Metroplex Berhad (provisional liquidator appointed) *v* Rothschild (Singapore) Ltd and another [2011] SGHC 225

Case Number	: Suit No 915 of 2010 (Registrar's Appeal Nos 240 and 241 of 2011)
Decision Date	: 10 October 2011
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Vijay Kumar (Vijay & Co) for the plaintiff/appellant; Vinodh S Coomaraswamy, SC, Stephanie Wee and Victoria Ho (Shook Lin & Bok LLP) for both defendants/respondents.
Parties	: Metroplex Berhad (provisional liquidator appointed) — Rothschild (Singapore) Ltd and another

Civil Procedure

10 October 2011

Woo Bih Li J:

Introduction

1 The plaintiff, Metroplex Berhad ("Metroplex") is a guarantor pursuant to a credit agreement. It commenced the present action in Singapore ("Suit 915") against the first defendant, Rothschild (Singapore) Limited ("Rothschild") and the second defendant, Morgan Stanley Emerging Market Inc ("MSEM") after winding up proceedings had been commenced in Malaysia by MSEM against Metroplex and a ruling had been given by the High Court of Malaysia ("the Malaysian High Court") on certain issues raised there.

2 The defendants made various applications totalling five in number. On 25 July 2011, an Assistant Registrar ("AR") made two orders. One was to stay Suit 915 against Rothschild until the final disposal of the winding up proceedings in Malaysia, including the final disposal of any appeal or appeals. The other was to set aside an earlier order granting leave to Metroplex to serve a sealed copy of the Writ of Summons in Suit 915 on MSEM in New York, United States of America.

3 Metroplex appealed against these orders. On 15 September 2011, I dismissed the appeal in respect of the order to stay Suit 915 against Rothschild. As for the other appeal, I granted a stay thereof on similar terms as the stay order for Suit 915 against Rothschild.

4 I elaborate on the background and my reasons.

Background

5 By a written credit agreement dated 14 June 1996 ("the Credit Agreement"), the following parties (collectively known as "the Lenders"):

(a) Rothschild;

(b) Societe Generale, Labuan Branch ("SocGen");

(c) Korean French Banking Corporation-SOGEKO ("SOGEKO")

agreed to grant a multi-currency term loan of US$17,000,000.00 to Legend International Resort Limited (previously known as Subic Bay Resort (HK) Limited) ("Legend").

6 The Credit Agreement consisted of:

(a) an agreement between the Lenders and Legend;

(b) an agreement between the Lenders and Rothschild as the agent (cll 20(A) to 20(K); and

(c) an agreement between Metroplex as guarantor and the Lenders (cl 12).

7 The Credit Agreement was amended or varied by the following letters:

(a) a letter dated 4 September 1996 issued by Metroplex and Legend to Rothschild in its capacity as agent for the Lenders; and

(b) a letter dated 14 June 1999 issued by Rothschild in its capacity as agent for the Lenders to Legend and Metroplex.

8 By a letter dated 2 November 1999 addressed to Legend and copied to Metroplex, Rothschild notified Legend that an event of default had occurred under the terms of the Credit Agreement.

9 By a letter dated 17 November 1999, Rothschild demanded that Metroplex, as Legend's guarantor under the Credit Agreement, pay the sums due from Legend under the Credit Agreement.

10 By a purchase and sale Agreement dated 8 November 2004 ("the Purchase and Sale Agreement") between Rothschild and [MSEM], Rothschild agreed to "sell to [MSEM] by novation those of the Assigned Rights that are capable of novation, and otherwise sells, transfers, assigns and conveys the Assigned Rights to [MSEM] ..." [note: 1]

11 By a letter dated 10 November 2004, Rothschild notified Legend that it had assigned all its rights and interest in the loan to MSEM with effect from 10 November 2004.

12 By a novation notice dated 10 November 2004 ("the Novation Notice"), Rothschild transferred its commitment under the Credit Agreement to MSEM.

13 By a letter dated 7 April 2005, both Rothschild and MSEM notified Legend and Metroplex that Rothschild had assigned all the Assigned Rights (as defined in the Credit Agreement) to MSEM pursuant to the Sale Agreement.

14 By a deed of assignment dated 7 April 2005 ("the Deed of Assignment") between Rothschild and

MSEM, Rothschild assigned all its rights and title under the Outstandings and Assigned Rights (as defined in the Credit Agreement) to MSEM ("the Further Assignment"). Clause 2.1 of the Deed of Assignment provided as follows: [note: 2]

> Assignment: To the extent that Rothschild still retains any of the same as at the date of this Assignment, Rothschild hereby assigns to [MSEM] and [MSEM] hereby accepts the assignment of:
>
> (a) All of such right, title and interest of Rothschild in, to and under the Outstandings which Rothschild has or may have; and
>
> (b) All of such right, title and interest of Rothschild in, to and under the Assigned Rights which Rothschild has or may have.

15 By a notice dated 7 April 2005, both Rothschild and MSEM notified Legend and Metroplex of the Further Assignment ("the Assignment Notice").

16 By a letter dated 8 April 2005 issued by Shearn Delamore & Co (as solicitors for MSEM) to Metroplex, MSEM demanded payment from Metroplex of the sum of US$7,126,960.21, being the sum due from Metroplex as guarantor for Legend. Metroplex did not pay MSEM.

17 On 13 April 2005, MSEM commenced winding up proceedings in Malaysia seeking a winding up order on the grounds that Metroplex was unable to pay its debts and that it was just and equitable to wind Metroplex up.

18 On 15 April 2005, MSEM also filed an application for the appointment of a provisional liquidator over Metroplex.

19 On 13 May 2005, Metroplex applied to strike out MSEM's winding up petition on the grounds that, *inter alia*:

> (a) the novation of the rights from Rothschild to MSEM was invalid;
>
> (b) the purchase price paid by MSEM for the loan had released and cancelled Legend's indebtedness and liabilities to Rothschild;
>
> (c) MSEM's acquisition of rights against Metroplex as Legend's guarantor was ineffective;
>
> (d) in the alternative, if the novation was valid, it resulted in the release and discharge of Metroplex as Legend's guarantor;
>
> (e) the assignment of Rothschild's rights and benefits to MSEM was ineffective in law and at equity; and
>
> (f) the winding up petition by MSEM amounted to an abuse of process.

20 The Malaysian High Court hearing Metroplex's striking out application agreed to determine the application on the basis of questions framed by both parties by way of agreed issues ("the Agreed Issues"). The Agreed Issues were as follows:

> (a) First Issue: Was it legally incompatible for Rothschild and MSEM to have sought at one and the same time, to novate the Assigned Rights, and to the extent the Assigned Rights could not

be novated, to have assigned those Assigned Rights?

(b) Second Issue: On the true construction of the Credit Agreement and the Novation Notice, if the attempted novation to MSEM by Rothschild failed, were Legend as borrower and Metroplex as guarantor released from their obligations under the Credit Agreement?

(c) Third Issue: If the failed novation did not release or otherwise discharge the rights as between Rothschild and each of Legend and Metroplex, were those rights effectively assigned to the MSEM by way of the assignment under the Purchase and Sale Agreement or alternatively, by way of the Further Assignment on 7th April 2005?

(d) Fourth Issue: Whether, having regard to the construction of relevant contemporaneous documents under which the assignment of the Assigned Rights was effected, Rothschild had failed to assign the benefit of the guarantee at or around or shortly after 10th November 2005 and if not, what was the effect under Singapore law?

21 As Singapore law governed each of the Credit Agreement, the applicable letter, the Novation Notice, the Deed of Assignment and the Assignment Notice, the Malaysian High Court ordered that the Agreed Issues be the subject of a written opinion by a court-appointed expert witness on Singapore law.

22 In addition, Metroplex and MSEM were each permitted to submit its own expert report commenting on the report of the court-appointed expert.

23 On 16 November 2010, the Malaysian High Court found in favour of MSEM and dismissed Metroplex's striking out application. It decided as follows:

(a) On the First Issue: It was not legally incompatible for Rothschild and MSEM to have sought at one and the same time to novate the Assigned Rights, and, to the extent the Assigned Rights could not be novated, to effect the assignment of those rights (p 19 of the Grounds of Decision dated 16 November 2010) ("the Malaysian GD").

(b) On the Second Issue: On the true construction of the Credit Agreement and the Novation Notice, the inoperative novation did not result, *per se*, in Legend and Metroplex being released from their obligations under the Credit Agreement. Counsel for Metroplex had conceded in written submission that the failed novation did not release either Legend as borrower or Metroplex as guarantor of their obligations under the Credit Agreement. This point was also acknowledged by Metroplex's expert witness, Mr Kenneth Tan, SC (p 20 of the Malaysian GD).

(c) On the Third Issue: There was a valid and effective assignment of the Assigned Rights to MSEM under the Purchase and Sale Agreement. The Purchase and Sale Agreement provided for Rothschild to, *inter alia*, assign the Assigned Rights to MSEM. Notice of the assignment was given to Legend and Metroplex at the latest on or about 7 April 2005. Under Singapore law, an effective legal or statutory assignment came into effect at the latest on 7 April 2005. The assignment was legal since it fulfilled all the prequisites for a valid legal assignment (pp 34 to 36 of the Malaysian GD).

(d) On the Fourth Issue: Under Singapore law, the rights of MSEM to enforce the guarantee was secured effective 7 April 2005 upon the execution of the Further Assignment and the service of the notice thereof on Metroplex. This assignment was valid even if Rothschild had earlier failed to assign the benefit of the guarantee at or around or shortly after 10 November 2004 (p 39 of

the Malaysian GD).

24 Metroplex filed an appeal against that decision. By consent, the winding up proceedings in Malaysia have been stayed pending the hearing of the appeal.

25 Metroplex commenced Suit 915 in Singapore on 7 December 2010 shortly after the decision of the Malaysian High Court dated 16 November 2010.

26 The Writ of Summons was subsequently amended on 8 March 2011 and 23 March 2011. The Statement of Claim was filed on 23 March 2011.

27 Metroplex claimed that Rothschild had breached the Credit Agreement as follows: [note: 3]

> 18. The Defendants are in breach of the aforesaid Credit Agreement.
>
> Particulars of breach
>
> (a)(i) By clause 24(A) of the Credit Agreement, the Assignment and Novation of the Credit Agreement can only be given to a permitted assignee.
>
> (a)(ii) By clause 24(C) of the said Credit Agreement, the "New Lender" is defined to mean a bank or financial institution to which a Lender seeks to novate all or part of its rights and/or obligation in accordance to Clause 24(C).
>
> (a)(iii) In this case, [MSEM] is not a bank or a financial institution in Singapore and Malaysia.
>
> (a)(iv) By assigning all the rights of the loan agreement to a "non-permitted" assignee, [Rothschild] is in breach of the Credit Agreement.
>
> (b)(i) Clause 24 of the Credit Agreement only allows the "outstandings" to be assigned.
>
> (b)(ii) "Outstandings" is defined in the interpretation clause on pg. 2 of the Credit Agreement as being "in relation to a Lender at any particular time, the aggregate principal amount of its share of all (if any) **advances outstanding at that time**".
>
> (b)(iii) "Advances" have been defined to mean an advance made or to be made by the Lenders to the Borrower under this Credit Agreement or, as the case may be, the outstanding principal amount of any advance.
>
> (b)(iv) Therefore [Rothschild] can **only assign** the **outstandings** and not all or any rights under the Credit Agreement.
>
> (b)(v) The said novation/assignment assigned all the rights of the lender (not merely the outstandings) which is a breach of the said Clause 24 of the Credit Agreement.
>
> (c)(i) Clause 24(A) of the Credit Agreement required [Rothschild] to consult the Borrower and [Metroplex] with regard to novation. There was no consultation.
>
> [emphasis in original]
>
> 19. As a consequence of the aforesaid breaches, [Metroplex] has suffered loss and damage.

Particulars

(i) The breaches enabled [MSEM] to become a purported creditor and to commence winding up proceedings against [Metroplex] in Malaysia, thereby causing loss and damages to [Metroplex].

(ii) Loss arose from legal fee and expenses incurred and incurring (to be assessed).

28 Metroplex also alleged that notwithstanding the various steps taken by Rothschild and MSEM, MSEM did not obtain the benefit of Metroplex's guarantee. The main reliefs it sought in Suit 915 were as follows: [note: 4]

(a) A declaration that the Purchase and Sale Agreement between [Rothschild] and [MSEM], dated 8 November 2004, does not in law or equity effect a Novation or an assignment of the benefit of the said guarantee to [MSEM].

(b) Further and in the alternative, a declaration that [Metroplex] is under no obligation to pay any monies under the said guarantee to [MSEM].

(c) A declaration that the Letter from [Rothschild] and [MSEM] to [Legend] and [Metroplex] dated 7 April 2005, does not in law or equity effect an assignment of the benefit of the said guarantee to [MSEM].

(d)(i) A declaration that the Assignment of the loan under the Credit Agreement on 10 November 2004, from [Rothschild] to [MSEM], without assigning the benefit of the guarantee, has discharged the obligations of the guarantor [Metroplex] and [Rothschild] is not entitled to maintain any action against [Metroplex] under the said guarantee after the 10 November 2004.

(d)(ii) Consequently, the Deed of Assignment on 8 April 2005 has also no effect of [Rothschild] assigning the benefit of the said guarantee to [MSEM].

(e) Damages (including loss stated in paragraph 19(ii)) above.

...

29 As mentioned above, five applications were filed by the defendants in Suit 915 and the AR made orders in respect of two, *ie*, Summons No 2438 of 2011 ("Summons 2438") and Summons No 2440 of 2011 ("Summons 2440"). Summons 2438 was Rothschild's application for a stay of Suit 915 pending the final outcome of the winding up proceedings in Malaysia. Summons 2440 was MSEM's application to set aside an order granting Metroplex leave to serve a sealed copy of the Writ of Summons on Rothschild in New York. These two applications were successful and Metroplex appealed against each of the decisions in respect of those applications by filing Registrar's Appeal Nos 240 and 241 of 2011.

The court's reasons

30 Counsel for Metroplex, Mr Vijay Kumar, relied heavily on the breaches alleged by Metroplex which I have set out above at [27].

31 It seemed to me that these breaches were raised to contest the issues which the Malaysian High Court had decided in the winding up proceedings there. In other words, what Metroplex was

really saying was that both the novation and assignment were invalid because of the breaches.

32 According to Mr Vinodh S Coomaraswamy, SC, counsel for Rothschild and MSEM, the question of Rothschild's failure to consult Metroplex had been raised before the Malaysian High Court and was discussed in the Malaysian GD at pp 15 and 16.

33 As for the question whether the definition of "permitted assigns" in the Credit Agreement precluded the novation or assignment to MSEM, Mr Coomaraswamy said that he was instructed that the point had been raised in the winding up proceedings but as there was an English case in favour of MSEM, Metroplex then dropped the point. He did not address me on the point that only "outstandings" could be assigned, perhaps because this was not raised specifically in Mr Kumar's written submission.

34 Mr Coomaraswamy submitted that even if none of the points was raised before the Malaysian High Court, Metroplex ought to have raised it. If they failed to do so, Metroplex was still bound by the decision of the Malaysian High Court. I agreed that Metroplex was bound by that decision at least *vis-a-vis* MSEM whether it had raised the breaches or not in the winding up proceedings.

35 It was common ground that Rothschild was not a party to the winding up proceedings. Hence, it was arguable that Metroplex was not bound by the decision of the Malaysian High Court *vis-a-vis* Rothschild. Even if this was so, that decision could not be ignored. Any court would be slow to decide that, as regards Rothschild, the assignment was not valid, even though a Malaysian court had ruled that it was valid as regards MSEM. It seemed to me that it was also arguable that the decision of the Malaysian High Court was binding on Metroplex both in respect of its claim *vis-a-vis* Rothschild and MSEM because its claim against Rothschild was really a mirror of its claim against MSEM. Nevertheless, even if the decision was not binding on Metroplex *vis-a-vis* Rothschild, that decision was certainly relevant.

36 In the circumstances, the logical step was to stay Suit 915 against both Rothschild and MSEM pending the outcome of all appeals in Malaysia in respect of the Malaysian High Court decision.

37 Nevertheless, Mr Kumar relied on other arguments to avoid that conclusion. He submitted that Metroplex's application to strike out the winding up proceedings was an interlocutory one and also that no declaration was made by the Malaysian High Court whose decision was not final.

38 I was of the view that it did not matter whether Metroplex's application was an interlocutory one or not. The Malaysian High Court had made a ruling. This was not an instance where it had dismissed Metroplex's striking out application without making a ruling. A court may make a ruling on a substantive issue in an interlocutory application. Furthermore, that ruling is binding on the parties whether that ruling is in the nature of a declaration or not. The decision is still final in the sense that it is not a decision on an interlocutory issue. It is only not final in the sense that Metroplex may appeal against it. Nevertheless, pending the outcome of any appeal, that decision was binding.

39 Mr Kumar also submitted that there were Malaysian cases which decided that a court should not decide on the merits of a dispute in winding up proceedings. It seemed to me that it was for a court to decide whether it should decide on the merits of certain issues. There is no blanket prohibition. In any event, the Malaysian High Court had reached a decision, whether it ought to have done so or not. I stress that the parties had agreed to the issues which the Malaysian High Court rendered its decision on. It was for Metroplex to appeal against that decision which it has done.

40 Mr Kumar also submitted that Singapore was the only forum in which Metroplex could commence proceedings against Rothschild (even if it were a party in the winding up proceedings) or MSEM. This

was because of cl 29(B) of the Credit Agreement under which the parties thereto agreed that "the courts of Singapore are to have jurisdiction to settle any disputes which may arise out of or in connect, with this Agreement...". He submitted that that was an exclusive jurisdiction clause binding on Metroplex because cl 29(C) of the Credit Agreement permitted the Lenders to take proceedings in any other court of competent jurisdiction but there was no similar provision in favour of Metroplex.

41 I was of the tentative view that even though there was no provision permitting Metroplex to commence proceedings in a court from a jurisdiction other than Singapore, there was also no provision prohibiting Metroplex from doing so. Clause 29(B) did not appear to confer exclusive jurisdiction on the courts of Singapore.

42 Even if it did, the short point was that Metroplex's claims against Rothschild and MSEM in Suit 915 were essentially made on the premise that the novation and the assignment were not valid. Those were the issues it had itself agreed to be decided in Malaysia. If the premise failed, then its claims in Suit 915 would also fail.

43 Mr Kumar also argued that Metroplex could not make a counterclaim against Rothschild in the winding up proceedings in Malaysia. However, again that counterclaim would be on the same premise, *ie*, that the novation and the assignment were not valid. If either was valid, then there would be no breach by Rothschild or no breach which would entitle Metroplex to seek separate damages. For example, if Rothschild could not novate the debt and the guarantee to MSEM but could assign them, as it did, there would be no damages claimable by Metroplex. Costs would be dealt with in the winding up proceedings.

44 Mr Kumar further argued that if Metroplex was wound up in Malaysia, it could not make a claim against Rothschild or MSEM. That was another invalid argument. In the first place, the premise of the intended claim would be decided in Malaysia. Secondly, even if there was a separate and distinct claim, liquidation does not put an end to litigation. A liquidator may initiate or continue an action. Whether he has funds to do so is a separate matter.

45 Mr Kumar's arguments were without merit. It seemed to me that Metroplex was trying to circumvent the decision of the Malaysian High Court.

46 As I mentioned above, the logical step was to stay Suit 915 against both Rothschild and MSEM. It would have been unnecessary to make a decision on the application to set aside the order granting leave to serve a sealed copy of the Writ of Summons in Suit 915 on MSEM in New York since the substantive issues were already being determined in Malaysia. However, since the AR did set aside the order granting leave, I decided to stay the hearing of the appeal against that decision until the final disposal of the winding up proceedings in Malaysia, including any appeals in respect of the same.

[note: 1] Defendants' submissions p 9 para 2.4.1

[note: 2] Plaintiff's Bundle of Documents Vol 1 p 261

[note: 3] Plaintiff's Bundle of Documents Vol 1 pp 107-10

[note: 4] Plaintiff's Bundle of Documents Vol 1 pp 112-4