IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 75

Suit No 816 of 2019
(Registrar's Appeal No 56 of 2020)

Between

Lee Wen Jervis

… *Plaintiff*

And

(1) Jask Pte Ltd
(2) Doraiswamy Chitra
(3) Udehkumar s/o Sethuraju

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Pleadings] — [Amendment]

TABLE OF CONTENTS

Lee Wen Jervis
v
Jask Pte Ltd and others

[2020] SGHC 75

High Court — Suit No 816 of 2019 (Registrar's Appeal No 56 of 2020)
Aedit Abdullah J
9 March 2020

20 April 2020

Aedit Abdullah J:

Introduction

1 This was a Registrar's Appeal ("RA") arising from the learned Assistant Registrar's ("learned AR") decision in Summons No 51 of 2020 ("SUM 51"), where the learned AR dismissed the defendants' application for leave to amend their Defence and add a Counterclaim. I dismissed the RA and the defendants have made a further appeal.

Procedural History

The main suit

2 The main suit involves a claim for unpaid debt. The 1st defendant is a company, and the 2nd and 3rd defendant are its directors and shareholders.[1] The plaintiff loaned moneys to the 1st defendant pursuant to various loan agreements.[2] The 2nd and 3rd defendants gave personal guarantees to the plaintiff in exchange for the loans, and also gave the plaintiff options to purchase ("OTPs") properties belonging to them, if the debt was not paid on time.[3] The 1st defendant failed to repay the debt on time. The defendants then entered into a settlement agreement with the plaintiff. When they failed to abide by the settlement agreement, the plaintiff claimed against the defendants for the debt.[4] The Statement of Claim, Defence and Reply had all been filed and it was not disputed that pleadings had closed.[5]

Proceedings before the learned AR

Defendants' submissions

3 The defendants then filed SUM 51 and sought to amend the Defence. They argued that they were allowed to amend their Defence at any point in time, but cited no authority for this proposition.[6] The main amendments sought to be

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1 Statement of Claim (Amendment No. 1) dated 30 August 2019 ("SOC") at para 1; Defence dated 18 September 2019 ("Defence") at para 1

2 SOC at para 4; Defence at para 1

3 SOC at paras 6–8; Defence at para 1

4 SOC at paras 4, 9, 12 and 17; Defence at para 1

5 Defendants' submissions dated 6 February 2020 ("Defendants' submissions to AR") at para 1

6 Notes of Evidence dated 7 February 2020 ("AR Hearing") at p 3, lines 19–26

pleaded in the Defence were that: (1) the plaintiff was an unlicensed moneylender and hence the various contracts are unenforceable ("UML defence"); (2) the loan agreements, personal guarantees and OTPs were shams and in breach of various legislation ("sham defence"); and (3) the purchase prices of the OTPs were set by the plaintiff unilaterally and were unconscionable ("unconscionability defence").[7]

4 The defendants argued that contractual loans granted by an unlicensed moneylender are unenforceable under s 14(2) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA").[8] The defendants relied on *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") and argued that as long as the borrower establishes that the lender has lent money in consideration for a higher sum being repaid, the burden shifts to the lender to prove that he is licensed or is exempt.[9] They argued that the plaintiff has admitted to charging interest for the loan, but failed to address in the affidavit why he is a licensed or exempt moneylender,[10] and hence failed to meet his burden of proof. Flowing from this, the defendants also sought to file a Counterclaim that any moneys which had been paid to the plaintiff as repayment of the loan should be returned.[11]

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7 Udehkumar s/o Sethuraju's affidavit dated 6 January 2020 ("Udehkumar's affidavit") at paras 3–6; Plaintiff's submissions dated 5 February 2020 ("Plaintiff's submissions to AR") at para 11; AR Hearing at pp 5–6

8 Defendants' submissions to AR at paras 16–18

9 Defendants' submissions to AR at para 18

10 Defendants' submissions to AR at para 19

11 Udehkumar's affidavit at paras 16–19

Plaintiff's submissions

5 In response, the plaintiff relied on *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 ("*JBJ*") and argued that amendment of pleadings should only be allowed if it discloses a reasonable defence to the claim, and if the defendant shows that it is not an immaterial and useless amendment.[12] The plaintiff argued that the amendments sought by the defendants raised totally new defences that were unsubstantiated and *mala fide*, and that they should not be allowed.[13] *Sheagar* was wrongly cited by the defendants, and it instead stands for the proposition that the borrower bears the burden of proving that the lender is not an excluded moneylender.[14] The defendants' amendments did not show why the plaintiff is not an excluded moneylender and hence fails to show a reasonable defence.[15]

6 The plaintiff also raised concerns about the sham defence. He submitted that the loan agreements were drafted by the defendants' counsel's law firm.[16] The 3rd defendant was a former partner of this law firm.[17] The sham defence hence seems to be confessing that the defendants' law firm had drafted a sham agreement.[18] As such, the plaintiff argued that the defendants' counsel should recuse himself.[19]

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12 Plaintiff's submissions to AR at paras 7–8

13 Plaintiff's submissions to AR at paras 10–12

14 Plaintiff's submissions dated 7 February 2020 ("Plaintiff's 2nd submissions to AR") at paras 6–12

15 Plaintiff's 2nd submissions to AR at para 11

16 Plaintiff's 2nd submissions to AR at para 14

17 Plaintiff's 2nd submissions to AR at para 14

18 Plaintiff's 2nd submissions to AR at para 14

19 Plaintiff's 2nd submissions to AR at para 14; AR Hearing at p 5

The learned AR's findings

7 The learned AR held that amendments can only be allowed if they raised a reasonable defence, relying on *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 ("*Lim Yong Swan*") at [43].[20] He refused leave to amend the pleadings as the proposed amendments raised no reasonable defence.[21] The UML defence could not be sustained as the plaintiff *prima facie* falls within the definition of an excluded moneylender under s 2 MLA.[22] Section 2 MLA provides that any person who lends money solely to corporations is an excluded moneylender, and since the 1st defendant was a company, the plaintiff appears to fall under this definition.[23]

8 The learned AR also refused the other amendments, holding that the defendants provided no evidential basis to support the sham defence, or to show that the OTPs were so undervalued as to be invalid.[24] The learned AR also found that the defendants had provided no legal basis to show that an undervalued OTP is *ipso facto* invalid.[25]

9 Finally, the learned AR made no orders concerning defendants' counsel acting for the defendants as it was not a matter before him.

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20 AR Hearing at p 6

21 AR Hearing at p 6

22 AR Hearing at p 6

23 AR Hearing at p 6

24 AR Hearing at p 6

25 AR Hearing at p 6

Proceedings before this court

Defendants' submissions

10 The defendants then appealed the whole of the learned AR's decision before this court. The defendants' submissions before this court were primarily focused on the UML defence, and not much was mentioned of the sham defence or the unconscionability defence.

11 The defendants argued that there was a reasonable defence that the plaintiff was an unlicensed moneylender.[26] As set out by *Sheagar* ([4] *supra*), the plaintiff was at least required to plead that he was an excluded moneylender, before the burden shifts to the defendants to contradict this.[27] Here, the plaintiff had not even pleaded that he was an excluded moneylender.[28]

12 The learned AR's finding that the plaintiff was a *prima facie* excluded moneylender was mistaken because the fact that the 1st defendant was a corporation did not mean that the plaintiff was an excluded moneylender.[29] A moneylender is excluded only where it solely lends money to corporations.[30] Hence, the mere fact that one borrower was a corporation did not mean that the plaintiff solely lent money to corporations.

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26 Defendants' 2nd submissions to HC at paras 14–15

27 Defendants' 2nd submissions to HC at para 9

28 Defendants' 2nd submissions to HC at paras 14–15; Defendants' 1st submissions to HC at para 20

29 Defendants' 1st submissions to HC at paras 8, 25

30 Defendants' 2nd submissions to HC at paras 3–5

13 The defendants alternatively argued that in any case, the learned AR's finding that the plaintiff is *prima facie* an excluded moneylender should not have prevented the amendments, as this was a reasonable defence that should have been tested at trial.[31] The *prima facie* finding is not sufficient to show that the defence pleaded was unsustainable.[32] The fact that the plaintiff was an unlicensed moneylender had been pleaded in a separate case, and the plaintiff's reply to this pleading in that case was a mere bare denial.[33] It is hence quite clear that this issue has to be contested at trial.[34]

Plaintiff's submissions

14 In response, the plaintiff argued that the learned AR was correct in finding that the amendments showed no reasonable defence.[35] The plaintiff mainly rehashed the arguments made before the learned AR.[36] However, the plaintiff additionally made a positive submission that it has not made any other loans to any non-corporate entities.[37] This was the first time this submission was made, as it was not made to the learned AR, given that the plaintiff had previously only relied on the burden of proof.[38] The plaintiffs argued that the

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31 Defendants' 1st submissions to HC at paras 12–15, 24

32 Defendants' 1st submissions to HC at para 12

33 Defendants' 1st submissions to HC at paras 18–20

34 Defendants' 1st submissions to HC at paras 18–20

35 Plaintiff's submissions dated 5 March 2020 ("Plaintiff's submissions to HC") at para 9

36 Plaintiff's submissions to HC at para 9

37 Plaintiff's submissions to HC at para 14

38 Plaintiff's 2nd submissions to AR (especially at para 11); Plaintiff's submission to AR; AR Hearing

defendants have neither alleged that the plaintiff had made a loan to a non-corporate entity, nor adduced any evidence to show this.[39]

The decision

15 I dismissed the RA and upheld the learned AR's orders as the amendments sought did not disclose a reasonable defence. However, this was based on reasoning which differs slightly from the learned AR's.

The requirements for leave to amend pleadings

16 Under O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), the court may grant leave to amend pleadings at any stage of the proceedings (see also *Sheagar* ([4] *supra*) at [116]). However, such leave should only be granted where the amendments disclose a reasonable defence (*JBJ* ([5] *supra*) at [4]; *Lim Yong Swan* ([7] *supra*) at [43]). In addition, it should be allowed if it enables the real issues in the proceedings to be determined, ensuring that substantive justice is met, provided that procedural fairness to the opposing party is maintained (*Sheagar* at [117]).

17 The various amendments sought raised no reasonable defence and the amendments were not required for substantive justice to be met.

UML defence

18 The statutory framework for the UML defence was discussed in depth by the Court of Appeal in *Sheagar* (at [30]–[75]). For the purposes of the present RA, it suffices to note that the MLA framework does not apply to an excluded

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[39] Plaintiff's submissions to HC at paras 13–14

moneylender (*Sheagar* at [67]), and that any person who lends money solely to corporations is an excluded moneylender (s 2(*e*)(iii)(A) MLA). *Sheagar* had also held that the burden of proof is on the borrower to show that the lender is not an excluded moneylender (*Sheagar* at [40]–[75]).

19 On the facts, the proposed amendments to the Defence did not raise a reasonable defence as the amendments did not enable the defendants to meet their burden of proof of showing that the plaintiff is not an excluded moneylender.

20 First, the amended Defence did not even explicitly plead that the plaintiff is not an excluded moneylender. At best, this could only have been inferred, based on the amended pleading that the loan agreements were shams. The defendants argued that the loans were actually given to the 2nd and 3rd defendants instead of the 1st defendant, and that since the 2nd and 3rd defendants were not corporations, the plaintiff is not an excluded moneylender.[40] Apart from this inference, there was no other pleaded fact to suggest that the plaintiff is not an excluded moneylender. For example, it was not pleaded that the plaintiff had lent money to some other non-corporation. The UML defence hence seemed to have been based on and was linked to the sham defence.

21 Second, even accepting the above inference, the sham defence in itself was just a bare assertion that was not supported by any pleaded fact. O 18 r 8(1) of the ROC provides that a party must specifically plead any fact showing illegality, which he alleges makes any claim not maintainable. Further, although

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40 Udehkumar's affidavit at pp 12–13

the pleadings need not contain evidence, they must contain the material facts which are relied upon (O 18 r 7(1) ROC). In the present case, no facts were pleaded to support that the loan agreements were shams. Even if the amendments had been allowed, the defendants will not be able to show how the agreements were shams, since the defendants cannot rely on material facts not pleaded in the pleadings (*Sheagar* [4] *supra*) at [94]).

22 Third, it is unclear how far the defendants can go with the sham argument. The plaintiff submitted that the loan agreements were drafted by the defendants' counsel's law firm and the 3rd defendant was a former partner of this law firm. This was not contested by the defendants. The sham defence hence seemed to be confessing that the defendants' law firm had drafted a sham agreement.

23 The defendants argued that the plaintiff had not even pleaded that he was an excluded moneylender, and that the plaintiff had a burden to plead as such before the burden shifted to the defendants to disprove this. I did not accept this contention. The defendants relied on *Sheagar* but did not show how that case stands for this proposition.[41] In the present case, the UML defence had not been pleaded in the defendants' original Defence, and hence there had been no need for the plaintiff to plead that he was an excluded moneylender in the Reply. In any case, the plaintiff had submitted before me (although not previously before the learned AR) that he has not made any other loans to any non-corporate entities (above at [14]), and this was sufficient. In any case, as stated, the burden is on the defendants to show that the plaintiff was not an excluded moneylender.

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41 Defendants' submissions to AR at para 9

24 For these reasons, the proposed amendments relating to the UML defence did not disclose a reasonable defence.

25 I note that the learned AR had reached the same conclusion, but on different grounds, by finding that the plaintiff was *prima facie* an excluded moneylender. With respect, the learned AR's finding that the plaintiff lent money to one corporation does not mean that the plaintiff solely lent money to corporations. Further, there had been no basis to have made such a finding, since the plaintiffs had not even submitted before the learned AR that they were an excluded moneylender, merely stating that it was the defendants' burden to show otherwise.[42] In any case, even if the plaintiff was *prima facie* an excluded moneylender, this did not mean that the UML defence was not a reasonable defence, since such a *prima facie* finding can be reversed with evidence. The central issue that should have been addressed was whether the amended facts pleaded were sufficient to make out a reasonable defence.

Sham defence

26 For the reasons discussed under the UML defence, the proposed amendments relating to the sham defence also did not disclose reasonable defence. No facts were pleaded to substantiate breaches of any other legislation.

Unconscionability defence

27 The defendants had pleaded in the original Defence that the OTPs were so undervalued as to be invalid.[43] They had sought leave to amend the Defence

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42 Plaintiff's 2nd submissions to AR (especially at para 11); Plaintiff's submission to AR; AR Hearing

43 Defence at para 1

to plead that the agreements were unconscionable, as the purchase prices to the OTPs were unilaterally determined by the plaintiff, and were below market value. The purpose of this amendment seemed to be to elaborate on what was already pleaded in the original Defence by arguing that the doctrinal basis for this defence is the doctrine of unconscionability. The learned AR rejected the amendment sought, reasoning that defendants had provided no legal basis to show that an undervalued OTP is *ipso facto* invalid (per [8] above). I do note that the amendment was for the purpose of pleading the legal basis of unconscionability, and to elaborate on the facts supporting it. However, in any case, I found that the amendments put forward by the defendants in support of the unconscionability doctrine did not disclose a reasonable defence.

28 The Court of Appeal in *BOM v BOK and another* [2019] 1 SLR 349 ("*BOM*") established that a modified narrow doctrine of unconscionability applies in Singapore. The doctrine applies if the party claiming that the contract was unconscionable was suffering from an infirmity which is of sufficient gravity to acutely affect the party's ability to conserve his own interests (*BOM* at [141]). This infirmity includes physical, mental or emotional infirmities, and requires an intensely fact-sensitive inquiry to establish. Such infirmity must also have been, or ought to have been, evident to the other party procuring the transaction (*BOM* at [141]). In addition, the court will consider whether the transaction was at an undervalue, and whether the party pleading unconscionability had obtained independent legal advice (*BOM* at [141]); these requirements are very important but not mandatory. If these requirements are fulfilled, the burden shifts to the other party to show that the transaction was fair, just and reasonable (*BOM* at [142]).

29 On the facts, the defendants' amended Defence did not disclose any infirmity, let alone one which is of sufficient gravity to acutely affect their ability to conserve their own interests. This amendment was hence rejected.

Defendants' Submissions

30 Before concluding, it is necessary to point out that there was a glaring omission in the defendants' submission to the learned AR dated 6 February 2019, which was of concern. The relevant paragraph of the submissions states (at para 18):[44]

> … the Law is clear … that when an individual indulges in moneylending activities with interest or for higher returns he is deemed an illegal Moneylender and the Burden is on Him to discharge the same as pointed out by the Learned Chief Justice in ***Sheagar's*** case at [75] as follows:-
>
> > "75 For the avoidance of doubt, we summarise the principles to be adopted in relation to s 14(2) of the MLA.
> >
> > (a) To rely on s 14(2) of the MLA, the borrower must prove that the lender was an "unlicensed moneylender".
> >
> > (b) If the borrower can establish that the lender has lent money in consideration for a higher sum being repaid, he may rely on the presumption contained in s 3 of the MLA to discharge his burden.
> >
> > (c) The burden then shifts to the lender to prove that he either does not carry on the business of moneylending or possesses a moneylending licence or is an "exempted moneylender".
> >
> > (d) …"
>
> [emphasis in original]

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44 Defendants' submissions to AR at para 18

31 As seen, the defendants' solicitors had quoted the entire of paragraph 75 of *Sheagar*, except that point (d) of the same paragraph was omitted. For reference, point (d) states that:

> (d) However, if there is an issue as to whether the lender is an excluded moneylender, the legal burden of proving that he is not will fall on the borrower.

32 Point (d) makes it clear that the burden of proving that the lender is not an excluded moneylender falls on the borrower. This directly contradicts the defendants' argument that the lender bears the burden of proving the same. I have concerns about what led to the omission, and it may be that this would have to be canvassed at the appeal.

Conclusion

33 The amendments disclosed no reasonable defence and the RA was dismissed. S$5,500 in costs were awarded in favour of the plaintiff, inclusive of disbursements.

Aedit Abdullah
Judge

Vijai Dharamdas Parwani and Lim Shu Yi (Parwani Law LLC) for the plaintiff;
Dhanwant Singh and K V Sudeep Kumar (S K Kumar Law Practice LLP) for the defendants.