Establishing the Authenticity of a Document:
CIMB Bank Berhad v World Fuel Services (Singapore) Pte Ltd and another appeal
[2021] SGCA 19

I. EXECUTIVE SUMMARY

The authenticity of a document is of paramount importance in the law of evidence.[1] This was illustrated in *CIMB Bank Berhad v World Fuel Services (Singapore) Pte Ltd and another appeal* [2021] SGCA 19, which concerned the authenticity of a deed of debenture, *i.e.* a document which creates or acknowledges a debt.

In 2017, World Fuel Services (Singapore) Pte Ltd ("**WFS**") purchased marine fuel from Panoil Petroleum Pte Ltd ("**Panoil**"). Separately, CIMB had provided banking facilities to Panoil. This was secured by a debenture, which was issued over all the goods and/or the receivables and documents representing the goods financed by CIMB (the "**Debenture**"). When Panoil was subsequently placed under judicial management,[2] CIMB relied on the Debenture and gave notice to WFS that Panoil had assigned all its rights, title, interest and benefit under the Panoil-WFS marine fuel sale transactions to CIMB (the "**Notice of Assignment**"). CIMB then demanded payment from WFS of the sums involved, including interest for late payment. The parties eventually went to court.

The High Court (the "**HC**") agreed with WFS that CIMB had failed to prove the authenticity of the Debenture and dismissed CIMB's claims. Although CIMB's appeal was dismissed, the Court of Appeal (the "**CA**") rejected the HC's finding that CIMB had failed to prove the Debenture's authenticity. In doing so, the CA made certain holdings regarding the requirements for the authenticity of documents for evidential purposes. It also determined whether the marine fuel sale transactions between Panoil and WFS were based on Panoil or WFS' terms, which would determine the amounts due under them, and hence to CIMB.

II. MATERIAL FACTS

According to CIMB, a number of documents governed the Panoil-WFS marine fuel sale transactions. These were certain sales confirmations ("**Panoil's Sales Confirmations**"), which incorporated Panoil's terms and conditions for sale of marine fuel to WFS ("**Panoil's Terms and Conditions**"). Importantly, clause 8.2 of Panoil's Terms and Conditions ("**Clause 8.2**") stated that payment for each delivery of marine fuel "shall be made by the Buyer free and clear of any deduction, set-off, counter claims whatsoever". There were also corresponding invoices (the "**Invoices**") issued by Panoil (collectively, the "**Sales Contracts**").

Panoil and WFS also entered into three contracts (collectively, the "**Umbrella Contracts**"), each containing a provision entitling WFS to a right of set-off. The two parties additionally entered into an offset agreement in August 2014, providing for the mutual setting off of certain payable sums (the "**2014 Offset Agreement**"). Thus, under the Umbrella Contracts and the 2014 Offset Agreement, WFS was entitled to set-off the sums due under the Invoices to Panoil.

Subsequently, WFS purchased marine fuel from Panoil on 11 occasions, between July 2017 and August 2017 ("**Subject Transactions**").

In October 2017, Panoil was placed under judicial management. Panoil's banker, CIMB, notified WFS that under the Debenture, Panoil had assigned all its rights, title, interest and benefit under the Subject Transactions to CIMB. CIMB then demanded payment from WFS of the relevant sums

[1] Generally, a document is considered authentic if it has the character and authority of an original, whereby any necessary legal formalities have been complied with.
[2] Generally, in a judicial management, an independent judicial manager is appointed to manage the affairs, business, and property of a company under financial distress.

under the Subject Transactions, including interest for late payment. When WFS did not make such payment, CIMB commenced a lawsuit at the HC, based on its rights under the Debenture as the legal assignee.[3]

The HC held that CIMB's claims against WFS were based on the Debenture. Since the HC found that CIMB had not first proven the Debenture's authenticity, the HC dismissed CIMB's claims. Nevertheless, the HC found that the language of the Debenture was wide enough to include Panoil's rights under the Sales Contracts, such that pursuant to the Debenture, Panoil's rights had been assigned to CIMB. However, the HC judge did not find it necessary to make a finding as to whether the 2014 Offset Arrangement governed the Subject Transactions, as Clause 8.2 superseded any right of set-off that would have arisen under the 2014 Offset Agreement as well as the Umbrella Contracts.

III. ISSUES

On appeal, the CA considered the following two issues:

(a) whether CIMB had proven the authenticity of the Debenture (the "**Authenticity Issue**"); and
(b) whether WFS was entitled to a contractual right of set-off (the "**Set-off Issue**").

A. The Authenticity Issue

First, the CA considered whether the authenticity of the Debenture was even in issue. *Second*, the CA considered whether the original Debenture had been adduced in evidence. Having concluded both issues in the positive, the CA went on to decide whether adducing the original of the Debenture was, in itself, sufficient to prove its authenticity. The CA also discussed whether the indirect or circumstantial evidence was indeed sufficient to prove the authenticity of the signatures on the Debenture. Finally, the CA determined whether the HC erred in declining to compare the Debenture signatures, pursuant to section 75 of the Evidence Act (Cap 97, 1997 Rev Ed) ("**Evidence Act**").

(1) Whether the authenticity of the Debenture was even in issue

The CA held that the authenticity of the Debenture was in issue. The CA noted several ways in which a disputing party may dispute the authenticity of a document such as the Debenture, including:

(a) by alleging specifically that the signatures were forgeries;
(b) by denying the authenticity of the document;
(c) by simply not admitting the authenticity of the document, either by a specific or a general averment (*i.e.* a statement) in its pleadings; or
(d) where such document is not pleaded but has only been produced in discovery,[4] by a notice of non-admission of a document.

As such, it was not necessary – as CIMB argued – for WFS to first plead in its court submissions that the signatures on the Debenture were forged. Instead, it could put the authenticity of the Debenture in issue – as it did here – by relying on its non-admission to raise the issue of authenticity. Specifically, in CIMB's Statement of Claim,[5] CIMB stated in Paragraph 3 that CIMB's facilities to Panoil were secured by the Debenture, while in Paragraph 4 it stated that through the Debenture, Panoil had assigned to CIMB all its right, title, benefit and interest under the Sales Contracts issued by Panoil to WFS. And WFS, in its Defence, did not admit to these two paragraphs. This allowed WFS to rely on its non-admissions to raise the issue of authenticity. This was even though the non-admissions were general and did not specifically mention that the execution of the Debenture was not admitted. This then shifted the burden to CIMB to prove that the Debenture was indeed authentic.

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[3] Generally, a legal assignee is a party whom a right or liability is legally transferred.
[4] Generally, discovery is a process where parties obtain evidence, from each other or third parties, which is potentially relevant to the case.
[5] Generally, the party initiating a claim in court will file a Statement of Claim. The party against whom the claim is made will then file its Defence in response to the Statement of Claim. This can include admitting, or refusing to admit to, specific statements in the Statement of Claim.

Further, WFS had filed two notices of non-admission with regard to the Debenture when CIMB had included it in its list of documents. By so doing, WFS had made clear to CIMB that it was disputing the authenticity of the Debenture.

(2) Whether the original Debenture had been adduced in evidence

As the authenticity of the Debenture was placed in issue, its production into evidence was important. WFS argued that the original Debenture was not even properly adduced into evidence, *i.e.* through one of CIMB's witnesses; instead, it was introduced only when WFS' witness was being cross-examined. Nonetheless, the CA held that the original Debenture had been adduced in evidence.

The CA agreed that since its authenticity was in issue, the original Debenture *should* have been adduced through one of CIMB's own witnesses. For example, since a representative of CIMB had referred to the Debenture in her sworn statement and exhibited a copy of it, the original should have been shown to her for her to confirm that it was the original of the document she was referring to. CIMB could also have called the lawyers who registered the Debenture with the Accounting and Corporate Regulatory Authority ("**ACRA**") to give evidence. CIMB failed to take any of these steps.

Nonetheless, the CA held that CIMB's omission was not fatal to its case. The original Debenture was disclosed to WFS by CIMB prior to the start of the trial and inspected by WFS. During trial, the original was introduced by CIMB's counsel in the course of cross-examining WFS' witness. CIMB's counsel had informed the court that WFS' solicitors had inspected the original; he then asked for the original to be marked as Exhibit P1. The original was then marked by the court without objection. CIMB's counsel also pointed out that a copy was in CIMB's core bundle of documents. At that time, WFS' counsel did not argue that the original should have been introduced through one of CIMB's witnesses instead. Further, in closing submissions, no such objection was raised by WFS. Finally, WFS did not – at trial or on appeal in the CA – allege that the form and contents of the original were not the same as the copy exhibited in the CIMB witness' sworn statement or the copy found in CIMB's core bundle of documents for the trial.

(3) Whether adducing the original of the Debenture was sufficient to prove its authenticity

As WFS had put the authenticity of the Debenture in issue, the question then was whether CIMB had proven the Debenture's authenticity by adducing its original. The CA held that producing an original document was, in itself, insufficient to establish the document's authenticity.

The CA noted that CIMB's argument that it had discharged its burden of proof (*i.e.* to prove the authenticity of the Debenture) by simply producing the original document in court arose from a misinterpretation of the Evidence Act. Even after primary or secondary evidence of a document (*i.e.* the original or a copy) is produced, its authenticity still has to be established, because the production of a document purporting to have been signed or written by a certain person is no evidence of its authorship. Instead, the making, execution or existence of a document has to be proven, *e.g.* by the evidence of the person or persons who made it, or a person who was present when it was made.

In addition, the CA held that CIMB's argument that the authenticity of a document and the authenticity of signatures therein were two distinct issues was also incorrect. Here, they overlapped since the authenticity of a document may be put in issue *because* the authenticity of the signatures was disputed. A party who has the burden of proving the authenticity of a document first has to produce primary or secondary evidence thereof. Thereafter, it *also* has to prove that the document is what it purports to be; this would include proving the authenticity of the signatures if authenticity was in dispute.

(4) Whether the indirect evidence was sufficient to prove the authenticity of the signatures

WFS argued that where there is direct evidence of the authenticity of a document (*i.e.* by the

signatories themselves or by a witness to the signatories), such direct evidence must be adduced. However, the CA observed that section 69(1) of the Evidence Act does not provide that the authenticity of a document may be established *only* by direct evidence *i.e.* by testimony from the signatories themselves or by a witness to the signatories. The CA did note that direct evidence would usually be the strongest evidence available to a party, and the maker of a document should generally be called as a witness to prove its authenticity. A party's failure to call a witness to give direct evidence could also potentially result in an adverse inference (*i.e.* a negative conclusion) being drawn against it under section 116, illustration (g) of the Evidence Act.

Nonetheless, failing to adduce direct evidence where it is available is not necessarily fatal to proving a document's authenticity; the impact depends on the facts of each case. Relevant but non-exhaustive factors include: the strength of the indirect or circumstantial evidence adduced, the reasons given by the relevant party for not adducing direct evidence, and the probative value[6] of the direct evidence if it had been adduced.

Thus, the CA agreed with CIMB that a party may rely on indirect or circumstantial evidence to establish authenticity, even where direct evidence would have been available. The CA noted that in this case, there was no suggestion that either of the signatories had disowned his or her signature on the Debenture. There was also no suggestion that Panoil was disowning the Debenture. In fact, CIMB had, since the purported date of the Debenture, been operating under the belief that the Debenture had been validly executed. Further, there was no suggestion by Panoil that the Debenture had not been executed or that its execution was invalid.

In addition, the Debenture was registered with ACRA. This was done through the lodgement of the Statement of Particulars of Charge (the "**Statement of POC**") with ACRA. Importantly, the Statement of POC was signed by the same two officers of Panoil who also signed on the Debenture, and the authenticity of their signatures on the Statement of POC was not disputed by WFS. Furthermore, the Statement of POC was lodged by the solicitors for Panoil. The logical inference was that the Debenture was registered with ACRA on Panoil's instructions. Finally, the common seal of Panoil was properly affixed onto the Debenture. Sealing was a necessary requirement for the execution of a deed at the time of execution of the Debenture. WFS had not disputed that the seal had been properly affixed onto the Debenture, even though it disputed the authenticity of the signatures of the purported witnesses to such affixing. The affixing of Panoil's common seal lends support to the view that the Debenture was authentic.

As such, the CA found that the circumstantial evidence to establish the authenticity of the Debenture was overwhelming.

(5) Whether the HC judge had erred in declining to compare the signatures under section 75 of the Evidence Act

Section 75 of the Evidence Act provides that the court has the power, but is not obliged, to compare the signatures on a disputed document, with other signatures admitted or proved to the satisfaction of the court to have been made by said signatories. Accordingly, the CA found that there was insufficient basis to say that the HC judge had erred in declining to exercise the power under section 75 of the Evidence Act.

Nevertheless, the CA considered the signatures of the original Debenture with the signatures in other documents where authenticity was not disputed, not to determine authenticity as such under section 75 of the Evidence Act, but rather to see if there was any reason why the indirect or circumstantial evidence the CA had referred to should not be given due weight. The CA saw no such reason.

[6] Generally, probative value refers to the ability of a piece of evidence to prove something important in a trial to be more or less true.

B. The "Set-off" Issue

The CA considered whether WFS was entitled to a contractual right of set-off.[7] WFS claimed that in exercise of its rights under the Umbrella Contracts and the 2014 Offset Agreement, it had issued eight offset notices between July 2017 and August 2017. WFS argued that through these notices, it had set-off the entire sum due to Panoil under the Invoices. Thus, WFS claimed that at the date of receipt of CIMB's Notice of Assignment in August 2017, there were no longer any amounts outstanding or accruing to Panoil under the Subject Transactions.

CIMB in turn agreed with the HC that Panoil's Sales Confirmations, and not the Umbrella Contracts and/or the 2014 Offset Agreement, governed the Subject Transactions. Further, it argued that the terms of the 2014 Offset Agreement did not apply to or were not incorporated into the Sales Contracts. In any event, it claimed that any right of set-off which arose under the Umbrella Contracts and/or the 2014 Offset Agreement had been superseded by Clause 8.2.

The issue that arose for determination was whether the HC was correct in holding that 2014 Offset Agreement had been superseded by Clause 8.2, assuming that each Sales Confirmation (which incorporated Clause 8.2) from Panoil was the applicable contract document for each of the sales by Panoil to WFS.

The CA disagreed with the HC that this involved the classic "battle of the forms", where a question often arises as to which version of the offer forms the parties' final agreement.[8] The CA noted that the 2014 Offset Agreement was a short one-page document covering one substantive issue only, *i.e.* the right of set-off. This suggested that the parties had focused on this sole issue and entered into a contract encapsulating their agreement on it, intending for the right of set-off to apply to their transactions. On the other hand, Clause 8.2 was part of a pre-printed set of general terms and was merely one provision in a set of terms canvassing multiple issues. Further, Panoil's Sales Confirmations were pre-printed documents unilaterally issued by Panoil. Panoil's Terms and Conditions were also standard terms that were pre-printed and unilaterally issued by Panoil. Conversely, the 2014 Offset Agreement was signed by *both* parties.

Thus, the approach in the "battle of the forms" did not apply to the contest between the terms in the 2014 Offset Agreement and in Panoil's Sales Confirmations, such that the last document sent would contain the terms governing the transactions. Instead, the 2014 Offset Agreement clearly superseded Clause 8.2 because it was specifically agreed to between the parties whereas Clause 8.2 was not. Accordingly, the CA held that WFS was entitled to a right of contractual set-off under the 2014 Offset Agreement.

IV. LESSONS LEARNT

There are two important lessons from this case. First, the CA has clarified the means by which the authenticity of a document can be proven or disputed. Even where direct evidence would have been available, indirect or circumstantial evidence can also be used to prove the authenticity of the document instead. As for disputing the authenticity of a document, the opposing party may do so by issuing notices of non-admission. In particular, it is not necessary for the opposing party to plead forgery or that the signatures on the document were forged to put the authenticity of the document in issue.

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[7] In a contractual right of set-off, generally if Party A owes Party B money, Party A may reduce the amount it needs to pay Party B, by any amounts that Party B itself owes Party A.

[8] In a contract negotiation, it is common for one party to make an offer on certain terms, to which the other party will propose a counter-offer with different terms, to which the first party will propose yet another version of an offer with different terms, and so forth. This is known as the classic "battle of the forms". In such cases, the court will examine each "shot" which was "fired" by the respective parties, and only find a concluded agreement when a final and unqualified acceptance has been made.

Second, where two parties to a contract clash over whose terms should apply in the business transaction, the courts will take a context-specific approach in deciding the governing terms. Specifically, the winner is not always the party who puts forward the latest set of terms as the more specific document ought to prevail over a standard form document.

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