IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 88

Suit No 1076 of 2014

Between

S. Pacific Resources Ltd

… Plaintiff

And

Tomolugen Holdings Ltd

… Defendant

GROUNDS OF DECISION

[Contract] — [Contractual terms]

[Contract] — [Consideration]

S. Pacific Resources Ltd
v
Tomolugen Holdings Ltd

[2016] SGHC 88

High Court — Suit No 1076 of 2014 (Registrar's Appeal No 150 of 2015)
Chua Lee Ming JC
30 December 2015

10 May 2016

Chua Lee Ming JC:

1 On 17 November 2014, judgment in default of appearance was entered against the defendant for the sum of $12.5m, interest and costs. On 12 February 2015, the defendant applied to set aside the judgment. On 12 May 2015, an Assistant Registrar ("the AR") set aside the judgment. The plaintiff appealed and on 30 December 2015, I allowed the appeal and restored the default judgment against the defendant. The defendant has appealed against my decision.

The undisputed facts

2 Pursuant to a Share Sale and Put Option Agreement dated 16 September 2011 between the plaintiff and the defendant ("the Agreement"), the plaintiff purchased 2.9 million shares in Auzminerals Resource Group Limited ("AMRG") from the defendant for S$12.5m. The purchase was

completed in five tranches between 16 September 2011 and 13 November 2011.

3 AMRG is a company incorporated in Singapore dealing in the business of mining and mineral resource development in Queensland, Australia. The defendant and its wholly-owned subsidiary, Lionsgate Holdings Pte Ltd, were the majority shareholders in AMRG. The defendant used the proceeds from the sale of the 2.9 million shares to the plaintiff to fund AMRG's operational expenses.

4 Pursuant to clause 2B of the Agreement, the defendant granted the plaintiff a put option to require the defendant to purchase the 2.9 million shares from the plaintiff at S$12.5m ("the Put Option"). The Put Option was exercisable only if certain events ("the Trigger Events") did not take place "on or before 31 December 2012".

5 To avoid confusion, in these grounds of decision, I shall use the following terms as defined in the Agreement:

(a) "Sale Shares" – these refer to the 2.9 million shares sold by the defendant to the plaintiff (recital (C) of the Agreement);

(b) "Option Shares" – these refer to the shares which the plaintiff could require the defendant to purchase by exercising the Put Option (recital (D) of the Agreement).

6 Under the Agreement, the Put Option would expire if it was not exercised within the "Option Period". As originally defined, the Option Period was a period of six months "commencing on the date falling twelve (12) calendar months from the Sale Completion Date". The Sale Completion Date

was 13 November 2011. Under the original definition, the Option Period would start on 13 November 2012. However, when read with clause 2B (see [4] above) it was clear that, effectively, the Option Period was from 1 January 2013 to 13 May 2013.

7 The plaintiff requested that the Option Period be extended and pursuant to an amendment agreement dated 7 March 2013 ("the Amendment Agreement"), the Option Period was amended to mean:

> any date on or after the date falling twelve (12) calendar months from the Sale Completion Date.

The amendment effectively meant that the Put Option had no expiry date, although it could be exercised only after 31 December 2012 (due to clause 2B).

8 As none of the Trigger Events took place by 31 December 2012, the Put Option became exercisable. On 5 August 2014, the plaintiff exercised the Put Option in respect of the Option Shares and served notice in writing on the defendant as required under the Agreement. The defendant defaulted by failing to complete the purchase of the Option Shares from the plaintiff; hence the claim by the plaintiff in this action.

The defence

9 The appeal before me proceeded on the basis that the default judgment was a regular judgment. Thus, it was incumbent upon the defendant to "establish a *prima facie* defence in the sense of showing that there are triable or arguable issues": *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60].

10 Subsequent to the default judgment being set aside by the AR, the defendant filed its defence. The defence contained the following averments:

> (a) That the Amendment Agreement was not supported by consideration and therefore was not binding on the defendant. Accordingly, the Put Option expired after 13 May 2013 and the plaintiff's exercise of the Put Option on 5 August 2014 was not valid.
>
> (b) That the plaintiff's exercise of the Put Option was subject to the conditions precedent contained in clause 3A of the Agreement. As at least one of the conditions precedent was not fulfilled, the plaintiff's exercise of the Put Option was not valid.

11 The affidavits filed on behalf of the defendant in support of the application to set aside the default judgment raised several issues in relation to the defence, including forgery, fraud and non-compliance with *all* the conditions precedent in clause 3A of the Agreement. However, it appeared that at the hearing before the AR, the defendant argued only one issue, *ie*, whether the condition precedent in clause 3A(b) had been met. Before me, the defendant argued both defences set out in the defence.

Whether the Amendment Agreement was supported by consideration

12 Clause 9 of the Agreement provided that any period mentioned in the Agreement could be extended by mutual agreement between the parties. The Amendment Agreement extended the "Option Period" by removing the expiry date.

13 The plaintiff submitted that the Amendment Agreement was enforceable as it had been made pursuant to clause 9 of the Agreement. There

was no doubt that the parties had entered into the Amendment Agreement with the expectation and the intention that each party will abide by it whether or not the Amendment Agreement was supported by consideration. However, the doctrine of consideration required the Amendment Agreement to be supported by consideration; otherwise, it will not be binding. In my view, the present case is an example of how the doctrine of consideration sits uncomfortably with commercial expectations.

14 The issue is not new. It has been said that, where variations of contracts are concerned, dispensing with the doctrine of consideration will bring the law in line with commercial expectations and promote certainty: Lee Pey Woan, "Consideration" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 4.059–4.060. The desirability of reforming the law of consideration has also been acknowledged by Singapore courts: *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2014 Reissue) at para 80.081. However, the doctrine of consideration remains an established part of the law in Singapore: *Gay Choon Eng v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [117].

15 That said, the modern approach in contract law is for courts to be more ready to find the existence of consideration: *Woo Kah Wai and another v Chew Ai Hua Sandra and another appeal* [2014] 4 SLR 166 at [97], citing *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 and *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594.

16 In my view, the Amendment Agreement (or more specifically, the defendant's promise to extend the Option Period) was supported by

consideration. It is trite that consideration may take the form of detriment to the promisee (*ie*, the plaintiff) or benefit to the promisor (*ie*, the defendant). The Amendment Agreement extended the Option Period indefinitely. There was no detriment to the plaintiff since the extension of the Option Period benefited him. However, in my view, there was a benefit to the defendant.

17 At the time that the Amendment Agreement was entered into, the Option Period as originally defined had not yet expired. This meant that if the Option Period was not extended, the plaintiff would have had to decide whether to exercise the Put Option by 13 May 2013 or lose the Put Option. If the plaintiff exercised the Put Option, completion of the sale of the Option Shares would have had to take place within 30 days and the defendant would have had to pay the plaintiff $12.5m on completion. In my view, the extension of the Option Period benefited the defendant as it reduced the risk that the plaintiff would exercise the Put Option by 13 May 2013, and consequently the risk that the defendant would have to pay the plaintiff $12.5m within 30 days thereafter. It will be recalled that the defendant had used the proceeds of $12.5m from the sale of the Sale Shares to the plaintiff to fund AMRG's operational expenses. It did not matter that the plaintiff might still have exercised the Put Option by 13 May 2013 notwithstanding the amendment; the increased probability that it would not have done so was sufficient. It is settled law that the court does not concern itself with the adequacy of consideration.

Whether the condition precedent in clause 3A(b) was applicable

18 The defendant submitted that the condition precedent in clause 3A(b) of the Agreement had not been fulfilled. Clause 3A(b) provided as follows:

> 3. CONDITIONS PRECEDENT
>
> A. The parties agree that the completion is conditional upon the following conditions being satisfied not later than the Sale Completion Date hereof:-
>
> …
>
> (b) a board resolution of [the plaintiff] approving the transactions contemplated in this Agreement, such resolution not having been varied or revoked on the Sale Completion Date or on the Option Completion Date, as relevant;

19 The defendant argued that clause 3A(b) required the plaintiff to produce a new board resolution for the completion of the sale of the Option Shares. The defendant's argument rested on the fact that clause 3A(b) contained the words "or on the Option Completion Date, as relevant". It was not in dispute that no new resolution was produced by the plaintiff for this purpose.

20 The plaintiff submitted that clause 3A(b) provided for a condition precedent to the *completion of the plaintiff's purchase of the Sale Shares*, and that it merely required that the resolution produced for this purpose should not have been varied or revoked on or before the Option Completion Date.

21 The plaintiff also referred me to clause 5A(a) which dealt with completion of the plaintiff's purchase of the Sale Shares. Clause 5A(a) was titled "Sale Completion" and provided as follows:

> Subject to the satisfaction or waiver (as the case may be) *of the conditions in Clause 3*, on each Sale Completion Date, completion of the sale and purchase of the relevant Sale Shares shall take place at the office of the Company … [emphasis added]

22 In contrast, clause 5B, which was titled "Option Completion", provided as follows:

> (a) Subject as hereinafter provided, completion of the sale and purchase of the Option Shares pursuant to an Exercise shall take place at the office of the Company …
>
> (b) On completion:
>
> (i) the [plaintiff] shall deliver to the [defendant] duly executed transfer(s), in favour of the [defendant] or as the [defendant] may direct, in respect of the Option Shares to the [defendant] under this Agreement together with the share certificate(s) relating to such Option Shares together with a certified extract of the resolution of the board of directors of the Company resolving to register the transfer of the Option Shares to [the defendant];
>
> (ii) the [defendant] shall pay to the [plaintiff] the Specified Price for the Option Shares.

23 The plaintiff submitted that unlike clause 5A, clause 5B was not subject to the conditions in clause 3. It was not part of the defendant's case that clause 5B(b)(i) had not been complied with.

24 The defendant argued that clause 5B had to be read together with clause 3A. I disagreed with the defendant. As the plaintiff submitted, both clauses 3A and 5B were clear.

25 In my view, it was clear that clause 3A(b) applied to the completion of the plaintiff's purchase of the Sale Shares, and that it was not intended to and did not apply to the completion of the defendant's purchase of the Option Shares. First, clause 3A required the conditions set out within to be satisfied "not later than the Sale Completion Date". The Agreement defined "Sale Completion Date" to mean the "date on which the sale and purchase of the *Sale Shares* is to be completed *pursuant to [Clause 5A]*" [emphasis added]. As seen earlier, clause 5A dealt with the completion of the Sale Shares, not the

Option Shares. Second, in terms of timing, clause 3A could not possibly apply to the completion of the Option Shares if the deadline for compliance was the completion of the Sale Shares. Third, clause 5B (which dealt with the completion of the Option Shares) was not expressed to be subject to clause 3, unlike clause 5A.

26 In conclusion, clause 3A(b) did not require the plaintiff to produce a new board resolution for the completion of the defendant's purchase of the Option Shares. The only requirement was that the resolution already produced under clause 3A(b) for the completion of the Sale Shares should not have been varied or revoked on the Option Completion Date. There was no evidence that the board resolution produced under clause 3A(b) had been varied or revoked. In any event, as stated at [19] above, the defendant's case was that a new resolution was required, not that the earlier board resolution had been varied or revoked.

27 I would add that at the hearing before me, the counsel for the defendant sought an adjournment for him to take instructions on an affidavit filed on behalf of the plaintiff on 28 December 2015, and to file a reply if necessary. That affidavit exhibited the plaintiff's resolution that was required pursuant to clause 3A(b) of the Agreement for the completion of the Sale Shares. I refused the application for an adjournment on the basis that the relevance of the resolution was not clear at that time and that I would reconsider the application (and adjourn the appeal, if necessary) if my decision on the appeal were to hinge on the resolution. As it turned out, the resolution was not relevant since the issue was whether clause 3A(b) required a new resolution by the plaintiff for the completion of the Option Shares. It was not in dispute that the plaintiff's purchase of the Sale Shares had been properly completed.

Conclusion

28 In conclusion, I was of the view that the defendant had not shown any triable or arguable issues. Accordingly, I allowed the appeal and restored the default judgment against the defendant. I also ordered the defendant to pay the costs of the appeal fixed at $5000 plus disbursements.

Chua Lee Ming
Judicial Commissioner

Yow Choon Seng (David Chong Law Corporation) for the plaintiff;
Ramachandran Doraisamy Raghunath and Lee Weiming Andrew
(Selvam LLC) for the defendant.