IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA(I) 01

Civil Appeal No 71 of 2017

Between

(1) Jacob Agam
(2) Ruth Agam

… *Appellants*

And

BNP Paribas SA

… *Respondent*

GROUNDS OF DECISION

[Banking] — [Statutory regulations] — [Overseas banks with representative offices]

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Jacob Agam and another
v
BNP Paribas SA

[2017] SGCA(I) 01

Court of Appeal — Civil Appeal No 71 of 2017
Sundaresh Menon CJ, Judith Prakash JA, and Dyson Heydon IJ
12 May 2017

18 May 2017

Dyson Heydon IJ (delivering the grounds of decision of the court):

Introduction

1 This is an expedited appeal against the orders of the Singapore International Commercial Court in *BNP Paribas Wealth Management v Jacob Agam and another* [2017] SGHC(I) 2 ("the Judgment"). At the end of oral argument, this court made an order dismissing the appeal, together with consequential orders. The court's reasons for having taken that course are set out below.

2 The Notice of Appeal identifies a single ground of appeal:

> Whether the Court had erred in its interpretation of Sections 14A to 14C and 55B to 55C of the Banking Act (Cap. 19) in determining that Court approval was not required in the instant case.

The parties and the commencement of the proceedings

3 The appellants are Jacob and Ruth Agam ("the Appellants"). They are citizens of Israel. They operate a number of companies ("the Appellants' companies").

4 BNP Paribas Wealth Management ("Wealth Management") was a bank incorporated in France. It was a wholly-owned subsidiary of BNP Paribas SA ("Paribas SA"). Paribas SA is the respondent to the present appeal ("the Respondent").

5 In 2010, Wealth Management (through its Singapore branch) advanced approximately €61.7m to the Appellants' companies ("the Loans"). The Loans were secured by, *inter alia*, personal guarantees by the Appellants. The documentation for the Loan provided for the application of Singapore law and the jurisdiction of the Singapore courts.

6 The Loans were not fully repaid on maturity in 2015. Wealth Management commenced proceedings in the Singapore High Court in November 2015 for recovery of approximately €30m from the Appellants in their capacity as guarantors of the Loans ("the Main Proceedings"). Related proceedings have been instituted in France.

7 The Main Proceedings were transferred to the Singapore International Commercial Court in April 2016. The Main Proceedings have not yet been heard by that court.

The merger

8 As will be seen below, Paribas SA applied to be substituted for Wealth Management as plaintiff in the Main Proceedings. This application followed a

merger whereby Paribas SA succeeded to the assets and liabilities of Wealth Management ("the Merger"). This was effected by a written merger agreement ("the Merger Agreement").

9 The Merger Agreement is in French. Extracts below are as translated and reproduced in the decision at first instance.

10 The Merger Agreement purported by its recitals to be effected pursuant to Art L.236 of the French Commercial Code ("the Code"), which allows, *inter alia*, for the universal transfer of the assets of a company to an existing company. It was common ground at first instance 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": the Judgment at [9].

11 Articles L.236-1 and L.236-3 of the Code provide, relevantly:

> **Article L.236-1**
>
> 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 L.236-3**
>
> 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. …
>
> …

12 Article L.236-6 of the Code provides for mechanisms by which such a merger may take place.

13 Recital II to the Merger Agreement asserted, *inter alia*, that the Merger "consists of the absorption of Wealth Management by [Paribas SA], with the suppression of its legal personality". Similarly, Art 1.1 of the Merger Agreement provided that the Merger "entails on the Closing Date the universal transfer of all of the assets and liabilities of Wealth Management, which shall be entirely vested in [Paribas SA], in the state in which they shall be on this date". Section III provided that "[t]he final completion of the merger by absorption of Wealth Management by [Paribas SA] … 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".

14 Article 4.1(A) of the Merger Agreement provided that "[Paribas SA] shall be generally subrogated purely and simply on the Closing Date in all the rights, legal actions, obligations and miscellaneous commitments of Wealth Management". The term "subrogated" was similarly used in Art 4.1(B) (the term used in French was "*sera subrogée*"). Whether the use of the term "subrogated" was consistent with the use of that term in common law jurisdictions was at issue before the court at first instance.

15 Wealth Management was struck off the register of French companies upon "merger absorption" by Paribas SA on 12 October 2016. The surrender of Wealth Management's banking licence in Singapore was notified in the Government Gazette on 3 October 2016. In the court below, the Appellants' counsel admitted that the Merger was effective in France.[1]

[1] ABOD vol 1 at pp 84-85.

16 On 27 October 2016, Paribas SA filed an application to be substituted for Wealth Management in the Main Proceedings, pursuant to O 15 r 7(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). This provision states as follows:

> Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party. An application for an order under this paragraph may be made ex parte.

17 This application was the subject of the decision at first instance. In that decision, the court comprised Steven Chong J (as he then was) and Roger Giles and Dominique Hascher IJJ. Giles IJ delivered the judgment of the court. The court made orders, *inter alia*, for the substitution of Paribas SA as plaintiff in place of Wealth Management.

Relevant provisions

18 Section 55B of the Banking Act is found in Part VIIA Division 1 of the same. It applies to the transfer of the whole or part of the business of a "transferor" (defined by s 55A to mean "a bank in Singapore, the whole or part of the business of which is, or is to be, or is proposed to be, transferred under this Division"). And "transferee" is defined to mean "a bank in Singapore, or a company which has applied for or will be applying for a licence to carry on banking business in Singapore, to which the whole or part of a transferor's business is, or is to be, or is proposed to be, transferred under this Division". Section 55B(1) and (2) provides as follows:

> (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*.
>
> [emphasis added]

The last three words are important in this appeal.

19 Two definitions in s 2(1) are relevant. "[B]ank" is defined as meaning "any company which holds a valid licence under section 7 or 79". "[B]ank in Singapore" is defined as meaning "(*a*) a bank incorporated in Singapore; or (*b*) in the case of a bank incorporated outside Singapore, the branches and offices of the bank located within Singapore".

20 Section 7 provides that a company which desires authority to carry on banking business in Singapore is to apply to the Monetary Authority of Singapore ("the Authority"). The Authority has power to grant a licence with or without conditions, or to refuse to grant it. Section 7(4) provides: "[t]he Authority may at any time vary or revoke any existing conditions of a licence or impose conditions or additional conditions thereto".

21 Section 55C establishes machinery provisions in relation to what a transferor's application to the High Court of Singapore or a judge thereof is to involve, where approval is applied for under s 55B(1)(*d*).

22 Sections 14A to 14C provide that applications can be made to "the Minister" for approval of the mergers of banks and their wholly-owned subsidiaries, upon satisfaction of specified criteria.

Leave to appeal

23 The Appellants' written submissions raised various issues which were outside the Notice of Appeal. Those issues arise out of the Appellants' contentions that they were entitled to appeal as of right, that there had been no need for them to apply for leave to appeal and that they wanted to advance an argument that the use of the word "subrogated" in the Merger Agreement was decisive in this case. It can be notoriously difficult to decide whether an order is only interlocutory, so that it cannot be appealed against without leave, or final, so that an appeal lies as of right (see *The "Nasco Gem"* [2014] 2 SLR 63 at [7]–[14]). At the start of oral argument, counsel for the Appellants was invited to develop his submissions as though he had obtained leave on an unrestricted basis, or as though the appeal was on foot as of right. This invitation was extended because it was more economical and efficient to proceed to the substance of the arguments counsel wished to advance. There would have been little point in debating the law about whether the appeal did lie as of right if it were clear that even if it did, it ought to be dismissed on the merits.

24 In passing, though, it should be said that the Appellants ought to have given the Respondent more notice of their proposed tactics on appeal in order to avoid surprise. The Respondent only had a little over a week's notice given that the Appellants filed and served their Skeleton Arguments on 4 May 2017

for the appeal listed for hearing on 12 May 2017. Since the Skeleton/Skeletal Arguments of the parties were served contemporaneously and not consecutively, the Respondent had no chance to deal with the subrogation point before the oral hearing.

25 It is now possible to turn to the principal arguments of the Appellants. They were advanced under four heads. It is convenient to take them in the order in which they were put. They relate to subrogation, the meaning of "without prejudice" in s 55B(2), the meaning of "under any law" in s 55B(2), and the meaning of s 14A.

Subrogation

26 In more than one place, the Merger Agreement used the word "subrogated". The Appellants argued that:

(a) the effect of the Merger Agreement was therefore the same as subrogation as that expression is understood in common law systems like Singapore's;

(b) in consequence, Paribas SA had no independent right to sue the Appellants but could only sue in the name of Wealth Management; and

(c) since Wealth Management no longer existed, there was no legal person with standing to sue the Appellants.

27 The primary argument of the Appellants was that because the word "subrogated" was used in the Merger Agreement, the Merger Agreement had to be treated as having the effect of subrogating Paribas SA to the rights of Wealth Management. The argument rested on the attribution of the common law meaning of "subrogated" to the word as used in the Merger Agreement.

28 The Appellants put forth two other arguments. One was that since Singapore law governed the guarantees on which the Appellants were being sued, it also affected the construction of the Merger Agreement (despite the fact that the Merger Agreement was governed by French law). By itself, in our judgment, it could not have that effect.

29 The other argument was based on France's adherence to the European Union treaties. This argument should not be accepted because no notice had been given of it to counsel for the Respondent.

30 The main argument of the Appellants on subrogation should be rejected for a reason which can be shortly expressed. In this context, a single word in a contract, even if it is used more than once, cannot control the meaning of the contract as a whole. The word "subrogated", whatever its meaning in French law, cannot be given the common law meaning where it would contradict the entire substance of the Merger Agreement. As the court below held, the Merger Agreement was to lead to the dissolution of Wealth Management and the universal transfer of its assets to Paribas SA. That outcome contradicted the idea, inherent in the common law conception of subrogation, that Wealth Management would survive as a legal person in a way permitting Paribas SA to sue in its name. Further, the common law conception of subrogation does not include succession to a liability, and the Merger Agreement, in referring to subrogation in obligations, involved succession to a liability.

Section 55B(2): "without prejudice"

31 The court below described s 55B(2) as a saving provision. In other words, the court below operated on the basis that "the right of a bank to transfer the whole or any part of its business under any law" was saved from any adverse

operation that might otherwise apply by virtue of s 55B(1). Section 55B(2) provided that s 55B(1) was not to prejudice that right.

32 In written submissions, counsel for the Appellants contended that s 55B(2) "does not state that a bank need not comply with the provision of [s 55B(1)]", but that the use of the expression "without prejudice" in this context "indicates that a 'bank' is not free to disregard the requirements necessary to complete a transfer under [s 55B(1)]". It was argued that although s 55B(2) "allows a bank to undertake a partial or complete business transfer under another law … it does not affect [s 55B(1)]'s requirement that a 'bank' obtains Court approval as part of any such transfer".

33 The meaning attributed to s 55B(2) in that way is completely contrary to its plain meaning. However, counsel for the Appellants put forward various policy justifications for his interpretation of the provision. The policy arguments advanced by counsel for the Appellants concern Singapore's standing as an international banking and financial centre, the realities of international banking operations and the supposed policy objectives of the Authority. For example, counsel for the Appellants contended orally that a bank with Singapore assets might be taken over by some bank which was undesirable or fragile or otherwise not fit and proper without any prudential oversight by the Authority.

34 These policy arguments overlook the context of s 55B(2) in ss 7 and 55B(1). The power of transfer in s 55B is granted to a "transferor" (*ie*, a bank in Singapore). It is not an unlimited power. It is only a power to transfer to a transferee *which is licensed to carry on banking business in Singapore*. Accordingly, the transferee cannot be some wholly unsatisfactory legal person operating without surveillance from the Authority. The transferee, being licensed, will already have satisfied the Authority that it meets the requirements

for a licence. And if conditions need to be imposed, varied or revoked, the Authority may do that at any time.

35 Even if there were two possible meanings of "without prejudice" in s 55B(2), which there are not, the policy arguments do not point to the Appellants' preferred meaning as being correct. The legislative scheme accommodates those policy concerns.

Section 55B(2): "under any law"

36 The words "under any law" stand in contrast to "any written law". The words "written law" refer to the Constitution and to Singapore legislation: s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed). The words "any law" can refer to any law in the world.

37 The Appellants relied on references to "law" which was not Singapore law in ss 25(3) and 26(3) of the Banking Act. However, these provisions create very specific duties for the particular purposes of ensuring the provision of financial information about banks incorporated outside Singapore, and give no support to the view that in s 55B(2) the words "under any law" means "under Singaporean law". The Appellants also relied on s 29(4) which provides for directors to indemnify banks in Singapore against loss. It also provides that this is without prejudice to the liability of directors "under this Act or any law". This too does not afford support for the Appellants' submissions concerning the words "under any law".

38 Again, the Appellants relied on policy arguments to support the conclusion that in s 55B(2) "any law" meant "any written law". Among them was the argument that depositors and others were given safeguards by the need for Ministerial and court approval under s 55B and, in the case of s 14A mergers,

by the role of the Minister in granting a certificate of approval. It was submitted that the field of bank mergers was covered by ss 14A and 55B. It was further submitted that to permit a merger to take effect "under any law" – *ie*, including the law of jurisdictions other than Singapore – left it open for any merger affecting Singapore banks to take place as long as some jurisdiction whose law (not being Singapore law) permitted it, without any regard to the impact on Singapore.

39 Section 14A will be considered below. The other aspects of the Appellants' arguments in relation to the words "under any law" fail because of the words "to a transferee which is licensed to carry on banking business in Singapore" in s 55B(1).

40 The policy concerns articulated by the Appellants are met by the fact that s 55B(2), in preserving the right to make a transfer "under any law", is dealing only with transfers to transferees already licensed in Singapore. The Appellants have thus failed to demonstrate any reason for not giving "under any law" its ordinary meaning and instead reading it as "under Singaporean law".

Section 14A

41 The Appellants submitted that once Wealth Management decided not to apply to the court under s 55B, it should have applied to the Minister under s 14A. That submission is incorrect.

42 Section 55B read by itself is not mandatory, but permissive. As the court below pointed out, the same is true of s 14A. And read together, ss 14A and 55B do not compel a transferor to choose one method or the other. A transferor may proceed "under any law" if it wishes.

43 Further, as counsel for the Respondent pointed out, while s 55B(1) is limited to transfers *to* banks in Singapore licensed to carry on banking business in Singapore, being transfers *from* banks in Singapore (which are already licensed), s 14A is limited to mergers between banks and their wholly-owned subsidiaries. This points against the idea that ss 14A and 55B between them cover a particular field. And the Appellants' argument cannot escape the consequences of the permissive language used in each section.

Conclusion

44 For these reasons, the court made the following orders: (1) the appeal is dismissed; (2) the Appellants are to pay the Respondent's costs of the application for leave to appeal and the appeal itself; and (3) the usual order for payment out of the security is made.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Dyson Heydon International Judge

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