

Focus Energy Ltd v Aye Aye Soe (Standard Chartered Bank, Singapore Branch, garnishee) and another matter [2010] SGHC 48

Suit No: Suit No 65 of 2008 (Registrar's Appeals No 427 and 428 of 2009)
Decision Date: 9 February 2010
Court: High Court
Coram: Tay Yong Kwang J
Counsel: Harish Kumar and Goh Seow Hui (Rajah & Tann LLP) for the plaintiff; Solomon Richard (Solomon Richard & Co) for the defendant.

Subject Area / Catchwords

Civil Procedure – Judgments and orders – Enforcement

Statutory Interpretation – Construction of statute – Purposive approach

9 February 2010

Tay Yong Kwang J:

Introduction

1 On 19 October 2009, the judgment creditor Focus Energy Ltd (“Focus Energy”) obtained judgment against the judgment debtor Aye Aye Soe (“AAS”) for US\$22,518,878.20, interest thereon at the rate of 5.33% from the date of the writ and costs of the action to be taxed or agreed. Pursuant to the judgment, Focus Energy applied for and obtained on 22 October 2009 a Garnishee Order to Show Cause against the garnishee, Standard Chartered Bank, Singapore Branch (“SCB”). The same day, Focus Energy also obtained a Garnishee Order to Show Cause against another garnishee, United Overseas Bank Limited (“UOB”).

2 An Assistant Registrar heard both Garnishee Orders to Show Cause on 29 October 2009. After hearing arguments, the Assistant Registrar adjourned both matters to 6 November 2009 to allow AAS to apply for a stay of execution of the Garnishee Orders to Show Cause.

3 The application for a stay of execution of the Garnishee Orders to Show Cause was subsequently heard on 6 November 2009 by an Assistant Registrar who dismissed it. The Assistant Registrar also dealt with both Garnishee Orders to Show Cause on 6 November 2009.

4 Before the Assistant Registrar, counsel for AAS, Mr Solomon Richard, argued that O 49 r 7(1) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) (“the ROC”) requires the judgment creditor to produce a certificate indicating that the Monetary Authority of Singapore (“MAS”) has given its permission under the Exchange Control Act (Cap 99, 2000 Rev Ed) (“the ECA”) for the payment to the judgment creditor if the judgment creditor is resident outside the scheduled territories named in the ECA. However, the Assistant Registrar agreed with counsel for Focus Energy, Mr Harish Kumar, who argued that since MAS issued a circular on 25 May 1978 (MAS 1103, Reference: ID Circular 6/78 dd 25.5.78) (“the MAS Circular”) effectively lifting all exchange controls, MAS was deemed to have given its permission for such payment and there was no question of non-compliance with O 49 r 7(1). The Assistant Registrar therefore made a final order in respect of each of the Garnishee Orders to Show Cause. SCB was ordered to pay to Focus Energy US\$1,349,528.81, S\$36,530.74 and EUR708,985.42 while UOB was ordered to pay to Focus Energy US\$15,040.65 and S\$312,181.80.

5 AAS appealed against the final orders against SCB (Registrar's Appeal No 427 of 2009) and against UOB (Registrar's Appeal No 428 of 2009). Both appeals were heard before me on 14 January 2010. I dismissed both appeals for the reasons set out below.

My decision

6 O 49 r 7 of the ROC provides:

7. —(1) The Court shall not make an order under Rule 1 requiring the garnishee to pay any sum to or for the credit of any judgment creditor resident outside the scheduled territories unless that creditor produces a certificate that the Monetary Authority of Singapore has given permission under the Exchange Control Act (Chapter 99), for the payment unconditionally or on conditions which have been complied with.

(2) If it appears to the Court that payment by the garnishee to the judgment creditor will contravene any provision of the Exchange Control Act, it may order the garnishee to pay into Court the amount due to the judgment creditor and the costs of the garnishee proceedings after deduction of his own costs, if the Court so orders.

7 The ECA provides in s 7(1) and s 8(1):

7. —(1) Except with the permission of the Authority, no person shall do any of the following things in Singapore:

(a) make any payment to or for the credit of a person resident outside the scheduled territories;

(b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside the scheduled territories;

(c) place any sum to the credit of any person resident outside the scheduled territories.

8. —(1) Except with the permission of the Authority, no person shall in Singapore do any act which involves, is in association with or is preparatory to the making of any payment outside Singapore, to or for the credit of a person resident outside the scheduled territories.

S 2(1) of the ECA defines “scheduled territories” as:

the territories specified in the First Schedule, except that the Authority may at any time by order amend that Schedule, either by the addition or exclusion of territories or otherwise.

8 The list of countries in the said First Schedule does not include Myanmar (or its former name, Burma), the alleged country of residence of the judgment creditor to whom payment is to be made. Focus Energy does not agree that it is resident in Myanmar. It was incorporated in the British Virgin Islands (listed in the said First Schedule as one of the “scheduled territories”). While it is registered as a branch in Myanmar and has previously operated an oil concession there, it maintains that it is resident in the British Virgin Islands for the purposes of the ECA and therefore does not reside outside the “scheduled territories”. This issue was not decided by the Assistant Registrar as both parties focused their arguments on the issue whether a MAS certificate was required under O 49 r 7(1) on the assumption that payment was going to be made to an entity resident outside the “scheduled territories”. Before me, the parties proceeded on the same basis.

9 The MAS Circular is in the following terms:

Exchange Control Liberalisation

1 With effect from 1 June 1978, all persons are exempted from the provisions, obligations, etc, imposed under the various sections of the Exchange Control Act (Chapter 245). Therefore, no exchange control formalities or approvals are required for all forms of payments or capital transfers. Any limits or restrictions which were imposed under the Second Edition of the Exchange Control Manual dated 1 January 1977 have been abolished.

2 All statistical returns which were previously submitted under the Exchange Control Manual are no longer required.

10 Mr Solomon argued before me that since Focus Energy is resident in Myanmar and Myanmar is not a scheduled territory under the ECA, O 49 r 7(1) of the ROC requires a certificate from MAS before the Court can make an order requiring the garnishee to make payment to Focus Energy, the judgment creditor. Since no such certificate was provided, Mr Solomon asked that the final orders be set aside. Where the MAS Circular was concerned, Mr Solomon submitted that the MAS Circular was not legally binding and that the Assistant Registrar was wrong in law to have given it more weight than the ECA.

11 Parliament conferred on MAS the power to grant exemptions from any provision of the ECA imposing any obligations or prohibitions. Section 33 of the ECA provides:

33. —(1) Any provision of this Act imposing any obligation or prohibition shall have effect subject to such exemptions as may be granted by order of the Authority.

(2) Any such exemption may be either absolute or conditional.

12 Parliament also conferred on MAS the power to grant permission, consent or authority or to give directions. Section 38 of the ECA makes it clear that such power is extremely broad. The provision states:

38. —(1) Any permission, consent or authority granted under this Act —

(a) may be either general or special;

(b) may be revoked by the Authority;

(c) may be absolute or conditional;

(d) may be limited so as to expire on a specified date unless renewed; and

(e) shall be published in such a way as, in the opinion of the Authority, to give any person entitled to the benefit of it an adequate opportunity of getting to know of it, unless in his opinion publication is not necessary for that purpose.

(2) Any directions given under any provision of this Act —

(a) may be either general or special;

(b) may be revoked or varied by subsequent directions; and

(c) shall be given to such persons and in such manner as the Authority thinks appropriate, and if so given shall be valid for all purposes.

...

In particular, the phrase “general or special” in both s 38(1)(a) and s 38(2)(a) denotes that this power may be exercised with respect to a particular individual or group or generally. The phrase “if so given shall be valid for all purposes” in s 38(2)(c) encompasses legal proceedings such as garnishee orders.

13 When MAS issued the MAS Circular, exempting all persons from the obligations and prohibitions imposed under the various sections of the ECA, it was exercising its powers under the ECA although it did not specify which particular provision it was invoking. The Assistant Registrar was therefore only recognising the valid exercise by MAS of its statutory powers under the ECA. The MAS Circular effectively exempts all persons from all exchange control for all forms of payments or capital transfers.

14 The Interpretation Act (Cap 1) applies to the ROC (see O 1 r 3 of the ROC and the definition of “written law” and “subsidiary legislation” in s 2 of the Interpretation Act). Applying the purposive approach mandated in s 9A of the Interpretation Act (Cap 1) in

interpreting O 49 r 7(1) of the ROC, it is evident that the purpose of requiring a certificate from MAS is to ensure that no provision in the ECA will be infringed by the payment in question. This is made even clearer by O 49 r 7(2) (see [6] above). Taking into account the blanket exemption granted to all persons by way of the MAS Circular, the purpose for which a certificate is required by O 49 r 7(1) has already been satisfied. MAS is deemed to have given its permission for such payment to the judgment creditor resident outside the “scheduled territories”. Another way of looking at the issue is to say that all prohibitions in the ECA have been effectively suspended since 1 June 1978 and there is no exchange control, and hence no need for permission regarding any payment, in respect of any territory until such time as the MAS Circular is revoked or modified. AAS has not shown any evidence that the MAS Circular is no longer in force or has been modified in any way.

15 One can envisage that if an application were made now to the MAS for a certificate pursuant to O 49 r 7(1), MAS will surely refer to the MAS Circular and state that no permission for payment is required as all exchange controls have been lifted and remain so.

16 By virtue of the MAS Circular, it is not necessary under O 49 r 7(1) of the ROC to obtain a certificate from MAS indicating its permission for the payment before the Court makes an order requiring a garnishee to pay money to a judgment creditor who is resident outside the “scheduled territories”. The Assistant Registrar was therefore correct in making the final orders directing the two garnishees to pay the relevant amounts to Focus Energy.

17 Accordingly, I dismissed both appeals and ordered AAS to pay Focus Energy costs of \$600 for each of the appeals.