

Wong Kian Kok and Another (liquidators of Asichem Trading (S) Pte Ltd (in liquidation)) v
Landmark Chemicals (Far East) Pte Ltd and Another
[2008] SGHC 145

Case Number : Suit 239/2008, RA 286/2008
Decision Date : 02 September 2008
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Cavinder Bull SC and Harleen Kaur (Drew & Napier LLC) for the plaintiff/respondent; Chelva Rajah SC (instructed) and Kesavan Nair (Genesis Law Corporation) for the first defendant/appellant
Parties : Wong Kian Kok and Another (liquidators of Asichem Trading (S) Pte Ltd (in liquidation)) — Landmark Chemicals (Far East) Pte Ltd; Landmark Chemicals S.A.

Contract – Contractual terms

2 September 2008

Choo Han Teck J:

1 The plaintiffs who are the liquidators of Asichem Trading (S) Pte Ltd sued the first defendant in Suit 664 of 2003 and obtained interlocutory judgment with damages to be assessed. The second defendant, an associated company of the first defendant, had commenced arbitration proceedings against the plaintiff. On 19 April 2006 the plaintiff and the first defendant were about to proceed with the assessment of damages when they decided to negotiate a global settlement that included the arbitration proceedings between the plaintiff and the second defendant. The arbitration was originally scheduled to take place from 24 to 26 April 2006. The assessment of damages was, in the meantime, adjourned, first to 20 April 2006, then to 28 April 2006.

2 On 19 April 2006, an agreement was reached on terms that the first defendant pays the plaintiff US\$1,450,000 in full and final settlement of the plaintiff's claim in Suit 664 of 2003 within seven days and the second defendant would withdraw its claim and discontinue the arbitration proceedings against the plaintiffs.

3 There was a draft written agreement setting out the terms. The draft was not signed but there was no dispute that the terms there were all agreed. The relevant term was in cl 5 which reads:

If Landmark Far East fails to make or if Asichem or their nominees or assigns fail to receive full and complete payment of the Settlement Sum to Asichem's bank account or accounts or such bank account or bank accounts to be nominated by Asichem or to such bank account or accounts of Asichem's assigns pursuant to clause 2 above, Asichem shall be at liberty to revive their original claims in the Action by filing and serving a fresh notice of appointment for assessment of damages in the High Court of the Republic of Singapore.

The first defendant having failed to pay, the plaintiffs sued in this action to recover the sum of US\$1.45m under the agreement. They obtained summary judgment against which the first defendant appealed. Mr Chelva Rajah SC appeared on behalf of the first defendant and Mr Cavinder Bull SC appeared on behalf of the plaintiffs.

4 Mr Chelva Rajah submitted that though the terms were agreed, there was one material term not clear, and that was what were the consequences if payment was not made by the first defendant. Since this was not settled, Mr Chelva Rajah argued that the 'agreement' was inchoate and, therefore, there was no settlement upon which the plaintiff could sue.

5 Mr Cavinder Bull submitted that all the material terms had been agreed and an email setting out the terms were sent to the first defendant's solicitors. The plaintiffs then proceeded to assign its rights under the agreement to Citichem International Ltd and gave the requisite notices of assignment to the first defendant. This assignment was subsequently set aside on the ground that it constituted unfair preference. The issue remained whether there was an actionable settlement agreement for the plaintiffs to sue. Mr Chelva Rajah said that it was "not that a material [term] was not agreed. The terms had been agreed but [the parties had a] different understanding [of the terms]." The plaintiffs understood the agreement to be that if the first defendant failed to pay, the plaintiffs would have the option of suing on the US\$1.45m as agreed, or proceed to assessment of damages as was its right prior to the agreement. In either case, the first defendant had agreed to the consequences, that is, it could be sued on the US\$1.45m or resume the assessment of damages proceedings. The second defendant would not be involved since it would have withdrawn its claims under arbitration. Mr Chelva Rajah argued that the defendants understood the term in cl 5 to mean that if the plaintiffs proceeded to have damages assessed, then the second defendant was entitled to re-commence the arbitration.

6 I am of the opinion that an actionable agreement had been reached as set out in the draft written agreement. The agreement made no provision as to the second defendant's rights in the event the plaintiffs take action against the first defendant for non-compliance, and it was a sensible omission. The intention of all parties was that all legal and arbitral proceedings should end when the first defendant pays the plaintiffs US\$1.45m within seven days. Under those circumstances, the second defendant was happy to forgo all its rights under arbitration. Should the first defendant fail to pay, the plaintiff was entitled to proceed against the first defendant under the agreement, without disturbing the second defendant. In these circumstances, the misunderstanding of the rights of the second defendant in the event of the first defendant's failure to pay was an unnecessary worry for either defendant. They would be in no worse position had the first defendant performed its obligations under the settlement. By this action, the plaintiffs were merely ensuring that it does. In either case, neither the first nor the second defendant would have altered their positions in any way. The second defendant is not a party to this appeal. I was of the view, therefore, that if the first defendant wanted its full day in court to argue its case before the trial judge, it has first to make full payment into court, and I so ordered.

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