IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 56

Civil Appeal No 144 of 2020

Between

Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd

… *Appellant*

And

CIMB Bank Berhad

… *Respondent*

In the matter of HC/Suit No 186 of 2018

Between

CIMB Bank Berhad

… *Plaintiff*

And

(1) Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd

… *Defendant*

EX TEMPORE JUDGMENT

[Contract] — [Assignment]

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v
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Court of Appeal — Civil Appeal No 144 of 2020
Steven Chong JCA, Woo Bih Li JAD and Quentin Loh JAD
20 May 2021

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Steven Chong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2020] SGHC 160.

Facts

2 The brief facts of the case are as follows. The respondent bank, CIMB Bank Bhd ("CIMB") extended trade financing facilities to Panoil Petroleum Pte Ltd ("Panoil") by way of an all-monies debenture which provided for the respondent's security interest in Panoil's book debts. In July and August 2017, Panoil entered into contracts to sell marine fuel ("the Contracts") to the appellant, Italmatic Tyre and Retreading Equipment (Asia) Pte Ltd ("Italmatic"), pursuant to which it issued seven invoices. The sale confirmations

issued in respect of the Contracts incorporated Panoil's standard terms and conditions ("Panoil T&C"). Clause 8.2 of the Panoil T&C obliged Panoil's customers to pay Panoil "without deduction, set-off or counterclaim".

3 A set-off agreement was entered into between Italmatic and Panoil dated 1 July 2015 ("the 2015 set-off agreement"), which allowed either party to set-off any "undisputed" debts owed to the other. When Panoil went into financial difficulties, CIMB issued a notice of assignment dated 29 August 2017 to Italmatic in respect of the debts owed by Italmatic to Panoil under the seven invoices, requiring Italmatic to make payment to CIMB instead of Panoil, and brought suit against Italmatic to enforce that debt. Italmatic contended that the debt it owed Panoil under the seven invoices had been entirely set-off or alternatively cancelled.

4 As regards the set-off defence, Italmatic's pleaded case was that on 13 August 2017 (prior to CIMB's notice of assignment), Panoil and Italmatic re-affirmed the 2015 set-off agreement and agreed to set-off the amounts "owing by each other against the amounts owing to each other". In support, Italmatic relied on an exchange of letters on 13 August 2017 ("the 13 August 2017 Letters"). In these letters, Italmatic proposed a set-off of the amounts it owed to Panoil in the terms contained in a net statement of accounts attached to its letter, which it described as a "contra statement". This showed a net amount of $2,100 owed by Panoil to Italmatic. Panoil responded by accepting the set-off.

5 As regards the cancellation defence, Italmatic pleaded that on 17 August 2017, Eastern Pacific Tankers Sdn Bhd ("Eastern Pacific"), to whom it resold the marine fuel which it had purchased from Panoil under the Contracts, sent a

letter to Panoil, copying Italmatic, to notify Panoil to bill Eastern Pacific directly. On 18 August 2017, Panoil accepted Eastern Pacific's request by letter. We shall refer to these letters as "the August 2017 Cancellation Letters". On the same day, Italmatic purportedly cancelled the seven invoices on 18 August 2017 and notified Panoil accordingly by an email.

6 CIMB disputed the authenticity of the 2015 set-off agreement, the 13 August 2017 Letters and the August 2017 Cancellation Letters and put Italmatic to strict proof. A Notice of Non-Admission was also served by CIMB to dispute the authenticity of these documents.

7 The Judge found that while the 2015 set-off agreement was authentic, it was inconsistent with cl 8.2 of the Panoil T&C which had been incorporated into the Contracts. Clause 8.2 precluded Italmatic from exercising its right of set-off under the 2015 set-off agreement by the 13 August 2017 Letters. In any case, Italmatic did not exercise such a right as the 13 August 2017 Letters were, in the Judge's view, fabrications. The set-off defence therefore failed. Similarly, the Judge held that the cancellation defence failed as he found that the August 2017 Cancellation Letters were also fabrications on the evidence before him. Accordingly, the Judge held that CIMB succeeded in its claim against Italmatic for the debt outstanding under the seven invoices.

8 The appeal therefore turns on whether the Judge had erred in rejecting both the set-off defence and the cancellation defence.

Our decision

9 As regards the set-off defence, Italmatic contended that the recent decision of this court in *CIMB Bank Bhd v World Fuel Services (Singapore) Pte Ltd and another appeal* [2021] SGCA 19 ("*World Fuel Services*") was indistinguishable from the present case and that its appeal should therefore succeed. It argued that the Judge had erred in finding that the 13 August 2017 Letters were fabrications, pointing to a Credit Advice issued by a bank on 22 August 2017 which showed that Panoil had remitted US$2,400.12 to Italmatic on that date. According to Italmatic, this remittance was made to settle the net debt of US$2,100 owed to it by Panoil purportedly due under the "contra statement" referred to in [4] above. Accordingly, Italmatic contends that it had validly exercised its right to set-off under the 2015 set-off agreement by way of the 13 August 2017 Letters. The problem with this submission is that Italmatic failed to produce the Credit Advice at trial; it sought to introduce the Credit Advice on appeal in Summons No 137 of 2020. This application was heard on paper and dismissed on 22 February 2021 on the basis that the requirements set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") were not satisfied.

10 As regards the cancellation defence, Italmatic argued that the Judge erred in finding that the August 2017 Cancellation Letters were fabrications. Its argument was essentially that the Judge had erred in reaching that conclusion on the evidence before him.

11 We first deal with the set-off defence. As a preliminary observation, we do not agree with the Judge's view that cl 8.2 of the Panoil T&C precluded Italmatic from exercising its right to set-off under the 2015 set-off agreement.

The 2015 set-off agreement was *specifically* agreed to between the parties while cl 8.2 of the Panoil T&C was not. Accordingly, as this court observed in *World Fuel Services*, the 2015 set-off agreement did give Italmatic a right to set off the amounts it owed Panoil against the amounts owing from Panoil and this right is not superseded by cl 8.2. It follows from this that we also do not agree with the Judge's view that the nullification of cl 8.2 of the Panoil T&C required a variation to the Contracts which must be supported by consideration. By the 2015 set-off agreement, the parties had agreed to permit the set-off notwithstanding cl 8.2 of the Panoil T&C. If this had been *validly* carried out via the 13 August 2017 Letters, no variation would be required and the question of consideration would not arise.

12 In our view, the 2015 set-off agreement does not contemplate an automatic set-off. This is clear from the express language of the agreement. The agreement expressly provides that "each party is entitled to set off its invoices against the other party's invoices from time to time, without further reference to the other party, and the set-off is binding on both parties" and that such set-off is "only applicable for undisputed amounts in the invoice". Thus, the fact that the right of set-off can only be exercised for "undisputed amounts" implies that some form of notice issued to the other party to the set-off, coupled with some form of confirmation from such other party that the amounts specified in the notice is not disputed, is required for the set-off to be effected. We are therefore of the view that on its proper construction, the 2015 set-off agreement merely confers on both parties the entitlement or right to effect the set-off which must be exercised by notice and confirmation. Such notice and confirmation can be express or implied or arise from the conduct of the parties. In this case, it was

Italmatic's pleaded case that the 13 August 2017 Letters served the functions of such notice and confirmation.

13 The authenticity of the 13 August 2017 Letters is therefore key in determining whether Italmatic had exercised its right of set-off against Panoil in respect of the seven invoices. The Judge found, however, that the 13 August 2017 Letters were fabrications on the evidence before him. Against the many reasons set out by the Judge for this conclusion, Italmatic principally relies on the Credit Advice to prove the authenticity of the 13 August 2017 Letters. However, as we have stated, we rejected the Credit Advice as fresh evidence for the appeal as it failed to satisfy the *Ladd v Marshall* requirements for the admission of fresh evidence. It was therefore not evidence that we should, or indeed could, consider on appeal. On this point, *World Fuel Services* does not assist. In that case, the set-off agreement was not restricted to "undisputed" amounts and in any case the right of set-off was exercised by way of eight set-off notices. Significantly, the authenticity of the eight set-off notices was not challenged. That is not the case here.

14 If the Credit Advice were to be admitted in evidence, CIMB would have been entitled to cross-examine Italmatic's witnesses about it. Hence it was not a case of admitting fresh evidence without the need for further evidence at trial. In any case, we doubt that the Credit Advice would have changed the outcome of the appeal. The amount stated in the Credit Advice, US$2,400.12, does not match the net amount stated in the 13 August 2017 Letters, which was US$2,100. As we have intimated, this apparent discrepancy would have to be explained and tested in cross-examination at trial. Furthermore, while the Credit Advice reflected a transfer of US$2,400.12 from Panoil to Italmatic, it did not

state the purpose for which this transfer was made. It is, therefore, by no means clear that the Credit Advice pertained to the settlement of the net amount owed by Panoil to Italmatic. Accordingly, we do not think that the Credit Advice, even if admitted, would adequately address the multiple reasons provided by the Judge for his conclusion that the 13 August 2017 Letters were fabrications.

15 We therefore agree with the Judge's conclusion that the set-off defence was not established on the evidence before him.

16 We now turn to the Judge's dismissal of the cancellation defence. As mentioned, the Judge found that the August 2017 Cancellation Letters were also fabrications. The Judge set out several reasons for his conclusion, namely that the cancellation defence was an afterthought, that inconsistent reasons were advanced for the cancellation defence, that there were inconsistencies between the statement of account annexed to the August 2017 Cancellation Letters and Italmatic's pleaded case, that the August 2017 Cancellation Letters appeared to have been discovered in suspicious circumstances, that the August 2017 Cancellation Letters did not appear to have been sent out on the date stated, and that Panoil had failed to issue replacement invoices to Eastern Pacific. Italmatic's case on appeal is that these reasons were erroneous. The Judge supported his conclusion on the evidence before him as well as the various inconsistencies in the documentary evidence put forward by Italmatic and the oral evidence given by Italmatic's witnesses.

17 We are not persuaded by Italmatic's arguments. Italmatic's arguments against the Judge's reasons appear to us to be based on speculation or bare assertions of fact. For instance, in response to the Judge's finding that inconsistent bases were advanced for the cancellation defence, Italmatic argued

that "it is quite obvious" that the real reason why Eastern Pacific requested for the novation was that Eastern Pacific had hoped to set off what it owed to Panoil. This appeared to us to be speculative and was, in any case, not pleaded. Italmatic also argued that the Judge had erred in finding that the August 2017 Cancellation Letters were discovered in suspicious circumstances. The Judge had observed that the fact that copies, but not the originals of the August 2017 Cancellation Letters were belatedly discovered in Panoil's alternative premises was a factor against the authenticity of the August 2017 Cancellation Letters. Italmatic's explanation for the missing originals of the August 2017 Cancellation Letters was that the originals could have been posted to the addressee, misplaced or did not exist because they were sent by email. These were, again, speculative and unsupported assertions of fact. Having regard to Italmatic's arguments and the evidence, we are of the view that the Judge's determination that the August 2017 Cancellation Letters were fabrications was not against the weight of the evidence. It follows that there is no basis for us to disturb the Judge's conclusion that the cancellation defence failed. We note with some circumspection that the purported cancellation allegedly took place *after* the purported set-off. If the purported set-off had occurred on 13 August 2017 via the 13 August 2017 Letters, then logically there would no longer be any outstanding invoices due from Italmatic to Panoil to be cancelled on or about 18 August 2017.

18 For completeness, we will make a few preliminary observations on the set-off defence. As mentioned earlier, Italmatic's set-off defence is predicated on the notice of set-off having been served on Panoil by the exchange of the 13 August 2017 Letters, which, in the Judge's view, it failed to prove on the evidence before the court. However, we observe that an assignee of a debt, in

this case CIMB, takes subject to equities that exist prior to the notice of assignment being given to the debtor, in this case Italmatic. This is because the assignee of a debt takes the chose in action as it is and cannot be in a better position than the assignor, namely Panoil (see *MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 at [70]). Such equities may arguably encompass a contractual set-off agreement where such an agreement was made prior to the notice of assignment given to the debtor. There is some authority to that effect: see the High Court decision of *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2010] 3 SLR 48 at [91]. That being said, this point was not argued in the proceedings below nor pleaded, and we leave it for determination with the benefit of full arguments in an appropriate future case. In any case, even if this point had been raised below, notice and confirmation of the "undisputed" set-off would still be required under the 2015 set-off agreement whether *before or after* the notice of assignment. However, in the present case, Italmatic rested its set-off defence *only* on the 13 August 2017 Letters as such notice and confirmation. As we have affirmed the Judge's finding that the 13 August 2017 Letters were fabrications, there was hence no exercise of the contractual set-off under the 2015 set-off agreement and, accordingly, this point would have made no difference to the outcome of the appeal.

Conclusion

19 For the reasons set out above, we dismiss this appeal and award costs of $55,000 all-in for this appeal and for Summons No 137 of 2020 and Summons No 14 of 2021 (which were unsuccessful applications brought by Italmatic for which costs were awarded to CIMB, the determination of which were reserved

to the appeal) to be paid by Italmatic to CIMB. There will be the usual consequential orders.

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Lim Chee San (TanLim Partnership) for the appellant;
Chan Kia Pheng and Walter Yong (LVM Law Chambers LLC) for the respondent.