CDIB Venture Investment (Asia) Ltd v Soeryadjaya Edwin and Others and Another Suit [2003] SGHC 209

Case Number : Suit 1139/2001, 1140/2001

Decision Date : 15 September 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Rajiv Nair [Shook Lin & Bok] for the plaintiffs; K. Shanmugam SC, Valerie Tan and Christopher Tan [Allen & Gledhill] for the defendants

Parties : CDIB Venture Investment (Asia) Ltd — Soeryadjaya Edwin; Joyce Soeryadjaya Kerr; William Soeryadjaya

Contract – "Put option" in sale and purchase agreement – Whether right to exercise put option depended on breach of warranty – Whether breach could be rectified or waived – Whether term could be implied that plaintiffs would not do anything to jeopardise the project – Conduct of plaintiffs – No implied term in the circumstances.

1 These two consolidated suits were instituted by the plaintiffs against the defendants for the payment of money under a put option in a sale and purchase agreement in each of the suits respectively. The first (Suit 1139 of 2001) was for A$23.08m against Edwin Soeryadjaya, his sister, Joyce Soeryadjaya, and William Soeryadjaya (who is their father and guarantor) as the first, second and third defendants respectively. The second (Suit 1140 of 2001), was for A$7m from Bradley Fraser (the husband of Joyce Soeryadjaya) as the first defendant and William Soeryadjaya (who was his guarantor) as the second defendant. These claims arose from two contracts respectively known at trial as the 'Esplanade Agreement' and the 'JGL Agreement'. The background and history of events in the consolidated suits were connected.

2 Sometime in the early part of 1994 the Soeryadjaya family invested in the pig farming industry in Australia. Through their Australian companies Esplanade Investments Pte Ltd and JGL Trading Pte Ltd they participated as shareholders in a project called 'The Pratten Project' in Queensland which was a project (worth A$80m) to develop a major pig farming and meat processing industry in Australia. The project was managed by a company called 'Danpork Australia Pty Ltd' (DAPL). DAPL was owned by the two major groups of shareholders. The first group was the Danish consortium 'Danpork A/S'. The second was Euphron Pty Ltd. They held the shares in DAPL in the proportion of 35% to 65% respectively. Euphron was, in turn, owned by JGL and Esplanade in the proportion of 40% and 60%. These companies were owned by the Soeryadjaya family. The Soeryadjaya family sold its entire shareholding in Esplanade to a Taiwan group called CDIB (Asia) the plaintiffs in the first suit (but named as CDC Investment (BVI) Ltd in the sale and purchase agreement). The Soeryadjaya family also sold 12.5% of their shares in JGL to CDIB (USA), the plaintiffs in the second suit (but named in the sale and purchase agreement as CDC Indochina Venture (BVI) Inc.). The two sale and purchase agreements will be referred to as the 'Esplanade' and 'JGL' agreements respectively - the subject matter of the two consolidated suits now before me. The two CDIB companies therefore owned about 65% of Euphron. The remaining 87.5% of JGL shares were held by Joyce Soeryadjaya in trust for the family. The overall shareholding in DAPL was in the proportion of 35% to Danpork, 42.25% to CDIB, and 22.75% to the Soeryadjaya family.

3 The plaintiffs in each case sued to enforce their rights under a 'put option' in respect of each of the sale and purchase agreements. They averred that the vendors failed or refused to re-purchase the shares concerned. There was no dispute that the respective put options in question were exercised under cl 9.10(b) and 9.10(b)(i) and (ii) of the Esplanade and JGL agreements respectively. For ease of convenience, the two clauses are set out in full:

"Esplanade Agreement –

9.10 Repurchase

(a) (Option) Each Vendor grants to the Purchaser an irrevocable option to require that Vendor to repurchase in accordance with this Clause at the Option Price the Shares sold to the Purchaser by that Vendor under this Agreement.

(b) (Exercise of Option) The Option may only be exercised on the basis of a breach of either or both of warranties 4 and 5. The Purchaser may exercise the Option by delivering to the Vendors a written notice specifying:

(i) the breach of warranty on the basis of which the Option is exercised; and

(ii) that the Purchaser requires the relevant Vendor to repurchase the Shares.

(c) (Timing of exercise) Notice under paragraph (b) may be given in relation to particular breach of warranty only if:

(i) a period of 30 days has elapsed since notice under Clause 9.7 was given in respect of that breach;

(ii) if capable of remedy, the breach of warranty has not been remedied to the Purchaser's reasonable satisfaction; and

(iii) the relevant notice under Clause 9.7 was given no more than 3 years after Completion.

(d) (Completion of repurchase) The Vendors shall repurchase any Shares required to be repurchased in consequence of the exercise of the Option:

(i) within fourteen days after the exercise of the Option; and

(ii) by paying the Option Price to the Purchaser.

(e) (Purchaser's obligations) On receipt of the Option Price, the Purchaser shall deliver to the Vendors:

(i) (Share certificates) The share certificates in respect of the Shares.

(ii) (Transfers) Transfers in registrable form in favour of the Vendors, or other transferees as they may direct, duly executed by each registered holder as transferor of the Shares; and

(iii) (Resignations) Signed resignations of the directors appointed to the respective boards of directors of the Group Members at the request of the Purchaser."

'JGL Agreement –

9.10 Repurchase

(a) (Option) Each Vendor grants to the Purchaser an irrevocable option to require the

Vendor to repurchase in accordance with this Clause at the Option Price the Shares sold to the Purchaser by that Vendor under this Agreement.

(b) (Exercise of Option) The Option may only be exercised:

(i) within the period of six (6) months after 1 April 2001; or

(ii) at any other time, on the basis of a breach of either or both of warranties 4 and 5.

(c) (Method of Exercise) The Purchaser may exercise the Option by delivering to the Vendors a written notice specifying:

(i) either:

(A) in the case of an exercise under paragraph (b)(i) that the Option is being exercised under that paragraph; or

(B) in any other case, the breach of warranty on the basis of which the Option is exercised; and

(ii) that the Purchaser requires the relevant Vendor to repurchase the Shares.

(d) (Timing of exercise) Notice under paragraph (c)(i)(B) may be given in relation to a particular breach of warranty only if:

(i) a period of 30 days has elapsed since notice under Clause 9.7 was given in respect of that breach;

(ii) if capable of remedy, the breach of warranty has not been remedied to the Purchaser's reasonable satisfaction; and

(iii) the relevant notice under clause 9.7 was given no more than 3 years after Completion.

(e) (Completion of repurchase) The Vendors shall repurchase any Shares required to be repurchased in consequence of the exercise of the Option:

(i) within thirty (in the case of an exercise of the Option under paragraph (b)(I) or fourteen days after (in any other case) the exercise of the Option; and

(ii) by paying the Option Price to the Purchaser.

(f) (Purchaser's obligations) On receipt of the Option Price, the Purchaser shall deliver to the Vendors:

(i) (Share certificates) The share certificates in respect of the Shares.

(ii) (Transfers) Transfers in registrable form in favour of the Vendors, or other transferees as they may direct, duly executed by each registered holder as transferor of the Shares; and

(iii) (Resignations) Signed resignations of the directors appointed to the respective

boards of directors of the Group Members at the request of the Purchaser.'

Warranty No 5 reads:

'PRATTEN PROJECT

Construction of the Pratten Project will commence before 1 July 1998'

4 So far as the Esplanade shares were concerned, the right to call upon the put option depended solely on a breach of warranty 5. There is no dispute that the deadline of 1 July 1998 specified in warranty 5 was extended to 31 October 1999 by consent. This is evident from William Soeryadjaya's letter to the managing director of the CDIB companies, Mr Hsien Jone Cheng, dated 21 November 1998, a copy of which letter is found in CB367. The defendants also adduced evidence from the project manager (Kevin Tyrell) in charge of construction of the Pratten Project. His evidence, virtually unchallenged, was that construction of the project commenced with the initiation of the earthworks, and that took place in November 1999. If, as it were, the commencement deadline was extended to 31 October 1998, the grace period of 30 days under the agreement in the event commencement did not begin by 1 July 1998 would implicitly be likewise extended. This 30-day grace period was provided under cl 10(c)(i). Kevin Tyrell also testified that the earthworks could have commenced anytime after 1997. The defendants also introduced unchallenged newspaper reports of the ground breaking ceremony on 18 November 1999 in which the Queensland Deputy Prime Minister unveiled a plaque to mark the start of construction. It was only in his closing submissions that Mr Nair, counsel for the plaintiffs, argued that the newspaper reports were hearsay evidence and should not be relied upon. He did not challenge the admission of those reports during the trial proper when the reports were referred to the witnesses. Hence, the evidence of the newspapers were properly admitted. The weight to be given to such evidence, however, will vary with each case. Presently, I would merely regard the reports as corroborating the oral testimonies of the defendants' witnesses, including Kevin Tyrell. I am of the view that the evidence on the whole sufficiently proved that construction did commence in time such that no breach of warranty 5 can justifiably be maintained. Commencement of construction must refer to the actual physical acts of construction. I am unable to accept Mr Nair's interpretation that there can be no commencement of construction unless all the financial support, that is, the funding for the project, are in place. Such an interpretation puts an unwarrantable strain on the use of ordinary language, and in particular, the word 'construction'.

5 There is a second important condition attached to the purchaser's rights under the put options, and that is that a requisite notice under cl 9.7 must first be given to the vendors. Clause 9.7 provided as follows:

'9.7 Dealing with Warranty breach after Completion

If the Purchaser becomes aware after Completion of any circumstances which constitute or are likely to constitute a breach of any Warranty, the Purchaser must, so far as is reasonable, do each of the following:

(a) promptly give the Vendors full details of the circumstances and any further related circumstances of which the Purchaser becomes aware; and

(b) permit the relevant Group Member, at the Vendors' expense, to take all action that the Vendors direct to avoid, remedy or mitigate the breach, including legal proceedings and disputing, defending, appealing or compromising the claim and adjudication of it.'

Two notices were duly despatched on 27 July 1998. However, a few days earlier, on 23 July 1998, CDIB sent a letter drafted and signed by Gen Feng Shueh to William Soeradjaya, and copied to Edwin and Joyce Soeradjaya, and David Lim (the Managing Director of Euphron), and CDC (the parent company of the CDIB companies). This letter is important. It was written to give William Soeradjaya advance notice that notices under cl 9.7 of the sale and purchase agreements were about to be given to the vendors. The letter reads:

> 'I was informed yesterday by our account officer of the Euphron project that they have directed our Australian lawyers to issue a letter to the vendors and guarantor of the project concerning a breach in agreement and repurchase options'.

Then the writer went on to say:

> 'Please do not be too concerned about this issue because after conversing with the account officer, it came to my understanding that it is not our intention to 'push' this issue but only a follow up on the sales agreement. According to company regulation, the account officer had to do such action to not get into trouble with our internal audit'.

6 This letter, read in its entirety, is even clearer in terms of the effect and implications it created. Gen Feng Shueh was writing to give the Soeryadjaya family advance warning that legal notices under the sale and purchase agreements would soon be issued and, at the same time to advise the family not to worry about the legal notices when they do come because, as he explained, the notices were sent as a matter of a technical or formal compliance under the agreement and was written by the account officer to satisfy internal audit. The writer was, in effect, telling the recipient, by tone and text, that the requirement to rectify the breach of either warranty 4 or 5 complained of, need not be taken seriously, it was written for their (plaintiffs') own account and not really for enforcement purposes against the defendants. In other words, he meant that the legal letters that were being sent could be ignored. This letter of 23 July 1998 raised an immediate and relevant question as to whether it was sent with sufficient ostensible authority to justify the Soeryadjaya family's reliance on it. The letter itself was written on CDC's letterhead. The evidence of Jessica Jook made it clear that the key persons in CDIB, herself and HJ Cheng included, knew of the letter. She said Cheng was annoyed, but no one took any step to retract or otherwise nullify that letter. Gen Feng Shueh was then the principal officer from the plaintiff companies dealing with the Soeryadjaya family. I find therefore that his letter of 23 July was written with the ostensible as well as implied authority of the plaintiffs. William Soeryadjaya was clearly confused, if not misled by the letter. Furthermore, the Soeryadjaya family subsequently contributed a sum of S$210,000 as a shareholders' loan to Euphron. This loan and the acceptance of it is inconsistent with the notice of breach. The loan is yet another indicia of the waiver of the breach. A contractual notice as envisaged under the agreements in question must be unqualified and unequivocal. A clear and proper notice should do the job it is designed to do; that is, to put the recipients on notice so that they can (as in this case) prepare for the eventuality of having to buy back the shares. The recipients will have to take steps to secure the necessary funds for the imminent re-purchase. An equivocal notice, on the other hand, misleads the recipients and creates prejudice to them. In construing the importance and impact of a contractual notice in this way, the burden is not on the recipients to show that they were prejudiced. To do so is to be confused between the likelihood of prejudice or potential prejudice either of which is an objective exercise, and the actuality of prejudice, which is largely a subjective one.

7 Clause 9.7 required a notice of breach of warranty to be given together with the details of breach and it provided that the vendor would be given the opportunity to rectify the breach. Under cl 9.10(c)(ii) it further provided that '*if capable of remedy*, the breach was not remedied', the

purchaser may proceed to exercise the option. But if one looks at warranty 5, it said simply: 'Construction of the Pratten Project will commence before 1 July 1998'. Although this was a warranty that could be waived, it was not a breach that could be rectified once the stipulated deadline of 1 July 1998 has passed. An omission to do an act can be rectified by performing that act subsequently, but an omission to do an act by a certain date cannot be rectified when that date had passed. Meeting John Doe is not the same as meeting John Doe by Christmas 2003. Yet the legal notice of 27 July 1998 gave the vendor 30 days to 'remedy this breach'. It is in this context that Gen Feng Shueh's letter of 23 July 1998 saying, in effect, not to worry about rectifying the breach within 30 days – a breach that was irremediable in the first place – must be read. The breach could not be rectified, but could be waived. On the facts, I find that the breach (if 1 July 1998 was the operative date) had been waived. Furthermore, on the evidence, it seems abundantly clear that the control of Euphron (after the sale agreement) was in the hands of the CDC group that is, the plaintiffs. That control naturally included the power to determine and move the levers of DAPL. It therefore means that the commencement of construction, as well as the rectification required under the notice to rectify, were entirely in the hands of the plaintiffs. Even without Gen Feng Shueh's misleading letter of 23 July 1998, there was nothing the plaintiffs could do to rectify the 'breach' of not commencing construction. There is one further problem with the notices of 27 July 1998, apart from the confusion caused by Gen Feng Shueh's letter. If it can be said that the parties had varied the terms of warranty 5, by agreeing to postpone commencement of construction to 31 October 1999, than implicitly, therefore, if there was a breach after that, a fresh notice must be given because the initial breach had been waived. However, variation of the terms was not pleaded by either party although Mr Shanmugam SC argued that a fresh notice must be given. But counsel's argument for a fresh notice was based on waiver. Waiver, in my view, does not require a fresh notice – the entire obligation under warranty 5 is extinguished by waiver. If, on the other hand, it was a variation, a fresh notice ought to have issued, but even that is academic because the project had in fact commenced within the new time limit. Nonetheless, be it waiver or variation, the plaintiffs had no cause to rely on a breach of warranty 5 on the evidence before me.

8 Mr Shanmugam SC, counsel for the defendants, made a very strong case against the plaintiffs' reliance that the Pratten Project would commence by 1 July 1998, in that the failure to commence as scheduled was caused solely by the plaintiffs themselves. Counsel quoted Jessica Jook as saying that 'what CDIB wanted was to make sure that the financing was in place before they started the construction'. In my view, there is nothing in this attitude *per se* that speaks against the plaintiffs. It was probably a prudent thing to do. I do not think that reasonable businessmen would proceed on a major construction before getting the financial funding in place but if there is a deadline for the commencement of construction then whether financing was in place or not is not in that sense, relevant. If the parties wish to qualify the commencement warranty in this way they must express their intention clearly. This leads me to the defendants' submission that the plaintiffs scuttled the offers from Rabobank and Sinopac. Counsel argued that the plaintiffs deliberately, and with no ostensibly sound reasons, refused to accept these two financial offers which, if accepted, meant that the construction could have begun on time. In a letter dated 16 August 1999 Malcolm McKenzie (since died) of Danpork wrote to one of their Danish partners stating that the plaintiffs' Bryan Pai had 'instructed Danpork Management to cease negotiations with Rabobank due to the long term delays and he (Pai) would arrange finance from Taiwan'. As to the Sinopac offer, the evidence showed that the defendants had in fact accepted it, but no explanation was given as to why the loan was not drawn down.

9 I have thus little difficulty finding as a fact that the project was delayed by the CDC group after it had obtained its banking licence. It appeared to have lost interest in the Pratten Project and were keen to divest their interests in it after that. Ostensibly, the plaintiffs claimed that they could not proceed because they were not happy with the arrangements in respect of the loan financing for

the project. This was not the true reason. Although Mr Shanmugam SC suggested that this meant that the start of the project was delayed by the wilfulness of the plaintiffs, I do not think that the evidence would warrant such an inference. By this, I mean that there is insufficient evidence to conclude that the plaintiffs had deliberately delayed the start of the project merely to call on the option. I am of the view that at worst, the plaintiffs were negligent or not sufficiently competent or decisive and thereby, let slip the opportunities for getting the financial assistance that would have enabled the project to start on time even though a complete loss of interest in the joint venture might have been the underlying corporate motive. But this kind of default is within the ordinary risks of the agreements as drafted. The implied term that Mr Shanmugam SC had in mind is one that has to be expressly stated in order to preclude the plaintiffs from exercising the option on that account. As Mr Shanmugam SC rightly submitted, to succeed on this ground the defendants must persuade me that there is an implied term in the agreements to the effect that the plaintiffs would do nothing to jeopardise the project such as to let them rely on their own wrong to the detriment of the defendants. But I do not think that such a term can be implied in the present case. The implied term was pleaded as follows, that the plaintiffs 'would control and manage the Pratten Project, completely and efficiently, without delay, such that the Pratten Project would not be delayed and/or the shareholding in Euphron and the Pratten Project would be devalued'. The Esplanade and JGL agreements are not simple or straightforward agreements and as counsel conceded, were drafted by the parties' solicitors in Australia. Counsel submitted that the plaintiffs deliberately refused to accept the Rabobank and Sinopac loans so as to use that as an excuse for the failure of the Pratten Project. This submission was premised on the assumption that the offers were totally reasonable. But more importantly, implicit in that assumption is that for that implied term to be meaningful, it must also be implied that the plaintiffs were obliged to accept any reasonable offer of financial assistance that they receive. This is impossible unless what constitutes a reasonable offer is a matter that can also be inferred, but that cannot be achieved. The agreements are too specific. Any such inference would invariably be a subjective decision unless the parties have by express consent delineate an objective criteria to make the details of that term plausible and ascertainable. The put options and the buy-back scheme, though commercially common, were dependent upon and operated on unusual conditions in this case. The more intricate the set-up, the more prudent it would be for the court to avoid implying terms into the contract.

10 Furthermore, the implied term summarised by counsel in paragraph 141 of his closing submission was suggested as follows:

> 'That CDIB should not act to ruin the Pratten Project, but should act to co-operate and realise the Pratten Project'.

For the reasons that I have explained above, an implied term this broad cannot be fair or practical. This is an apt moment to cast another look at the complex character of the project as well as the nature of the plaintiffs' investment in it, and the complex agreements drafted to meet the needs arising from the venture. A more acceptable but narrower version of implied term was, in fact, already provided expressly in the agreements. That is, the defendants' liability in respect of the warranties would be 'reduced or extinguished' accordingly to the extent that the matters arose by reason of the conduct of the plaintiffs. It is also encapsulated in the waiver defence. In short, if a man seeks a warranty from another that an event 'X' will take place, it must surely imply that he will not deliberately prevent the event from occurring. An unqualified warranty is a warranty that may well hold up against 'Acts of God', but not against the wilful act of the person to whom the warranty was given. Hence, the wilful act on the part of the plaintiffs was the omission in proceeding with construction by 1 July 1998, and not that which Mr Shanmugam SC asserts in his submission. The latter would result in an excessive finding.

11 In this case, it was intended by the two agreements to give the purchasers a controlling interest in Euphron. What is not clear is why the put option in the JGL agreement differed significantly from that in the Esplanade agreement. There was obviously a reason, but beyond noting that it was unlikely to be a solicitor's slip, any other inference would be utterly speculative. On the evidence, I am not prepared to find that the purchasers wilfully calculated their moves merely to exercise the put-options. Mr Shanmugam SC submitted that in this case, the evidence suggest very strongly that the plaintiffs changed their mind about investing in the Pratten Project and, therefore, deliberately chose not to accept the Rabobank and Sinopac loan offers. It is true that the plaintiffs had their commercial reasons for not proceeding with the Pratten Project, but that was nonetheless, a legitimate, and in that sense, reasonable ground for their decision to go into the mode of deliberate neglect and withdraw themselves and their commitment, provided the conditions set out in the agreements are complied with. The implied term defence in its broad form therefore fails.

12 Mr Shanmugam SC also argued that the plaintiffs were not in a position to re-transfer the shares in Esplanade as well as JGL. The evidence of HJ Cheng, a principal officer and witness of the plaintiffs, testified that part of the Esplanade shares had been sold to a company called Taiwan Sugar. Counsel relied on *Lee Hooi Lian v Kuay Guan Kai* [1990] SLR 262 for the proposition that an option holder could in fact sue a grantor for breach of contract should the grantor sell the asset before the option could be exercised. The facts in *Lee Hooi Lian* are quite different. In that case, the legal question was whether the plaintiff (who obtained an option to purchase a property from the defendant) was entitled to claim a refund. He had complied with a condition in the option that would have entitled him to a refund of the money he had deposited towards the purchase of the property. The narrow issue there was whether the plaintiff could rely on the terms of the option when he had not yet exercised it. The court held that he could. In the course of the judgment, the judge accepted the position adopted in many jurisdictions, namely that when a 'defendant unconditionally repudiated her obligation under an option, she waived the necessity of a tender.' This was itself based on the legal homily that 'the law will not require the doing of a vain thing'. Naturally, if the plaintiffs in the present case before me are unable to re-transfer the shares to the defendants then the put option would have to be regarded as wrongly exercised. However, the parties have not reached that stage. At this point, it is not necessary to enquire whether the plaintiffs can or cannot re-transfer the shares. The defendants had maintained all along that the plaintiffs were not entitled to exercise the option. The defence put up in this form presently was, therefore, an academic one. It was hypothetical in that it depended on the hypothesis 'if we, the defendants, had accepted your call to repurchase, can you, the plaintiffs, in fact transfer the shares to us?' I am of the view that this defence also cannot succeed.

13 Under the JGL put option clause, the purchasers were entitled to exercise their rights at any time within six months from 1 April 2001, or at any time in the event of a breach of warranties 4 or 5. The first alternative was clearly independent of the second and, apart from the time frame agreed was otherwise unconditional. There was no dispute that the purchasers exercised the option within the time stipulated. It follows that the call option in respect of the JGL shares was validly made and the vendors are bound to honour it.

14 For the reasons above, I dismiss the plaintiffs' case in respect of the Esplanade shares, but allow their claim in respect of the JGL shares. The JGL agreement, in my view, unequivocally specify the option price to be A$7m and that is the amount I hold to be payable for the transfer of the JGL shares back to the defendants. I will hear parties on the question of costs at a later date.