CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd)
v
Ong Puay Koon and others and another appeal

[2017] SGCA 70

Court of Appeal — Civil Appeal Nos 42 and 43 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong JA

Contract — Contractual terms — Interpretation

29 November 2017

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Parties

1 These two appeals arise out of a set of Convertible Bond Subscription Agreements ("CBSAs") that the parties entered into. Given the view we have taken on the first appeal, which is Civil Appeal No 42 of 2017 ("CA 42 of 2017"), it is unnecessary for us to deal with the second appeal, which is Civil Appeal No 43 of 2017 ("CA 43 of 2017").

2 The plaintiff in the court below was CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Limited) ("CIFG"). CIFG is an investment vehicle that was established in 2007 to enter into the CBSAs with the defendants.

3 The defendants in the court below were Ong Puay Koon ("Ong"), Lee Sin Peng ("Lee"), Andy Ho ("Ho"), and Yap Tien Sung ("Yap"), collectively referred to as the "Initial Shareholders". They were the second to fifth defendants in the court below and were the initial shareholders in Polimet Pte Ltd ("Polimet"). Polimet, which is a special purpose vehicle incorporated as a holding company for the Initial Shareholders' other companies, was the first defendant in the court below. Polimet and the Initial Shareholders were all parties to the CBSAs. We refer to Polimet and the Initial Shareholders collectively as "the Respondents".

Background

4 The Initial Shareholders were involved in the business of manufacturing components used to make diodes through four companies incorporated in China and Hong Kong ("the Group Companies"). In 2007, they decided to acquire a company known as "Philips" and tried to find an investor willing to finance the acquisition. Between June and October 2007 the Initial Shareholders met with Kendall Court Capital Partners Limited ("KC"), a fund management company that wholly owned CIFG through a mezzanine fund. Although the parties hotly contested what occurred during those meetings, what is material for the purpose of these appeals is that they did agree to a deal whereby CIFG would finance the intended transactions.

5 The parties envisioned that Polimet would be incorporated as a holding company of the Group Companies. KC would provide a US$5m loan by subscribing for convertible bonds issued by Polimet with a five-year maturity term and a US$8.33m redemption value. KC wanted security for the loan and this was part of what was discussed. What is material for present purposes is that the provision of an indemnity, which is the subject matter of this appeal,

was not specifically discussed in this context of how the loan would be secured. How it came to be included in the agreement is something we will deal with shortly.

6 A draft term sheet was sent to Lee dated 1 August 2007 ("Term Sheet 1"), containing broad terms of the agreement. Specifically, this included an indemnity clause indicating that KC should be indemnified by Polimet for all losses arising out of or relating to the investment.

7 Further discussions took place at which the question of personal guarantees ("PGs") and which of the Initial Shareholders were to provide them was negotiated.

8 A revised draft term sheet dated 9 August 2007 ("Final Term Sheet") was sent to Lee on 10 August 2007. It indicated that Lee and Ho would provide joint and several PGs based on their initial 50% shareholding in Polimet. No other terms were changed from Term Sheet 1, including the provision that *Polimet* would indemnify KC. Chris Chia Woon Liat, the managing partner in KC, and Lee signed the Final Term Sheet.

9 On 7 September 2007, KC sent Lee drafts of the 2007 CBSA and the PGs. The documents were reviewed by some of the parties on 9 September 2007 in Salzburg. The indemnity clause that is the subject of the present appeals and which found its way into the 2007 CBSA was reviewed for the first time at that meeting. It differed from the provision that was originally contained in the two term sheets at least to the extent that it was not limited to Polimet but extended to the Initial Shareholders. On 5 October 2007, the parties executed the 2007 CBSA and incorporated Polimet. The 2007 CBSA contained the indemnity clause as aforesaid, namely cl 12. CIFG also obtained as security, charges over

the assets of all the Group Companies, PGs from Lee and Ho, and the Initial Shareholders' shares in Polimet (which would be transferred back to them once the facility was fully discharged).

10 The 2007 CBSA was later supplemented by other CBSAs. The material terms – including cl 12 – remained the same in each of them. By 2011 it became clear that Polimet would not be able to meet its payment obligations.

11 Polimet eventually defaulted and CIFG issued demands in 2012 and subsequently in August 2013.

12 The parties eventually entered into a partial settlement agreement ("the Settlement Agreement") and recorded a consent judgment on 22 August 2016. Polimet was to pay CIFG about US$39m comprising about US$18.6m as the outstanding sum along with facility fees and contractual default interest of 2% per month, and a further 2% interest per month until full payment. Lee and Ho were to pay CIFG about US$8.7m and interest at 5.33% per annum. The Settlement Agreement noted that the parties disputed the scope of cl 12 – whether the Initial Shareholders could be liable for Polimet's default – and also whether the default interest of 2% per month under cl 5.5 was an unenforceable penalty.

The decision below

13 The matter was heard before a Judicial Commissioner ("the Judge") who dealt with various issues in her judgment (which can be found at *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22) but what is material for present purposes is the construction she placed on cl 12.1 of the CBSAs (which is the indemnity clause) and in particular, whether on its true construction it had the

effect of enabling CIFG to claim the entirety of its losses arising from Polimet's default against each of the Initial Shareholders on a joint and several basis.

14 The Judge found that the clause was not so wide and for the reasons which follow, we agree with her though we differ somewhat in our reasoning and also in the construction we place on that provision. In relation to cl 12.1, the Judge first found that it appeared to be an unlimited and general indemnity which, on its face, would cover Polimet's default (at [79]). But the Judge found it odd that there was no reference to the possibility of Polimet's default in cl 12.1, especially since Polimet was one of the indemnifiers under cl 12.1 and its default would have been the most important category of potential breach (at [84]). The Judge further noted that there were other clauses on repayment – in particular cl 11 which sets out the procedure on an event of default – and which specifically confined the class of persons who would be liable and the documents under which they would be liable in such circumstances (at [85]). These were inconsistent with placing such a wide construction on cl 12.1. She therefore found that there was at least ambiguity on the face of the provision (at [87]).

15 The Judge then turned to the context. She found that the parties did not discuss cl 12 until the Salzburg meeting (which was after the Final Term Sheet had been signed) and this suggested that all the parties assumed that CISG's only recourse against the Initial Shareholders personally was pursuant to Lee and Ho's PGs. This was why they focused their negotiations on the PGs. The Judge also considered it significant that there was no discussion as to the scope of cl 12.1 or what the Initial Shareholders would be liable for under that provision. Given that the main purpose of the Salzburg meeting was to finalise an agreement that captured the same substance as the Final Term Sheet, the

Judge found that the Salzburg meeting could not have altered the parties' commercial bargain (at [100]–[102]).

16 The Judge also found that the commercial context supported a narrow reading of cl 12; only Lee and Ho had agreed to grant the PGs and only on the basis of the PGs being limited to their 50% shareholding in Polimet. It would not make sense that they would then agree to be exposed to 100% of Polimet's liabilities through cl 12.1 at the same time (at [105]). It was also not evident what the benefit would be to KC in obtaining these PGs from Lee and Ho if cl 12.1 already covered 100% of potential liabilities (at [106]).

17 We share these concerns but we elaborate on this below.

Issue on appeal

18 The central issue to be decided by us is, as we have noted, the true construction of cl 12.1.

Analysis

19 We begin with a brief statement of the relevant principles to be applied in the construction of contracts. These are well established in several decisions of this court and before us in the course of the oral arguments there was no real disagreement as to these. Stated briefly, these principles are as follow:

(a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore)Ltd* [2016] 1 SLR 1069 at [2]);

(b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and

known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]);

(c) The reason the court has regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]); and

(d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).

20 In that light we turn to the text of cl 12.1, which provides:

> **12. INDEMNITY**
>
> 12.1 **General Indemnity**. The Initial Shareholders and the Issuer hereby jointly and severally agree and undertake to fully indemnify and hold the Bondholder and its shareholders and their respective fund managers, directors, officers and employees (the "**Indemnified Parties**") harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) directly or indirectly caused to the Indemnified Parties and in particular, but without prejudice to the generality of the foregoing, for any short-fall, depletion or diminution in value of the assets of the Issuer, the Group or any Group Company resulting directly or indirectly from or arising out of any breach or alleged breach of any of the representations, warranties, undertakings and covenants given by the Initial Shareholders and/or the Issuer under this Agreement or for any breach or alleged breach of any term or condition of this Agreement.

21 It is evident that the language of cl 12.1 is extremely broad. Indeed, as we pointed out to Mr Teo, who appeared for CIFG before us, the text is broad:

(a) as to the class of beneficiaries since the indemnity conceivably extends to a host of persons not even party to the CBSAs; and

(b) as to the matters conceivably covered by the indemnity. Indeed on its terms, it appears to be unlimited as to the sort of matters that could conceivably be covered by the indemnity.

22 To demonstrate its potential width, we asked Mr Teo in the course of his argument whether the language was wide enough to permit a claim brought by a non-party to the CBSAs, for instance an employee of CIFG who suffered losses in the share market from a bad personal investment unconnected to the CBSAs. Mr Teo accepted that it seemed to be, though he hastened to add that he was not suggesting that this would be the correct interpretation of the clause. We will return to this momentarily but we pause here to observe that such breadth would make it absurd to construe the clause on its plain terms without regard to its context. The point simply is that it is impossible to contemplate that the parties would objectively have intended such an effect. But how is a court to resolve such a difficulty? We accept without reservation Mr Teo's salutary reminder that we cannot simply rewrite the bargain that the parties have concluded; but before we even get there, it is of course critical to have careful regard to the relevant context, and this is perhaps even more so when it is evident that the language simply cannot mean what it says.

23 In our judgment the relevant context in this case includes the following in particular:

(a) The entirety of the document and the way the contract as a whole was drafted. In the different but somewhat analogous context of the interpretation of statutes, we have similarly had regard to the entirety of the statute in question in discerning the correct interpretation of a particular provision (see, *eg, Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [35] and [54(b)]). In our judgment it is no less relevant to do the same when dealing with the construction of a contract.

(b) The entirety of the commercial documents that were entered into as part of this transaction. This is no more than an extension of the first point.

(c) The circumstances in which cl 12.1 was admitted into the agreement. We consider it relevant to refer to this in the present context even though it is part of the pre-contract negotiations because this part of the factual matrix was not controversial or disputed.

24 It may be noted that each of these points is clear, obvious, known to both parties and uncontroversial and accordingly we consider that they can fairly be considered to form part of the context against which the clause is to be construed. When this is done, it becomes clear, in our judgement, that cl 12.1 could not bear the meaning that CIFG contends it does.

25 Turning first to the entirety of the CBSAs, it may be noted that these made provision for the specific allocation of risks variously to Polimet, to the Initial Shareholders or to a combination of some or all of them. Purely by way of illustration, cl 11.1(a) makes it an event of default if "any Security Party fails to pay to the Bondholder any amount due and payable under any Transaction Document on the due date or on demand if so payable". This made Polimet liable for the loan; and Lee and Ho liable under the PGs to the extent they

undertook to be so liable thereunder. It is not consistent with this to then provide that Polimet, Lee, Ho and each of the Initial Shareholders would also be liable for the entirety of the loan. This was a point noted by the Judge and we agree with it. What is material to emphasise is, as we have already stated, that throughout the CBSAs there are obligations variously placed on Polimet, the Initial Shareholders or some combination of them and this makes it even more unlikely that cl 12.1 had the effect of overriding the entire allocation of the risks under the contract. Mr Teo candidly accepted that on his construction of the clause, its effect would be to make each of the parties responsible on a joint and several basis to answer for the breach of any term of the contract.

26 This is then strengthened by reference to the second contextual point we have noted above (at [23]). As we have observed, when the original structure of the transaction as a whole was being negotiated the parties did discuss the question of security and the points they agreed on were eventually reflected in the two term sheets. The first of these provided generally for PGs to be furnished, but by the second and final term sheet this was confined to PGs from Lee and Ho limited to the extent of their shareholding. In our judgment, this militates strongly against adopting the construction that Mr Teo urges on us because were it the case that cl 12.1 makes each and all the parties answerable for each and the entirety of the obligations under the CBSAs, then the PGs would have been unnecessary and otiose. Indeed, the fact that CIFG pursued and obtained the PGs from just two of the relevant persons and for only half of the total liability undermines its present case.

27 This leads us to the third and final contextual point and that is the circumstances in which the clause was introduced. It is common ground that:

(a) The clause was first introduced at the Salzburg meeting;

(b) It was not mentioned at that time that this would change the commercial structure of the deal. Indeed Mr Teo candidly accepted that the parties were probably not aware at the time of the contract that cl 12.1 could have the sort of effect that he was urging upon us in the appeal;

(c) The clause was read over by those at the meeting but its scope and effect were not discussed; and

(d) It was introduced as a "boiler-plate" provision to complete the document.

28 In our judgment, this last factor not only strengthens the force of the first two points but makes it impossible to contend that what was a common form boiler-plate provision that made its way into the agreement at the last stages of discussion could have the effect of overriding the commercial structure of the deal and the calibrated allocation of risk that is reflected elsewhere in the suite of agreements that were entered into. In our judgment, read in context, cl 12.1 was nothing more than a gap-filling provision introduced into the contract at a late stage to cover matters, if and to the extent these were not already covered elsewhere.

29 Mr Teo accepted that cl 12.1 did at least have that effect. Thus if there were obligations in the CBSAs that were not specifically allocated to any one or more of the parties, cl 12.1 would make it incumbent on all the named parties to perform or be liable for non-performance of such a provision. Similarly, if there were losses that arose from matters not arising out of the CBSAs at all, but were nonetheless somehow related to the transaction, then these too might be covered. However, Mr Teo submitted that beyond this, the clause also had a wider effect, which was to make Polimet and each of the Initial Shareholders

liable for *any* loss suffered or claimed by the indemnified parties arising from the breach of *any* provision of the CBSAs. For the foregoing reasons we do not agree that, when read in context, the clause can be given such an extended meaning, even if the words on their own might allow this.

30 We therefore dismiss the appeal though we commend Mr Teo for the candour, fairness and tenacity with which he advanced his case.

31 We make no order as to costs in CA 43 of 2017 and fix the costs of CA 42 of 2017 in the aggregate sum of $50,000 (inclusive of reasonable disbursements) in favour of the Respondents.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal

Teo Chun-Wei Benedict and Poon Guokun Nicholas (Drew & Napier LLC) for the appellant in Civil Appeal No 42 of 2017 and the respondents in Civil Appeal 43 of 2017;
Tan Chee Meng S.C., Lim Xian Yong Alvin and Ho Wei Jie Vincent (WongPartnership LLP) for the respondents in Civil Appeal No 42 of 2017 and the appellants in Civil Appeal 43 of 2017.