

SINGAPORE INTERNATIONAL COMMERCIAL COURT

24 January 2018

Media Summary

Singapore International Commercial Court Suit No 5 of 2017 (Summons No 41 of 2017)

Macquarie Bank Limited v Graceland Industry Pte Ltd [2017] SGHC(I) 12

Background facts

1 The dispute arises out of the defendant's refusal to pay amounts that were allegedly due to the plaintiff as a consequence of the termination of an agreement involving a commodity swap transaction. Summons No 41 of 2017 was the defendant's application under O 20 r 5 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) seeking leave to amend its defence and counterclaim, some eight weeks ahead of the trial on 19–23 February 2018.

2 The plaintiff, Macquarie Bank Limited ("Macquarie"), is an Australian company and a global provider of banking and financial services. The second defendant in the counterclaim, Mr Stephen Becher Wolfe ("Mr Wolfe") was, at the material time, a Senior Adviser in Macquarie's Fixed Income, Currencies and Commodities Group. The defendant, Graceland Industry Pte Ltd ("Graceland"), is a Singapore company that engages in trading of phosphate-based chemical products.

3 Sometime in 2014, Macquarie and Graceland entered into an agreement ("the Agreement") which involved a commodity swap transaction regarding 30,000 metric tonnes of urea fertiliser ("the Transaction"). According to Macquarie, the Agreement incorporates some terms of the 2002 International Swaps and Derivatives Association Master Agreement ("ISDA Form"). Macquarie claims that Graceland breached the Agreement by failing to execute an ISDA Master Agreement by the stipulated date, and therefore that Macquarie had the right to terminate the Agreement. Macquarie thus claims \$1,200,000, the amount allegedly owed to it by reason of the early termination, calculated in accordance with the terms of the ISDA Form.

4 Graceland disputes the terms of the Agreement as pleaded by Macquarie. It also denies liability on other alternative bases. First, that Graceland had entered into the Agreement under a mistaken belief as to the nature of the Transaction (*ie*, that it was an exchange-traded transaction rather than an over-the-counter transaction with Macquarie as the counterparty). Second, that Macquarie and Graceland were mutually mistaken as regards the nature of the Transaction. Third, that Macquarie and/or Mr Wolfe breached the fiduciary duties they owed to Graceland. Fourth, that Macquarie and/or Mr Wolfe had made various fraudulent or negligent misrepresentations to Graceland and/or made material non-disclosures. Graceland counterclaimed for the loss and damage suffered as a result of the above.

The application

5 Graceland's proposed amendments to its defence and counterclaim dealt with five major categories: (a) the terms of the Agreement, particularly whether the parties had agreed to adopt the terms of the ISDA Form in the calculation of the early termination amount; (b) Graceland's knowledge on whether a bank could be a counterparty to a commodity derivative transaction; (c) particulars of correspondence relating to a potential fertiliser derivative transaction that had preceded the Transaction; (d) Graceland's provision of certain commercially sensitive and confidential information to Macquarie on the latter's request; and (e) certain phone conversations between Mr Wolfe and a representative of Graceland. Graceland argued that these amendments were necessary to ensure that relevant issues and facts would be fully canvassed at trial for the purpose of determining the real questions in controversy between the parties. Further, the proposed amendments were merely clarificatory in nature and would not cause surprise to or prejudice Macquarie.

6 Macquarie opposed the application on the basis that Graceland had brought the application in bad faith with a view to seeking to vacate the trial dates. It also argued that Graceland had failed to provide an adequate explanation for the lateness of its application and that Graceland had demonstrated egregious conduct. On the latter issue, Macquarie highlighted, among other points, that Graceland had previously informed the court that it did not intend to amend its pleadings, the proposed amendments sought to introduce the very particulars that Graceland had

previously refused to provide to Macquarie, were an attempt to re-litigate issues that had already been decided, and were deficient.

Procedural history

7 At the first hearing of the application on 21 December 2017, the court granted Graceland leave to amend its defence and counterclaim, apart from the proposed amendments relating to the categories (a), (b) and (d) mentioned at [5] above. Thereafter, Graceland sought to make further arguments pursuant to s 28B of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) in relation to those disallowed amendments and provided a revised draft defence and counterclaim. There was a further oral hearing on 8 January 2018 to hear those arguments and consider the proposed amendments. However, as the court considered some of the proposed amendments to be, for various reasons, ambiguous or unsatisfactory, the court granted Graceland a further opportunity to serve a further draft amended defence and counterclaim. A third hearing was convened on 10 January 2018 to finalise matters.

The decision

8 The court eventually granted Graceland's amendment application in large part. However, having regard to Graceland's egregious conduct, the lateness of the application and the fact that Graceland's application had failed in part, the court held that Macquarie and Mr Wolfe were entitled to costs of the application, and costs consequential upon the amendments in any event.

Reasons for the judgment

9 The court noted that in certain circumstances, an applicant's egregious conduct could of itself justify the refusal of an application for leave to amend. However, it was also necessary to consider what prejudice has or might be suffered by the other party, and whether such prejudice could be adequately compensated by an appropriate order as to costs.

10 The court had originally refused leave to amend in relation to category (a) because in its view, the amendments raised issues that were entirely new on the face of the pleadings. Given the proximity to trial, to allow such amendments would cause real prejudice to Macquarie that could not be properly compensated by an order as to costs. However, upon further arguments and Graceland's abandonment of part of its amendment as originally proposed, the court allowed the amendments to the extent that they only put in issue what were the terms of the Agreement.

11 The court had also originally refused leave to amend in relation to category (b) because during the first hearing, Graceland's counsel was unable to provide the court with satisfactory assurances that all documents relevant to that issue had already been disclosed. Subsequently, Graceland's counsel took further instructions and expressly confirmed in its letter to the court that Graceland had been unable to locate any further documents which may be relevant and material to this issue. Given the absence of prejudice to Macquarie, the amendment was allowed.

12 In relation to category (c), the court took the view that allowing the amendment would not cause much prejudice to Macquarie. All of the relevant documentation had already been disclosed and the point had been dealt with in affidavit evidence and by expert reports filed by both sides. Thus, any consequential steps that Macquarie might need to take would not be a great burden.

13 As for category (d), the court had originally refused leave because the proposed amendments were too vague and lacking in particulars. However, Graceland subsequently provided a revised draft and counterclaim which set out those further particulars. The court was satisfied that the amendment was necessary to identify properly the relevant issues and did not cause any prejudice to Macquarie which could not be compensated for by an order as to costs.

14 Finally, in relation to category (e), the court allowed the amendment on the basis that Graceland would not object to Macquarie filing of a supplementary affidavit limited to only dealing with that proposed amendment.

* This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court.