

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC 242

Originating Application No 261 of 2023

Between

Abcom Pte Ltd

... Claimant

And

- (1) TransAsia Private Capital
Limited
- (2) TA Private Capital Security
Agent Limited

... Defendants

GROUND OF DECISION

[Credit And Security — Remedies — Winding-up — Injunction to restrain
bringing of winding up application]
[Insolvency Law — Winding up — Statutory Demand]

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Abcom Pte Ltd
v
TransAsia Private Capital Ltd and another

[2023] SGHC 242

General Division of the High Court — Originating Application No 261 of 2023

Philip Jeyaretnam J
27 July 2023

31 August 2023

Philip Jeyaretnam J:

Introduction

1 By this originating application the claimant sought an injunction to restrain the defendant from bringing a winding up application against it, asserting that it disputed that the debt is due and payable in good faith and on substantial grounds and that the underlying loan transaction is unenforceable under the Moneylenders Act 2008 (2020 Rev Ed) (“Moneylenders Act”). When the application came on for hearing before me on 27 July 2023, I dismissed it. On 10 August 2023, the claimant appealed. I now explain why I dismissed the application.

Facts

The parties

2 The claimant is Abcom Pte Ltd, a Singapore company. I shall refer to it as Abcom. The first defendant is TransAsia Private Capital Limited, a Hong Kong company that is the manager of the Asian Trade Finance Fund, a sub-fund of the TA Asian Multi-Finance Fund.¹ I shall refer to the first defendant as TransAsia Capital. Abcom was the borrower under a facility agreement dated 13 August 2019 (“ATFF-ABCOM FA”),² while TransAsia Capital was the lender. The second defendant is TA Private Capital Security Agent Ltd, the security agent for the first defendant in relation to this lending arrangement, and as such entitled to enforce the security given by Abcom in the event of default.³ I shall refer to it as TA Capital. Collectively, I shall refer to them as the defendants.

Background to the dispute

3 Parties entered into an amended facility agreement dated 14 March 2022 (“Amended ATFF-ABCOM FA”).⁴ By cl 1.4 read with cl 2, Abcom acknowledged that as of 25 February 2022, the outstanding amount of principal was US\$12,374,888.65 and the outstanding amount of interest, fees and charges was a further US\$1,050,420.42. By cl 6.4 of the Amended ATFF-ABCOM FA,

¹ Affidavit of Jiffriy Chandra dated 18 April 2023 (“Affidavit of Jiffriy Chandra”) at p 34.

² Affidavit of Bharat Mandloi dated 20 March 2023 (“Affidavit of Bharat Mandloi”) at pp 69–91, Exhibit “BM-5”.

³ Affidavit of Jiffriy Chandra at paras 20–22.

⁴ Affidavit of Bharat Mandloi at pp 95–101, Exhibit “BM-6”.

the governing law was the law of Singapore, and the Singapore Courts had exclusive jurisdiction to hear disputes in connection with it.

4 The nature of the facility that was extended was trade finance, for the purpose of financing the commodity trading undertaken by Abcom. Unfortunately, in Abcom’s telling, it had “repayment difficulties arising from a series of international events including COVID-19, the London Metal Exchange crisis arising from the Russia-Ukraine war and other issues beyond [its] control” [emphasis in original omitted].⁵

5 Abcom emailed the defendants on 19 July 2022, explaining its difficulties and requesting a “six-month moratorium” while saying that if they generated any profits they would pay.⁶ The defendants neither accepted nor rejected this request but Abcom made payments over the next six months that were less than what it was required to pay under the Amended ATFF-ABCOM.⁷

6 Abcom does not claim there was any agreement concerning what would happen once the moratorium ended.⁸ There was an in-person meeting in January 2023 to discuss the best way to move forward.⁹ No agreement was reached concerning how the shortfall in payments during the six months were to be addressed,¹⁰ but Abcom resumed paying the monthly instalments as required by

⁵ Claimant’s Written Submissions dated 20 July 2023 (“CWS”) at para 26.

⁶ CWS at para 31.

⁷ CWS at para 32.

⁸ CWS at para 46

⁹ CWS at para 48.

¹⁰ CWS at para 47.

the Amended ATFF-ABCOM from February 2023 onwards, including the payment due for January 2023.¹¹

7 The defendants threatened to commence legal proceedings by letters dated 14 February 2023¹² and 22 February 2023¹³ and then issued a statutory demand dated 6 March 2023.¹⁴

8 On 20 March 2023, Abcom filed these proceedings to restrain the defendants from bringing a winding up application against it. Abcom’s principal ground as it appeared in the supporting affidavit for the application was that as a result of the communications in the second half of 2022 concerning the moratorium the shortfall of payments made during that six-month period was not due and payable. In the written submissions two other grounds were raised, one that there had been “frustrating events” and the other that TransAsia Capital was an illegal moneylender. Neither of these additional grounds was seriously pursued before me.

Applicable law

9 It is settled law that the court will at the instance of the company enjoin a person from bringing a winding up application where the debt claimed by that person against the company is disputed in good faith and on substantial grounds: see the Court of Appeal decision in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268, at [62]. Where a debt is disputed in good faith and on substantial grounds, the person relying on that debt lacks standing to

¹¹ CWS at paras 55–56.

¹² Claimant’s Bundle of Documents dated 20 July 2023 (“CBOD”) at pp 29–32.

¹³ CBOD at pp 37–38.

¹⁴ CBOD at pp 41–42.

bring the winding up application as a creditor of the company under s 125 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (“IRDA”). Both parties accepted that this was the position in law, such that Abcom’s burden in this matter was to show triable issues concerning the debt. Put simply, this approach strikes the balance between ensuring that companies that are unable to pay their debts do not continue to trade and preventing the threat of winding up proceedings being used as a tactic to pressure companies into settling genuinely disputed debts.

10 In support of its argument that the defendants could not resile from the position that they had allowed Abcom, without dispute, to hold back payment on the basis of a moratorium, Abcom invoked three doctrines, namely waiver by election, waiver by estoppel, and approbation and reprobation.

11 Waiver by election stops a person from going back on a decision to exercise one of two inconsistent rights, and treats the right not exercised as having been abandoned.¹⁵ Waiver by estoppel stops a person from exercising a right following a representation that he would not do so in circumstances where there has been detrimental reliance.¹⁶ Approbation and reprobation precludes a person who has exercised a right so as to obtain a benefit from doing so from then exercising another right that is alternative to and inconsistent with the right exercised.¹⁷

12 As for illegal moneylending, lenders who lend solely to corporations (and certain other specified business entities) are excluded: see s 2 of the

¹⁵ CWS at para 34.

¹⁶ CWS at para 35.

¹⁷ CWS at para 36.

Moneylenders Act which defines “excluded moneylender”. Abcom’s argument was that notwithstanding that it is a corporation, there was a personal guarantee provided by its director under which the director was to be liable “as sole or principal debtor” and consequently, as the guarantee and loan facility were all part of the same transaction, the loan was to be treated as being made to an individual. It then followed that the lender could not be said to lend solely to corporations, was thus not an excluded moneylender, and hence there was an infringement of the Moneylenders Act.

13 Finally, COVID-19 and the London Metal Exchange were relied on as frustrating events.¹⁸ This defence was not elaborated on.

Reasons for my decision

14 I dealt with the defences in the order of frustration, illegal moneylending, and moratorium.

15 The defence of frustration was plainly misconceived. Without even considering the nature of the events relied on and their impact on performance, the doctrine of frustration where successfully invoked discharges the contract and so relieves both parties from contract performance for the future entirely. It is not a doctrine that may be invoked to excuse a period of non-payment or reduced payment of loan instalments while leaving the loan contract in force. A second and separate point is that a loan contract is not frustrated by the borrower’s economic circumstances changing even when the result of events beyond its control such that it becomes unable to repay the loan. The loan contract had in fact been performed by the lender, only leaving the borrower’s

¹⁸ CWS at para 27.

obligation to repay. Absent a term of the loan contract, the occurrence of adverse events is simply the borrower's risk.

16 The defence of illegal moneylending was equally misconceived. Abcom is a corporation. The loan was in connection with Abcom's business of commodity trading. There was no suggestion that Abcom was a sham set up to evade the operation of the Moneylenders Act. The fact that there was a guarantee in respect of the loan given by an individual (even with a principal debtor clause) did not make the loan to an individual or mean that TransAsia Capital was not lending solely to corporations. There was no evidence that TransAsia Capital does not lend solely to corporations.

17 Turning to the defences arising from the alleged moratorium, I did not accept that any of them had the effect contended for. I assumed in favour of Abcom that the defendants did in fact agree to the six-month moratorium requested, notwithstanding that the correspondence did not fully support such an assumption. This only meant however that there was forbearance during the period of the moratorium. Abcom's position was that there was no agreement about how to treat the resulting shortfall once the moratorium came to an end. The difficulty for Abcom was that absent such further agreement, the position was that it had to pay the deferred payments (or shortfall) once the period of forbearance ended. The natural meaning of the word "moratorium" is that it is a temporary postponement of repayments. The temporary period that Abcom requested was six months. That is now in the past.

18 Turning to the three doctrines invoked in turn, there was not and could not be any suggestion on the evidence that there was an election not to require the payments to be made once the moratorium ended or to be deferred to the

end of the loan period, nor any representation to that effect, nor any approbation of such continued non-payment.

19 I also noted that as of the date of the statutory demand, there was an earlier shortfall in instalments pre-dating the six-month moratorium.

Conclusion

20 For these reasons, it was clear that Abcom could not raise triable issues concerning the timing of the repayment of the debt once the six-month period of forbearance, or moratorium, ended. It simply could not be said that Abcom genuinely disputed the debt in good faith. Accordingly, I declined to grant to Abcom the injunction it sought.

Philip Jeyaretnam
Judge of the High Court

Liew Teck Huat (Niru & Co LLC) for the claimant;
Chan Cong Yen, Lionel (Chen Congren) and Chang Guo En
Nicholas Winarta Chandra (Oon & Bazul LLP) for the defendants.
