Velstra Pte Ltd v Dexia Bank NV
[2004] SGCA 49

Case Number : CA 21/2004

Decision Date : 28 October 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Vinodh Coomaraswamy and David Chan (Shook Lin and Bok) for appellant; Tan Chuan Thye and Felicia Chua (Wong and Leow LLC) for respondent

Parties : Velstra Pte Ltd — Dexia Bank NV

Evidence – Admissibility of evidence – Hearsay – Whether hearsay statement admissible as being statement made against own interest – Sections 17, 21(1), 32(c) Evidence Act (Cap 97, 1997 Rev Ed)

Insolvency Law – Avoidance of transactions – Transactions at an undervalue – Whether insolvent party must have intended to deal with counter party – Whether transaction at an undervalue – Section 98 Bankruptcy Act (Cap 20, 2000 Rev Ed)

28 October 2004 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This appeal raises the question as to whether the payment of a sum of US$20,920,000 made on 5 January 2000 by the appellant company, Velstra Pte Ltd ("Velstra"), which is now under liquidation, allegedly to the respondent was a transaction at an undervalue within the meaning of s 98 of the Bankruptcy Act (Cap 20, 1996 Rev Ed) ("BA"), read with s 329(1) of the Companies Act (Cap 50, 1994 Rev Ed) ("CA"). In the present action, the liquidators of Velstra sought to have the transaction reversed and the money returned.

2 At the High Court, Kan Ting Chiu J held that, in the circumstances of the case, the payment of the sum to the respondent was not a transaction within the meaning of s 98 of the BA. The liquidators, being dissatisfied, have appealed to this court.

The background

3 Velstra is a Singapore company under liquidation on account of insolvency. It was linked to a Belgian company called Lernout and Hauspie Speech Products NV ("L&H") which specialised in the development of speech recognition, dictation and translation software. The respondent, Dexia Bank NV is a Belgian bank which had absorbed another bank known as Artesia Bank.

4 On 25 June 1999, three persons, namely, Jo Lernout, Pol Hauspie and Nico Willaert ("LH&W") opened a joint account no 553-2056900-42 ("the joint account") with Artesia Bank, which bank will hereinafter be referred to as "the respondent" unless the context otherwise requires. The respondent agreed to grant to LH&W in respect of the joint account a rollover credit facility of up to US$20m. A few days after the opening of the joint account, the credit facility granted was drawn down. When the facility expired on 10 October 1999, the loan outstanding in the account had not yet been repaid.

5 Towards the end of 1999, Velstra entered into a loan agreement for US$36m with one Mr Harout Khatchadourian ("HK"). On 30 December 1999, Velstra's bank, DBS Bank, sent a SWIFT

message to the respondent stating that on 4 January 2004 it would be receiving US$36m in favour of Velstra. This message was sent at the request of Velstra, which sole executive director was one Mr Snauwaert.

6 Also on the same day, Velstra instructed the DBS Bank, by the filling up of a telegraphic transfer form ("TT form"), to effect the remittance of US$20.92m to:

Beneficiary Bank	:	Artesia Bank Brussels SWIFT CODE ARTEBEBB
Beneficiary's Bank A/C No	:	553-2056900-42
Beneficiary's Name	:	Artesia Bank Brussels Swift Code ARTEBEBB

Presumably this TT form was submitted in advance of Velstra coming into funds. It would also be fair to assume that the SWIFT message must have been despatched at about the time the TT form was handed in by Velstra. What is interesting to note is that the account number given in the TT form was the joint account of LH&W.

7 We should add that on the same day, 30 December 1999, Velstra instructed DBS, through the submission of three other TT forms, to remit three other sums to the respondent for the account of three other entities, which together with the sum in question in this action, added up to US$36m, the very sum on loan from HK.

8 Upon receipt of the SWIFT message, and in anticipation of funds coming through from Velstra, the respondent debited its own internal account and credited US$21m into the LH&W joint account. This crediting was subject to the "usual reservations".

9 On 5 January 2000, HK transferred the sum of US$36m into Velstra's account with DBS Bank which, in turn, remitted it to the respondent in accordance with the instructions in the four TT forms.

10 In the books of Velstra, the remittance of the US$20.92m was recorded as being made in:

(a) payment to CIB (referring to "consortium of investors from Belgium" and meaning LH&W);

(b) repayment of a loan of US$4,811,600 from a consortium of Belgium investors.

These entries were made by the bookkeeper of Velstra who affirmed that she did so on the instructions of Snauwaert.

11 On 5 January 2000, when the respondent received the remittance of US$20.92m, no further book entries were made except that, in relation to the shortfall between the US$21m which the respondent credited into the joint account and the actual sum of US$20.92m received, it debited the difference to the joint account on 13 January 2000.

12 After Velstra was placed under liquidation following a winding up order on 12 April 2002, the liquidator sought to recover the sum US$20.92m remitted to Artesia Bank pursuant to s 98 of the BA, read with s 329(1) of the CA.

The statutory provisions

13 We will at this juncture set out the statutory provisions which govern the matter. The relevant portions of s 98 of the BA read:

> (1) … where an individual is adjudged bankrupt and he has at the relevant time … entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order …
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.
>
> (3) For the purposes of this section … an individual enters into a transaction with a person at an undervalue if –
>
> > (a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
> >
> > (b) … or;
> >
> > (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.

14 Section 98 is made applicable to a company under liquidation by virtue of s 329(1) of the CA which reads:

> Subject to this Act … any transfer … payment … made … by … a company which, had it been made … by an individual, would in his bankruptcy be void or voidable under section 98 ... of the [BA] … shall in the event of the company being wound up be void or voidable in like manner.

Decision below

15 It is not disputed that the remittance of the sum of US$20.92m to the respondent was made within five years of Velstra being wound up. The judge below found that, by the balance sheet test, Velstra was insolvent at the time the payment was made. He dismissed the claim on the ground that there was no "transaction" between Velstra and the respondent within the meaning of s 98. He said that before there could be such a "transaction" it must be established that Velstra had intended to transact with the respondent. As Velstra had no prior dealings with the respondent and was not indebted to the latter nor had ever intended to make any payment to it, there was no transaction between them. That being the position he took, the judge did not proceed to deal with the question whether the transaction was at an "undervalue".

Issues on appeal

16 It is common ground that in order for the appellant to succeed in this appeal, it has to prove the following ingredients:

> (a) That there was a transaction between Velstra and the respondent by virtue of the remittance;
>
> (b) That the transaction took place within five years of Velstra going into liquidation;

(c) That, on 5 January 2000, Velstra was insolvent or had become insolvent as a result of the remittance of US$20.92m to the respondent on that day; and

(d) That the transaction was effected at an undervalue.

17 In the present appeal, ingredient (b) is not in dispute. What the respondent challenges are, in the main, ingredients (a) and (d). However, the respondent also did not admit to ingredient (c) as having been satisfied.

18 Before us, counsel for Velstra submitted that the trial judge had erred in finding that there was no "transaction" between Velstra and the respondent. Counsel emphasised the fact that the sum of US$20.92m was remitted to the respondent and the latter had retained it. To hold that there must be a specific intention on the part of Velstra to remit to the respondent before the remittance would be caught by s 98 would gravely undermine the object of the section. Counsel argued that the correct approach would be to look at the objective facts. There would be a transaction within the meaning of s 98 so long as money or property was received and retained by the counter party.

19 In the alternative, counsel submitted that even if it were necessary to show "intention", on the facts there was an intention on the part of Velstra to transact with the respondent. This was because the instructions on the TT form clearly indicated that Velstra intended to remit the said sum to the respondent, who was named as the beneficiary.

20 On the issue of undervalue, counsel for Velstra contended that the transaction was so because Velstra had received nothing of value from either the respondent or from any other person in connection with the payment.

21 We propose to deal with the issues raised in this appeal under the following heads:

(a) Whether it is necessary to show that the insolvent party must have intended to deal with the other party who, in fact, received the property or money in order that there could be a "transaction" within the meaning of s 98;

(b) Whether, on the facts in the present case, there was a "transaction" between Velstra and the respondent; and

(c) Whether the "transaction" was at an undervalue.

The question of intention

22 Section 98(1) of the BA applies where, *inter alia*, an individual who is adjudged a bankrupt, (or in the case of a company, in liquidation) has "entered into a transaction with any person". The plain meaning of these words would connote mutual dealings, and that the counter party is one with whom the insolvent party wishes to deal.

23 Admittedly, as would be seen from s 98(3) quoted above (at [13]), a gift is also a transaction within the meaning of s 98(1). In the context here, a gift is perhaps an express statutory exception to the mutuality rule. We had in *Mercator & Noordstar NV v Velstra Pte Ltd* [2003] 4 SLR 667 ("*Mercator*") opined (*obiter*) at [24] that a gift is a unilateral act. There is controversy, as a matter of jurisprudence, whether a gift is a one-sided act or a two-sided consensual act. Is the donee's acceptance an essential part of the law of gift? It would seem that no single theory can apply to all situations where a gift arises.

24 The significance of the donee's consent in this regard is discussed at some length in an article entitled "The Role of Donee's Consent in the Law of Gift" by Jonathan Hill published at (2001) 117 LQR 127, where the author also analysed the doctrinal issue as to whether a gift is a unilateral act or a two-sided consensual act. The author concluded with these observations at 148:

> As with many areas of the common law, the courts have reached pragmatic solutions to the various problems which have come before them. In the law of gift, the common law evidences a tension because of the interrelationship of two conflicting ideas: the notion that gifts are two-sided consensual acts, on the one hand, and the law's acceptance of one-sided modes of transfer (such as wills and deeds), on the other. As a consequence the common law has been unable to produce a single theory that explains legally how a gift operates. In certain situations there must be mutual express consent – that is to say, both the donor and the donee must positively consent to the transaction in question in order for it to operate as a transfer of property; in others a gift is effective unless and until disclaimed by the intended donee – that is to say, the transaction operates as an effective transfer of property unless the donee expresses his dissent.
>
> This lack of unifying theory has the consequence that general pronouncements run the risk of being misleading.

25 Whichever is the correct jurisprudential basis, what is clear is that a gift which is refused should not pose any of the problems which s 98 was enacted to address. Obviously, if a gift is not accepted, the donee would have returned it, or, at least, would not have resisted the demand for its return. So no question of any undervalue will arise.

26 If A intends to give a sum of $x to B and through a mistake it is passed on to C, we do not see how it could be said that A intends to "enter into a transaction" with C. While what happens in this scenario does not come within s 98, it does not thereby mean that A is without any other recourse. It seems clear to us that A can claim for the return of the money from C on the basis of money had and received.

27 Counsel for Velstra argued, relying on the difference in wording between ss 98 and 99 of the BA, that the intention of the insolvent party in the context of s 98 is wholly irrelevant. Section 99(1) and (4) read:

> (1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.
>
> (4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b).

28 It would be seen that in s 99(4), there are express words requiring clear intention on the part of the insolvent party to confer on the other person an unfair preference, *ie*, "unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection 3(b)". What this means is that in order to prove unfair preference, it is not enough to merely show that the payment puts the payee-creditor in a better position than the payee would have been in the event of the payer's insolvency. It must also be shown that the payer was, in making the payment, influenced by a desire to produce such a result.

29 But we fail to see how the difference in wording between ss 98 and 99 could necessarily suggest that "intention" has no part at all in relation to the interpretation of the expression "enter into a transaction" in s 98(1). The two sections are dealing with different concepts. In relation to s 98(1), what is needed is the intention of entering into the transaction with that counter party. For the purposes of s 99, not only must it be shown that the payer intends to pay to the payee but that it was with the specific purpose of giving to the payee an unfair preference. Thus, the requirements of the two provisions are quite different. Clearly, the requirement as to intent in s 99 is of a higher level than that for s 98.

30 We would add that our BA was based on the UK Insolvency Act 1986 and the latter Act was enacted to give effect to the recommendations in the report of the Cork Committee entitled *Insolvency Law and Practice* (HMSO, 1982). The Cork report identified the transactions which should be disallowed *vis-à-vis* the general creditors and they were those "voluntarily initiated by the debtor himself", including gifts (see para 1208 of report).

31 The appellant has made reference to the Australian case of *Re Emanuel (No 14) Pty Ltd* (1997) 147 ALR 281 ("*Re Emanuel*"). There, company A, shortly before its insolvency, compromised a claim with B and in turn directed B to pay a part of the compromised sum to C in discharge of a debt due from A to C. The liquidator of A sought recovery of the sum from C on the ground that there was a transaction between A and C. The Australian Federal Court held that there was a transaction between A and C although neither was a party to all the component elements of the transaction.

32 With respect, we think it is way off the mark to suggest that *Re Emanuel* can be relied upon to say that "intention" is irrelevant to determine whether there is a transaction between two parties under s 98. As far as that case is concerned, A intended to pay the sum to C, and B was just A's instrument to effect that. Obviously A could have demanded the full compromised sum from B, and having received the sum, to pay the debt which A owed to C. Short-circuiting this process would not have altered the essential nature of the transaction. The substance of the whole transaction is clear: the payment was effectively made by A to C.

33 Thus, we are in agreement with the trial judge that whether the counter party is a pure donee or otherwise, for a transaction to fall within s 98, the counter party must be a person to whom the donor party intends to make the payment, or pass the property.

With whom did Velstra intend to transact

34 We have in [6] above set out the instructions of Velstra as to whom it intended to remit the US$20.92m. On the one hand it was stated on the TT form that the beneficiary was to be Artesia Bank, and on the other hand, the account number into which the remittance was intended to be credited was the joint account of LH&W. This explains why, as found by the trial judge, the two experts called by the parties did not think that the instructions were conclusive that Artesia Bank was the intended recipient of the payment.

35 It is not in dispute that Velstra did not have any prior dealings with Artesia Bank. The experts of both parties agreed that as a matter of Belgian law, the remittance instructions and the SWIFT message were not conclusive as to the counter party of that remittance. However, Velstra was related to LH&W in that Velstra was a subsidiary of NV Language Development Fund ("LDF") which was set up by L&H. Nico Willaert was the director of L&H. Snauwaert, who was Velstra's executive director, was also the director managing LDF. Snauwaert acted primarily on the instructions of L&H. Bearing these in mind as well as:

(a) the fact that the instruction of Velstra to DBS was that the remittance was to be credited into account no 553-2056900-42, which was the joint account of LH&W;

(b) the fact that it was recorded in Velstra's books that the remittance of the US$20.92m was in respect of the repayment of a loan from a consortium of Belgian investors (*ie* LH&W), and payment to the consortium on behalf of several other parties; and

(c) the fact that the book-keeper of Velstra attested that the entries were so made in the books on the instructions of Snauwaert,

the only conclusion one could reasonably draw is that the remittance was meant for LH&W. The further fact that on the TT form it was stated that the beneficiary was Artesia Bank could not, in the context, override those other facts and is thus inconsequential.

36 Here, we note the evidence of Velstra's banking expert that by reason of the advance crediting, the respondent had received the US$20.92m on 5 January 2000 as principal in its own right and not as agent for its customers, LH&W. In our judgment, this view did not give sufficient consideration to three important factors. First, the advanced crediting was provisional. Second, the instruction of Velstra was to credit the money into the joint account. Third, as between Velstra and the respondent there had been no prior dealings between them. More importantly, this expert in his affidavit of evidence-in-chief said, with regard to the procedure of giving credit under usual reservations, as follows:

> Therefore, when a customer is granted a credit under usual reservation by its bank against an expectation, the customer agrees with its bank, expressly or by implication, that when the expectation materializes, the customer's claim against the bank at that time to have the customer's account credited with the materialized value of the expectation is waived or otherwise assigned to the bank.

37 The remittance was for the account of LH&W. By virtue of an express or implied agreement, the remittance was to be assigned to the bank. This process, *ie*, the giving of provisional credit and the assignment, was entirely an arrangement between the respondent and its customer and could have no effect as to whom Velstra intended to enter into a transaction with. Velstra did not assert that it knew that provisional credit had been granted by the respondent to LH&W.

38 Accordingly, this was an instance where Velstra intended to remit the sum to LH&W and the respondent was just the conduit to effect that. The sum was received by the respondent in the course of its business. With the receipt of the remittance, the provisional crediting was confirmed subject only to the adjustment made because of the difference between the amount of the provisional credit given and the actual sum received. It is the substance, not the form, that should be decisive.

39 Reliance was placed by counsel for Velstra on an admission made by Snauwaert to the liquidator that Snauwaert believed that the beneficiary of the US$20.92m was the respondent. However, Snauwaert never came to court to testify and thus what was alleged to have been said by Snauwaert is therefore hearsay. To overcome this obstacle, counsel relied upon ss 17, 21(1) and 32(c) of the Evidence Act (Cap 97, 1997 Rev Ed) to contend that the statement made by Snauwaert was admissible as being a statement made against his own interest. Though the point was not expressly made, presumably the statement could be construed to be against Snauwaert's interest because if it were true it would expose him to criminal liability under s 157(1) of the CA or a suit for damages for breaching his duties as a director of Velstra, *ie*, paying the sum to the respondent when

Velstra was not liable to the respondent for the same.

40 However, for a hearsay statement to be admissible under the "against interest" rule, it must be shown that the person who made it was conscious that what he said was against his own interest: see *Ramrati Kuer v Dwarika Prasad Singh* AIR 1967 SC 1134 and *Sarkar's Law of Evidence*, (15th Ed, 1999) at p 691. In the context of this case it must be established that Snauwaert realised that in so saying he was opening himself to criminal prosecution under s 157 or civil liabilities. There was no evidence of that at all. Thus the statement is inadmissible.

41 Moreover, even if it were permissible to admit the statement of Snauwaert, the weight that should be given to it would, in our view, be minimal. First, the respondent did not have the opportunity to cross-examine Snauwaert to establish the basis of his belief. Second, no explanation was given as to why the remittance was directed to be credited into the joint account. Third, what Snauwaert was alleged to have said is contrary to what was recorded in the books of Velstra as instructed by him. Fourth, the liquidator who testified in court, Mr Hutchinson, did not refer to this statement of Snauwaert in his examination-in-chief but only in re-examination.

42 The appellant also relied on the fact that the respondent had not, upon receipt of the remittance, credited it into the joint account. To this, we will make three points. First, as we have mentioned before, the remittance was for the joint account. Second, while no fresh credit was given to the joint account on receipt of the remittance, this contention has conveniently disregarded the provisional credit given by the respondent to the joint account upon receiving the SWIFT message. The receipt of the remittance would be the event which would confirm the previous entries already made. Without this remittance, the provisional credit given on 30 December 1999 would have been reversed. Third, the respondent debited the joint account with the difference between the provisional credit of US$21m and the actual receipt of US$20.92m. This again shows that the remittance was in relation to the joint account.

43 What is the true nature of a transaction must be viewed in the light of all the relevant circumstances. The SWIFT message received by the respondent on 30 December 1999, the provisional credit entries which were made by the respondent in its books and the actual receipt of the US$20.92m all related to one transaction. The objective facts are not confined only to those which occurred on 5 January 2000. To truncate the facts and view each event as distinct and separate would inevitably lead to a wholly erroneous conclusion, based as it does on a partial view of things. The entries made by Velstra in its book is clear evidence of what was its intention in making the remittance.

44 We are very conscious of the object behind the provisions in s 98 of the BA, read with s 329(1) of the CA, which is to prevent the dissipation of company assets and to protect creditors in general of insolvent companies: see *Mercator* ([37] *supra*). But it does not follow that every entity to whom the insolvent party has made payment must be required to return the money to the Official Assignee of a bankrupt or the liquidator of a company. Every case should be looked at objectively and fairly to determine what is the true nature of the transaction, who is the real counter party and whether the transaction was at an undervalue.

45 In the result, we agree with the trial judge that the expression "entered into a transaction" in s 98 contemplates that the counter party must be a party with whom the insolvent party wishes to transact. We also agree with his finding that, in relation to the remittance of the US$20.92m, the respondent was not the counter party. The counter party was LH&W. The remittance was made to the respondent as the banker of LH&W. While the respondent received the remittance, it received the money as agent of LH&W.

46 Thus, we would dismiss the appeal not only on the ground that there was no transaction between Velstra and the respondent but also on the ground that the transaction was between Velstra and LH&W.

The question of undervalue

47 In the light of our decision above, the question of undervalue does not arise. However, even if we were to hold that in the circumstances of the case the remittance was received by the respondent in its own right, we do not think that the appellant has established that the transaction was at an undervalue to which issue we will now briefly touch on.

48 Here, the appellant highlighted the fact that there was no transmission of any property at all from the respondent to the appellant in return for the remittance. Neither was there any assignment to the appellant of the respondent's rights against LH&W. The appellant further contended that there was no evidence that any of the related parties, who were identified in Velstra's book as the parties on whose behalf the remittance was made to the respondent, had made any request to Velstra to make the payment, thus giving rise to an obligation on their part to repay Velstra.

49 With respect, we think this approach takes an incomplete account of the situation. The fact of the matter is that as on 30 December 1999, LH&W owed Artesia Bank a sum exceeding US$20m plus accruing interest. By virtue of the SWIFT message sent by DBS Bank at the request of Velstra, Artesia Bank gave provisional credit to the joint account of LH&W in anticipation of the remittance which would be received shortly. It would be fair to infer that Velstra had requested DBS Bank to so notify Artesia Bank pursuant to an arrangement made between Velstra and LH&W who were related. Otherwise, there would have been no sense in Velstra asking the DBS Bank to inform the respondent that Velstra would be coming into funds. This ties in neatly with the instructions which Velstra gave on the TT form. Having given the provisional credit of US$21m to LH&W and having confirmed that credit in favour of LH&W upon receipt of the remittance, it is clear to us that Artesia Bank had provided full consideration for the remittance.

50 In this regard, what must not be overlooked are the book entries made by Velstra in relation to the remittance. There is nothing to prove that those entries were not correct or genuine.

Judgment

51 In the premises, the appeal is dismissed with costs. The security for costs, together with any accrued interest, shall be released to the respondent to account of the latter's costs.