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## Assignments in Breach of Public Policy May Amount to Debt Trafficking

*DGJ v Ocean Tankers (Pte) Ltd (in liquidation)* [2024] SGCA 57

The Court of Appeal ruled that assignments may be ineffective for offending public policy. Additionally, an assignment of a bare right to sue must not prejudice the administration of justice. Generally, non-assignment clauses would also prohibit the assignment of contractual and related rights.

### Facts

This was an appeal against the High Court's decision in *Re Ocean Tankers (Pte) Ltd (In Liquidation)* [2023] SGHC 330. Our client update may be found [here](#).

Ocean Tankers (Pte) Ltd ("**Ocean Tankers**") was a company controlled by Mr Lim Oon Kuin that has collapsed. A debtor of Ocean Tankers ("**Debtor**") chartered vessels from it. After Ocean Tankers was placed in judicial management, the Debtor commenced arbitration proceedings against Ocean Tankers for certain breaches. Ocean Tankers counterclaimed for certain amounts owed.

A creditor of Ocean Tankers that was related to the Debtor notified the liquidators of two assignments to the Debtor ("**Assignments**"). The first related to several bills of lading and a default judgment. The second related to a contract with a non-assignment clause and related tortious claims.

The Debtor raised these assigned claims in the arbitration as a defence by way of legal and/or insolvency set-off. The liquidators applied for Ocean Tankers to be wound up and sought a declaration that the purported Assignments were ineffective as they were prohibited by a non-assignment clause and/or non-assignable bare rights to sue. The liquidators also sought to strike down the assignments on public policy grounds.

### Issues

The Court of Appeal had to determine these key issues:

- (a) Whether the Assignments were effective as against Ocean Tankers.
- (b) If the Assignments were valid, whether insolvency set-off applied.

### Assignments against public policy may be ineffective

The Assignments were ineffective for subverting the *pari passu* regime.

A bare right to sue is generally not assignable for offending the policy against champerty. Champerty involves maintaining a civil action in exchange for a share of the proceeds. Three exceptions exist where<sup>1</sup>:

- (1) such assignment is incidental to the transfer of property;
- (2) the assignee has a legitimate interest in the litigation; or
- (3) there is no realistic possibility that the administration of justice would be prejudiced.

However, public policy concerns are not confined to situations involving assignments of bare rights to sue. Public policy concerns protecting the due administration of justice. Accordingly, the laws on assignment are subject to

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<sup>1</sup> *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("**Re Vanguard**")

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public policy considerations. Like how contracts may be struck down for illegality, any assignment may be ineffective for offending public policy.

The exceptions in *Re Vanguard* continue to apply to assignments of bare rights to sue. However, the test is modified as set out below. An assignment may also be challenged by showing that there is an applicable public policy that would be offended. Courts would adopt a substance over form approach when considering the effect and purpose of such assignment. Public policies underlying the insolvency regime are relevant where such assignment occurs in the context of a company's liquidation.

The policy against arrangements which offend the *pari passu* rule is a cornerstone of insolvency law and a dominant consideration in the liquidation process. It strikes down arrangements even where parties had no intention of offending the rule.

The *pari passu* regime affects unsecured creditors. Therefore, their interests must be considered. The Assignments were held to be an abuse of the insolvency set-off process because the Debtor sought to obtain preferential payment. Therefore, the Assignments were ineffective for subverting the *pari passu* regime. Such arrangements deprived Ocean Tankers of the full value of its assets available for *pari passu* distribution.

The scope of debt trafficking remains a question of fact. However, the "optimisation" of liabilities as in the present case would be an abuse of the insolvency set-off process.

### **Assignment of Bare Rights to Sue Available in Two Situations**

The *Re Vanguard* test was modified to emphasise the need to safeguard the administration of justice. A bare right to sue is now only assignable where:

- (1) such assignment is incidental to the transfer of property and there is no realistic possibility that the administration of justice would be prejudiced; or
- (2) the assignee has a legitimate interest in the litigation and there is no realistic possibility that the administration of justice would be prejudiced.

In this case, the fact that the Debtor stood to gain from the assignment did not amount to a legitimate interest. Also, the fact that the Debtor and Assignor formed part of the same corporate group did not constitute sufficient legitimate interest.

### **Non-Assignment Clauses Prohibit Assignments of Contractual and Tortious Rights**

The court held that parties' intentions influence the construction of non-assignment clauses. Parties would likely have intended to deal only with the original contract parties. Such an intention likely extends to any disputes arising from the contract. Therefore, in the absence of contrary evidence, non-assignment clauses would be construed to prohibit the assignment of both contractual and tortious rights arising from the contract.

### **Insolvency Set-Off Only Relevant with a Valid Assignment**

Given that none of the Assignments were valid, the issue of insolvency set-off was not engaged.

### **Learning points**

- (a) Assignments may be ineffective for contravening public policy. The adoption of an independent substance over form analysis on whether an act contravenes public policy suggests that the scope of public policy may be wider than previously thought.
- (b) Impact on the market – While the impact on the distressed debt market is limited, it is not clear what the wider ramifications on markets heavily reliant on the assignment of debts such as asset securitisation would be.
- (c) Law on champerty – Contracting parties should ensure that any assignment of bare rights to sue meet the requirements under the modified *Re Vanguard* test.

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- (d) Scope of non-assignment clause – Assignees should be aware of the existence and coverage of any non-assignment clause. Such clauses would typically be construed to prohibit the assignment of contractual and tortious rights arising from the contract.

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