Bogart Malls Pte Ltd *v* Enets Pte Ltd and another suit
[2014] SGHCR 7

Case Number : Suit No 493 of 2012 and Suit No 495 of 2012

Decision Date : 28 March 2014

Tribunal/Court : High Court

Coram : Yeong Zee Kin SAR

Counsel Name(s) : Daniel Koh with Jasmine Chan (Eldan Law LLP) for the plaintiff; Christopher James De Souza with Kevin Ong and Lionel Leo Zhen Wei (WongPartnership LLP) for the defendant.

Parties : Bogart Malls Pte Ltd — Enets Pte Ltd

Civil Procedure – Judgment on admission – whether admission has to flow from Defendant to Plaintiff

Contract – electronic commerce – payment gateway services

28 March 2014 Judgment reserved.

Yeong Zee Kin SAR:

1 These are the Plaintiffs' applications for judgment based on admissions made by the Defendant in two documents: an internal audit report and a letter from the Defendant addressed to American Express International Inc (Amex).

Summary of facts

2 The Plaintiffs provide software consultancy and online payment solutions to merchants through their website <www.mensboxshop.co.uk> and entered into Bank Connect Services (BCS) agreements with the Defendant under which the Defendant is to provide payment gateway services. There was an outage in the Defendant's systems sometime between 4 and 28 December 2009. Resulting from this outage, which the Defendant describes as a non-deliberate outage, the Plaintiffs suffered losses to the following extent:

(a) For Bogart Malls Pte Ltd ("Bogart"), of the total transactions amounting to USD 524,320.97 that originated from its website and that passed through the Defendant's system, only transactions amounting to USD 366,485.77 were consolidated and transmitted to Amex. Consequently, payments for transactions totalling USD 524,320.97 were made to Amex but Amex only paid USD 366,485.77 to Bogart. Bogart is now suing Defendant for the shortfall of USD 188,674.54.

(b) For eTrust Processing Pte Ltd ("eTrust"), of the total transactions amounting to USD 2,116,549.18 that originated from its website and that passed through the Defendant's system, only transactions amounting to USD 1,402,642.23 were consolidated and transmitted to Amex. Consequently, payments for transactions totalling USD 2,116,549.18 were made to Amex but Amex only paid USD 1,402,642.23 to eTrust. eTrust is now suing Defendant for the shortfall of USD 935,859.08.

3 The cause of the outage has since been identified and rectified by the Defendant. Thereafter,

the Defendant conducted an internal audit. A copy of the "Audit Report – Investigation Report on eNets Merchant Settlement Disputes" was disclosed during discovery. In the audit report, the audit team concluded that the outage was due to a design error in the Defendant's systems. The Defendant's system design failed to take into consideration time zone differences between the Plaintiffs' and Defendant's servers. The Defendant's system assumed that the Plaintiffs' servers were in the same time zone. As a result of this, when settlement reports were compiled by the Defendant's system for transmission to Amex, certain transactional records were erroneously omitted. The audit report states that:

> The omission of records in the settlement files is a result of design error in our system. Our system was designed for all Bank Connect merchants of AMEX to conduct transactions in a Time-Zone that is the same at NETS Gateway Time-Zone.
>
> As our contract with Amex stated that we have to ensure that all approved transactions are given to Amex, NETS cannot be absolved from such responsibilities as a processor.

4 There were similar admissions by the Defendant in a letter dated 13 January 2011 addressed to Amex:

> Having done so, we wish to inform you that we have recently identified a non-deliberate outage in the AMEX settlement program which resulted in an unintended discrepancy. As a result of this outage, transactions amounting to US$935,850.08 were un-captured in the settlement files that were forwarded to you for the [period of 4 to 28 December 2009.]

5 The Plaintiffs base their applications for judgment on the above admissions. The Plaintiffs' case is that the Defendant's obligations under the BCS agreement includes an obligation for the Defendant to aggregate transactions into settlement records and to submit these as a consolidated settlement report to Amex on behalf of the Plaintiffs; and the provision of the same or similar settlement reports to the Plaintiffs to enable them to verify the payments that they receive from Amex. Accordingly, the Defendant had breached the BCS agreement when it omitted certain transactional records from the settlement reports that it had submitted to Amex during the outage. The Defendant disputes that it was under any obligation to compile or submit settlement reports to Amex, either on behalf of the Plaintiffs or under the agreement that it had with Amex.

Undisputed facts

6 For the purposes of opposing the Plaintiffs' application for judgment on admission, the Defendant did not dispute the occurrence of the outage, nor the fact that loss was suffered by the Plaintiffs. Neither does the Defendant dispute the cause of the outage or that the Plaintiffs' losses were due to a design error in its payment gateway system.

7 It is also not disputed that the Defendant does in fact compile a set of settlement reports that it submits to Amex. Nor the facts that the Plaintiffs had never submitted settlement reports to Amex; or that they have received payment. Additionally, parties do not dispute that the Plaintiffs have access to an online administration portal ("admin portal") after they have signed up for BCS through which the Plaintiffs can access settlement reports.

Summary of issues

8 In brief, the precise scope of the BCS agreement is in contention. The BCS agreement is in the nature of an agreement for the provision of payment gateway services by the Defendant: ie

transmitting the Plaintiffs' online transactions to Amex for authorisation and, upon authorisation or rejection, the details of such authorisation or rejection back to the Plaintiffs. The Defendant describes this as a payment broadcast service.

9 The Plaintiffs' position (as it emerged during submissions) is that the scope of the BCS agreement, in addition to the aforementioned payment broadcast service, includes additional services in the compilation of settlement reports and the submission of the same to Amex, on behalf of the Plaintiffs. The Defendant's position is that their obligations under the BCS agreement did not extend to the provision of settlement reports.

10 Although settlement reports were accessible by the Plaintiffs, the purpose of providing these settlement reports is in dispute. The Defendant submitted that it was the Plaintiffs' obligation to access the settlement reports in the admin portal and thereafter, it was the Plaintiffs who had to download and submit the settlement reports to Amex.

11 The Plaintiffs' submissions were that the admin portal was a service that was offered by the Defendant to enable the Plaintiffs to verify that payments received from Amex are accurate. The Plaintiffs' representative deposed to the fact that this is precisely what he did once – and once only – in December 2009. He logged in to verify the payment received from Amex for that month against the settlement report accessible through the admin portal.

Plaintiff's case

12 The Plaintiff's case for judgment on admission is based on admissions by the Defendant of the cause of the outage being a design fault on their part, leading to a breach by the Defendant of their obligation to submit settlement reports to Amex by the omission of certain transactional records during the outage period.

13 Although it is not disputed that the Defendant does in fact submit a settlement report to Amex, the legal character of this act is in dispute. The Plaintiffs' case is that the Defendant submitted settlement reports to Amex on behalf of the Plaintiffs in performance of its legal obligations under the BCS agreement, in order that the Plaintiffs can fulfil their obligations to Amex under the Amex Service Establishment (or "Merchant") agreements that the Plaintiffs have entered into with Amex. In other words, certain of the Plaintiffs' obligations under the Merchant agreement had been out-sourced to the Defendant via the BCS agreement.

Defendant's case

14 According to the Defendant, the BCS agreement is no more than a contract for the provision of payment gateway services *only*, and the compilation and submission of settlement reports were done purely as a gesture of goodwill and not out of any contractual obligations. The Defendant points to clause 3.1 of the Amex-NETS (eNETS Credit) agreement ("Amex-Nets agreement") that it has entered into with Amex in order to support its argument that apart from transmitting transactional information, there is no contractual obligation for it to provide settlement reports to Amex:

> 3.1 NETS will provide Amex with the information required to settle Transactions processed through NETS (as per clause 2.2). Once Amex has received that information via any intermediary carrier or financial switching entity, *NETS's responsibility ceases*. NETS is not responsible for the operation of the financial settlement system. [Emphasis mine.]

15 The Defendant also relies on clause 1.1 of the BCS agreement to similarly support the argument

that no obligation arises thereunder to provide settlement reports to Amex on behalf of the Plaintiff:

> 1.1 use its best endeavors to facilitate the payment transactions and functions required to enable the Applicant to provide the Service to consumers;

16 The Defendant's submission was that since it was not legally bound to provide the settlement reports, they were therefore provided gratuitously.

17 To the contrary, the Defendant also submitted that clause 14(2) of the Merchant agreement places a contractual obligation on the Plaintiffs to provide a weekly total of all charges:

> 14(2) A Summary of Charge ("SOC") shall be sent to us at least once each week showing the total of all Charges for that week, together with our copies of all completed [Record of Charges]. A SOC shall not be require where no Charges are incurred for that week.

18 The Defendant further submits that the scope of BCS should be contrasted with the Master Merchant services that it also offers. The Master Merchant arrangements entail a larger scope of services: first, the Master Merchant agreement is longer (36 pages versus 4 pages for the BCS agreement) and second, the commission that the Defendant imposes is higher (3.5% per transaction versus 0.5% under the BCS agreement).

Contractual framework for the provision of payment gateway services

19 The proper approach, to my mind, is to ascertain the express terms of the BCS agreement, in order to determine the precise scope of services contracted thereunder. First, we need to understand the place of the BCS agreement in the set of agreements between Amex, its merchants and payment gateway services providers. This set of inter-related agreements is best understood in the following manner: In order for the Plaintiffs' online portals to accept electronic payments made using Amex credit cards, they need to sign up with Amex, ie the Merchant agreements. This gave them the right to access the Amex electronic payment and settlement network (Amex network). In order for the Plaintiffs to acquire the technical means to access the Amex network, they needed to contract the services of a payment gateway services provider, eg the BCS agreement. The Defendant is able to provide payment gateway services for connection to the Amex network by virtue of the Amex-Nets agreement that it had signed with Amex.

20 The precise scope of the BCS agreement is in issue in the present case. There is no doubt that it is a payment gateway services agreement. However, does this entail that the Defendant merely transmits requests for authorisation to Amex and thereafter relays the authorisation or rejection back to the Plaintiffs? Or is the BCS agreement a contract for a suite of payment gateway services that the Defendant performs on behalf of the Plaintiffs in order for the Plaintiffs to fulfil some of their obligations under the Merchant agreements, including the Plaintiffs' obligations to provide weekly settlement reports to Amex under clause 14(2) of the Merchant agreement.

21 I think that the proper analysis should commence with the Merchant agreement. The Merchant agreement allows the Plaintiffs to accept payments through the Amex network. The Plaintiffs have certain obligations under the Merchant agreement, including compliance with the requirement for obtaining authorisation electronically and the compilation and submission of weekly settlement reports to Amex; and if orders are accepted over the Internet, additional technical requirements have to be complied with.

22 The Merchant agreement contemplates the involvement of third party service providers who

can provide payment gateway services and caters for the possibility for the use of such services by the Plaintiffs. The pertinent clause under the Merchant agreement states:

> **15 Processing Agent**
>
> If you enter into an agreement with a third party to submit Charge and Credits (explained in Sections 18 and 19 below) and obtain Authorisation on your behalf, you shall obtain our prior written approval, which shall not be unreasonably withheld. …

23 There is a complementary provision in the Amex-Nets agreement that allows the Defendant to provide payment gateway services as processing agent to merchants:

> 3.4 NETS may only capture/manage Transactions on behalf of Merchants who have a valid Merchant agreement with Amex. …

24 At first blush, the extent of business process outsourcing permitted under the Merchant agreement appears to be limited to the engagement of payment gateway service providers to submit transactional details and relay details of Amex's authorisation or rejection of the transaction. There is no mention in these clauses of other business processes, in particular the provision of weekly settlement reports. The Amex-Nets agreement is consistent with this.

25 This appears to be carried through in the BCS agreement. The BCS agreement that was tendered appeared to be a standard set of terms and conditions but they were sparse on details of the scope of services that were to be provided thereunder. The only term that the Defendant could point to as the operative clause setting out the extent of services to be provided under the BCS agreement is clause 1.1, which merely states that the Defendant shall "use its best endeavours to facilitate the payment transactions *and functions required* to enable the Applicant to provide the Service to consumers." [Emphasis mine.]

26 "Service" is defined as the eNets Debit and/or Credit Payment Service: but there is no further description in the BCS agreement. The Defendant points to the eNets Credit Payment Service description on its website to submit that the scope of service is:

> … enabling merchants to accept major international (VISA, MasterCard, [Amex]) credit card payments online. [The Defendant] provides merchants with *a range of front-end options* including merchant's own payment page, virtual terminal and customisable order and payment page for merchants that do not have a shopping cart. [Emphasis mine.]

27 Had clause 1.1 of the BCS agreement been limited to the facilitation of payment transactions, the Defendant's case that it provided no more than a payment broadcast service would have been stronger. However, the BCS agreement also refers to other "functions" that the Defendant provides and a "Merchant Starter Kit" that provides the software tools and information required for integration with the Defendant's payment gateway; and the description of the eNets Credit Payment Service contemplates a "a range of front-end" of services that suggests that the eNets Credit Payment Services could possibly have been marketed as a complete end-to-end solution that merchants (like the Plaintiffs) can contract for.

28 Unfortunately, even taking the BSC agreement together with the description of the eNets Credit Payment Services available on the Defendant's website, the precise scope of services under the BCS agreement is not clear. Pertinently, it is not clearly stated whether, by reason of the BCS agreement or the eNets Credit Payment Services website, the Defendant had contractually undertaken the

responsibility of compiling settlement reports on behalf of the Plaintiffs for submission to Amex.

29 Thus, an analysis of the express terms of the interconnected agreements, together with the description of services that is available from the Defendant's website, does not lead to an unequivocal conclusion in favour of either the Plaintiffs or the Defendant. The express terms suggest that the BCS agreement can be something more than a contract purely for payment gateway services. This opens the door, at least more than a crack, for the Plaintiffs to argue that the scope of services that they had contracted under the BCS agreement extended beyond what the Defendant had described as a payment broadcast service. In order for the Plaintiffs' to succeed, it will have to argue that a term be implied into the BCS agreement that the Defendant is obligated to compile and submit settlement reports on their behalf to Amex, in order to give effect to the suite of end-to-end payment gateway services that the Plaintiffs have contracted thereunder.

Whether case for judgment of admission of facts made out

30 The burden ultimately lies on the Plaintiffs to show that the court should exercise its discretion by granting an order for judgment based on the admissions that have been identified. I am not satisfied that the Plaintiffs have discharged the burden and now provide my reasons for dismissing their applications.

Can an admission contained in a document directed at a third party be relied on for judgment on admission?

31 There was a preliminary point that parties were asked to address during submissions: whether the admissions, upon which an application for judgment on admission are premised, must flow from the Defendant to the Plaintiffs. The documents relied on in the present applications, although authored by the Defendant, were not directed at the Plaintiffs. The audit report was an internal document; and the letter was intended for Amex and it was made within the context of the Amex-Nets agreement. I had expressed reservations as to whether these admissions could be relied on for an application for judgment on admissions of fact.

32 After surveying the cases that were cited before me, the authorities seem to suggest that admissions on which an application for judgment on admission is premised may be restricted to documents passing between the parties:

(a) In *Vithal Kumar a/l Jayaraman v Azman bin Md Nor* [2010] 2 MLJ 67, the admission relied upon was contained in an agreement between the plaintiff and the defendant wherein the defendant had acknowledged taking earlier loans from the plaintiff.

(b) In other cases, the admissions were contained in letters from the defendant addressed to the plaintiff: *Shunmugam Jayakumar v Jeyaretnam Joshua Benjamin* [1996] 2 SLR(R) 658; *Rankin v Garton Sons & Co Ltd* [1979] 2 All ER 1185; *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd* [2011] 3 MLJ 343; *Ellis v Allen* [1914] 1 Ch 904; *Blundell v Rimmer* [1971] 1 WLR 123.

(c) And of course, the admissions can be contained in the pleadings: *Ow Chor Seng, Coutts Bank (Schweiz) AG* [2002] 1 SLR(R) 380; *Ong Gim Huat v Toh Suan Lin Amy* [1992] 2 MLJ 610; *Core Development Ptd Ltd v Ideal Accomodation (Singapore) Pte Ltd* [2009] SGHC 167.

In none of the cases cited by parties had the plaintiff relied on a document that the defendant had produced either for its own use or addressed to a third party.

33 Under section 31 of the Evidence Act, "admissions are not conclusive proof of the matters admitted, but they may operate as estoppels". Had either the audit report or the letter been relied on as admissions in proceedings between Amex and the Defendant, the admissions cannot be conclusive proof of those same facts in the present proceedings.

34 It had also been observed that oral evidence adduced by a party in one set of proceedings cannot be tendered as admissions by that same party in a subsequent set of proceedings: *British Thomson-Houston Co Ltd v British Insulated and Helsby Cables Ltd* [1924] 2 Ch 160. Thus, if the contents of either the internal audit report or the letter been given in oral testimony by the Defendant in proceedings between Amex and the Defendant, the oral testimony cannot be used as admissions in these proceedings. Would it therefore make a difference if the documents had been tendered instead?

35 While no objections were raised against reliance on the internal audit report or the letter on the basis that they were not directed at the Plaintiffs, I nevertheless had my reservations. To my mind, it all comes down to reliability of the statements of admissions contained in these documents and an examination of the context in which they were made, in order to assess their relevance and weight in the present proceedings. Ultimately, an order for judgment on admission is discretionary: *Shunmugam Jayakumar v Jeyaretnam Joshua Benjamin* [1996] 2 SLR(R) 658, at [35]. Had I been given any reason to doubt the reliability of either the audit report or letter, it would have been open to me to exercise my discretion not to make an order for judgment. In any event, this point was not fully argued nor am I required to base my decision on this point.

Trial necessary in order to ascertain facts on which a term is to be implied

36 The authors of the Singapore Court Practice state that the "admission may be made before or after the commencement of proceedings (see *Tom Manas Enterprise v Soh Ah Wah* [1995] 2 AMR 1751, at 1755)": paragraph 27/3/1. In the present case, the admissions that the Plaintiffs rely on are in an internal audit report and a letter from the Defendant to Amex, both of which were authored in 2011 before the present writs were filed in 2012.

37 In *Blundell v Rimmer* [1971] 1 WLR 123, it was held that an admission of negligence without admission that the plaintiff had suffered damage was insufficient to entitle the plaintiff to interlocutory judgment under this Rule, as there was no admission of liability. Similarly, "the admission must be a clear admission of all, and not simply evidence of some, of the facts upon which the plaintiff would have to rely to establish his cause of action": *Carabao Exports v Online Management Consultants* [1988] 3 MLJ 271. I think that the principle applies to our case. The Defendant has admitted that there was an outage resulting in the omission of certain transactional records from the settlement report compiled by the Defendant and submitted to Amex. It is also admitted that this outage was due to a design flaw in the Defendant's system.

38 However, there is no admission of liability as the Defendant disputes that it owes any obligation under the BCS agreement to either compile the settlement report for the Plaintiffs' benefit or to submit the settlement report to Amex on behalf of the Plaintiffs. Determination of the precise scope of services that the Defendant has to provide under the BCS agreement is crucial. So far, neither party has been able to produce a definitive description of just what the BCS entails. The Defendant has been providing a suite of services to the Plaintiffs (eg payment broadcasting and access to settlement reports) but, if clause 1.1 of the BCS agreement is to be definitive of the extent of the BCS, then some of these services are provided gratuitously (eg preparation of settlement reports and submission to Amex).

39 For the Plaintiffs to succeed in their claims, they have either to find a description of the scope of BCS that includes a service wherein the Defendant provides settlement reports to Amex on the Plaintiffs' behalf or they have to argue that this term ought to be implied into the BCS agreement in order to give business efficacy to the BCS agreement. The fact that the Plaintiffs had never prepared or submitted any settlement report to Amex, and yet had received payments from Amex, suggests that they had thought that this was a service that the Defendant was providing under the BCS agreement. Their conduct corroborates their case. Similarly, the fact that they had logged into the admin portal once, in order to access settlement reports to verify payments received from Amex, is also conduct that corroborates their case that the settlement reports were provided by the Defendant for the purpose of verifying payments received.

40 However, in order to argue that a term ought to be implied on the facts, the Plaintiffs may have to re-examine their pleadings to ensure that they have pleaded all the facts necessary to support their case. Furthermore, in order for the Court to ascertain that such terms has to be implied in order to give business efficacy to the BCS agreement, the intentions of the parties at the time the BCS agreement was concluded have to be ascertained at trial. Evidence of the representations that passed between the Defendant's representatives who dealt with the Plaintiffs' representatives when the BCS were sold and when the BCS agreement was signed will have to be given. Hence, the Plaintiffs cannot avoid a trial if it is to find success in their case.

41 For the foregoing reasons, I dismissed the Plaintiffs' applications for judgment on admission and awarded costs in favour of the Defendant.

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