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WHEN IS A DEPOSIT REFUNDABLE? EXPRESS TERMS ARE IMPORTANT

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AUTHORS AND CONTACTS

Daniel Chia, Kenneth Chua

Singapore's Court of Appeal recently ruled that a party to a contract is not entitled to a refund of a $300,000 deposit it had paid in anticipation of an agreement that never materialised. Contracting parties are therefore well advised to avoid making deposit payments based on unstated assumptions, and instead rely on express terms stating the purpose of the payment and that the deposit is refundable if the purpose does not materialise.

The urgency of grasping business opportunities may mean that sometimes parties make substantial payments as deposits, on unspoken assumptions as to the basis for the payment, in order to move matters forward. Such parties run the risk of losing their deposit if the assumptions on which they made the payment unexpectedly fail to materialise. The recent Court of Appeal case of *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] SGCA 2 illustrates this when the Court of Appeal declined to allow a refund of a deposit in (subjective) anticipation of a contract materialising, when the contract did not in fact materialise.

BACKGROUND: *BENZLINE V SUPERCARS*

Daimler AG manufactures, *inter alia*, Mercedes-Benz cars. Lorinser buys from Daimler and modifies these Mercedes-Benz cars before selling them under the Lorinser brand. In 2013, Daimler concluded an agreement with Lorinser to extend Daimler's international consumer warranty to Lorinser cars provided the cars were sold by an authorised dealer. This development made it commercially attractive to distribute Lorinser cars in Singapore.

The proposal was for Benzline to enter into an agreement with Lorinser for the dealership (Benzline-Lorinser Agreement) and a "back-to-back" agreement with Supercars (Exclusive Sub-Dealership Agreement) which would mirror the Benzline-Lorinser Agreement so that Benzline could pass on all liability to Lorinser to Supercars. Benzline shared drafts of the Benzline-Lorinser Agreement with Supercars so that Supercars could comment on the same. At this time, the Benzline-Lorinser Agreement and the Exclusive Sub-Dealership Agreement were not yet executed. Under time pressure and perhaps in anticipation of the agreements being concluded soon after, Supercars made a 30% deposit payment which was eventually paid to Daimler. Negotiations between Benzline and Supercars over the terms of the Benzline-Lorinser Agreement then broke down and the relationship deteriorated. No Lorinser cars were delivered to Supercars, and Supercars commenced proceedings seeking a refund of the $300,000 paid.

HIGH COURT: REFUND ALLOWED

The High Court held that the $300,000 was a pre-contractual deposit (i.e. a part payment at law) made to demonstrate good faith and seriousness. It was refundable when the Exclusive Sub-Dealership Agreement failed to materialise.

COURT OF APPEAL: NO REFUND

The Court of Appeal disagreed and held that on the evidence, the payment was made for the specific purpose of enabling Lorinser to pay a deposit to Daimler and set in motion the production process, to avoid an unacceptable delay in delivery of the cars. The Court of Appeal held that the payment was conditioned on Supercars being offered the choice to enter into the Exclusive Sub-Dealership Agreement on terms materially similar to the first draft of the Benzline-Lorinser Agreement which Supercars had reviewed immediately prior to making the payment. Supercars was offered this choice but declined to contract. Accordingly, Supercars was not entitled to a refund of the $300,000.

TAKEAWAY: STATE EXPRESSLY THE PURPOSE OF THE PAYMENT/DEPOSIT

A party in Supercars's position would be well advised to

- record in writing the purpose of its deposit payment;
- state that the deposit is refundable if that purpose does not materialise (i.e. state when the deposit is refundable); and
- have the payee acknowledge the above in writing **before** making payment.

Indeed, the Court of Appeal began its analysis by considering whether there was any express understanding that entry into the Exclusive Sub-Dealership Agreement formed part of the basis of the payment and concluded that on the evidence, there was no such express understanding. Had there been an express written understanding, the outcome of the case may well have been different.

In the absence of an express understanding, the Court of Appeal examined whether that basis could be objectively implied and concluded that it could not. In this regard, the Court of Appeal crucially held that "mere fortuitous agreement between parties' unspoken assumptions is insufficient". This meant that it was insufficient that Benzline's managing director agreed (in cross-examination) that the purchase order was placed on the condition that Supercars would be sub-dealer and that the $300,000 deposit was a pre-contractual deposit on the basis that the parties were going to sign a sub-dealer contract.

The Court of Appeal held that the basis to be implied had to be "fundamental to the transaction, or otherwise obvious to an objective observer". The party seeking a return of a payment/deposit for unjust enrichment who relies on "failure of basis" bears the burden of showing what the basis is and that it has failed. This can be an uphill task.

The above comments apply by extension if there is to be a contract which stipulates for payment of a deposit. The paying party should ensure that the contract states clearly the circumstances under which the deposit is refundable/non-refundable.

CONTACTS

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

Singapore
Daniel Chia
Kenneth Chua