Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and Another and Another Application [2009] SGCA 55

Case Number	: CA 59/2009, SUM 4678/2009
Decision Date	: 18 November 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Chenthil Kumar Kumarasingam (Drew & Napier LLC) for the appellant; Gregory Vijayendran and Sung Jingyin (Rajah & Tann LLP) for the respondents
Parties	: Straits Advisors Pte Ltd — Behringer Holdings (Pte) Ltd; Behringer Corporation Limited

Civil Procedure

Contract

18 November 2009 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the judge ("the Judge") in *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd* [2009] SGHC 86 ("the Judgment").

Background and issue on appeal

2 The appellant, Straits Advisors Pte Ltd ("Straits Advisors"), is a corporate advisory firm. The first respondent, Behringer Holdings (Pte) Ltd ("BH"), is a local company in the business of general wholesale trading. The second respondent, Behringer Corporation Limited ("BCL"), is a foreign company and the sole shareholder of BH. For convenience, the respondents will be referred to collectively as "Behringer".

3 In contemplation of an initial public offering ("IPO") of BCL's shares, Behringer contracted with Straits Advisors for the provision of consultancy services and the secondment of personnel. The first set of contracts ("the Original Agreements"), all dated 11 January 2006, comprised:

(a) a letter releasing one Dominic Andrla ("DA") from Straits Advisors in order for him to act as Behringer's group chief financial officer ("Group CFO") ("the Release Letter");

(b) an employment agreement, governing DA's duties as Behringer's Group CFO and the remuneration payable by Behringer to Straits Advisors for the services of DA ("the Employment Agreement");

(c) a letter clarifying the details in the Release Letter ("the Side Letter"); and

(d) a secondment agreement, providing for the secondment of one Ricardo Villanueva to Behringer to act as head of Corporate Finance ("the Secondment Agreement").

The first three contracts (*ie*, all except the Secondment Agreement) were wholly and expressly

superseded by a consultancy agreement dated 10 November 2006 ("the Consultancy Agreement").

4 The material part of section 4 of the Consultancy Agreement (around which the present proceedings centre) provided as follows:[note: 1]

> **4 Success Fee**
>
> 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:-
>
> 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.
>
> *In the event that Behringer terminates the appointment of [DA] and/or Straits Advisors (other than for gross negligence or willful 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/-*
>
> ...
>
> 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]

5 In its action against Behringer (*viz*, Suit No 487 of 2008 ("Suit 487")), Straits Advisors claimed for shares (defined in the second paragraph of section 4 as set out in the preceding paragraph) to be issued pursuant to the paragraph of section 4 italicised above ("the Shares"), alleging in this regard that the appointment of DA and/or Straits Advisors had been terminated by Behringer without any gross negligence or wilful default on their part.

6 In response, Behringer took out an application for construction of the Consultancy Agreement pursuant to O 14 r 12 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) to determine whether or not, on the true construction of the Consultancy Agreement, section 4 was only operative upon "IPO Activation", an event defined in section 3 of the Consultancy Agreement as one month after Straits

Advisors receives written notification from Behringer of BCL's decision to proceed with a plan to list on a recognised stock exchange, or of an anticipated takeover action of BCL. The parties are agreed that no IPO Activation has ever occurred. Therefore, if the question presented is answered in the affirmative, Straits Advisors will necessarily fail in its action against Behringer.

7 In the proceedings below, Behringer succeeded before both the assistant registrar and the Judge, who both answered the question in the affirmative. Straits Advisors now appeals to this court. At the hearing of the appeal, Straits Advisors also applied via Summons No 4678 of 2009 for leave to raise further arguments. Since the further arguments sought to be raised were not materially different from those already raised in Straits Advisors' written submissions, we allowed the application.

Our decision

8 Before addressing the arguments raised on appeal, we must first emphasise that contractual terms must be construed in the light of the *context* in which they were drafted (see generally the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029). Narrow and technical constructions which are inconsistent with the whole scheme of a given contract and the circumstances in which it was concluded must be eschewed. We would also add that a contextual understanding is especially important in the instant case, where the relevant agreements can, with respect, hardly be said to be models of precise – let alone exemplary – draftsmanship.

9 It is therefore of the first importance to ascertain what the specific context was at the time the parties entered into the Original Agreements. It would also be equally (if not more) important to ascertain whether, and (if so) to what extent, *that* context continued when the parties entered into the Consultancy Agreement, which, as mentioned, superseded three of the Original Agreements.

10 In our view, it is clear that the parties were actively contemplating an IPO of BCL's shares when they entered into the Original Agreements on 11 January 2006; there would have been no reason for Behringer to have contracted with Straits Advisors for the latter's services at all, let alone at the handsome rates that it did, if the situation were otherwise. By contrast, and crucially for the purposes of the present appeal, the parties' initial enthusiasm had demonstrably cooled by the time of the Consultancy Agreement, section 2 of which put the contractual arrangements in so far as DA and Straits Advisors were concerned on a dormant footing, with significantly fewer duties as well as lower rates of monetary remuneration than under the Original Agreements. Section 3 of the same proceeded to provide that the dormant stage would end upon IPO Activation (a mechanism introduced by the Consultancy Agreement), at which time DA and Straits Advisors would be required to perform more intensive duties, for which Straits Advisors would be remunerated at *the same rate of fees as it enjoyed under the Original Agreements*, which, as mentioned, were concluded in a climate where the parties were actively contemplating an IPO of BCL's shares.

11 In light of this change in context, evidenced by the clear and undisputed terms of the Consultancy Agreement, it is evident that, when the parties signed the Consultancy Agreement, they intended to delay the work and remuneration scheme envisaged under the Original Agreements until Behringer chose to issue a written notice to trigger IPO Activation (see [6] above). Put another way, it is highly improbable that the parties intended that the Shares, by any measure the most valuable remuneration payable to Straits Advisors, to be issuable precisely at the point in time when they had expressly provided that the IPO plans were to be placed on a *dormant* footing.

12 This contextual interpretation is fortified by the text and structure of the Consultancy Agreement itself. Section 4, which governs the issuance of the Shares, is first referred at the end of

section 3 (in the form of the statement, "Success Fee: See section 4 below") which, as mentioned, governs, *inter alia*, the remuneration payable to Straits Advisors *after* IPO Activation. Section 4 itself is entitled "Success Fee", a characterisation which would be rendered nonsensical if the Shares were to be issuable when an IPO Activation had not even occurred. Finally, the provision in section 4 for the Shares to be issued if Behringer *terminates* the Consultancy Agreement "other than for gross negligence or willful default" before a successful IPO (reproduced in italics at [4] above), is placed *immediately after* the provisions in section 4(i) and (ii) which provide for the Shares to be issued upon a successful IPO. Viewed in this context, the termination provision is clearly intended to give effect to the parties' continued intention that Behringer should not terminate the Consultancy Agreement in bad faith and deprive Straits Advisors of its entitlement to the Shares. What the termination provision *does not* do is to stipulate when Straits' Advisors entitlement to the Shares *arises*; that is controlled by the rest of section 4, as well as section 3, whose language and purpose indicate beyond doubt that the Shares were issuable only after IPO Activation. Put positively, the termination provision is a natural and integral part of the whole "Success Fee" regime, which in turn comes into operation only upon IPO Activation. We are therefore unable to agree with the attempt of counsel for Straits Advisors, Mr Chenthil Kumar Kumarasingam, to interpret the termination provision in isolation from its overall context, such that Straits Advisors would be entitled to the Shares upon termination of the Consultancy Agreement regardless of the status of Behringer's IPO plans.

13 The context in which the Consultancy Agreement was concluded also undermines Mr Kumarasingam's main argument in his oral submissions before us, *viz*, that it was improbable for Straits Advisors to have given up its allegedly accrued right to the Shares under the Original Agreements. In advancing this argument, Mr Kumarasingam relied on the Judge's observation (at [20] of the Judgment) that the Original Agreements "contemplated that the Shares would be issued once [Behringer] had terminated [Straits Advisors'] services". Mr Kumarasingam interpreted this observation to mean that Straits Advisors had an "accrued right" to the Shares under the Original Agreements upon termination of its services. With respect, we do not think that Mr Kumarasingam is right, as a question of approach, to interpret the Consultancy Agreement in light of the *Original Agreements*, without taking into account the fact (as mentioned in [10] above) that the context in which the Original Agreements had been signed had *changed* by the time the parties signed the Consultancy Agreement, which was expressly intended "to super[s]ede the [Original] Agreements ... in their entirety".[note: 2]

14 We are also unable to see how it can, in any event, be argued that Straits Advisors had an "accrued right" to be issued the Shares under the *Original Agreements* to begin with. Certainly, we do not understand Mr Kumarasingam to be arguing that the Shares were already issuable under the Original Agreements. Indeed, there had been no successful IPO event, and it was not contended that Behringer had terminated *the Original Agreements* "other than for just cause", which would have triggered the issuance of the Shares under Art 3.1 of the Employment Agreement as well as under section 2 of the Release Letter. We are also unable to agree with Mr Kumarasingam if he is arguing that Straits Advisors' right to be issued the Shares upon wrongful termination under the Original Agreements is somehow preserved notwithstanding the conclusion of the Consultancy Agreement. As mentioned, this contradicts the text and context of the Consultancy Agreement (see [10]–[13] above), both of which point to the fact that an IPO Activation was required before Straits Advisors could even raise the issue as to the entitlement to the Shares. We are therefore unable to agree with Mr Kumarasingam's interpretation of the observation in the Judgment below (quoted at [13] above) as standing for the proposition that Straits Advisors had any "accrued right" to be issued the Shares.

15 In this regard, we also note the fact that the very definition of the Shares in section 4 – "0.37 per cent of the post IPO (or post takeover, as applicable) share capital of BCL" – contemplates their being issuable *only after* IPO Activation. The alternative definition in section 4 (reproduced in

the last sentence at [4] above) – "not be less than 0.37 per cent of the *present* share capital of BCL" – is similarly stated to apply "[i]n the event that *post* IPO or *post* takeover share capital cannot be ascertained" [emphasis added]. We note further that the definitions are far more specific than the vague statement at the beginning of section 4 (reproduced above at [4]) that, "It is agreed, with immediate effect, as follows...", which in our view is an unfortunate flourish by the draftsman, and ought not to have any substantive meaning as such attributed to it.

16 Further, even assuming *arguendo* that there was an "accrued right" under the Original Agreements, we do not think it improbable that Straits Advisors had, in fact, given up such a right when it entered into the Consultancy Agreement. Here, we note that, under the Original Agreements, DA was *released* by Straits Advisors and *seconded* to Behringer, and (in addition) was subject to significant non-competition and fidelity obligations (see generally Arts 5 and 6 of the Employment Agreement). This arrangement would, if the Original Agreements had continued to operate, have prevented DA from being deployed to other, more profitable, ventures. Such an arrangement would have made good commercial sense when the chances of the Shares being issuable upon a successful IPO were high. However, it would have made poor commercial sense if Behringer was no longer actively pursuing an IPO, as was the case by the time the Consultancy Agreement was signed. Therefore, there was, in our view, a clear commercial advantage to be gained by Straits Advisors when it entered into the Consultancy Agreement, under which DA was bound to work for Behringer for no more than 2 days a month, and Behringer, on its part acknowledged that DA "will spend part of his time attending to other business matters not relating to Behringer and is agreeable to the same"[note: 3] (section 2 of the Consultancy Agreement). Consequently, it is, in our view, not improbable that Straits Advisors would have given up its "accrued right" to the Shares under the Original Agreements, if indeed there was such a right to begin with (a proposition which we have rejected above at [14]).

17 Finally, we would like to address Mr Kumarasingam's use of Behringer's subsequent conduct in respect of the Secondment Agreement (which, as noted at [3] above, was not superseded by the Consultancy Agreement) as an aid to the construction of the Consultancy Agreement. The subsequent conduct that Mr Kumarasingam relied on was Behringer's termination of the Secondment Agreement on 24 April 2007 (*ie*, after the Consultancy Agreement was concluded). In particular, Mr Kumarasingam relied on the fact that Behringer agreed, in the termination agreement dated 24 April 2007 ("the Termination Agreement"), "to pay to Straits Advisors an amount of US$75,000 for termination *as per the terms of the Secondment Agreement*" [emphasis added].[note: 4] Mr Kumarasingam argues that this constituted an acknowledgement on Behringer's part that it remained bound to pay the remuneration agreed under the Secondment Agreement, and (by an apparently logical extension) to issue the Shares under the Consultancy Agreement, even though there was no IPO Activation. We cannot, with respect, accept this argument. The Termination Agreement was a fresh agreement which, by its own terms, "super[s]ede[d] the Secondment Agreement in its entirety".[note: 5] It cannot therefore consistently be construed as an acknowledgement of existing liability, which was the meaning that Mr Kumarasingam sought to attribute to it. In the circumstances, since the Termination Agreement is not even relevant conduct in the first place, we do not propose to discuss whether it is otherwise admissible subsequent conduct (in law) for the purposes of interpreting the Consultancy Agreement.

18 For the above reasons, we are of the view that the question presented should be answered in the affirmative and thus we find in favour of Behringer. Before concluding, we observe, for completeness (and since we pressed Mr Gregory Vijayendran, counsel for Behringer, on the point during oral submissions), that while it is Behringer alone who decides whether or not to issue a written notice to trigger IPO Activation, thereby triggering sections 3 and 4 of the Consultancy Agreement, it must act in good faith and for proper purposes in arriving at its decision. It cannot, for example,

refuse to issue a written notice to trigger IPO Activation with respect to Straits Advisors in order to avoid issuing the Shares, while at the same time pursuing its IPO ambitions with another set of advisors instead. But, as Mr Vijayendran correctly pointed out, Straits Advisors is not claiming in its action against Behringer that Behringer had engaged in any such conduct.

Conclusion

19 For the reasons set out above, we dismiss the appeal with costs, with the necessary consequence that Straits Advisors fails in its action against Behringer (*viz*, Suit 487) as well. The usual consequential orders apply.

[note: 1]Appellant's Core Bundle ("ACB") Vol II at pp 24–25.

[note: 2]ACB Vol II at p 20.

[note: 3]ACB Vol II at p 22.

[note: 4]ACB Vol II at p 64.

[note: 5]ACB Vol II at p 64.