to the Bank from time to time shall be secured by a Fixed Deposit of S$18m`. Thus, the phrase `all monies and liabilities which may be owing to the Bank from time to time` must relate to ancillary debts such as interests and costs arising under the facility. It cannot mean any money or liability outside the facility. If that was the intention, it was not revealed in the words and context of the letter. I now turn to the wording of the charge itself. It was not disputed by DBS that the charge in question (created on 18 March 1998) was the security required under cl 1 of the facility letter. Clause 1 contains the covenant of the chargor in these words:

> *... to pay you on demand all sums of money which now or hereafter from time to time and at any time shall be owing or remain unpaid to you in respect of the banking facilities or incurred or assumed by you on [Sogo`s] behalf or on [Sogo`s] account, anywhere in or outside Singapore and all [Sogo`s] other liabilities whether alone or jointly with any other person or persons, whether as principal or surety, whether absolute or contingent, primary or collateral and whether presently payable or not together in all cases with interest thereon at your rate or rates as you may from time to time determine ...*

Again, Mr Chan contended that the reference in this passage was to `all monies` that DBS may advance to Sogo in whatever form. By themselves these words cover any money advanced by DBS to Sogo and did not appear to be restricted to the terms of the facility letter. But it is axiomatic that standard form phrases in corporate documents must not be recited like the mantra of a holy order. In this case, the terms which Mr Chan drew my attention to were given too lavish an ambit without consideration of the contract as a whole. Other provisions in the charge must be taken into account. Clause 4 of the charge referred specifically to the termination provision under the facility letter of 4 March 1998. It also reserved and preserved the right of the chargor to withdraw such sums from the secured deposit as commensurate with the sums repaid by Sogo under the repayment schedule. The charge cannot be read as covering debts of Sogo created or arising after the expiry or expiation of the facility letter. If that was indeed the intention it was not revealed by the words and context of the charge. Mr Chan argued that Tararone would not be entitled to withdraw more than the sum stipulated in the repayment schedule at each stage as specified. For example, as at April 2000 the repayment schedule envisaged that Sogo would have $3m remaining from the original debt of $18m. As it turned out, Sogo appeared to have paid up much more and thus had only $365,873.87 remaining

at that point. So, Mr Chan argued that if Tararone was permitted to withdraw its fixed deposit leaving only $365,873.87, and Sogo draws up a bigger cheque the next day DBS would be unsecured for the difference. That might be so although it may not have been what DBS would have wanted had it addressed its mind to the matter at the time the facility and charge was created. The real question is whether the parties had intended that the charge should secure any loan made by DBS to Sogo when the facility under the facility letter had expired or terminated. Nothing in either document suggests that the parties had this in mind.

Mr Chan argued that the charge covered `all monies` advanced by DBS and not merely those under the facility letter. The contract does not bear this interpretation because any extraneous advance outside the facility would not have been governed by the withdrawal clause because that clause allows a withdrawal of money by Tararone from the fixed deposit only in tandem with payment by Sogo in respect of the `Overdraft Account`.

Any doubt that one might otherwise entertain would be dispelled by the provision in cl 6 of the charge which specifically refers to Tararone`s obligation to keep the charge as a continuing security up to $18m. I think that the words `continuing security` ought not be given a wider meaning than was plain in the context of the facility and the charge. Otherwise, it would be inconsistent with Tararone`s right to withdraw money from the fixed deposit as and when the debt was reduced by Sogo. If it was intended that this specific charge was to inure for the benefit of fresh loans by DBS to Sogo even after the facility letter was terminated I would expect that intention to be expressed in unambiguous terms.

In the absence of terms to the contrary, it follows that when the facility (the `overdraft account`) was terminated by DBS on 15 July 2000, DBS was entitled to all the money then outstanding and the security of the charge up to the same amount, but no more. The termination letter written by the bank`s solicitors clearly brought the facility granted by the facility letter of 4 March 1998 to an end. The letter made no reference to forbearance or extension whatsoever. There were no other loans or facilities outstanding at that point. Any fresh advance, loan or credit that DBS may offer after that date would constitute a new arrangement to be interpreted as a separate and new agreement as such, and outside the terms of the facility letter of 4 March and the charge of 18 March 1998. Tararone had no further obligation than to pay (as pledgor) the sum of $365,873.87 as demanded by DBS if Sogo did not pay.

Mr Chan referred to DBS`s letter to Sogo dated 18 July 2000 in which the bank stated that it will honour Sogo`s cheques provided the aggregate amount does not exceed the amount in the security held by it. This letter written on 18 July is of little utility. First, it was written after the facility had been terminated. Secondly, it was written after Sogo`s cheque for $2.5m was paid out on 17 July. The fact that DBS wrote that it would honour further cheques drawn by Sogo (after the termination of the facility) only if Sogo accepts the condition that the security of the charge continues in force underlined the need for fresh security; and that must mean that Tararone must consent. These two reasons rendered the following point otiose, but for completeness I ought to mention it. This letter was not copied to Tararone. It is accepted that Mr Takeshi was a managing director of Sogo as well as Tararone but that is not sufficient to conclude that Tararone accepted the terms of the letter of 18 July. The companies are separate entities each having its own board of directors and the creditors may not be the same. When the facility was terminated, especially in circumstances in which all parties concerned were aware of the impecuniosity of Sogo, Tararone`s express consent must be obtained if DBS wanted an extension of the security. The question whether it was wrong of Sogo to draw on a cheque of that size in the circumstances must be explored elsewhere. Likewise, whether Mr Takeshi had acted properly as an officer of the company is an irrelevant issue before me. Without more, the how and the why of the $2.5m cheque ought not cloud the construction of the contractual

documents which were agreed upon before the final financial collapse of Sogo and Tararone.

For these reasons I am of the view that Sogo`s debt to DBS that had arisen or crystallized before the facility was terminated was properly secured by the charge; but debts arising after the termination are not so secured. I, therefore, allowed DBS`s claim to that extent. Since the respondents had admitted Tararone`s liability to the same extent prior to the hearing I ordered costs to follow the event. It may be that at the initial stage the respondents denied all liability but in the circumstances, I do not think that it is sufficient to justify any fraction of the costs to be adjusted in favour of the applicants.

Outcome:

Order accordingly.