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## Set-Off – Assignability of Claims and Coverage of Non-Assignment Clause

*Re Ocean Tankers (Pte) Ltd (in liquidation) [2023] SGHC 330*

The Singapore High Court recently ruled on issues relating to the assignability of claims, coverage of non-assignment clause and insolvency set-off.

### Facts

Ocean Tankers (Pte) Ltd (**Ocean Tankers**) is one of several businesses controlled by Mr Lim Oon Kuin and his family that have collapsed. A debtor of Ocean (**Debtor**) chartered vessels from it under several charterparties. 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 (**Assignor**) notified the judicial managers 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 judicial managers applied for Ocean Tankers to be wound up and sought a declaration that the purported Assignments were void and/or unenforceable as they were prohibited by a non-assignment clause and non-assignable bare rights to sue.

### Issues

The High Court had to determine these key issues:

- (a) Whether the non-assignment clause barred the assignment of contractual and tortious rights? If so, were they nevertheless effective in equity?
- (b) Whether the assigned claims are bare rights of action which cannot be assigned?
- (c) Whether the Debtor can assert insolvency set-off for the value of the assigned claims if Ocean Tanker is discharged from judicial management and wound up?

### Coverage of non-assignment clause

#### (a) Whether the non-assignment clause barred the assignment of both contractual and tortious rights

The High Court held that the non-assignment clause only barred the assignment of contractual claims. It did not bar the assignment of related tortious claims.

This is because:

1. *Literal interpretation* - The wording of the clause referred only to contractual rights. The clause provided that the *rights and obligations* under the contract shall not be *assigned or novated* without the other party's consent. Novation is a contractual process. Also, obligations may only be novated, not assigned. Therefore, where a non-assignment clause refers to the assignment or novation of "rights and obligations", it would only apply to *contractual* rights and obligations.
  2. *Heading* - The clause heading stated that it governs the "TRANSFER OR ASSIGNMENT OF AGREEMENT" which suggested that it only covered the transfer of contractual rights as the agreement is a contract.
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3. *Contextual interpretation* - Other clauses in the contract specifically refer to non-contractual rights. This showed that the contract distinguished between different types of rights. Therefore, when the non-assignment clause refers to rights and obligations “under the Agreement”, it applies only to contractual rights.

**(b) Whether the assignments prohibited by the non-assignment clause nonetheless took effect in equity**

The High Court held that the assignment of the contractual claims, which breached the non-assignment clause, was ineffective both at law and equity. Furthermore, the prohibited assignment could not take effect as a declaration of trust because there was no valid declaration of trust that the Assignor was to hold any right or benefit for the benefit of the Debtor.

### **Assignability of a bare right to sue**

The judicial managers also challenged the Assignments as assignments of bare rights to sue.

A bare right to sue cannot generally be assigned because it would contravene the public policy against maintenance and champerty. However, exceptions exist in two scenarios:

1. The assignment is ancillary to the assignment of a property right.
2. The assignee has a genuine commercial interest in the enforcement of the assigned claim. Such genuine commercial interest should exist independently and prior to the assignment itself.

The High Court found the first assignment (which had merged into a default judgment granted by an overseas court) to be a valid assignment of a judgment debt because it was no different from other types of debt.

However, the second assignment of tortious rights was voided for being an assignment of a bare right to sue. The High Court found that the tortious rights were not ancillary to an assignment of any property right or interest because it was pursuant to the contract, the assignment of which was barred by the non-assignment clause. The Debtor also did not have a genuine commercial interest in the tortious rights because it had no prevailing interest before the assignment.

### **Insolvency Set-off**

The High Court held that insolvency set-off would operate automatically to reduce the Debtor’s liability upon the commencement of winding up in relation to debts that were validly assigned to the Debtor.

It should be noted that insolvency set-off operates automatically upon the commencement of winding up and not judicial management under the preceding position under the Companies Act which applied to the present case. Under the Insolvency, Restructuring and Dissolution Act, it also operates automatically upon the commencement of judicial management.

### **Learning points**

- (a) Coverage of non-assignment clause – assignees need to determine the existence and coverage of any non-assignment clause. In this case, the non-assignment clause did not prohibit the assignment of tortious rights.
- (b) Assignment of bare right to sue – assignees need to ensure that the rights assigned are not bare rights to sue. Such rights are generally not assignable.
- (c) Insolvency set-off – insolvency set-off is automatic upon the commencement of judicial management or winding up. The insolvent company, its creditors and debtors have to take this into consideration when it formulates its strategy in an insolvency.

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