Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and Another [2009] SGHC 86

Case Number : Suit 487/2008, RA 414/2008

Decision Date : 08 April 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Surenthiraraj s/o Saunthararajah and Sharmini Selvaratnam (Harry Elias Partnership) for the plaintiff; Gregory Vijayendran and Sung Jing Yin (Rajah & Tann LLP) for the defendants

Parties : Straits Advisors Pte Ltd — Behringer Holdings (Pte) Ltd; Behringer Corporation Limited

Contract

8 April 2009 Judgment reserved.

Lee Seiu Kin J:

1 This is an appeal from the decision of Assistant Registrar Then Ling ("the AR") in Summons No 4224 of 2008 ("Sum 4224/08"). The defendants had taken out Sum 4224/08 to determine the following question:

> Whether on a true construction of the Consultancy Agreement dated 10 November 2006 between the Defendants and the Plaintiff ("**the Consultancy Agreement**") pleaded by the Plaintiff at paragraph 7 of the Statement of Claim filed herein on 4 August 2008 (in particular Clauses 3 and 4 of the same), Clause 4 is operative only one month after the Plaintiff receives written notification from the Defendants of:-
>
> a) the 2nd Defendant's decision to proceed with a plan to list on a recognised stock exchange; or
>
> b) there is an anticipated takeover action of the Defendants.
>
> [emphasis in original]

Background to the Action

2 The plaintiff is a corporate finance advisory firm. The first defendant is a limited private company incorporated in Singapore and is in the business of general wholesale trading. The second defendant, an unregistered foreign company, is the sole shareholder of the first defendant. On 11 January 2006, the defendants engaged the plaintiff to provide services related to an intended initial public offering ("IPO") of the shares of the second defendant.

3 The plaintiff and the defendants entered into four separate agreements on 11 January 2006. First, there was a letter (the "Release Letter") under which the plaintiff released Dominic Andrla ("DA") so that he could be appointed as the defendants' Group Chief Financial Officer ("CFO"). Second, there was a letter which clarified the terms of the Release Letter (the "Side Letter") with respect to the plaintiff's remuneration. Third, there was an employment agreement entered into

between DA and the defendants under which DA was appointed as Group CFO of the defendants (the "CFO Agreement"). I will refer to these three agreements (the Release Letter, the Side Letter and the CFO Agreement) collectively as the Previous Agreements. The fourth was a secondment agreement, under which Mr Ricardo Villanueva was to be seconded to the defendants as head of corporate finance.

4 On 16 October 2006, the defendants appointed a new CFO, Roch Low, and DA's responsibilities as CFO were transferred to Roch Low. As a result, the plaintiff and the defendants entered into a consultancy agreement dated 10 November 2006 (the "Consultancy Agreement") which was to supersede the Previous Agreements.

5 There arose a dispute as to whether the plaintiff's or DA's appointment had been terminated by the defendants. There was an exchange of email between Roch Low and DA with respect to the necessity of the plaintiff's services but it is not necessary for me to make any finding as to whether the plaintiff's services were terminated by the defendants. Thereafter, the plaintiff commenced Originating Summons No 417 of 2008 ("OS 417/08") against the defendants, claiming to be entitled to 5,668,852 shares of the second defendant (the "Shares") under the Consultancy Agreement. OS 417/08 was heard by Belinda Ang J, who ordered it to be converted into a writ. After this was done, the defendants applied under O 14 r 12 of the Rules of Court (Cap 322, r 5, 2006 Rev Ed) for the determination of the above question (at [1]).

6 I set out the salient terms of the Consultancy Agreement:

> **2 Terms and compensation for Mr Andrla's services after Transfer Date**
>
> The terms for the provision of Mr Andrla's services after the Transfer Date (the 'Pre-Listing Terms') are as follows:
>
> | | |
> |---|---|
> | Job Title: | Senior Consultant |
> | Description: | To maintain a high level overview of issues relating to the Finance and Corporate Finance departments … so as to be ready to assist Behringer with its IPO … |
> | Time contribution: | With effect from the Consultancy Date, Mr Andrla's time devoted to Behringer will be determined solely by Mr Andrla. However, in any event, it will not exceed the equivalent of (2) working days a month. This time may or may not be spent at Behringer's premises, at Mr Andrla's discretion. Behringer is aware that Mr Andrla will spend part of his time attending to other business matters not relating to Behringer and is agreeable to the same. |
>
> …
>
> In consideration for Straits Advisors' services under this Agreement and, in particular, for the provision of Mr Andrla's services to Behringer, Behringer hereby agrees to compensate Straits Advisors as follows:

Monthly payments S$8,333.33 per month …

3 Terms and compensation for Mr Andrla's services after IPO Activation Date

The Pre-Listing Terms will be superceded by the following terms ("IPO Advisory Terms") one month after Straits Advisors is notified in writing of the decision by BCL to proceed with a plan to list on a recognised stock exchange, or anticipated takeover action ("IPO Activation"):

Job Title:	Senior Consultant
Description:	To assist Behringer with its IPO on a recognized stock exchange …

…

In consideration for Straits Advisors' services under this Agreement and, in particular, for the services of Mr Andrla to Behringer for the period after the IPO Activation Date, Behringer hereby agrees to compensate Straits Advisors as follows:

Monthly payments:	S$28,333 per month…
Bonus:	An annual performance bonus of S$85,000 based on reasonably agreed Key Performance Indicators (KPI) …
Success Fee:	See Section 4 below.

4 Success Fee

(1) We refer to the paragraph entitled 'Shares' in section 2 of the Release Letter, and 3.1 of the CFO Agreement and paragraphs 1 to 3 of the Side Letter referred to above. *It is agreed, with immediate effect, as follows*: -

(2) Behringer hereby agrees to issue shares in BCL to Straits Advisors or its nominee equivalent to 0.37 per cent of the post IPO (or post takeover, as applicable) share capital of BCL for a total nominal sum of US$100/- (the "Shares"). The Shares will be issued under the following circumstances:

(i) When approval has been granted by a recognised stock exchange for the listing of BCL's shares, the Shares shall be issued upon receipt of the said approval. For the avoidance of doubt, the approval to list BCL's shares shall be a condition precedent for the issuance of the Shares under this clause (i).

(ii) In the event of a takeover of Behringer of all or substantially all of its business, the Shares shall be issued on the offer becoming unconditional and, if applicable, the acquirer

having secured more than 50 per cent of the issued share capital of BCL.

(3) In the event that Behringer terminates the appointment of Mr Andrla and/or Straits Advisors (other than for gross negligence or wilful default), *prior to the conditions in (i) or (ii) above being satisfied*, *the Shares shall immediately be issued* to Straits Advisors or its nominee for the total nominal sum of US$100/-.

…

(5) This Agreement may be terminated by Straits Advisors giving Behringer three months' written notice or payment of the equivalent or three months' monthly payments in lieu of notice.

(6) For the purposes of this agreement, IPO of Behringer will include the listing of any corporate vehicle as a result of any restructuring of the Behringer group resulting ultimately in the present business of BCL being listed. *In the event that post IPO or post takeover share capital cannot be ascertained, the parties will agree to an equivalent number of shares in the existing share capital of BCL (or relevant corporate vehicle), provided that in any event it will not be less than 0.37 per cent of the present share capital of BCL*.

[Emphasis added]

7 No IPO Activation notice was provided by the defendants. Therefore, an issue arose as to whether the plaintiff was entitled to the Shares (as provided in s 4(3) of the Consultancy Agreement) if the defendants had terminated the plaintiff's services before giving the IPO Activation notice. The defendants estimated that the Shares in question were worth approximately US$340,131 (using the par value of each share in the second defendant to calculate the approximate value)[note: 1].

The arguments

8 The plaintiff relied on the words "with immediate effect" in s 4(1) to argue that s 4 of the Consultancy Agreement was distinct from s 3. Therefore, the plaintiff argued that there were two circumstances in which the second defendant's shares would be allotted to the plaintiff under s 4 of the Consultancy Agreement. The first was in the event of success (where approval for listing was granted or where an unconditional offer for a takeover was made). The second was in the event of termination of the plaintiff's services by the defendants. The plaintiff claimed that this was supported by how s 4(6) had provided for a mechanism to determine the number of shares to be issued in the event the post-IPO/takeover issued share capital of the second defendant could not be ascertained (see italicised portion above at [6]). This, according to the plaintiff, supported the interpretation that the termination fee was applicable where such termination took place before the defendants had given notice of IPO Activation.

9 Further, the plaintiff argued that the reference to Success Fee in s 3 could only be read in relation to s 4(2) and did not extend to the entire s 4. Success Fee was not a defined term. Section 3 referred to s 4 (see Success Fee under s 3) only because s 3 dealt with the possibility of reaching a success event and was therefore linked to s 4(2), which sets out the conditions for receiving the Success Fee.

10 The plaintiff also argued that the *contra proferentum* rule did not apply because there was no doubt or ambiguity. In the plaintiff's view, their interpretation of s 4 was consistent with the commercial objectives of the Consultancy Agreement because it preserved the position that was originally intended under the CFO Agreement. Article 3.1 of the CFO Agreement stated as follows:

Shares:	Behringer hereby agrees to issue shares in BCL to Straits Advisors or its nominee equivalent to 0.37 per cent of the post IPO share capital of BCL for a total nominal sum of not more than US$100/- (the "Shares"). The Shares will be issued under the following circumstances: (i) When approval has been granted by a recognised stock exchange for the listing of BCL shares; … (ii) In the event of a takeover of BEHRINGER or all or substantially all of its business, all the Shares shall be issued on the offer becoming unconditional and, if applicable, the acquiror having secured more than 50 per cent of the issued share capital. In the event that BEHRINGER terminates the appointment (other than for just cause) of Dominic and/or Straits Advisors, prior to the conditions in (i) or (ii) above being satisfied, the Shares shall immediately be issued to Straits Advisors or its nominee for the total nominal sum of not more than US$100/-. [emphasis in original]

11 Since the terms of the Previous Agreements entitled the plaintiff to the Shares if the defendants had terminated its appointment prematurely, it would have been commercially sensible for the same arrangement to be in place for the Consultancy Agreement.

12 The defendants argued that the Consultancy Agreement envisaged two distinct regimes: one regime before the IPO Activation notice is issued (the "pre-IPO Activation" stage) and the other regime after the same is issued by the defendants (the "post-IPO Activation" stage). Further, s 4 was incorporated into s 3 and was applicable only post-IPO Activation, since s 3 stated "Success Fee: See section 4 below".

13 The defendants also argued that the purpose of the plaintiff's services was to help the second defendant achieve either an IPO or takeover. They also relied on the fact that the success fee was to be measured in relation to the second defendant's post IPO or post takeover share capital. Further, the defendants also argued that their interpretation was commercially sensible. The success fee involved was a hefty reward to recognise DA's effort to bring about a successful event and was included to protect the plaintiff from being deprived of the success fee if he was terminated when the second defendant was on the brink of an IPO or takeover (which would have been after DA had expended much time and effort assisting the defendants with such). It would not be commercially sensible for the plaintiff to obtain a windfall if no success event had crystallised. The defendants further argued that any ambiguity with respect to s 4 had to, applying the *contra proferentem* rule, be interpreted in its favour.

The law on interpretation of contracts

14 The applicable canons of interpretation were stated by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 to be as follows (at [131]):

> 131 As for the exact interpretation that should be assigned to the provisions of the contract, the court will draw upon all the usual canons and techniques of contractual interpretation (for an overview thereof, see *Lewison* … at ch 7) in arriving at it, for instance, the *contra proferentum* rule, the rule that specific provisions will be given greater weight than general provisions, *etc*. It will undoubtedly be beneficial to the business and legal communities if we set out how these canons of construction relate to the contextual approach that is to be adopted under proviso (*f*) to s 94. To this end, we find the following summary of principles in *McMeel* … at paras 1.124 to 1.133 helpful and endorse its application in Singapore (it should be noted that *McMeel* uses the terms "interpretation" and "construction" interchangeably in the passage below):
>
> > *The aim of construction*
> >
> > First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.
> >
> > *The objective principle*
> >
> > Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader. [See in this regard the earlier discussion at [125]–[127] above].
> >
> > *The holistic or 'whole contract' approach*
> >
> > Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.
> >
> > *The contextual dimension*
> >
> > Fourthly, the exercise in construction is informed by the *surrounding circumstances* or *external context*. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal*, *regulatory*, *and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.
> >
> > *Business purpose*
> >
> > Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.
> >
> > …
> >
> > *Avoiding unreasonable results*

> Eighthly, a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.
>
> *Specially negotiated terms*
>
> Ninthly, a specially agreed provision should override an inconsistent standard provision which has not been individually negotiated.
>
> *Generally provisions versus precise provisions*
>
> Tenthly, a more precise or detailed provision should override an inconsistent general or widely expressed provision.
>
> Needless to say, the above principles are only a guide and are by no means exhaustive; they also have to be read in the light of the observations which we made earlier. In arriving at the final interpretation to be placed on a contract, the court must bear in mind the limits represented by ss 94–96 of the Evidence Act … The court may also be aided by ss 97–99 of the Evidence Act … We should add finally that, as stated in *Mitchell* … at p 148:
>
> > [T]he courts must remain mindful of the fact that in the end, commercial parties should have as much control over interpretative method as they do over other terms of the contract.
>
> In this regard, the potential impact of what are commonly called "entire agreement clauses" should be noted (see *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [25] and [41]).
>
> [emphasis in original]

14 To summarise, in interpreting a contract, the court should look at the contract objectively and ascertain the meaning which a reasonable person would adopt. In so doing, the court should adopt a holistic approach with the emphasis being on the document as a whole, while taking the relevant background and the commercial objectives into account. Applying the above principles to the Consultancy Agreement, I now consider whether the plaintiff was entitled to the Shares upon termination before IPO Activation notice was given.

15 The main thrust of the plaintiff's arguments was that the words "with immediate effect" in s 4 meant that this section was intended to be a standalone section (that was distinct from s 3) as the words indicated that s 4 became operative immediately. I note that the words "with immediate effect" were similarly used in the preamble of the Consultancy Agreement as follows:

> With reference to the paragraph 3.1 entitled "Bonus" in the CFO Agreement, *with immediate effect*, the annual performance bonus in respect of the services of Mr Dominic Andrla for 2006 is fixed at S$85,000. [emphasis added]

16 For convenience, I set out s 4(1) of the Consultancy Agreement again:

> (1) We refer to the paragraph entitled 'Shares' in section 2 of the Release Letter, and 3.1 of the CFO Agreement and paragraphs 1 to 3 of the Side Letter referred to above. *It is agreed, with immediate effect, as follows* … [emphasis added]

17 Comparing the preamble with s 4(1), it is apparent that the words "with immediate effect" followed references made in the Consultancy Agreement to specific sections of the Previous

Agreements. The above two examples were the only instances in which reference had been made to specific sections of the Previous Agreements in the Consultancy Agreement. Objectively, it seemed that the words "with immediate effect" were used to emphasise that the Consultancy Agreement would supersede the Previous Agreements from the date of the Consultancy Agreement. I would also observe that had the plaintiff intended for s 4 to be of general applicability (as it contended), it would have used words stronger and more direct than "with immediate effect" to indicate so. Therefore, the words "with immediate effect" did not support the plaintiff's argument that it was included to show that s 4 was to be distinct from s 3.

18 I further note that s 3 (under Success Fee) refers to s 4 generally and not a specific part thereof. In my view, a reasonable reader would interpret this to mean that s 4 was applicable only in relation to s 3, especially since the words "with immediate effect" did not have the effect of making s 4 distinct. There was nothing else in s 4 which indicated that the section was distinct from s 3 or that s 4(3) would operate pre-IPO Activation.

19 In my view, the plaintiff's reliance on the italicised portion of s 4(6) of the Consultancy Agreement at [6] above did not assist its case. Section 4(6) of the Consultancy Agreement provided a mechanism for determining the number of shares to be issued in the event the second defendant's post-IPO or post-takeover issued share capital cannot be ascertained. Section 4(6) would therefore cover the situation whereby the plaintiff was terminated after IPO Activation, but before approval for listing or an unconditional takeover offer was obtained. However, s 4(6) did not say anything pertaining to termination before IPO Activation. Section 4(6) would not be otiose if the plaintiff's interpretation was not adopted; neither were there any words in s 4(6) which suggested that the plaintiff's interpretation was correct. Therefore, in my view, there is nothing in s 4(6) that supported the plaintiff's claims.

20 Having construed the terms of the Consultancy Agreement, I now turn to consider the commercial objectives of the Consultancy Agreement. The Previous Agreements contemplated that the Shares would be issued once the defendants had terminated the plaintiff's services. It could be argued that the parties had intended for the same arrangement (with respect to the termination fee) to continue. However, the regime contemplated under the Previous Agreements was different from that in the Consultancy Agreement. The Previous Agreements contemplated only one phase, during which DA was to be actively involved. Under the CFO Agreement, while DA was allowed to continue to be employed as a director elsewhere (but only under limited circumstances), he was to spend the "majority of his time" working as the second defendant's CFO. In addition, the CFO Agreement provided that the plaintiff was entitled to monthly payments of $28,333 for DA's services. Comparing the CFO Agreement and the Consultancy Agreement, it is clear that DA's level of involvement in the second defendant's pre-IPO Activation was much lower. From having to spend at least a majority of his working time, under the Consultancy Agreement, DA only had to spend at most two working days a month working for the defendants and could attend to business matters not relating to the defendants. After the Consultancy Agreement came into being, the defendants had appointed a new CFO to replace DA. Indeed the plaintiff's reduced involvement was reflected in the monthly payments payable under the Consultancy Agreement, which was less than 30% of what was payable under the Previous Agreements. In my view, the plaintiff therefore could not rely on the termination fee structure in the Previous Agreements as the arrangements contemplated in the Previous Agreements were very different from that contemplated under the Consultancy Agreement. Objectively, it would be unlikely for the parties (especially the defendants) to have agreed for the plaintiff to receive the second defendant's shares if the plaintiff's services were terminated at a stage where its involvement was minimal. It was not commercially sensible for the defendants to have agreed to issue the Shares (which were worth a large sum) at a time when the parties had negotiated for the plaintiff's role in the defendants to be reduced due to uncertainty as to whether the second defendant would proceed

with its IPO.

21 Therefore, taking a holistic approach towards interpreting the Consultancy Agreement and considering the relevant commercial objectives, I conclude that s 4(3) was not applicable where termination had taken place pre-IPO Activation.

Conclusion

22 For the above reasons, I would uphold the AR's decision and determine the question raised above (at [1]) in the affirmative. Unless there is any reason to order otherwise (in which case I will hear counsel on the question of costs), costs of this appeal will follow the outcome, *ie* the plaintiff is ordered to pay costs to the defendant on the standard scale to be taxed unless agreed.

[note: 1] Respondent's Case at [58]