17-9-10
Henderson

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 269 of 2009

BETWEEN:

TALISMAN CAPITAL ALTERNATIVE INVESTMENT FUND LTD.

Plaintiff

AND:

SGC WORLDWIDE LTD.

Defendant

Appearances: Mr. Jeremy Walton & Ms. Marit Hudson of Appleby for the Plaintiff

Ms. Cherry Bridges of Ritch & Conolly for the Defendant

Before: Hon. Justice Henderson

Heard: August 25th, 2010

AMENDED JUDGMENT

1. The Plaintiff Talisman Capital Alternative Investment Fund Ltd. ("Talisman") asks for summary judgment on its claim in debt. The Defendant SGC Worldwide Ltd. ("SGC") does not deny the existence of the debt but says that it is not due and owing at present because of an oral agreement it made with the lender and that Talisman, who acquired the rights of the creditor by assignment, is unable to prove that the assignments are valid and enforceable.

Evidence

2. The evidence on behalf of Talisman is given by Geoffrey Tirman, a director of the company. Under a Master Financing and Security Agreement ("the Master Agreement"), SGC agreed to borrow from Westford Special Situations Master Fund, L.P. ("the Lender"). The Lender made a series of term loans under the Master Agreement to SGC which were evidenced by promissory notes. Various events of default were defined in the Master Agreement.

3. The Master Agreement provided that the Lender had the right:

> "... without the consent of or notice to [SGC], to sell, transfer, assign, negotiate, or grant participation in all or any part of, or any interest in, [the Lender's] obligations, rights and benefits under [the Master Agreement] ..."

4. Under an agreement executed as of April 30th, 2008 the Lender assigned its interest in the promissory notes in the total amount of US $13,600,000 dollars to Capital Strategies Fund Ltd. ("the first assignment"). By an agreement executed as of May 23rd, 2008 Capital Strategies Fund Ltd. sold the promissory notes to Surrey Muse Trading Ltd. ("the second assignment"). Under a third agreement executed as of March 5th, 2009 Surrey Muse Trading Ltd. sold the same promissory notes to a company described in the agreement as "Talisman Capital Alternative Strategies Fund Ltd.". Talisman seeks to assert rights acquired under this third assignment.

5. Shortly after taking the assignment, Talisman served (on March 27, 2009) a notice of event of default on SGC requiring it to repay the whole of the principal represented by the promissory notes (US $13,600,000) together with interest as at that date of

US $2,436,667. No payment has been made. The evidence establishes that, if the terms of the Master Agreement represent the entirety of the agreement between SGC and the Lender, SGC is in default and the amount claimed is owing.

6. SGC was in the gaming business. In its Defence SGC alleges that it entered into a "partnership" with Mr. Steve Stevanovich ("Mr. Stevanovich") under which he would arrange for funding for the development and expansion of SGC's business activities in Latin America and elsewhere. The Defence says that Mr. Stevanovich decided to procure funding for SGC from the Lender in the form of short-term promissory notes. Inconsistently, the Defence also asserts that "no admission is made as to the amount or date of any loan that was paid to [SGC] by [The Lender]". The uncontested evidence, however, establishes the fact of the loans and the lack of repayment. SGC says that Mr. Stevanovich agreed to roll over the short-term funding "from time to time," was not "entitled to procure an assignment by [The Lender] to a person outside the partnership structure," and was not authorized to permit a demand for repayment to be made by the Lender. It is also alleged that

Mr. Stevanovich told Paul Mouttet ("Mr. Mouttet") "to forget about the interest" stating that, as SGC became successful, he would "simply take more shares."

7. Mr. Mouttet, in his affidavit evidence, expands upon the nature of the oral agreement. He says that it is inapt to describe it, as Talisman has in argument, as an agreement for "perpetual funding." According to Mr. Mouttet, the two men agreed that profits from the gaming business would be used to repay interest first and then the principal. The SGC was not profitable.

Mr. Mouttet says that Mr. Stevanovich agreed orally that the term loans would represent a stop gap measure until he could arrange longer term financing. This was going to happen "later." It was expected that Mr. Stevanovich's shareholding would be re-calculated based upon "how much time it would take to repay the debt."

8. Mr. Stevanovich flatly contradicts Mr. Mouttet. He says, essentially, that the Master Agreement sets out clearly and fully the terms of the lending agreement. He denies that there was a partnership or that he agreed to provide funding beyond that which

he had already arranged. He denies agreeing to waive the interest payments in exchange for more shares in SGC.

9. Mr. Stevanovich is a director of the general partner of the Lender. He points out that the Lender had a one third shareholding in SGC and it would have been commercially unwise for it to agree to provide all of the funding for an indefinite period of time. He obtained a personal guarantee from Mr. Mouttet of SGC's obligations under the Master Agreement, a fact which is somewhat inconsistent with the sort of partnership described by Mr. Mouttet. He also obtained from Mr. Mouttet a promissory note dated September 27, 2007 representing certain interest payments which were owing but not paid.

10. In December, 2008 there were open discussions between the parties with a view to reaching a global settlement of various financial transactions, including the repayment by SGC of its indebtedness. A draft term sheet arising from these conversations is in evidence before me; it contemplates (at least on the part of the Lender) that the term loans would be repaid as part of the overall

settlement. Moreover, no additional shares in SGC were ever transferred to the Lender.

11. The Master Agreement supports fully the position of Talisman and Mr. Stevanovich; it offers no support whatsoever for the oral agreements relied upon by SGC. There is no documentary evidence at all before me which would support the existence of an agreement to continue to roll over the term loans, to provide funding for an unspecified period of time, to restrict an assignment to an assignee within the "partnership structure", or to waive the payment of interest in exchange for more shares. Moreover, the Master Agreement contains clause 12.6 to this effect:

> "All amendments to this agreement must be in writing signed by both Lender and Borrower. This Agreement and the Loan Documents represent the entire agreement about this subject matter, and supercede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations between the parties about the subject matter of this Agreement and the Loan Documents merge into this Agreement and the Loan Documents."

Analysis

12. To deprive SGC of its right to a full trial, I must be satisfied that there is "no fairly arguable point to be argued" on its behalf: *Anglo-Italian Bank v. Wells* (1878) 38 LT 197, per Jessel, MR. Our Court of Appeal has looked recently in some detail at the proper approach to a summary judgment application where there is (as here) conflicting or competing affidavit evidence. In *Merren v. Cayman National Bank* [2008] CILR 428, Vos, J.A. said that:

> *"The proper approach to an O.14 application, where there is conflicting or competing affidavit evidence, was settled in England in National Westminster Bank plc v. Daniel [1993] 1 WLR 1453 in which Glidewell, L.J. reviewed the history, and concluded by applying the dictum of Ackner, L.J. in Banque de Paris et des Pays-Bas (Suisse) S.A. v. Costade Naray [1984] 1 Lloyd's Rep. 21 where he said [1984] 1 Lloyd's Rep. at 23):*
>
> > *"It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence."*

Glidewell, L.J. himself concluded [1993] 1 W.L.R. at 1457):

> *"I think it right to ask, using the words of Ackner, L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd, L.J. in the Standard Chartered Bank case, Court of Appeal (Civil division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence"*
>
> ...

...In the Cayman Islands, there are two reported first-instance cases to which we have been referred. In Panier S.A. v. Burns 2002 CILR N[6] Graham, J. expressly applied National Westminster Bank plc v. Daniel, while in Zuiderent v. Christiansen 2004-05 CILR N[23] Sanderson, J. purported to apply Panier S.A. v. Burns, in suggesting that the appropriate test should be applied in two stages: (i) Is what the defendant says credible? And (ii) Has he shown that there is a fair and reasonable probability that he has a real bona fide defence?

In my judgment, the test is not really in two stages, because the two stages, as Glidewell, L.J. pointed out in National Westminster Bank plc v. Daniel, amount to much the same thing, because ([1993] 1 W.L.R. 1457) "if [the evidence] is not credible, then there is no fair or reasonable probability of the defendant having a defence." No harm would be done, it seems to me, by adopting the two-stage approach, even if, in reality, a negative answer to the first question would inevitably lead to a negative answer to the second question. For my part, however, I would prefer to regard the test as simply requiring the court to ask whether the defendant has shown a fair or reasonable probability that he has a real, or bona fide, defence. It can be noted that the words used in Daniel and Banque de

> *Paris were "real or bona fide" not "real bona fide". Accordingly, by citing Zuiderent v. Christiansen, it seems to me that, despite the slightly different formulation I have indicated above, the judge had in mind, substantively, the right test. The contrary has not been argued before us."*

13. Thus, I must ask whether SGC has a real or bona fide defence. That depends upon whether the evidence of Mr. Mouttet is credible, not in the sense that I believe it, but in the sense that there is a reasonable prospect of a trial judge believing it when the trial has concluded.

14. I am satisfied that the alleged oral agreements which depend, as they do, solely upon the uncorroborated evidence of Mr. Mouttet and which are flatly contradicted by all of the loan documentation and the Master Agreement do not amount to a real or bona fide defence. In addition, I share the sentiment expressed by Mr. Stevanovich that the alleged oral agreements are inconsistent with a number of actions by SGC after the Master Agreement was executed, including Mr. Mouttet's personal guarantee and the promissory note of Sept. 27, 2007. The note represented unpaid interest; the alleged agreement to waive interest occurred in the summer of 2007.

15. A third objection by SGC can be disposed of briefly. Mr. Mouttet asserts (in paragraph 40 of his second affidavit) that any money which may be owing under the Master Agreement is owed not to Talisman but to the Trustee in Bankruptcy of Westford Special Situations Fund Ltd., with which Mr. Stevanovich had some commercial involvement. I am advised by Counsel that the Trustee in Bankruptcy has been told of this action and of the summary judgment application but has expressed no interest in the matter. The evidence does not contain any coherent explanation as to why the debt, in contravention of the Master Agreement and the assignments, might be owing to a third party.

The Three Assignments

16. During the Hearing, SGC argued that Talisman is required to show affirmatively, with respect to each of the three assignments, that the stated consideration passed to the assignor. The assignments, which are in a similar form, each set out the consideration paid by the assignee and provide that the assignor acknowledges the receipt of that consideration in full and final payment.

17. In addition, Mr. Stevanovich has sworn an affidavit which confirms that the Lender received its consideration from Capital Strategies Fund Limited; he is a director of the investment manager of this latter company. He also says that Surrey Muse Trading Limited paid its consideration to Capital Strategies Fund Limited. He confirms that the Lender regards Talisman as the owner of the debt and solely entitled to collect it.

18. Mr. Tirman, who is also a director of Surrey Muse Trading Limited, says in his second affidavit that Surrey Muse paid its consideration to Capital Strategies Fund Ltd and subsequently received the stated consideration from Talisman for the notes. He also confirms that Surrey Muse Trading Ltd regards Talisman as the owner of the debt at this time.

19. This uncontradicted evidence satisfies me that the consideration described in each of the three assignments has passed from assignee to assignor. The contention that more evidence is required on this element does not amount to a real or bona fide defence. In the absence of affirmative evidence from SGC that the

consideration did not pass, Talisman may rely upon these acknowledgements. No authority to the contrary has been cited to me.

20. The final objection to Talisman's entitlement to collect on the debt turns upon irregularities in the third and final assignment.

21. The name of the Plaintiff is "Talisman Capital Alternative Investments Fund Ltd.". The third assignment describes the assignee (referred to as the "buyer") as "Talisman Capital Alternative Strategies Fund Ltd.". Mr. David Vidal-Cordero, an attorney-at-law in Washington, D.C., drafted this agreement. In his affidavit evidence he attributes the difference in name to a "scrivener's error" and asserts that he intended the document to identify Talisman by the name "Talisman Capital Alternative Investments Fund Ltd.".

22. The parties to the third assignment have entered into an *Erratum* to the agreement dated as of August 17, 2010 containing the proper description of the Plaintiff Company.

23. I have been told in argument that no company by the name of "Talisman Capital Alternative Strategies Fund Ltd." is in existence or, at least, is a part of any corporate group in which the Plaintiff is involved. SGC has not presented any evidence suggesting the contrary.

24. Mr. Vidal-Cordero's affidavit establishes that the intent of the parties was to bind the Plaintiff to the terms of the agreement to the exclusion of any other entity. I am satisfied that it was the Plaintiff Company which obtained rights and obligations under the third assignment to the exclusion of anyone else and that any argument to the contrary does not amount to a real or bona fide defence.

25. A further bit of confusion arises from the fact that there are three slightly differing copies of the third assignment in existence. Each of the three is identical except for the signatures of the parties. One is signed by Mr. Tirman on behalf of Talisman and on behalf of Surrey Muse Trading Ltd. He is a director of both companies. A second contains Mr. Tirman's signature on behalf of Surrey Muse Trading Ltd. and no signature on behalf of Talisman. A third contains Mr. Tirman's signature on behalf of Surrey Muse Trading

Ltd. and Mr. Graham Cook's signature on behalf of Talisman. Mr. Cooke is a director of Talisman.

26. Mr. Tirman has explained this inconsistency in his fourth affidavit:

> "11. This inconsistency is explained by the fact that I initially signed the Agreement on behalf of both Surrey and the Plaintiff on 5 March 2009 in Chexbres, Switzerland. This was, however, an oversight on my part, as I generally prefer not to sign one document on behalf of two entities. Therefore, almost immediately after the original was signed, I signed two further copes of the Agreement (as it is my practice to execute duplicate copies of all agreements between entities where I am a director, in order to have backup originals) and sent an electronic "PDF" file of that copy (which included my signature on behalf of Surrey) to Graham Cook, another director of [the] Plaintiff, in order that he could sign on behalf of the Paintiff.
>
> 12. Mr. Cook then printed out the PDF copy and signed that document and sent it back to me in PDF format. As a result, there are three copies of the Agreement as follows: (i) one with my original signature which was sent electronically to Graham Cook (ii) one with a copy of my signature and the original of Graham Cook's (a copy is at pages 4 to 7), and (iii) one with only my original signature (a copy is at pages 8 to 11)."

27. The copy of the agreement signed by Mr. Tirman for Surrey Muse Trading Ltd. but unsigned by anyone on behalf of Talisman can be disregarded. The remaining two copies of the agreement are each signed by individuals on behalf of both parties who, according to the uncontradicted evidence, had the authority to bind those parties to the rights and obligations in the agreement. The fact that one copy is signed by Mr. Tirman and one by Mr. Cooke is immaterial, given that both men had the necessary legal authority from the relevant corporate entity. The presence of two different signatures is anomalous but does not cast into doubt Talisman's intention to be bound by the assignment. This issue, also, provides no real or bona fide defence.

28. The Plaintiff seeks an order that its costs of the action be assessed on the indemnity basis pursuant to Paragraph 17 of the statement of Claim which provides that "Pursuant to Clause 12.2 of the Master Agreement, the Defendant agreed to indemnify the Plaintiff for all attorneys" fees and expenses incurred in enforcing the Master Agreement and the Term Loans". For these reasons I grant to the Plaintiff summary judgment and its costs of the action. The Cross-

Summons (which raises the same issues) is dismissed. The Plaintiff is at liberty to apply for its costs on the indemnity basis.

Dated this 17th day of September, 2010

Henderson, J.

Henderson, J.
Judge of the Grand Court