

Gall was instructed to act for Global Merchant Funding Limited against the Secretary for Justice in this landmark appeal (FACC 4/2015) before the Court of Final Appeal (“CFA”). The Court of Appeal and the CFA considered the correct interpretation of the terms of a Merchant Cash Advance Contract (“MCA Contract”) in accordance with the established legal principles to ascertain whether the transactions pursuant to the MCA Contract were in substance a loan under the Money Lenders Ordinance, Cap. 163 (“MLO”).

HONG KONG COURT OF FINAL APPEAL CONFIRMS THAT CASH-ADVANCE PRODUCT IS NOT A ‘LOAN’

Background

1. Global Merchant Funding Limited (“**GMF**”) was charged under section 29(1)(a) of the MLO for the offence of carrying on business as a money lender without a license.
2. Pursuant to the MCA Contract, GMF would purchase a fixed amount of the merchant’s future credit card receivables (“**Purchased Amount**”). The price/consideration paid by GMF was in the form of a one-off upfront cash advance (“**Purchase Price**”), which was at a discount from the Purchased Amount.
3. Under the MCA Contract, the merchant was obliged to issue a Processing Instruction Letter to the processing bank (“**Processor**”) irrevocably authorising the Processor to pay the agreed percentage of its future credit card receivables directly to GMF until the Purchased Amount was collected in full.

Issue

4. Since section 2 of the MLO defines “money lender” as “every person whose business...is that of making loans...”, the key issue in this case was whether GMF was ‘making loans’ to these merchants as a ‘money lender’ i.e. whether the agreement between GMF and the merchants was in substance or effect a loan of money.

Lower Courts’ Findings

5. The Permanent Magistrate had dismissed the charge and held that the MCA Contract did not constitute a loan..
6. Upon appeal brought by the Secretary for Justice, the Court of Appeal dismissed the appeal holding that the Magistrate did not err in his finding.

Arguments advanced by the Secretary for Justice at the appeal before the CFA

7. The Secretary for Justice further appealed against the Court of Appeal’s decision based on the following arguments.
8. The MCA Contract was in substance or effect a loan provided by GMF to the merchant.
9. The MCA contract involved no sale of any future receivable as the merchant itself had no right to the Purchased Amount, capable of being the subject of a sale.
10. The Processing Instruction Letter created an assignment by way of security and did not involve the sale and

purchase of choses in action.

11. Certain terms of the MCA Contract imposing a liability on the merchant in the event GMF was unable to collect the full Purchased Amount from future credit card receivables indicate that there was a loan repayable by the merchant and not a sale and purchase of credit card receivables.
12. Ultimately, these arguments were rejected by the Courts.

Court of Final Appeal's Decision

13. The CFA concluded that the MCA Contract was an agreement for the sale and purchase of receivables rather than a loan, even though the transaction represented a form of finance indistinguishable in economic effect from a loan with interest.
14. The CFA rejected the Secretary for Justice's contention that the MCA Contract was in substance or effect a loan provided by GMF to the merchant. As to whether the transactions between GMF and the merchants should be categorised as loans or as purchases of receivables, the Court held that the MLO's definition of a "loan" to include "every agreement (whatever its terms or form may be) which is in substance or effect a loan of money" must be understood to be referring to an agreement which has the legal substance or effect of a loan and not an agreement with such an economic or commercial substance or effect. The Courts will only look beyond the agreement between the parties when the agreement is a sham, which was not the case in this appeal.
15. The CFA held that the legal effect of the Processing Instruction Letter was to establish that the transaction was not a loan but a contract for the sale and purchase of receivables falling outside the MLO.
16. The receivable that GMF was agreeing to buy was a percentage of credit card settlement payments to be made by the Processor. The merchant's right against the Processor was a contractual right, enforceable by action, and was accordingly a chose in action capable of assignment.
17. The CFA further held that an assignment of future property for valuable consideration and an assignment of a chose in action over part of a debt are both valid in equity.
18. There is no need for there to be any express words of assignment. The parties' intention to assign the right was sufficiently clear from the Processing Instruction Letter which operated as an equitable assignment by the merchant to GMF of its right to payment by the Processor of the specified amount.

Conclusion

The decision involves an extension of the principles established in the authorities concerned with traditional discounting to transactions of this new form of funding, as a result of which the purchase of future credit card receivables from merchants for consideration of one-off merchant cash advance at discount will not amount to a loan within section 2 of the MLO.

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