Velstra Pte Ltd (in liquidation) v Dexia Bank NV (formerly known as Artesia Banking Corp NV) [2004] SGHC 23

Case Number : OS 1181/2002/K

Decision Date : 13 February 2004

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Vinodh Coomaraswamy and David Chan (Shook Lin and Bok) for plaintiff; Tan Chuan Thye, Ivan Chia and Eugene Thuraisingam (Allen and Gledhill) for defendant

Parties : Velstra Pte Ltd (in liquidation) — Dexia Bank NV (formerly known as Artesia Banking Corp NV)

Insolvency Law – Avoidance of transactions – Transactions at an undervalue – Whether plaintiff insolvent – Whether there was transaction between parties – Section 98 Bankruptcy Act (Cap 20, 2000 Rev Ed)

13 February
2004
Judgment reserved.

Kan Ting Chiu J:

Background

1 The plaintiff, Velstra Pte Ltd ("Velstra"), is a Singapore company in insolvent liquidation. The defendant Dexia Bank NV is a Belgian bank which merged with and absorbed another bank previously known as the Artesia Bank.

2 On 25 June 1999, three persons, namely Jo Lernout, Pol Hauspie and Nico Willaert ("LH&W") opened a joint account with the defendant, account no 553-2056900-42 ("the LH&W account"). The defendant granted to LH&W upon the opening of the account a rollover credit facility amounting to US$20m.

3 On 28 June 1999, US$20m was drawn from the account under the facility. The loan was not repaid when the facility expired on 10 October 1999.

4 On 30 December 1999, Velstra's bank, DBS Bank, sent a SWIFT message to the defendant that DBS Bank "will be receiving USD36m value 4 Jan 2000 in favour of Velstra Pte Ltd A/C No: 001005582-01-8-022".

5 On receipt of this message the defendant debited its own internal account with US$31m, and from the funds so debited, it credited US$21m to the LH&W account on 30 December 1999. The transfer was approved under Belgian law as a "repayment of loan under usual reservation", and was used to discharge the debt in the LH&W account.

6 On 5 January 2000, DBS Bank, on the instructions of Velstra, paid US$20.92m (the balance from the US$21m payment after deducting banking charges) to the defendant. The remittance instruction form named Artesia Bank Brussels as the beneficiary, but the account number given was that of the LH&W account.

7 At the trial the parties called expert witnesses to give their views on the effect of the SWIFT

message and Velstra's instructions on the remittance instruction form. Professor M P A Dassesse and Professor P Ellinger were in agreement that the message and the instructions were not proof that the defendant was the beneficiary of the payment.

8 The defendant did not credit the remittance into the LH&W account, but placed it into its central treasury in Brussels. The difference between the US$21m credited on 30 December 1999 and the amount received on 5 January 2000 arising from bank charges was debited against the LH&W account on 13 January 2000.

9 Velstra was wound up and placed in compulsory liquidation on 12 April 2002.

10 The defendant treated the payment as its own when it used the payment to discharge the debt of LH&W, either by being the beneficiary directly, or through LH&W.

11 In this action, however, that is not an issue. The issues are set out in [16], in particular, whether the payment received by the defendant was a "transaction".

The action

12 This action is instituted by the liquidators of Velstra. The company was a holding company involved in companies engaged in speech recognition, dictation and translation software development. It and its subsidiary and related companies were linked to a Belgian company, Lernout and Hauspie Speech Products NV ("LHSP"), listed on the US and European stock markets. LHSP was well regarded and attained considerable stature until August/September 2000, when it was hit by reports of corporate wrongdoing and came under stock exchange investigations which brought it to its collapse.

13 The plaintiff seeks a declaration that the transaction pursuant to which Velstra was caused to pay to the defendant the sum of US$20,920,000 on or about 5 January 2000 is a transaction at an undervalue within the meaning of s 98 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) read with s 329(1) of the Companies Act (Cap 50, 1994 Rev Ed), and a declaration that the transaction is null and void, and that the defendant should repay the sum to the plaintiff.

14 The plaintiff's claim is best understood by referring to its statutory underpinnings. Section 98 of the Bankruptcy Act reads:

> (1) … where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.
>
> (2) …
>
> (3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if —
>
> > (a) …
> >
> > (b) …
> >
> > (c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

and s 100(1)(a) provides that in the case of a transaction at an undervalue, the relevant time is any time within the period of five years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt, but under sub-s (2) that time is not a relevant time unless he (a) is insolvent at that time or (b) becomes insolvent in consequence of the transaction. A transaction is defined to include any gift, agreement or arrangement. Section 100(4) provides that a person is insolvent if (a) he is unable to pay his debts as they fall due; or (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities. The tests are called the cash flow test and the balance sheet test respectively.

15 Section 98 applies to this action through s 329(1) of the Companies Act which provides that:

> [A]ny transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.

16 In its opening statement the plaintiff accepted that to succeed it must show:

> a. That the Plaintiff either:
>
> i. Made a gift to the Defendant of US$20.92m on or about 5 January 2000;
>
> ii. Paid US$20.92m to the Defendant on terms that provided for the Plaintiff to receive no consideration; or
>
> iii. Entered into a transaction with the Defendant for a consideration the value of which is significantly less than US$20.92m.
>
> b. That the transaction took place within 5 years of the Plaintiff's going into liquidation.
>
> c. That the Plaintiff was insolvent on or about 5 January 2000 or became insolvent as a result of the payment of US$20.92m to the Defendant on that day.[1]

17 The action will succeed if it is established that Velstra was insolvent at or around the time of the payment, or as a result of it, *and* the payment was a transaction within the meaning of s 98. The onus of proof is on the plaintiff. It was common ground that the payment was made within five years of Velstra going into liquidation.

Whether the plaintiff was insolvent

18 The plaintiff's evidence on this issue came from W C Hutchison, one of the liquidators of the plaintiff and a practising accountant. He concluded, after examining Velstra's audited balance sheet as at 31 August 2000 and profit and loss statement for the period 19 June 1999 to 31 August 2000 that it was insolvent at the time of the payment, or became insolvent in consequence of it. The balance sheet showed that Velstra's liabilities exceeded its assets by $4,440,153 as at 31 August 2000 and the profit and loss account showed that Velstra suffered a net loss of $4,439,255 over the period in question. Hutchison was of the view that a very strong inference could be made from these statements that Velstra was insolvent on 5 January 2000.

19 The liquidators also prepared adjusted trial balances, balance sheets and profit and loss

accounts as at 4 January 2000 and 5 January 2000 from Velstra's ledgers.

20 The adjusted balance sheet as at 4 January 2000 showed assets of $15,198,836 against liabilities of $31,565,073, representing a deficit of $16,366,237, while the profit and loss account for the same period showed a loss of $16,366,239.

21 In these adjusted accounts, the liquidators had written down $10.2m worth of loans which Velstra made to three subsidiary companies, namely The French CALC Pte Ltd, The German CALC Pte Ltd and The Italian CALC Pte Ltd. The loans were made to enable each of the subsidiary companies to pay US$2m each towards the purchase of language development licences at US$4m each. The liquidators wrote these loans down on the ground that the subsidiary companies did not have the funds to pay the balance of the purchase price for the licences and would not be able to repay the loans.

22 The liquidators also wrote off $5.8m for goodwill. This amount represented the premium Velstra paid when it acquired six Belgian companies which held language development licences. When Velstra acquired the six companies, it paid a premium of $5.8m over the price the subsidiary companies paid for the licences. The liquidators regarded the premium as unjustified because the six companies had no assets other than the licences, and did not have employees to develop the licences into products and therefore had not enhanced the licences to justify the premium. I am unable to accept the liquidators' reasoning. Assets do not always have fixed values; assets may appreciate or depreciate over time. A licence may appreciate in value after it is acquired. Before the liquidators write off the goodwill, they must show that there was no appreciation when Velstra acquired the subsidiary companies. Hutchison also expressed doubts over the genuineness of the licences and over their prices as the purchases were not done at arm's length. However, these were not in issue as they were not reflected in the adjusted accounts, where only the premium was called into question.

23 In the adjusted 5 January 2000 accounts, Velstra's position worsened. The sum of $27,384,280 that it paid to LH&W on behalf of five related companies on 4 January 2000 was written down, and a loan from a lender by the name of Harout Khatchadourian of $61,199,961 made on 5 January 2000 ("the Khatchadourian loan") was taken into account. The 5 January accounts showed that the company's liabilities exceeded its assets by $52,390,296, and that the company had suffered a net loss of $52,390,298.

24 The defendant disputed those decisions. It relied on a report prepared by T J Reid, an accountant specialising in insolvency. Reid read Hutchison's first affidavit filed on 28 August 2002 before he made his report. Unlike Hutchison, he was not able to conclude from the information therein that Velstra was insolvent when it made the payment on 5 January 2000 or as a result of the payments. He had also read Hutchison's second affidavit filed on 6 October 2003 and other documents supplied to the defendant in the course of discovery in this action before he gave evidence in court, but did not file a further report or affidavit to update his comments, findings and conclusions.

25 In his evidence in court Reid elaborated that he could not conclude that Velstra was insolvent either immediately or prior to the payment of the Khatchadourian loan, nor as a result of the Khatchadourian loan.[2] The loan agreement, with its spelling errors, reads:

> Between:
>
> Mr. Harout Katchadourian, 243 Nahr Steet, Beirut – Lebanon

Hereinafter called party on the one hand

And

Mr. Velstra Pte Ltd, 5 Shenton Way, #12-05 Singapore 068808, represented by Mr. Tony Snauwaert

Herinafter called party on the other hand

IT HAS BEEN AGREED AS FOLLOWS

Party on the one hand will transfer, as a loan, to party on the other hand the sum of 36.000.000 USD (thirty six million US dollar).

This transfert will be done on account nº USD 0001-005582-01 in the DBS Bank Shenton Way Branch latest on December 27th 1999.

Party on the other hand accepts that this loan is granted by party on the one hand under the following conditions:

- Duration: two years starting Decmeber 27th 1999 ending December 27th 2001

- Intrest 8 % eight procent net (after Singapore taxes)

- Intrest to be capitalised at a rate of 8 % net

- Reimbursement of the loan : 41.990.400 USD (fourtyonemillion nine hundred ninty thousand and four hundred US dollar) latest on December 27th 2001 amount to be credited on the account of party on the one hand with valuta december 27th 2001.

As agreed in Beirut on December 24th 1999 in two copies each party having received its copy.

26 It was not disputed that the loan was not received till 5 January 2000 as it was delayed by "Y2K" measures then in operation.

27 Reid worked out that the liquidators took into account $3,802,464.98 as interest accrued on the loan up to 31 August 2000, although interest on the loan was to be capitalised and paid on the loan maturity date of 27 December 2001. He stated in his report that:

> [T]he significant negative equity position recorded at 31 August 2000 would not have existed at the time of the payment to [Artesia], as the losses arose primarily due to the accrual of interest on the Khatchadourian loan.

and the defendant submitted in its closing submissions that there was no present liability as at 31 August 2000 to pay interest on the loan.

28 Reid also questioned the legality of the loan agreement. He observed that the form of the agreement was unusual and he thought it may contravene the Moneylenders Act (Cap 188, 1985 Rev Ed). He added that if he was a liquidator, he would want to be satisfied that the loan was provable in liquidation, and take legal advice on it,[3] but he took no legal advice himself.

29 As a liability is defined in s 2(1) of the Bankruptcy Act to include a present, future, certain

and contingent liability, the liability to repay the Khatchadourian loan and interest was a liability although payment was not due till 27 December 2001. If the Khatchadourian loan was enforceable, Velstra was insolvent on 5 January 2000 in that the value of its assets was less than the amount of its liabilities. Khatchadourian had sued Velstra on the agreement and obtained judgment in default on 8 January 2002. The liquidators have not taken any action to set aside the judgment. Against this background there is no reason to disregard the liability on the accrued interest. It follows that Velstra was insolvent on 5 January 2000 by the balance sheet test.

30 On the cash flow test the plaintiff submitted that:

> [W]here a company has tied up a large part of its capital in assets which cannot be readily realised in order to permit it to pay its debts as they fell due, and the business venture in which the capital is tied up is not viable or worse, an instrument of fraud, the company is in fact insolvent even though the debts may not fall due for some time.[4]

31 The assets referred to are the language development licences and the business venture is the venture to develop and exploit the licences. The liquidators are saying that because the licence holders in whom Velstra had invested funds did not have the resources to develop and exploit the licences, Velstra will not receive returns from the licence holders to repay its debts.

32 As events turned out, the licences were not developed and Velstra received no returns. But there was little evidence that the ventures were not viable or that the licences were worthless on 5 January 2000. There were no signs of problems till August/September that year. One should be slow to conclude that the licence holders' lack of capital will prevent the licences from being developed. If LHSP continued to enjoy the reputation and support it did in January 2000, additional funds may well have been available to the licence holders to develop the licences, as there may well be parties willing to finance promising projects. The liquidators have not made out a case to my satisfaction that the company was insolvent on 5 January 2000 by the cash flow test.

Whether there was a transaction between the plaintiff and the defendant

33 The Court of Appeal in *Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR 667 dealt with the correct interpretation of "transaction". By the definition in s 2(1) of the Bankruptcy Act it would include gifts, agreements and arrangements.

34 The court had to decide whether a simple payment can be a transaction. The decision of Robert Englehart QC in *Re Taylor Sinclair (Capital) Ltd (in liquidation)* [2001] 2 BCLC 176 was considered. In that case it was held at [20] that:

> It is right to say that the word "transaction" as a matter of ordinary language embraces a potentially wide range of possibilities. Furthermore, the inclusive definition of s 436 of the 1986 Act is of broad ambit. It reads:
>
> > "transaction" includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly.
>
> Doubtless, one should be wary of circumscribing the width of the statutory language of s 238 lest the evident policy of the section be undermined. Nevertheless, as I read the section it does envisage that, apart perhaps from the case of a mere gift which is expressly included within ss 238 and 436, a transaction will be something which involves at least some element of dealing between the parties to the transaction. Not only is this implicit in the word "transaction" itself,

but it is reinforced by the references in s 238 to (a) the "entry into" a transaction (b) "with a person" and (c) "on terms that provide". Whilst plainly an actual contract is not required in order for there to be a transaction, the language of the section is redolent of contract and mutual dealing.

35 The Court of Appeal observed at [23] that:

As Englehart QC quite rightly pointed out, the ordinary meaning of the word "transaction" encompasses a wide range of possibilities. Ordinarily it means a "dealing". But it could also mean anything that passes between the parties. He seemed to think that there could only be a transaction if there was something like a contract or mutual dealing. In his mind, a unilateral act like a payment *simpliciter* could not be a "transaction".

36 It concluded at [24] that:

If a gift, which is an unilateral act, and which need not be made with the knowledge or consent of the donee, comes within the meaning of "transaction", we fail to understand why a simple payment, without more, could not be a "transaction". A simple payment, without more, is at least *prima facie* indicative of a gift and it should surely fall within the meaning of "transaction".

37 Having said that, it must be remembered that the unilateral making of a gift does not pass property. That is only completed when the gift is received and accepted. At that stage there must be involvement by the donee, who has the option of accepting or rejecting the gift. Both parties must want the gift to take place for it to be completed. This indicates that an element of intention on the part of the parties is necessary.

38 I think that before A can be said to have made a transaction with B, it must be established that A intended to have that transaction with B. If A intends to and makes a payment to B, that is a transaction under s 98 of the Bankruptcy Act. If A intends to make a payment to B, but the payment goes to and is received by C by mistake, one would hesitate to say A has transacted with C. Take a stronger case, if C stole the payment before it reached B, it will be a real breach of reason to say that there was a transaction between A and C.

39 What was the plaintiff's intention when it made payment on 5 January 2000? It had no prior dealings with the defendant, and was not indebted to it. It intended the sum to be paid into the LH&W account. In its books, the payment was recorded as repayment of a loan from a consortium of Belgian investors, and payment on behalf of various related parties.[5]

40 It is clear that the plaintiff never intended to make the payment to or to enter into any transaction with the defendant. Although the payment did not go to the defendant by mistake or dishonesty but by the defendant's exercise of its rights against LH&W under Belgian law, that does not make up for the lack of intention on the part of Velstra to transact with the defendant. It may be on a proper analysis that Velstra made a transaction with LH&W, and then the defendant made another transaction with LH&W, but Velstra did not enter into any transaction with the defendant.

Conclusion

41 The plaintiff has not proved its case as set out in [16] and the claim is dismissed with costs.

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[1] Plaintiff's Opening Statement para 2.1.2

[2]Notes of Evidence 20 October 2003 page 55

[3]Notes of Evidence 20 October 2003 pages 62-3

[4]Plaintiff's Closing Submissions para 7.5.6

[5]Notes of Evidence 14 October 2003 page 51