Monex Group (Singapore) Pte Ltd *v* E-Clearing (Singapore) Pte Ltd [2010] SGHC 63

Case Number : Suit No 54 of 2008

Decision Date : 26 February 2010

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Low Chai Chong and Suchitra Ragupathy (Rodyk & Davidson LLP) for the plaintiff; Koh Chia Ling and Arthur Yap (ATMD Bird & Bird LLP) for the defendant.

Parties : Monex Group (Singapore) Pte Ltd — E-Clearing (Singapore) Pte Ltd

Contract – Breach

26 February 2010 Judgment reserved.

Tan Lee Meng J:

1 The plaintiff, Monex Group (Singapore) Pte Ltd ("MXS"), is a subsidiary of an Irish company, Monex Financial Services Limited ("MXF"). MXF and Xor Technologies Ltd ("XOR"), an Israeli technology solutions provider, own a dynamic currency conversion system (the "Monex system"), which identifies the country in which a credit card is issued and converts different currencies automatically to the card holder's base currency.

2 MXS, which entered into a contract with the defendant, E-Clearing (Singapore) Pte Ltd ("ECS"), to exploit the Monex system in Singapore, sued the latter for the amount due to it under the said contract. ECS denied owing MXS any money and counterclaimed for losses suffered as a result of the latter's alleged breach of contract.

Background

3 To further its business interests in Asia, MXS's parent company, MXF, concluded a business cooperation agreement on 14 December 2001 with one Mr Luzi Matzig ("Matzig"), a Swiss gentleman with a Thai name, Lersan Misitsakul. To develop the business of both parties, Monex Thailand Pte Ltd ("MXTH") was incorporated on 17 June 2002. Matzig holds 51% of the shares of MXTH while MXF holds the remaining 49% of the shares. Matzig is also ECS's main shareholder. He holds 547,085 shares in ECS while other shareholders, namely Mr Wong Wei Ming and Mr Ma Chun Fai, hold only 86,665 ECS shares and 16,250 ECS shares respectively.

4 On 5 June 2003, MXF entered into a "Strategic Association Agreement" ("SAA 2003") with XOR to develop, build and implement the Monex system. According to MXS's director, Mr Francis Murphy ("Mr Murphy"), XOR's key man, Mr Yaniv Kimchi ("Mr Kimchi"), designed the Monex system and instructed the programmers on the operation of the system.

5 Under the SAA 2003, XOR's role was merely to provide "second level support" and "third level support" for the running of the Monex system. "First level support" for the operation of the Monex system was to be provided by the local partner in each of the countries in which the Monex system is in use. "First level support" was defined in the SAA 2003 as providing to users of the Monex system "online support" and "ascertaining the nature of any mistake, problem, error or defect", as well as

making a "good faith effort" to correct any mistake, problem, error or defect in the system. In Singapore, ECS was the local partner and was thus responsible for "first level support".

6 In regard to the scope of XOR's responsibility under the SAA 2003, "second level support" was defined in the SAA 2003 as the supply of "technical help desk services in the English language… to help locate and correct any mistake, problem, error or defect in the [system], which was not corrected after good faith performance of First Level Support". "Third level support" was defined in the SAA 2003 as the supply of "online assistance… in the English language, in order to correct bug-fixes and source code modifications to the [system]."

7 In Singapore, Citibank Singapore Ltd ("Citibank") agreed to adopt the Monex system and on 19 November 2003, MXS entered into a multi-currency conversion agreement with Citibank (the "Citibank contract").

8 MXS and ECS, which had worked together to secure Citibank's adoption of the Monex system, put their relationship on a more formal footing when they entered into a contract on 12 July 2004. Under this contract, MXS was to provide the Monex software while ECS was responsible for technical services, training services, system support services and marketing services necessary for the implementation of the Monex system in Singapore and in such other countries as may be agreed upon in writing between the parties.

9 The attempt to introduce the Monex system in Singapore in partnership with Citibank suffered a setback on 12 January 2005 when the bank terminated the Citibank contract.

10 Things brightened up for MXS and ECS when negotiations with DBS Bank Ltd ("DBS") with respect to the utilisation of the Monex system bore fruit. It was initially envisaged that MXS would, as in the case of the Citibank contract, be the party that signed the contract with DBS regarding the use of the Monex system by DBS's clients. However, some 12 days before the contract with DBS was signed on 15 February 2005, ECS informed MXS that it would be more convenient if it signed the said contract with DBS (the "DBS contract") for reasons which need not be discussed. According to MXS, it agreed to allow ECS to sign the DBS contract because of time constraints.

11 Under the DBS contract, ECS undertook to supply terminals with access to the Monex system software to merchants identified by DBS. ECS was required to train the merchants' employees in the use of the terminals and to respond promptly to queries from the merchants in relation to the use, operation and maintenance of the terminals and the Monex software. ECS was also obliged to maintain and repair the said terminals.

12 It was agreed between ECS and MXS that each party would be entitled to 50% of the "agreed net turnover" under the DBS contract. It was understood that the "net turnover" referred to the gross revenue less applicable taxes and the amounts paid to merchants and third party consultants while the "agreed net turnover" referred to the net turnover less the amount paid to DBS.

13 By September 2005, the Monex system was in operation in Singapore. During the currency of the DBS contract, some problems with the Monex system as well as with ECS's hardware surfaced. It is common ground that ECS was responsible for remedying hardware problems. Occasionally, clients of businesses that utilised the Monex system, such as Fullerton Hotel, were double-charged. From September 2005 to December 2006, problems arising from the operation of the Monex system were directed to XOR, which went out of its way to help ECS. In fact, XOR's personnel even took care of problems that were clearly within the scope of ECS's responsibility. At this juncture, it is pertinent to note that MXS had an arrangement with XOR to pay the latter 20% of the agreed net turnover out of

its own 50% of the agreed net turnover received under the DBS contract.

14 XOR also provided support services for the utilization of the Monex system in other Asian countries, such as Thailand, India, Vietnam, Sri Lanka and Hong Kong. These support services were mainly directed by Matzig, who dictated where XOR's resources should be deployed. XOR was rather overstretched. Subsequently, relations between XOR and the Monex group soured for reasons which need not be discussed.

15 Matzig had his own agenda with respect to the exploitation of the Monex system in Asia. He wanted to take over the intellectual property rights in the Monex system for Asia, excluding China, Taiwan, Korea and Japan. In November 2006, Matzig offered to buy the said rights. He threatened MXS's director, Mr Murphy, in an e-mail dated 27 November 2006 that if an agreement was not reached before the end of the year, he would most likely cease to cooperate with MXS and would launch his own software. Matzig's offer to take over the intellectual property rights in the Monex system was rebuffed.

16 ECS then claimed that MXS was no longer able to provide "essential" support services, which it interpreted as including the provision of "second level support" and "third level support" to it, and that MXS stopped providing such support altogether on 1 January 2007. This was denied by MXS.

17 ECS contended that to mitigate its losses, it had to engage a third party, MXTH, of which Matzig is the majority shareholder, to provide "essential" support services to it even though MXTH did not have the equipment, office space or expertise to provide the said support at the material time. Matzig had his eyes on the core XOR team, including the project director and main software programmer, Mr Kimchi. He wanted XOR's key personnel to be absorbed by MXTH. On 5 December 2006, MXTH entered into an agreement with XOR, under which XOR was required to send a team from Israel to train and establish a team of software experts within MXTH to provide "essential" support to ECS and its foreign offices. MXTH was required to bear the cost of the Israeli team.

18 The costs incurred by MXTH to put it in a position to provide "essential" support to Matzig's companies were shared between MXTH, ECS and ECS's foreign offices in Vietnam, Sri Lanka and India. According to ECS, its share of MXTH's start-up costs totalled $739,496.12. ECS also claimed to have paid $198,135.37 for its "essential" support services in 2007. Having paid MXTH these huge sums, ECS could claim that there were no profits left to share with MXS. Of course, this situation was totally unacceptable to MXS, which alleged that ECS, and more specifically, Matzig, made use of the Monex system to generate profits which were diverted to MXTH under sham arrangements.

19 In January 2007, ECS unilaterally reduced MXS's share of the agreed net turnover to 30% on the basis that the latter no longer had to pay XOR 20% of the agreed net turnover. MXS claimed that ECS made it a condition that future payments would be made only if it accepted the downward revision of its share of the agreed net turnover. As MXS refused to do so, ECS stopped paying MXS any part of the revenue earned under the DBS contract. Furthermore, ECS has not paid MXS the sum of $468,819.00 with respect to the agreed net turnover from January 2007 to December 2007. This sum was determined on the basis of the monthly profit sharing summaries, transaction reports and statements forwarded by ECS to MXS.

20 In January 2007, another company, Mainline Corporate Holdings, which holds Patent No 86037 in relation to another dynamic currency conversion system (the "Mainline patent"), successfully sued another bank in Singapore for infringing its patent. DBS wanted to know whether the Monex system infringed the Mainline patent. MXS was not worried about the Mainline patent because the Monex system had been in use in Europe before the Mainline patent was filed on 12 July 1999. It had no

doubt that such prior use is a sufficient defence against any claim that the Monex system infringed the Mainline patent.

21 On 2 January 2008, ECS terminated its contract with MXS on the ground that the latter had failed to furnish proof that its Monex system did not infringe the Mainline patent. In its termination letter, ECS informed MXS that the Monex system would be wound down completely by 23 March 2008. However, this was totally untrue.

22 If the Monex system was, as ECS claimed, to be wound down completely by 23 March 2008, DBS should have been informed of this. Evidently, DBS was left in the dark as it was not until 2 February 2009, 11 months after ECS's termination notice to MXS on 2 January 2008, that DBS served notice on ECS that it was terminating the DBS contract. ECS admitted that it was not until March 2009, one month after DBS terminated the DBS contract, that it finally ceased to make use of the Monex system.

23 Despite having terminated its contract with MXS on 2 January 2008 and stating that it would cease to use the Monex system by 23 March 2008, ECS continued to add more merchants to the list of merchants utilising the Monex system. Between 2 January 2008 and March 2009, ECS's revenue from the use of the Monex system increased. Throughout this period, ECS did not provide MXS with the requisite monthly profit sharing summaries, transaction reports and statements. As a result, MXS could not issue invoices to ECS for its share of the agreed net turnover under the DBS contract.

24 When ECS refused to pay MXS what the latter claimed was its share of the agreed net turnover under the DBS contract, MXS instituted the present proceedings.

25 ECS counterclaimed for losses suffered as a result of MXS's alleged breach of contract.

MXS's claim

26 When considering MXS's claim, reference must first be made to the different views that the parties hold with respect to the contract that governs their relationship with respect to DBS's use of the Monex system. MXS's case is that the contract that it signed with ECS on 12 July 2004 is still in force. However, as that contract envisaged that it was to sign contracts with banks and other institutions that wanted to utilise the Monex system, the terms of the contract had to be modified to take into account the fact that ECS, and not MXS, had signed the DBS contract. One of the new terms was that instead of MXS paying ECS remuneration, as was the case under the Citibank contract, ECS would collect payments from the merchants to whom the Monex system was provided and pay MXS its agreed share of the income.

27 In contrast, ECS contended for the purpose of its collaboration with MXS in relation to the DBS contract, the contract of 12 July 2004 was superseded by a new contract that it made with MXS. ECS's case is that this new contract was formed by conduct and that the terms of this new contract were based on those in the earlier contract of 12 July 2004.

28 Whether the contract of 12 July 2004 was modified, as claimed by MXS, or a new contract by conduct was formed, as alleged by ECS, need not be determined in the present proceedings because it is common ground that MXS and ECS were to gain equally from the adoption of the Monex system by DBS.

29 ECS's defence to MXS's claim is that it need not pay MXS any money because the latter had breached the contract in two ways. First, ECS contended that the Monex system infringed the patent

of another company. Secondly, it alleged that MXS failed to provide "essential" support services for the operation of the Monex system.

30 Whether or not MXS has breached the contract in the manner alleged, it is entitled to its share of the agreed net turnover under the DBS contract although it must, if proven that it is in breach, compensate ECS for losses suffered as a result of any breach of contract on its part. As ECS asserted that MXS's claims against it are extinguished by reason of set-off of its losses, ECS's counterclaim will next be considered.

31 When considering ECS's counterclaim, it must be noted at the outset that ECS did not call Matzig to testify even though he is the person in that company with the most intimate knowledge of the issues before the court. Instead, ECS's sole witness was its general manager, Ms Agnes Chua Guek Meng ("Ms Chua"), who, together with XOR's former project manager, Mr Kimchi, are shareholders of another company in the currency conversion business, EC Payment Solutions ("ECP"). Regrettably, Ms Chua did not know enough about the relevant issues to effectively advance ECS's defence and counterclaim.

Alleged breach of patent

32 It may be recalled that MXS had taken the position that the Monex system predates the Mainline patent and thus does not infringe that patent. However, ECS claimed that DBS was not satisfied with the MXS's assurances. On 2 January 2008, ECS terminated its contract with MXS on the ground that the latter had not given details of the prior art and stated in its termination notice that the Monex system would be wound down completely by 23 March 2008. It is ECS's case that it suffered a loss because the alleged infringement of the Mainline patent hampered its efforts to get more merchants to use the Monex system.

33 There was insufficient evidence to show that the Monex system infringed the Mainline patent. In any case, if ECS had been serious about terminating its contract with MXS on the ground of infringement of the Mainline patent, it should have informed DBS that it had terminated its contract with MXS on 2 January 2008 and that it had informed MXS that the Monex system would be wound down completely by 23 March 2008 as these developments had implications for DBS's clients. However, it was not until almost a year later in February 2009 that DBS finally terminated its contract with ECS for the utilisation of the Monex system. ECS claimed that it did not meet its own deadline of 23 March 2008 and had to make use of the Monex system until March 2009 because it took some time to "wind down the business". This cannot be true as ECS continued to add more merchants to its list of participating merchants under the DBS contract after 23 March 2008. In fact, it appears that more profits were made in 2008 than in the previous year. The following part of the cross-examination of Ms Chua is worth noting:

Q Your evidence is that the number of merchants grew in 2007 and grew further in 2008, correct?

A Mm.

Q Yes. So by extrapolation when we reach February 2009 before DBS terminated the system, the number of merchants could have grown further., correct? ….

A Yes….

Q And because of the growth of merchants, naturally, revenue grew as well, right?

A Yah, yes.

Q And revenue also when the economy picked up … *in the later part of 2008, yes, because there were more transactions, correct*?

A *Well, yah, correct*.

Q *Yes. And all this time, all these revenues were generated and earned using the Monex DCC system, correct?*

A *Correct*.

[emphasis added]

34 Apart from the fact that there was no proof that the Monex system infringed the Mainline patent, ECS failed to prove that it had suffered any loss if the Monex system had infringed the Mainline patent. Initially, ECS claimed that it had suffered a loss of $109,417.56. However, its defence and counterclaim was subsequently amended to reflect a very much higher loss of $706,229.24. By the time the trial began, this amount had been revised downwards to the original sum of $109,417.56.

35 Whether ECS's counterclaim is for $706,229.24 or $109,417.56, Ms Chua, conceded that she could not prove that either amount had been lost. She stated as follows during cross-examination:

Q You said there are loss of gains which would otherwise have been earned from new merchants, correct?

A Yes. …

Q *When you arrived at the figure, a precise figure of $109,417.56, you did not have a single piece of document to support that calculation, correct?*

A Okay, I --- I --- *I admit that I don't have …*.

Q [Y]ou put up a claim from $109,000 to $706,000 without a single piece of documentary evidence. Is that right?

A We have our basis for – … doing that, of putting that figure in.

Q *You agree that you have got no evidence whatsoever in Court?*

A I --- *I don't have evidence to support this*.

[emphasis added]

36 In view of Ms Chua's admission that ECS had no evidence to support its counterclaim for $109,417.56 for loss of profits, this counterclaim is dismissed.

Alleged failure to provide essential support

37 ECS's second counterclaim relates to the alleged failure by MXS to, in its own words, "provide essential services (namely the implementation of the Monex system as well as the provision of Second Level Support and Third Level Support as defined under the SAA 2003 entered into between MXF and

XOR Technologies Ltd on 5 June 2003) to the Defendants from 1 January 2007".

38 As has been mentioned, ECS claimed that as MXS was no longer able to provide "essential" support services as from 1 January 2007, it had no alternative but to engage MXTH to provide "essential" support services to it. It contended that it incurred the following expenses:

(i) the sum of $739,496.12, which was paid to MXTH to enable it to begin providing the essential services that XOR used to provide; and

(ii) the sum of $198,135.37, which was paid to MXTH for providing "essential services" from 1 January 2007 to 31 December 2007.

39 MXS pointed out that the terms "second level support" and "third level support", which are found in the SAA 2003, are not terms that were used in its contract with ECS. As such, it contended that ECS had no basis for assuming that "second level support" and "third level support" would be provided to it.

40 Even if MXS's objections are not taken into account, ECS's counterclaim lacks a solid foundation. To begin with, when asked to furnish further and better particulars of how MXS breached the contract, ECS merely stated that MXS failed to provide all "essential" services. Regrettably, the nature of the "essential" support services that had allegedly not been provided by MXS remained unclear even after the conclusion of the trial.

41 When cross-examined, Ms Chua admitted that many of her company's complaints against MXS for not providing "essential" support services related to hardware failure, which should have been remedied by ECS as this was clearly within its ambit of responsibility. For instance, ECS had complained about the problem of insufficient hard disk space in the application server but Ms Chua finally acknowledged that this was a hardware problem that should have been rectified by ECS. There was thus no basis for suggesting that MXS had failed to ensure that there was sufficient hard disk space. The relevant part of the proceedings is as follows:

Q Still on page 308, second paragraph of your e-mail [Reads] "last night all EDC terminals were down due to insufficient hard disc space in the application server". It's just as simple as that, correct, there [was] insufficient hard disc space?

A Mm.

Q That is your responsibility, isn't it?....

A Yes.

42 ECS had also complained that there was no "back up mirroring" but Ms Chua finally agreed that the backup server had two components, the hardware and the software, and it was not certain that there had been a software problem. More importantly, Ms Chua conceded that there was no loss of revenue as a result of the backup mirror issue.

43 Another complaint by ECS related to breakdowns in the Monex system as well as duplication of charges. ECS pointed out that merchants who used the Monex system, including Fullerton Hotel, had been embarrassed when their clients complained about double charging. However, when cross-

examined, Ms Chua accepted that bugs are to be expected in such systems and she reiterated that ECS's case is not that the Monex system failed but that MXS had failed to provide "essential" support services. It is worth noting that despite having paid around $1 million to MXTH to provide "essential" support services to ECS, the occasional problem of duplicate charges has not been solved by the former XOR personnel, who are now working for MXTH.

44 In truth, ECS, which accepted that it was obliged to provide "first level support" for the Monex system, could not fulfil this obligation because it was woefully unaware of the scope of its responsibilities under the contract and its staff did not have the necessary training to provide such support at the material time. Ms Chua conceded as follows during cross-examination:

> Q And you said your team was not told how to go about it as well, yes?
>
> A Yah, that's true.
>
> Q And at --- at this point in time in November 2006, … you have yet to sen[d] your local team for training, correct?
>
> A Yah …

45 What cannot be overlooked is that Ms Chua accepted that she did not ask MXS to provide any support for the Monex system after XOR exited from the scene. The relevant part of the proceedings is as follows:

> Q Is there any e-mail or document in Court to show that you have escalated a problem to the plaintiff; and the plaintiff has refused to assist you?
>
> A Refused? No, I won't say that.
>
> Q [I]f you have never requested for support from the plaintiff, on what basis did you say that the plaintiff had failed to give you support? ….
>
> A Okay, I think, erm, okay.
>
> Q Do you agree with me?
>
> A Yes.
>
> Q *You have got no basis to say that the plaintiff had failed to provide you … second and third level support …*.
>
> A *Yes, I've already answered "yes"……*.
>
> [emphasis added]

46 After saying that ECS had no basis for claiming that MXS had failed to provide "second level support" and "third level support", Ms Chua contradicted herself during re-examination and said that she did not ask MXS to provide any such support because the latter was in no position to offer any assistance. However, MXS insisted that it had sufficient resources to fulfil its obligations under its contract with ECS notwithstanding the breakdown of its relationship with XOR. It pointed out that although XOR had been appointed to offer assistance in Singapore, there were other technical people who supported the Monex system, which was still operating in China and Europe without XOR's help.

47 There is certainly more than meets the eye in ECS's arrangements with MXTH. ECS claimed to have contributed $739,496.12 to set up the infrastructure for MXTH so that MXTH can provide "essential" support services under the DBS contract as well as other business ventures in other countries in which Matzig had an interest. Apart from the fact that MXS was not asked to provide any support for the Monex system at the material time, ECS cannot expect to recoup this sum or any other sum that it claimed to have paid to MXTH for "essential" support when the court is left in the dark as to what support had actually been provided by MXTH. Mr Murphy rightly pointed out in his AEIC at [126] as follows:

> … [T]he invoices/receipts/documents produced by the Defendants to substantiate their counterclaim is highly questionable, and designed to avoid paying the Plaintiffs their shares in the remuneration/income/revenue/profits derived from the Monex System. It is necessary to point out that in their Defence and Counterclaim the Defendants state that it had to invest in a third party namely [MXTH]. However on review of its recent set of filed accounts there is no evidence of such investment. The pattern that emerges is that [Matzig] recognised the financial value of the Monex System and the contracts derived from selling such system in Asia and wanted total control of it without passing on the benefit to the rightful owners of the system namely the Plaintiffs.

48 Ms Chua testified that she did not know whether the sums paid by ECS to MXTH had been utilised for the purposes stated in the invoices. Furthermore, she made the startling concession that while she had to support the counterclaim on her company's behalf, she would, "speaking for herself", not have maintained the counterclaim with respect to MXTH's invoices in question. The relevant part of the proceedings is as follows:

> Q So insofar as you don't know whether these invoices have been paid, you can't maintain that claim, right? Do you agree, Ms Chua? …
>
> A Yes, I agree.
>
> Q And if these expenses have not been incurred or if you don't know whether these expenses have been incurred, you cannot properly sit there and maintain this claim, you agree?
>
> A I agree….
>
> Q So can you truthfully, honestly maintain this claim on behalf of the defendants? …
>
> A *If you ask me this question in this capacity, I would say that I can't* because I ---
>
> Q *Correct. And if you can't, speaking for yourself, would you withdraw this claim?*
>
> A *Okay. The thing is this ---- this suit is actually at a company level…*.
>
> Q *Speaking for yourself as an individual, can you maintain this claim?*
>
> A *As an individual, no*.
>
> [emphasis added]

49 As the company's only witness, Ms Chua cannot expect the court to be sympathetic to her company's counterclaim when she had conceded that she would not "as an individual" maintain the

counterclaim in question against MXS. When re-examined, Ms Chua tried to salvage her company's position but she did not convince me that she really knew what she was talking about.

50 I thus hold that it was not established that MXS had failed to provide ECS with "essential" support services or that MXS was no longer in a position to provide such services to ECS from January 2007. It follows that ECS's second counterclaim must be dismissed.

Conclusion

51 No matter how unhappy ECS and Matzig may have been about their arrangements with MXS, they cannot make use of the Monex system without paying MXS anything. I thus hold that ECS must account to MXS for the revenue earned from the utilization of the Monex system from January 2007 until it stopped using the Monex system around March 2009. The amount due to MXS will be assessed by the Registrar.

52 Interest on the amount due to MXS shall be paid from the date of the writ until the date of judgment at the same rate as post-judgment interest.

53 MXS is entitled to costs.

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