Lateral Capital Group Pte Ltd *v* ChemOne Holdings Pte Ltd
[2013] SGHC 143

Case Number : Suit No 265 of 2012

Decision Date : 23 July 2013

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Gan Kam Yuin and Cheng Geok Lin Angelyn (Bih Li & Lee) for the plaintiff; Ling Daw Hoang Philip and Ang Hou Fu (Wong Tan & Molly Lim LLC) for the defendant.

Parties : Lateral Capital Group Pte Ltd — ChemOne Holdings Pte Ltd

Contract

23 July 2013

Extempore Judgment.

Belinda Ang Saw Ean J:

1 This action concerns the engagement of the plaintiff, Lateral Capital Group Pte Ltd, ("LCG") to provide finance advisory services to the defendant, ChemOne Holdings Pte Ltd ("ChemOne"), who was the originator and developer of a US$2.4 billion aromatic chemicals plant on Jurong Island ("the JAC project"). After the parties closed their respective case, I heard submissions on four issues:

(1) The preliminary question of law framed by the parties involves a construction of the Engagement Letter dated 7 December 2009 and Scope of Work attached thereto based on a set of agreed facts (ref. Annex A).

(2) The quantum of LCG's fee claim. Is the fee payable US$768,042, or US$470,387.50? This issue only arises if the answer to issue (1) is "no'.

(3) LCG's claim of S$40,000. This claim is advanced on alternative bases: (a) an alleged agreement between LCG and ChemOne to retain LCG to continue to provide financial advisory services, through Robin Leigh, on a monthly retainer fee of S$10,000 (see para 13 of the Statement of Claim); or (b) a *quantum meruit* claim for work done by LCG at ChemOne's request from September to December 2011 (see para 16 of the Statement of Claim).

(4) ChemOne's counterclaim to recover S$30,000 paid to LCG under a mistake of fact (see para 11 of the Defence).

2 I should make clear that the first issue is based on an agreed set of facts. On the other hand, the court's determination of the other three issues is based on evidence before the court.

Issue 1: The preliminary question

3 Counsel for both sides put before this court a preliminary question and a set of agreed facts. As I understand it, the agreed facts were what the parties were comfortable with. Needless to say the wording of the preliminary question is thus constrained by the limited number of agreed facts. Parties have accepted such a constraint and I note counsel's repeated affirmation to stay within the

confines of the agreed facts. I have to be guided by experienced counsel who took time to draft the preliminary question recognising at the same time that an answer from this court would resolve one main issue in dispute thereby saving time and costs for the parties. The parties worded the preliminary question as follows:

> Whether, on the true construction of the Engagement Letter dated 7 December 2009 and the Scope of Work attached thereto, the Plaintiff's entitlement to be paid a Fee (as calculated in the Scope of Work) by the Defendants was conditional upon the Plaintiffs showing that the negotiations that the Plaintiffs led with the potential investors resulted in the potential investors closing the JAC Sub-Debt Transaction with JAC.

4 I shall first refer to two salient agreed facts (Fact 27 and Fact 31). Parties agreed at Fact 27 that LCG had "led and managed discussions and negotiations with the Abu Dhabi Investment Council ("ADIC") and others on multiple proposed transactions possibly including BP as a co-investor in respect of the JAC Sub Debt". At Fact 31, parties agreed that the "discussions on the transaction with Standard Chartered, BP and Icon which achieved legal closing were led by [ChemOne's] internal team". LCG came into the picture after BP was prepared to provide financing of at least US$70m. See Fact 13. Counsel for both sides accepted that LCG came into the picture to close the gap of US$100 million.

5 Fact 23 is on the fee payable. This particular agreed fact reproduces the terms of section 2 of the Engagement Letter read with the Scope of Work. It states that LCG is "entitled to receive a Fee in respect of each Transaction on which [LCG] or either of the Secondees works and which achieves legal closing expressed as a percentage of the value of the relevant Transaction, where 'value' means in respect of

> - a debt transaction, the total funds committed to be advanced, irrespective of how much is drawn and when…"

The rest of the text is on the percentage of the fee structure.

6 The parties' opposing position on the construction of the Engagement Letter and Scope of Work is discernible from Fact 27 and Fact 31. ChemOne accepts that LCG led and managed discussions and negotiations with ADIC in respect of the JAC Sub Debt but ADIC did not sign the JAC Sub Debt with Jurong Aromatic Corporation Pte Ltd ("JAC"). On this point, counsel for ChemOne, Mr Philip Ling, argues that LCG's entitlement to "the Fee" spelled out in Fact 23 is contingent on two requirements, namely LCG must not only have led discussions and negotiations with ADIC (which ChemOne accepts) but that there must be legal closure of the JAC Sub Debt with ADIC. On the agreed facts, there was no legal closure with ADIC. Mr Ling argues that the Fee is success-based and he relies on the following wording under the heading "Fees" in the Scope of Work in support of his contention:

> LCG is "entitled to receive a Fee in respect of each Transaction on which [LCG] or either of the Secondees works and which achieves legal closing".

7 Additionally, Mr Ling points out that Robin Leigh, the secondee of LCG, was separately paid a monthly retainer of S$10,000 for allocating only 50% of his time to the performance of his obligations under the Engagement Letter. This suggested that LCG was obliged to support and coordinate negotiations, but would be remunerated for additional work based on the legal closing of the transaction that it was working on as well. That is to say the success-based component of LCG's entitlement to the Fee.

8 Counsel for LCG, Ms Gan, disagrees with Mr Ling's construction of the Engagement Letter and Scope of Work for LCG's entitlement to the Fee. Ms Gan's case is that on a true construction of the Engagement Letter and Scope of Work, LCG's entitlement to the Fee is *not* dependent on the two conditions stipulated in the preliminary question. In short, the Fee was not contingent upon LCG 'leading' the team that actually achieved legal closure with the lender of the JAC Sub Debt.

9 Ms Gan's first argument is that there is *no express* stipulation in the Engagement Letter and the Scope of Work that requires LCG to lead negotiations or actually achieve the result of legal closing in order to be entitled to the Fee. On the contrary, LCG's principal responsibilities included co-ordination and support of negotiations (Fact 20). In the Scope of Work, it was agreed that LCG was not required to find investors (Fact 22).

10 Ms Gan's second argument is that LCG's Fee would be reduced by a percentage which represented the degree of completion (Fact 23). Hence, it showed that the parties were aware that differing amounts of work had to be done for the various transactions (as listed in percentages on PCB 11, Jurong Aromatics Corporation Sub. Debt to Jurong Aromatics IPO), and LCG would be paid a fee for the work done, but this is not necessarily dependent on LCG as the entity that actually achieved legal closing in any of these transactions in order for it to be entitled to claim the Fee.

11 The parties' focus is essentially on two conditions. It would be misleading to merely concentrate on one condition without the other. Reading PCB 10-11 "ACTIVITIES" and "FEES" together, I agree with Ms Gan's first argument. Mr Ling does not dispute that the word "led" does not appear in the Engagement Letter and Scope of Work. Besides the absence of such express stipulation, no such provision falls to be made by implication. In relation to her second argument, where it can be said that LCG had, for instance, provided coordination and support to the internal team, or had itself been involved to the extent of its principal responsibilities per the Scope of Work with one of the investors of the sub debt transaction like BP (Fact 13 read with Fact 27), a Fee would be payable as coming within the situation contemplated by Fact 23 in that LCG had assisted on a JAC sub debt transaction involving Standard Chartered Bank, BP and Icon that achieved legal closing. Important to the preliminary question are LCG's principal responsibilities which included a role to coordinate and support transaction negotiations, and Ms Gan has stated this many times. Notably, the Fee earned would not be affected by non-compliance with any of the condition precedents in the JAC Sub Debt agreement. This is clear from the paragraph appearing on PCB 12, and it reads: "The applicable Fee will still be payable if the investors or relevant counterparties are fully committed under legal binding documentation but the relevant Transaction fails to close for any reason beyond the control [of LCG]".

12 In conclusion the answer to the preliminary question is that LCG's entitlement to be paid a Fee as calculated in the Scope of Work is *not* conditional upon LCG showing that the negotiations that LCG led with the potential investors resulted in the potential investors closing the JAC Sub-Debt Transaction with JAC.

Issue 2: Quantum of the Fee

13 I now come to the quantum of the Fee payable. LCG contends that the Fee payable is US$768,042, while ChemOne argues that it should be US$470,387.50 (calculated without capitalised interest).

14 The operative provision in the Scope of Work reads as follows:

> It is therefore understood that LCG shall be entitled to receive a Fee in respect of each

> Transaction … expressed as a percentage of the value of the relevant Transaction, where 'value' means, in respect of;
>
> - a debt transaction, *the total funds committed to be advanced, irrespective of how much is drawn and when*, and shall include any form of offtake contract ...
>
> [emphasis added]

15 The debate is over the true meaning of the phrase "total funds committed to be advanced". According to Robin Leigh, the figure of US$768,042 was, *inter alia*, derived from his reading of cl 9.3(a) of the JAC Subordinated Facilities Agreement ("SFA") dated 13 April 2011. Clause 9.3(a) of the SFA states that interest accrued during the capitalisation period will be treated as part of the principal amount. LCG therefore argues that the phrase "total funds committed to be advanced" in the Scope of Work means the original principal amount *plus* capitalised interest. In contrast, ChemOne argues that the Fee should be based on the "principal loan" of US$171,050,000 only. According to Mr Ling, this is confirmed by the qualifying provision which makes clear that the amount of fees payable is to be based on what is the amount that can be drawn by and disbursed to the borrower.

16 The parties have based the fee payable to LCG as a percentage of the total funds committed to be advanced in a *future* agreement—in this case, the SFA.

17 Clause 9.1 of the SFA speaks in terms of a Loan accruing interest. Clause 9.3(a) states that during the capitalisation period, any interest accrued on a Loan will be capitalised and added to the outstanding principal amount of that Loan and will be subsequently treated for all purposes under the SFA as part of the principal amount of that Loan. The SFA defines a "Loan" as either a Facility A Loan or a Facility B Loan. Facility A Loan is defined as a loan made or to be made under Facility A or the principal amount outstanding for the time being of that loan as increased by an amount of interest accrued or other fees or amounts payable and in each case capitalised under cl 9.3. Facility B Loan is similarly defined *mutatis mutandis*.

18 However, the words "total funds committed to be advanced" must be read together with the qualifying words that follow, "irrespective of how much is drawn and when". In addition, the word "committed" must be examined in the light of the definition of "Commitment" in the SFA as well as the distinction that appears in the SFA between a "Loan" and "Facility". "Commitment" means Facility A Commitments and Facility B Commitments. In the SFA, "Facility" means "Facility A" or "Facility B". By cl 2.1, Facility A is the term loan facility in the aggregate amount equal to the Total Facility A Commitments, being US$65,402,000. Facility B is the term loan facility in the aggregate amount equal to the Total Facility B Commitments, being US$105,648,000. The effect of cl 2.1 is that "the Total Commitments" the original lenders make to the borrower is the aggregate of Total Facility A Commitments and Total Facility B Commitments, being US$171,050,000. Hence, the total amount of US$171,050,000 represents "the total funds committed to be advanced" within the meaning of the Scope of Work.

19 It follows that while it is correct to say that loans made under the Facilities may include capitalised interest, it is *not* correct to say that the amount available for draw down under the Facilities includes capitalised interest—since cl 2.1 of the SFA clearly states that only US$171,050,000 is to be made available to the borrower to draw down. In my view the natural and ordinary meaning of the phrase "total funds committed to be advanced" refers to the amount available to the borrower to draw down (*viz*, US$171,050,000), *excluding* capitalised interest.

20 In conclusion, the computation of the Fee payable should not include capitalised interest under

cl 9.3(a).

Issue 3: LCG's claim of S$40,000 for work done from September to December 2011

21 Robin Leigh's Secondee Contract was terminated with effect from 6 May 2011. It is common ground that he continued to provide ChemOne with financial advisory services until December 2011. ChemOne paid S$10,000 monthly to LCG from June to August 2011, *ie*, a total of S$30,000. LCG claims that it is entitled to receive a further sum of S$40,000 as ChemOne had not paid LCG the monthly retainer for the months of September to December 2011. LCG's pleaded case is that the unpaid retainer is due either on a contractual or *quantum meruit* basis.

22 I find that LCG has not proven that there was an agreement between LCG and ChemOne for ChemOne to pay S$10,000 per month to LCG after the Secondee Contract was terminated. First, there is not enough certainty of terms to render any agreement enforceable. There is no evidence on the duration of the agreement. It is also unclear as to when this agreement was legally concluded. Second, if an agreement is to be ascertained from contemporaneous documents, the only relevant document appears to be a ChemOne internal e-mail dated 18 May 2011. This e-mail does not assist LCG as it contradicts its pleaded case. In fact the e-mail suggests that Robin Leigh was being temporarily retained on a month to month basis. Third, Robin Leigh's own email to ChemOne dated 12 October 2011 again contradicts the pleaded case of an agreement between LCG and ChemOne. He wrote that he was entitled to S$10,000 monthly retainer based on "*an extension of the existing agreement (as provided for in that agreement)* and based on a spoken agreement and trust" [emphasis added]. The only agreement with an express provision for extension was the Secondee Contract. While LCG insisted that the email also referred to a "spoken agreement", this in my view merely alluded to the oral, and not written, form of the agreed extension.

23 In conclusion, the pleaded case of an agreement between LCG and ChemOne fails.

24 As for the *quantum meruit* claim, LCG asserts that it should be paid a reasonable fee of S$10,000 per month for financial advisory services from September to December 2011. However, this claim must fail too. The evidence is that at the relevant time, the Engagement Letter read with the Scope of Work was still in force. To all intents and purposes, the financial advisory services rendered in September to December 2011 were made pursuant to the Engagement Letter. In light of the Engagement Letter, there is no place legally for a *quantum meruit* claim to arise. There is no provision of a monthly retainer fee for financial advisory services in the Engagement Letter. The only fee provision is in the Scope of Work which is not the same as the monthly retainer. Legally, it is not permissible to imply a promise that is inconsistent with the express terms of the contract (see *Chitty on Contracts* (Sweet & Maxwell, 31st Ed, 2012) at para 31-146, earlier edition cited with approval in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386 at [30]).

25 In conclusion, LCG's claim for a *quantum meruit* fails.

Issue 4: ChemOne's counterclaim for S$30,000 paid under a mistake of fact

26 I now come to ChemOne's counterclaim for money had and received. Even though there is no agreement between LCG and ChemOne as pleaded, the evidence points to the fact that the S$ 30,000 was not paid under a mistake of fact. It is clear from the ChemOne internal e-mail of 18 May 2011 that Robin Leigh was to be temporarily retained on a month to month basis. Nothing seriously turns on the fact that the payments were made to LCG from June to August 2011 and not to Robin Leigh. More importantly, Robin Leigh is not saying that he has not received the S$30,000.

27 Consequently, ChemOne's counterclaim for S$30,000 fails.

Conclusion

28 Given the court's determination on the four issues, the parties are to confer on the directions and orders to be made in this action. I will hear parties on costs.