IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC(I) 2

Suit No 2 of 2016
(Summons No 24 of 2016)

Between

BNP Paribas Wealth Management

… *Plaintiff*

And

(1) Jacob Agam
(2) Ruth Agam

… *Defendants*

JUDGMENT

[Civil Procedure] — [Parties] — [Substitution]

BNP Paribas Wealth Management
v
Jacob Agam and another

[2017] SGHC(I) 2

Singapore International Commercial Court — Suit No 2 of 2016
(Summons No 24 of 2016)
Steven Chong J, Roger Giles IJ and Dominique Hascher IJ
14 November 2016, 12 January 2017

17 February 2017 Judgment reserved.

Roger Giles IJ (delivering the judgment of the court):

1 The proceedings were brought by BNP Paribas Wealth Management ("BNPWM"). BNP Paribas SA ("BNPSA") has applied to be substituted for BNPWM as plaintiff, consequent upon a merger whereby it succeeded to the assets and liabilities of BNPWM. The application is opposed by the defendants.

2 For the reasons which follow, the application should be granted.

The proceedings

3 BNPWM was a private bank, providing banking and investment services to its customers. It was incorporated in France and a wholly owned subsidiary of BNPSA. It acted in Singapore through a Singapore branch, and was registered in Singapore as a foreign company.

4 The defendants, who are brother and sister, are Israeli citizens. They owned through companies a number of properties in France and Monaco.

5 In 2010, BNPWM advanced approximately €61.7m to the companies, in part to refinance the properties and in part to provide a fund for investment. The security for the loans included personal guarantees by the defendants. The transaction was arranged and entered into through the Singapore branch of BNPWM, and the documentation provided for Singapore law as the governing law and for the jurisdiction of the Singapore courts.

6 Intermediate events brought repayment of some of the loans, but they were not fully repaid on maturity in 2015. On 27 November 2015, BNPWM brought proceedings against the defendants in the Singapore High Court, claiming approximately €30m from them as guarantors of the obligations of two of the companies. The defendants filed defences to the claim, and the first defendant also brought a counterclaim against BNPWM. In April 2016 the proceedings were transferred to the Singapore International Commercial Court.

7 The defendants' application to stay the proceedings in favour of France was dismissed by this court on 28 October 2016 – see *BNP Paribas Wealth Management v Jacob Agam and another* [2016] SGHC(I) 5.

The merger

8 The merger between BNPWM and BNPSA was effected pursuant to the French Commercial Code ("the Code"),[1] relevantly reading (in translation):

> **Article L236-1**
>
> One or more companies may, by means of a merger, transfer their assets to an existing company or to a new company which they shall form.
>
> One company may also, by means of a division, transfer its assets to several existing companies or to several new companies.
>
> These options shall be open to companies being wound up …
>
> …
>
> **Article L236-3**
>
> I.- The merger or division shall lead to the dissolution without winding-up of the companies which are disappearing and the universal transfer of their assets to the receiving companies, in their current state on the date when the operation is finally carried out. …
>
> …
>
> **Article L236-6**
>
> All the companies participating in one of the operations indicated in Article L.236-1 shall prepare a merger or division plan.
>
> This plan shall be filed with the registry of the Tribunal de commerce in whose jurisdiction the registered offices of these companies are situated and shall be published in accordance with the terms fixed by a Conseil d'Etat decree.
>
> In order for the operation to be valid, the companies participating in one of the operations indicated in the first and second paragraphs of Article L.236-1 shall be required to file with the registry a declaration in which they shall record all

---

1 2nd affidavit of Alix Cravero dated 26 October 2016 ("AC 2nd affidavit"), exhibit AC-7.

> the acts carried out in order to proceed with this operation and by which they shall confirm that the operation has been carried out in accordance with the acts and regulations. The clerk, under his responsibility, shall ensure the conformity of the declaration with the provisions of this article.

9 It was common ground in the application that a merger so made takes effect by the doctrine of universal succession under French law, resulting in the transfer of all assets and liabilities.

10 In conformity with Article L.236-6, on 25 February 2016, BNPSA and BNPWM executed a merger agreement ("the Merger Agreement"). BNPSA was "the absorbing company", and BNPWM was "the absorbed company". Recital II of the Merger Agreement recorded that the merger "consists of the absorption of [BNPWM] by [BNPSA], with the suppression of its legal personality", and that it "will be executed according to the provision of Articles L.236-1 and following" of the Code.[2]

11 Section I of the Merger Agreement listed the values of the assets and liabilities of BNPWM and stated that, subject to satisfaction of the conditions precedent later recorded, BNPWM "contributes to [BNPSA], by way of a universal transfer of its assets and liabilities in France and abroad… all of the assets and liabilities composing its assets and liabilities on the Closing Date…" (Article 1.1).[3] It was further stated in the same Article that the merger "entails on the Closing Date the universal transfer of all of the assets and liabilities of [BNPWM], which shall be entirely vested in [BNPSA] in the state in which they shall be on this date".

---

2 AC 2nd affidavit, exhibit AC-6 at p 3.

3 AC 2nd affidavit, exhibit AC-6 at p 4.

12 Section II provided that the merger should be completed and final on the Closing Date, subject to the satisfaction of a number of conditions precedent.[4] They included:

> … the absence of incapacity to obtain any… approval, authorization or exemption… in… Singapore, coming from or imposed by… the Monetary Authority of Singapore… (or any other applicable regulatory authority), which would have a material adverse effect on the implementation of the merger or the continuation of the transferred business…

13 The Closing Date depended on the consent of the European Central Bank on the withdrawal of BNPWM's banking licence, and in the event was 1 October 2016.[5]

14 Section III[6] was brief, in the terms:

> The final completion of the merger by absorption of [BNPWM] by [BNPSA], following the satisfaction of the conditions precedent provided in Section II above, shall have as a consequence, on the Closing Date, the universal transfer of the assets and liabilities of Wealth Management and its winding-up without liquidation.

15 Section IV[7] included:

> **Article 4.1 – General Conditions**
>
> **A)** [BNPSA] shall be generally subrogated purely and simply on the Closing Date in all the rights, legal actions, obligations and miscellaneous commitments of [BNPWM].

---

4 AC 2nd affidavit, exhibit AC-6 at p 7.

5 AC 2nd affidavit, para 13.

6 AC 2nd affidavit, exhibit AC-6, p 7.

7 AC 2nd affidavit, exhibit AC-6, p 8.

> **B)** [BNPSA] shall be subrogated from the Closing Date in the benefits and obligations of the contracts and commitments of any kind, validly binding [BNPWM] vis-à-vis third parties.
>
> If need be, it shall be responsible to obtain the permission of any third parties whatsoever, with [BNPWM] undertaking to take measures aimed at the transfer of the said contracts and commitments each time that this shall be necessary.
>
> **C)** [BNPSA] shall take responsibility for the assets and rights of [BNPWM] and, in particular, the business contributed to it with all its tangible and intangible assets forming part thereof, including the items, notably moveable items and equipment, in the state in which they shall be on the Closing Date.
>
> **D)** The contributions of [BNPWM] are granted and accepted in exchange for the obligation undertook by [BNPSA] to pay all liabilities of [BNPWM], as specified above. Generally, [BNPSA] shall assume responsibility for all of the liabilities of [BNPWM] existing on the Closing Date.
>
> …
>
> **E)** [BNPSA] shall comply with the laws, decrees, resolutions, regulations and practices concerning the uses of the same kind as that of the assets contributed and it shall be responsible for all the authorisations which shall be necessary, for its own account and its risks.

16 Article 4.1 was followed by specific provisions in Article 4.2, including:

> **A) Assumption of the disputes**
>
> [BNPSA] shall have full powers from the Closing Date, notably to bring or defend any legal actions in progress or which may be brought in the place of [BNPWM] concerning the assets contributed, to accept any decisions and to receive or pay any amount due because of a judgement or settlement agreements.

17 The Merger Agreement was duly filed and published as required by Article L.236-6 of the Code, and on 12 October 2016 a declaration of conformity as also required was filed with the Commercial and Companies

Registry of Paris.[8] On 12 October 2016 it was recorded against BNPWM's French registration that it was struck off upon "[m]erger absorption" by BNPSA.[9] BNPWM's Singapore branch also surrendered its banking licence in Singapore. This was notified in the Government Gazette on 3 October 2016.[10]

18 It became common ground in the application that all necessary steps had been taken as required by French law, and that the merger by the universal transfer of assets and liabilities and the winding up of BNPWM was effective in France. The merger has been acted upon in France: BNPSA was duly substituted for BNPWM in the French proceedings brought by the second defendant and her companies against BNPWM.

The application for substitution

19 On 27 October 2016, BNPSA filed the present application to be substituted as plaintiff in place of BNPWM, as transferee of the interest of BNPWM, pursuant to O 15 r 7(2) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed).

20 The defendants opposed the application on two bases, which we will shortly describe. Their written submissions included that since BNPWM no longer existed, the proceedings had abated and substitution of BNPSA was academic. We do not think that the defendants persisted in this submission, which in any event we would not accept. Succession to the assets and liabilities of BNPWM, if effective, would have preserved the cause of action

---

8 AC 2nd affidavit, para 13 and exhibit AC-7.

9 AC 2nd affidavit, exhibit AC-8.

10 Affidavit of Fiona Siew dated 28 November 2016, para 14.

and substitution of plaintiff would be available (see *Toprak Enerji Sanayi AS v Sale Tilney Technology plc* [1994] 1 WLR 840).

The first basis of opposition

21 The defendants' first argument rested upon the statements in Article 4.1A and B of the Merger Agreement that BNPSA "shall be generally subrogated" and "shall be subrogated" ("sera subrogée") in the rights and obligations (as more fully described) of BNPWM. They submitted that the parties to the Merger Agreement had thereby chosen to carry out the transfer of assets and liabilities by the particular mechanism of subrogation. As an entity subrogated to the rights of another entity must sue in the name of that entity, it was argued that BNPSA could only sue in the name of BNPWM; but BNPWM no longer existed, so there was no entity in whose name BNPSA could sue. They referred to *MH Smith Ltd (Plant Hire) Ltd v DL Mainwaring (T/A Inshore)* [1986] 2 Lloyd's Rep 244, in which it was held that proceedings brought by an insurer in its insured's name in the exercise of subrogated rights could not be maintained because the insured had been dissolved.

22 BNPSA did not seek to sue in BNPWM's name, and the argument could perhaps more briefly be expressed that subrogation did not entitle it to sue in its own name. In our view, however, the argument should not be accepted. It assumes that the subrogation referred to in Article 4.1A and B was the same as the common law (equitable) concept of subrogation. That is plainly not so.

23 There was no expert evidence of subrogation in French law. An affidavit of Christophe Lachaux, filed on behalf of the defendants, explained

that under French law a receivable was transferred by a sale ("cession"), a subrogation ("subrogation") or a delegation ("délégation").[11] He did not explain what was involved in a subrogation or the other mechanisms, other than that if subrogation is the mechanism then "the applicable substantive and procedural laws relating to transfer of legal actions as understood in the relevant jurisdiction of such legal actions, have to be followed".[12] This was not an explanation of subrogation, which was expressed in the Merger Agreement to operate in relation to both rights and obligations. It did not explain *how* subrogation operated (according to the argument) as a mechanism for the wholesale transfer of assets and liabilities; it also did not suggest that a concept other than transfer – or any other concept requiring suing in the name of another – was involved.

24 The defendants referred to the second sentence of Article 4.1B and to Article 4.1E as support for their argument, but we do not think that the articles refer to the common law concept of subrogation. The terms of the Merger Agreement are squarely against the argument. Whatever may be meant by subrogation in Article 4.1A and B, it could not be necessary that BNPWM continue to exist in order that BNPSA could effectively succeed to its assets and liabilities or maintain the right to sue in relation to those assets and liabilities. As provided by Article L.236-3 of the Code, the merger was to lead to the dissolution of the absorbed company and the universal transfer of its assets to the absorbing company, and the Merger Agreement so provided. Those consequences co-existed; it could not be that one was to be defeated by the other.

---

11 Affidavit of Christophe Lachaux dated 9 November 2016 ("CL affidavit"), para 6.

12 CL affidavit, para 7.

25 Further, the common law does not include subrogation to a liability, so in referring to subrogation in obligations and commitments (note "in" not "to") the Merger Agreement could not conceivably be expressing the common law concept of subrogation.

26 The primary description of the operation of the merger in the Merger Agreement is as a universal transfer of assets and liabilities (see Section I, Article 1.1; Section III), specifically with BNPSA having the full power to bring or defend any legal proceedings in progress or which might be brought "in the place of" BNPWM (Article 4.2). It may safely be assumed that such an important document was prepared in conformity with French law, and the universal transfer is not consistent with a mechanism by which BNPWM had to continue to exist for the exercise of BNPSA's rights as transferee.

27 Counsel for the defendants sought to respond to these matters. He submitted that in the absence of evidence of French law it should be taken to be the same as Singapore law, citing *Shaker v Mohammed Al-Bedrawi and others* [2002] EWCA Civ 1452. There are numerous exceptions to that principle, which is not applied inflexibly, and we do not think it has any application in ascertaining the meaning and effect of the references to subrogation in the Merger Agreement. He claimed that the exercise of subrogated rights could have been accommodated by delaying the dissolution of BNPWM until after the Closing Date, but that would scarcely be a practical course or congruent with the merger by the absorption of BNPWM which entailed the dissolution of BNPWM: indeed, the fact that the parties did not take it underlines that they did not intend by the references to subrogation to embrace the need for the continued existence of BNPWM. As to subrogation to a liability, counsel for the defendants appeared to acknowledge the difficulty but suggested that subrogation to a liability could be effective under

French law but otherwise with the same ingredients as the common law concept. In our opinion, his responses did not satisfactorily address the matters to which we have referred.

28 It may be noted that, in the related proceedings in France which have been brought by the defendants, BNPSA has been substituted for BNPWM as the defendant, which suggests that no impediment was seen to the transfer of BNPWM's liability to the defendants to BNPSA in the prior dissolution of BNPWM; although of course we know little about what exactly occurred in those proceedings.

The second basis of opposition

29 The defendants' second argument was principally founded on s 55B of Singapore's Banking Act (Cap 19, 2008 Rev Ed) ("the Act"). The provision is contained in Division 1 of Part VIIA of the Act and relevantly provides:

> **Voluntary transfer of business**
>
> **55B. —** (1) A transferor may transfer the whole or any part of its business (including its non-banking business) to a transferee which is licensed to carry on banking business in Singapore, if —
>
> (*a*) where the transferor is a bank incorporated in Singapore, the Minister has consented to the transfer or has certified that his consent is not required;
>
> (*b*) where the transferor is a bank incorporated outside Singapore, the business to be transferred is reflected in the books of the transferor in Singapore in relation to its operations in Singapore;
>
> (*c*) the transfer involves the whole or part of the banking business of the transferor; and
>
> (*d*) the Court has approved the transfer.
>
> (2) Subsection (1) is without prejudice to the right of a bank to transfer the whole or any part of its business under any law.

30 Section 55A contains definitions, including that "transferor" means a bank in Singapore, the whole or part of the business of which is or is proposed to be transferred under the Division. Section 55C governs application to the Court for approval, including that by the order approving the transfer, the Court may provide for the transfer of the whole or part of the business and other matters such as the continuation of legal proceedings and the dissolution without winding up of the transferor (s 55C(7)). The order may be made even if the transferor does not have capacity to transfer the business (s 55C(8)(*a*)), and the business or part thereof is transferred "by virtue of the order" (s 55C(9)).

31 BNPWM was a bank in Singapore within the definition of "transferor" in s 55A. BNPSA acknowledged that the merger involved a transfer of part of BNPWM's business and accepted that, unless s 55B(2) applied, court approval to the transfer was required. Court approval had not been obtained. BNPSA contended, however, that s 55B was merely "facilitative", that is, it prescribed a means of transfer but, through s 55B(2), left other means available.

32 As the arguments evolved, the issue became whether the transfer pursuant to the merger was "under [a] law" within s 55B(2). The defendants submitted that it was not, and that in the absence of court approval the transfer was ineffective in Singapore. Initially it was said that the conditions precedent in the Merger Agreement required compliance with Singapore laws relating to the transfer of banking assets and liabilities. That appeared to fall away with the acknowledgement that the merger was effective in France, and the submission evolved into an argument that recognition in Singapore of the succession to BNPWM's assets and liabilities would involve illegality and should not be given effect by the substitution of BNPSA.

33 In our opinion, s 55B(2) applies and it was not necessary that court approval be obtained.

34 Part VIIA of the Act was introduced by the Banking (Amendment) Act 2007 (No 1 of 2007). From the Parliamentary debates (see *Singapore Parliamentary Debates, Official Report* (22 January 2007) vol 82 (Mr Lim Hng Kiang, Minister for Trade and Industry)) and the Explanatory Statement to the Banking (Amendment) Bill (No 13 of 2006) ("the Bill"), it can be gleaned that the purpose of the amendment was to enhance the role of the Monetary Authority of Singapore ("the MAS") in bank resolution, including providing a mechanism by which a private sector resolution could be carried out in respect of a distressed or insolvent bank. The origin of s 55B(2) can be seen in the Explanatory Statement to the Bill:

> Division 1 of Part VIIA provides for the voluntary transfer of the business of a bank in Singapore. A bank may transfer the whole or part of its business (including its non-banking business) to another bank if the provisions in Division 1 are complied with and the approval of the High Court is obtained for the transfer. *Division 1 does not affect the voluntary transfer of any business of a bank under other written law or under an agreement.*
>
> [emphasis added]

35 What is the reach of "law" in s 55B(2), and does the phrase "under any law" exclude an underlying agreement between transferor and transferee? Each party sought to gain comfort from the italicised words. The defendants relied on the words "written law" in the Explanatory Statement which they said, through the definition of "written law" in s 2(1) of the Interpretation Act (Cap 1, 1997 Rev Ed), meant Singapore legislation; thus, it was said, "law" in s 55B(2), meant a Singapore statute. The defendants also submitted that the transfer was by the Merger Agreement, a voluntary transfer rather than under a law. By contrast, BNPSA relied on the phrase "under an agreement" which it

said showed that the Merger Agreement did not take the transfer of assets and liabilities outside s 55B(2).

36 Section 55B is not confined to the transfer of the business of a distressed or insolvent bank, and s 55B(2) uses the expression "under any law" rather than "other written law" as was used in the Explanatory Statement. In our view, the different expression used in the Act detracts from the assistance to be gained from the Explanatory Statement. When the legislature did not take up the defined expression "written law", but rather used the wide expression "any law", it would not be correct to restrict the latter expression to a Singapore statute. On the other hand, the legislature chose not to refer to a transfer under an agreement, but confined the saving provision to transfer "under any law". It is those operative words which must be applied.

37 Section 55A encompasses banks incorporated outside Singapore and subject to foreign laws, and the words "any law" amply extend beyond a Singapore statute and to a foreign law which will be recognised in Singapore as giving the right to transfer. In *JX Holdings Inc and another v Singapore Airlines Ltd* [2016] 5 SLR 988, out of international comity, the court recognised the transfer of assets and liabilities of a foreign corporation through a process of universal transfer under its law of incorporation (at [43]–[44]). BNPWM and BNPSA are companies which were incorporated in France. The succession to corporate personality in the merger of French incorporated companies being governed by French law, the Code is hence such a law and the transfer thereunder will be recognised by this court.

38 It may be accepted that the Merger Agreement was a necessary element in the merger between BNPSA and BNPWM, and that the merger was a voluntary act between them. But there was more than a commercial

agreement between a vendor and a purchaser of a business, having effect through the making of the agreement and carrying it out, in this case. The Merger Agreement was effected through Article L.236-3 of the Code, which is concerned with the particular event of merger. The article provides a means by which there can be a merger whereby the assets of one company are automatically transferred to another company. There are requirements by way of filing and publication, and the filing of a declaration of conformity is specifically "[i]n order for the operation to be valid" (Article L.236-6). The merger, and the transfer of assets and liabilities involved in it, take their force from the Code; without it, a merger agreement would have to be given effect by, and only to the extent possible as, particular transfers. In our opinion, the universal transfer of assets and liabilities in the merger was under the Code, and under a law for the purposes of s 55B(2).

39 This interpretation is supported by ss 14A–C of the Act. Section 14A(1) provides for approval by the Minister of the mergers of a bank and one or more of its wholly-owned subsidiaries, and by s 14A(2) the issue of a certificate of approval under s 14A(1) "merges the banks that are parties to the merger agreement on which the application for the certificate of approval is based". By s 14C, provisions in the Second Schedule to the Act then have effect. They include that the existing bank's undertaking shall by virtue of s 14C be transferred to and vested in the successor bank, and that any action or proceedings shall not abate and may be continued by or against the successor bank.

40 The operation of these provisions overlaps with that of ss 55A–C, in that a merger as referred to in the former provisions will generally involve a transfer as referred to in the latter provisions. For consistency within the Act, the transfer involved in a merger pursuant to ss 14A–C must be permitted as a

transfer under a law within s 55A(2); and it must be a transfer under a law notwithstanding that the merger is a voluntary act and involves a merger agreement. For ss 14A–C of the Act and the Code alike, the merger takes its force from the relevant legislation.

41 We add for completeness that the defendants also submitted that the transfer of assets and liabilities pursuant to the merger infringed s 14A of the Act. We do not agree. There is nothing to indicate that a merger must take place in the manner dealt with in ss 14A–C; they offer a means of merging which may be employed. From the Minister's speech at the Second Reading of the Banking (Amendment) Bill (No 22 of 1993) (see *Singapore Parliamentary Debates, Official Report* (30 August 1993) vol 61 col 448 (Dr Richard Hu Tsu Tau, Minister for Finance)), the provisions were introduced to facilitate merger between a bank and its subsidiaries in a more simple manner than under the Companies Act. BNPSA and BNPWM were not obliged to use it, and did not purport to do so.

42 Although it cannot govern our decision, we note that the MAS was informed of the merger, and that there was no indication that it considered that court approval had been required.

Conclusion

43 We do not accept either of the bases for the defendants' opposition to the substitution. No other reason was suggested, or appears, for declining to substitute BNPSA as plaintiff.

44 We make the following orders:

(a) BNP Paribas SA is substituted as plaintiff in place of BNP Paribas Wealth Management with effect on and from 1 October 2016.

(b) Leave is given for the name of the plaintiff in the writ of summons filed on 27 November 2015 to be amended to BNP Paribas SA, the amended writ of summons to be filed and served within three working days from the date of this order.

(c) All other documents filed thus far in the proceedings are taken to have been amended to substitute BNP Paribas SA for BNP Paribas Wealth Management with effect on and from 1 October 2016.

(d) The defendants are to bear 80 per cent of the costs of this application, most of which was occasioned by the unsuccessful arguments raised by the defendants in opposition of the application. We fix the costs payable by the defendants at $8,000 inclusive of disbursements.

Steven Chong	Roger Giles	Dominique Hascher
Judge	International Judge	International Judge

K Muralidharan Pillai, Luo Qinghui and Andrea Tan
(Rajah & Tann Singapore LLP) for the plaintiff;
Cheong Yuen Hee (instructed counsel) and Mohamed Zikri bin Mohamed Muzammil (instructing counsel)
(Hin Tat Augustine & Partners) for the defendants.