Altus Technologies Pte Ltd (under judicial management) v Oversea-Chinese Banking Corp Ltd [2009] SGHC 159

Case Number : OS 436/2009

Decision Date : 10 July 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Nicholas Narayanan (Nicholas & Co) for the plaintiff; Lee Eng Beng SC and Loke Shiu Meng (Rajah & Tann LLP) for the defendant

Parties : Altus Technologies Pte Ltd (under judicial management) — Oversea-Chinese Banking Corp Ltd

Companies – Receiver and manager – Judicial management order – Effect of judicial management order on right of set-off – Whether creditor was entitled to exercise its contractual right of set-off vis-a-vis debt owed by debtor company placed under judicial management

Companies – Receiver and manager – Judicial management order – Whether court should exercise its discretion under s 227X(b) Companies Act (Cap 50, 2006 Rev Ed) to order application of s 327(2) Companies Act read with s 88 Bankruptcy Act (Cap 20, 2000 Rev Ed) in the context of judicial management

Companies – Receiver and manager – Judicial management order – Whether exercise of right of set-off offended pari passu principle – Whether pari passu principle applied in the first place in the context of judicial management

10 July 2009

Andrew Ang J:

Introduction

1 The plaintiff sought a declaration that the defendant was not entitled to exercise its right of contractual set-off against the sum of US$627,260 due and owing by Samsung Corning Precision Glass Co Ltd ("Samsung Corning") to the plaintiff which was paid to the defendant under a mistake of fact, towards payment of debts owed by the plaintiff to the defendant; further, and/or alternatively, a declaration that the defendant's exercise of its right of contractual set-off was a breach of Part VIIIA of the Companies Act (Cap 50, 2006 RevEd); and an order that the defendant account and pay to Samsung Corning all sums paid by the latter to the defendant under a mistake of fact.

2 I dismissed the plaintiff's application for the reasons below. But first, it will be necessary to set out the salient facts.

The facts

3 The plaintiff was placed under judicial management on 13 February 2009 whereby one Tay Swee Sze ("the Judicial Manager") was appointed judicial manager. The plaintiff is involved in the business of the sputtering of targets for the electronics industry. This involves the application and chemical bonding of target compound onto materials such as LCD panels. Revenue for the plaintiff's business was approximately S$5.6m in 2008 and is expected to grow 10 to 15 per cent in 2009. Profits for 2009 are estimated at approximately S$350,000.

4 Samsung Corning, which is the plaintiff's major customer, ordered the sputtering of various products from the plaintiff. The plaintiff purchased the target compound required for the sputtering process from a US supplier, Synertech PM Inc ("Synertech"). From 14 January 2009 to 18 February 2009, eight invoices totalling US$627,260 were issued to Samsung Corning. The format of the invoices is the same. On these invoices, the plaintiff's bank account reference is stated quite clearly as such:

> OUR BANK ACCOUNT REF:
>
> ABN AMRO BANK
>
> ONE RAFFLES QUAY
>
> SOUTH TOWER
>
> SINGAPORE 048583
>
> SWIFT CODE: ABNASGSG
>
> USD a/c: 000.05.02.84.967

Payment was required to be made within 30 days.

5 The plaintiff contacted Samsung Corning for payment because it needed the moneys to pay its supplier, Synertech. Sometime on or around 16 March 2009, Samsung Corning informed the plaintiff that it had processed the payment for the invoices. Upon receipt of this news, the plaintiff informed Synertech that it would be making payment to the supplier shortly. On or around 23 March 2009, however, it was discovered that instead of the ABN AMRO account maintained by the Judicial Manager, Samsung Corning had transferred the sum of US$627,260 into the plaintiff's account ("the OCBC account") with the defendant which had been operated by the plaintiff before the plaintiff was placed under judicial management.

6 Subsequently, Samsung Corning issued a request to its own bank on 30 March 2009 to cancel the payment order but was told that the funds had already been credited into the OCBC account. Samsung Corning sent the defendant a letter dated 9 April 2009 instructing the latter to transfer the funds back to its account. The defendant did not do so. The Judicial Manager wrote to the defendant seeking to intervene. In response to the Judicial Manager's letters, the defendant in a letter dated 26 March 2009 stated that it was exercising its right of set-off against the plaintiff and would thus retain the moneys.

7 Without these moneys, the plaintiff faced financial hardship and reduced chances of being resuscitated by the judicial management process. The plaintiff thus applied for the aforementioned orders (see [1] above).

My decision

Whether the plaintiff has locus standi to seek the declaration sought

8 The plaintiff has *locus standi* in so far as the declaration is concerned with whether the defendant may exercise its right of set-off against the plaintiff by retaining the US$627,260. The plaintiff, however, has no *locus standi* to seek a declaration that the moneys were paid to the defendant by Samsung Corning under a mistake of fact and that the defendant has to account and

pay to Samsung Corning the moneys paid by mistake. A plaintiff cannot commence proceedings seeking a declaration that A owed money to B, when the plaintiff was neither A nor B (see *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 at [19]–[20]). The plaintiff has no standing to seek a declaration regarding the rights of two other parties. On this point, the plaintiff had tried to argue that Samsung Corning had assigned to the plaintiff its right to recover the mistaken payment from the defendant. In support, it referred to a letter by Samsung Corning to the defendant dated 9 April 2009 in which the former stated that it had requested that the plaintiff assist it in recovering the moneys. I am unable to see how this letter can constitute notice of an assignment of its right to sue the defendant. As I have stated in *Lanxess Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 2 SLR 769 at [8], the notice in writing of the assignment must be *clear, unambiguous and unconditional*. The 9 April 2009 letter could not have been good notice of an assignment. It only showed that Samsung Corning had sought *assistance* from the plaintiff in recovering the moneys from the defendant. This letter was not, by any measure, a clear, unambiguous and unconditional notice of an assignment. The plaintiff thus had no *locus standi* to seek a declaration for the defendant to repay Samsung Corning the moneys.

Whether there was a mistake of fact

9 Quite apart from the question of *locus standi*, the consequence of not having Samsung Corning as a party to the proceedings also meant that there was insufficient evidence for me to make the finding that the latter had indeed transferred the moneys because of a mistake of fact. Had Samsung Corning been made party to the proceedings, it would have been incumbent on it not only to show that there was indeed a mistake of fact but that the mistake had caused it to make the payment (see *Bernard & Shaw Ltd v Shaw* [1951] 2 All ER 267). Without having Samsung Corning as party to give evidence, there is simply no direct evidence to show that the moneys had been paid by mistake. Although the plaintiff was able to adduce evidence that Samsung Corning had issued an instruction to its bank to cancel the payment, this is still insufficient evidence to show that Samsung Corning had made the payment because of a mistake of fact. Samsung Corning could have sought to cancel the payment because it had learnt from the plaintiff that the defendant was going to exercise its right of set-off against the plaintiff by retaining the moneys. This *ex-post facto* realisation on the part of Samsung Corning that it ought not to have transferred the moneys into the plaintiff's account with the defendant would not have constituted a mistake of fact *as at the time* payment was made. This is one possible explanation for Samsung Corning's actions which would lead to the conclusion that the moneys were not paid by mistake. Based on the circumstantial evidence, there could be other explanations leading to different conclusions. Without direct evidence from Samsung Corning that it had paid the moneys by mistake, it is difficult to make a finding that it had indeed paid the moneys by mistake.

10 In the light of the problem of *locus standi* and the evidential difficulties in the plaintiff's case, I asked the plaintiff at the first day of the hearing (on 22 May 2009) to consider asking Samsung Corning to join as party to the proceedings. Counsel for the plaintiff said this would be considered. However, on the second day of the hearing (on 27 May 2009), I was informed that Samsung Corning would not be joined as a party.

11 In the result, I refused to grant the plaintiff the declaration sought, namely, that Samsung Corning had paid the defendant the moneys by mistake and that the defendant had to repay Samsung Corning the moneys.

Whether the defendant is entitled to exercise its right of set-off by retaining the moneys in the plaintiff's bank account

12 The plaintiff owes the defendant more than S$2m. The defendant thus sought to set-off the moneys in the plaintiff's bank account against the debt. The plaintiff argued that the defendant's exercise of its right of set-off would violate Part VIIIA of the Companies Act. Amongst other authorities, the plaintiff referred to *Good Property Land Development Pte Ltd v Societe-Generale* [1996] 2 SLR 239 as standing for the proposition that a bank could not exercise its right of set-off to retain funds paid to the credit of a company's account after the commencement of insolvency. The plaintiff argued that the consequence of this rule was that the defendant could not exercise its right of set-off after the plaintiff had been placed under judicial management. This was an odd argument. As counsel for the defendant rightly pointed out, these case authorities and the legislation referred to (s 88 of the Bankruptcy Act (Cap 20, 2000 RevEd) made applicable by s 327(1) of the Companies Act) apply in the context of winding-up and not in the context of judicial management. I therefore saw little relevance in the plaintiff's arguments.

13 When this was pointed out to counsel for the plaintiff, he sought to entreat this court to exercise its discretion under s 227X(b) of the Companies Act to order the application of s 327(2) of the same Act read with s 88 of the Bankruptcy Act to the judicial management of the plaintiff. In my view, it was not proper to accede to this request. It was noted in *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR 375 at [36] ("*Re Wan Soon Construction*") that:

> … s 227X(b) was intended to ensure that where the provisions relating to liquidation in Pt X of the Companies Act were appropriate in facilitating the general mission and purpose of judicial management (which is, *inter alia*, to achieve the better realisation of the company's assets), those provisions should, apart from the four specific provisions expressly set out in s 227X(b) itself (*viz*, ss 337, 340, 341 and 342), apply where, in the *court's discretion*, this was appropriate. [emphasis in original]

In my view, counsel for the plaintiff requested the invocation of s 227X(b) not because s 327(2) was appropriate in facilitating the general mission and purpose of judicial management but because he was of the view that this would enable the plaintiff to resist the defendant's exercise of its right of set-off. The use of s 227X(b) in this manner does not accord with its intended purpose. I therefore refused to exercise my discretion to grant the request. In any event, even if I had acceded to the request and ordered the application of s 327(2) of the Companies Act read with s 88 of the Bankruptcy Act, the defendant would still not be precluded from exercising its right of set-off. This was so because the defendant was exercising a contractual right of set-off and not a statutory right of set-off with which s 88 of the Bankruptcy Act is concerned.

14 On this point, with regard to the defendant's exercise of its contractual right of set-off, it is established law that a creditor may exercise such a right against a company placed under judicial management (see *Electro Magnetic (S) Ltd v Development Bank of Singapore Ltd* [1994] 1 SLR 734 ("*Electro Magnetic*")). In that case, the Court of Appeal considered whether a creditor was barred from exercising its right of set-off by virtue of Part VIIIA of the Companies Act (Cap 50, 1990 RevEd) and in particular, the following sections:

> Section 227C
>
> During the period beginning with the presentation for a judicial management order and ending with the making of such an order or the dismissal of the petition —
>
> …

(b) no steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire-purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; …

Section 227D

(4) During the period for which a judicial management order is in force —

…

(d) no steps shall be taken to enforce security over the company's property or to repossess any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement except with the consent of the judicial manager or with leave of the Court and (where the Court gives leave) subject to such terms as the Court may impose.

The Court of Appeal held (at 738I) that the right of set-off is a personal right and is not concerned with some real or proprietary interest, legal or equitable. It was thus not caught by the use of the word "security" in the sections quoted in the foregoing paragraph.

15 The Court of Appeal also considered the following sections:

Section 227C

During the period beginning with the presentation of a petition for a judicial management order and ending with the making of such an order or the dismissal of the petition —

…

(c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose.

Section 227D

(4) During the period for which a judicial management order is in force —

…

(c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with leave of the Court and (where the Court gives leave) subject to such terms as the Court may impose; …

The Court of Appeal held (at 741A) that the term "proceedings" should not be construed to include an

exercise of the right of set-off.

16 Consequently, I found that there was nothing in Part VIIIA of the Companies Act which precluded the defendant from exercising its contractual right of set-off so as to retain the moneys in the plaintiff's bank account.

17 On a separate point, the plaintiff also argued that the defendant ought not to be allowed to exercise its right of set-off because this would violate the *pari passu* principle. It was, however, made clear in *Re Wan Soon Construction Pte Ltd* (at [24]–[25]) ([13] *supra*) that while the *pari passu* principle applies with regard to unsecured creditors in the context of a winding up, it does not apply in the context of judicial management as well. Accordingly, I also rejected this argument by the plaintiff.

Conclusion

18 In the result, I dismissed the plaintiff's application and fixed costs at $6,500 plus reasonable disbursements.