Shenyin Wangou-APS Management Pte ltd (formerly known as Shanghai International-APS Management Private Limited) and Another v Commerzbank (South-East Asia) Ltd
[2001] SGHC 260

Case Number	: Suit 1335/1999
Decision Date	: 05 September 2001
Tribunal/Court	: High Court
Coram	: Choo Han Teck JC
Counsel Name(s)	: Fong Kwok Jen (Fong Partners & Associates) for the plaintiffs; Patrick Ang and Andrew Ang (Rajah & Tann) for the defendants
Parties	: Shenyin Wangou-APS Management Pte ltd (formerly known as Shanghai International-APS Management Private Limited); Another — Commerzbank (South-East Asia) Ltd

Contract – Contractual terms – Implied terms – Necessity – Whether necessary to imply term allowing payment in alternative currency where Malaysian ringgit unavailable in off-shore market

Contract – Contractual terms – Interpretation of clause – Whether exchange control restrictions amount to 'politically related measures' allowing defendants to suspend payment plaintiffs in Malaysian ringgit on maturity of latter's ringgit-denominated off-shore account

Contract – Frustration – Imposition of exchange control restrictions – Eradication of off-shore market in Malaysian ringgit – Impossibility of performance of contract on maturity date – Whether contract frustrated – When frustration arises

Judgment:

Cur Adv Vult

1. The first plaintiffs are an incorporated company carrying on the business of fund managers in Singapore. The second plaintiffs are an investment holding company incorporated in the British Virgin Islands and are clients of the first plaintiffs. The defendants are an off-shore bank in Singapore whose banking activities (reflecting the descriptive term of "off-shore" bank) include the taking of foreign currency deposits for non-residents. The business dealings in question in this case is a typical example. The two plaintiffs who are non-residents of Malaysia deposited Malaysian ringgit ("MYR") in off-shore accounts with the defendants. The total sum of US$162,401.79 deposited by the plaintiffs is not disputed by the defendants. The deposits were made at various times, but for convenience the parties agreed to assume that the maturity date for the total sum was 3 September 1998.

Off-Shore Accounts

2. It is not in dispute that money deposits are normally deposited in accounts in their respective countries of origin. Such accounts are known as on-shore accounts. An off-shore account, on the other hand, is an account opened with and operated by a bank (the off-shore bank) to carry out money transactions on behalf of the customer outside the country of origin of the currency in question. In 1997 the Malaysian government imposed exchange control restrictions. This led to a scarcity of MYR. As a consequence, off-shore banks were offering substantially higher interest rates for the deposits of MYR in off-shore accounts. The plaintiffs legitimately took advantage of this and placed deposits of MYR with the defendants. At the same time, they entered into forward contracts to sell MYR to the Public Bank in Malaysia. In the absence of any default or intervening events, the plaintiffs expected to make some profit from this back-to-back exercise. The off-shore bank on its part, would utilize the deposits of foreign currencies in the foreign exchange market; in the buying

and selling of the currencies on the sage principle of "buying low and selling high". Invariably, the banks adopt various counter-measures to minimise the effects of drastic swings in the prices of the currencies due, for example, to currency devaluation or some other phenomenon. Thus, foreign exchange markets and off-shore deposits are capable of spewing generous profits in a process that is laced with risks that commensurating with profits.

The Claim And Defence

3. The nature and basis of the plaintiffs claim are straightforward. They say that when their MYR deposits matured on 3 September 1998 they were entitled to withdraw them in MYR. Payment was, however, made by the defendants on 8 September, not in MYR but in US dollars at the rate of MYR4.00 to US$1.00. The plaintiffs had their own commitments to fulfil, namely to pay various sums in ringgits to the Public Bank in Kuala Lumpur. They were, therefore, obliged to purchase MYR in Malaysia to make good that commitment. Unfortunately for them the exchange rate they paid was MYR3.80 to US$1.00. Their claim in this suit was the difference of 0.20 cents between the rate used by the defendants in payment to the plaintiffs and the rate the plaintiffs had to pay on the re-conversion in Malaysia. This difference amounted to the sum of US$162,401.79 the sum claimed by the plaintiffs in their statement of claim.

4. The defendants resisted the claim with the alternative defences of payment under an express, alternatively, an implied term of the contract, and frustration of the contract. By their first defence (the express term defence), the defendants averred that by cl 12 of the contract with the plaintiffs the defendants were not obliged to effect payment in any specific currency if that currency was not available. Under their second alternative defence (the implied term defence), they averred that the plaintiffs knew or ought to have known that if the defendants were unable to deliver MYR off-shore they were entitled to deliver payment in an alternative currency, in this case, in United States dollars. Thirdly, (the frustration defence) they averred that by reason of exchange control measures instituted by the Malaysian government on 1 September 1998 and subsequently modified, the contract of deposit between the parties was frustrated in law.

The Exchange Control Measures

5. It was common knowledge that in 1998 the MYR as well as some other Asian currencies were subject to substantial capital outflows. If that continued unchecked, the foreign exchange reserves of the country in question would be greatly reduced and, correspondingly, the pressure to devalue that currency would have increased. It is not unusual for governments of an embattled currency to impose exchange control restrictions in its efforts to stabilize the situation. In the present case, however, the exchange control measures of the Malaysian government imposed on 1 September 1998 was described as "sudden, draconian, wide-sweeping in timing and effect, and unprecedented" by Prof. Heinz Riehl an expert witness for the defendants. I refer to "measures" in the plural form because various announcements and clarifications were shortly and subsequently issued thereafter in response to enquiries from the frenzied market institutions. According to the defendants and their experts, the clarifications and subsequent announcements only exacerbated the confusion prevailing in the financial markets after the initial announcement declared by Bank Negara with the heading: "Measures To Regain Monetary Independence". The relevant regulation was stipulated as follows:

> "Approval is required for transfer of funds between External Accounts. Transfer to residents accounts are permitted only until 30 September 1998; thereafter, approval is required. Withdrawal of ringgit from External Accounts require approval, except for the purchase of ringgit assets."

It is true that economic measures are not uncommon, but the term "economic measures" is a general term and is of little significance in itself. It is the specific measures themselves that is vital. For example, a government may declare that as an economic measure it will suspend the import of potatoes. That may have little or no impact on private contracts unless the parties, for example, are potato traders, and even so, much depends on what the measures to be implemented were.

6. An External Account strictly speaking, is a MYR account opened by a non-resident in Malaysia with on-shore banks. However, in practice, MYR accounts opened by non-residents with off-shore banks are also regarded as "External Accounts" in the present context because they are affected in the same way by the exchange control notifications; that is because the off-shore bank will have to open an External Account, principally for settlement purposes, with an on-shore bank.

7. On 2 September, Bank Negara announced that the exchange rate for MYR was fixed at MYR3.80 to US$1.00. A further statement of the same date announced that: "All settlement for transactions executed prior 1st September 1998 will only be allowed to be effected until 4th September 1998. Authorised dealers must verify evidences of all transactions before effecting the settlement on behalf of their customers" sic. A third notification was issued also within the day, stating:

> "All foreign exchange contracts, contracts for the sale and purchase of securities entered into prior to 1300 hours on 1 September 1998, transfers between External Accounts for settlement of such contracts would be allowed until 9 September 1998. For contracts that are due for settlement after 9 September 1998, Bank Negara Malaysia would be introducing mechanisms to ensure that the ability of market players to fulfil their Ringgit obligations would not be jeopardised following the implementation of the new rules. Bank Negara Malaysia will issue another circular on this matter by the end of the week".

It transpired that no further circulars were issued but a further clarification was made. In this clarification dated 4 September the relevant portion was set out under item 7 as follows:

> "All settlement for forex transaction and contracts for the sales of securities executed prior to 1300 hours on 1 September 1998 will only be allowed to be effected until 9 September 1998. Authorised dealers must verify evidences before effecting settlement on behalf of their customers. Settlement through transfers between external accounts will be allowed during this period."

Effect And Response Generally

8. The purpose of the 1 September regulation was to put an end to the activities of "currency speculators". I am using this term in parenthesis because it is difficult to define, more so identify, a currency speculator; but it was the term in use at that time as a general reference to people and institutions whose market activities were destabilizing the MYR. Because of the difficulty of definition and identification, the term could be applied indiscriminately to all, including the plaintiffs and defendants alike. The initial announcement on 1 September 1998 put an end to the liberty of foreign exchange market participants to settle their accounts on maturity date because the mechanism of transfer - the External Account - was broken and cannot be used without the approval of Bank Negara. Mr. Fong Kwok Jen, counsel for the plaintiffs, constantly reminded the defendants' witnesses that the Malaysian measures on 1 September did not irremediably prevent transfers between External Accounts. Each time the answer was, either directly or to the effect, that free transferability of funds was crucial in the viability of the off-shore foreign money market. The mere requirement that approval has to be sought destroys the certitude of settlement essential to the market. Prof. Heinz Riehl said

that it was not a case of changing the rules of the ball game. He emphasized that the measures of 1 September removed the ball altogether. The gush of anxiety from committed players may have led to the subsequent clarifications from Bank Negara. The evidence of Prof. Riehl, Mr. Rolf Willi (another expert witness for the defendant and the then Managing Director of Treasury in the Dresdner Bank in South East Asia), and Mr. Foo Soo Liang the Senior Manager of the defendants were of the view that given the varying degrees and stages of commitments made by the off-shore banks, the announcements by Bank Negara made it impossible for the banks to settle their commitments as they mature. In the off-shore money market almost no single transaction stands by itself. Every transaction creates a cascade of other transactions or what the defendants describe as "inter-locking transactions". Thus Prof. Riehl deposed that the economic measures of September 1998 eliminated the off-shore market for MYR interest rates and US dollar v MYR exchange rates. The foreign exchange committees, traders, and institutions all over the world held emergency meetings to deal with the chaos from the destruction of the off-shore MYR market. (82-84 Riehl)

9. Mr. Fong summed up the three critical issues very neatly before me. First, whether there was an express term of the deposit contract between the plaintiffs and defendants that the defendants are "absolved from liability" to deliver MYR to the plaintiffs when MYR became subject to exchange control measures such as those imposed in September 1998. Secondly, whether there is an implied term to the effect that should the defendants be unable to deliver MYR off-shore, they are entitled to effect delivery in an alternative currency; in this case, in US dollar. Thirdly, whether the deposit contract was frustrated by the exchange control measures imposed by the Malaysian government in September 1998.

The Express Term

10. The express term in question was cl 12 of the Terms and Conditions issued by the defendants. The relevant portions namely 12(a), (b) and (c) are set out as follows:

> "12. (a) If the Bank concludes a transaction with the Customer (e.g. a forward exchange transaction), as a result of which it owes the Customer an amount of foreign currency, it shall meet its foreign-currency liability by means of a credit entry on the account of the Customer in this currency (foreign-currency account), unless an arrangement exists to the contrary.
>
> (b) Drawings on credit balances on foreign-currency accounts (e.g. by means of transfer orders to the debit of the foreign-currency balance) shall be handled directly or, with the involvement of intermediate offices, through banks in the native country of the currency, if the Bank is unable to execute them completely within its own institution.
>
> (c) The obligation of the Bank to meet a foreign-currency liability (para. 1) or to execute a drawing to the debit of a foreign-currency balance (para. 2) shall be suspended to the extent that and for such time as the Bank, on account of politically related measures or events in the country of this currency, is unable to draw in the currency in which the claims or the foreign-currency balance is denominated, or only to a limited degree. Nor shall the Bank, to the extent that and for such time as these measures or events last, be obliged to perform at another location outside the country of the currency, in another currency (including Singapore dollars) or by the procurement of cash. However, the obligation of the Bank to perform drawings to the debit of foreign-currency balances (para. 2) shall not be suspended if the Bank is able to execute them

completely within its own institution."

11. Clause 12 is straightforward. The main contention here is whether the Malaysian economic control measures of 1 September 1998 falls within the definition of the phrase "on account of politically related measures". I think that it does. In my view, the natural meaning to be given to this phrase, in particular, the word "political", must include any matter that pertains to policy or government. Such was the approach by McCullough J in R v Radio Authority, ex parte Bull [1969] QB 169. The economic control measures of 1 September 1998 were instituted by the Malaysian government in the interests of its national economy. In a business report admitted by the parties in the agreed bundle, the Malaysian Prime Minister stated to the effect that it was this government's objective to render the off-shore ringgit valueless through the imposition of the economic measures. Under such circumstances, I think that it is fair and natural to describe the economic control measures to be a politically related event or measure within the meaning of cl 12. On the basis of that clause alone the plaintiffs case would fail. The plaintiffs' counsel Mr. Fong submitted that cl 12(c) does not apply because "the defendants have no obligations save to repay Ringgit obligations save in Malaysia." However, I do not see this alleged term anywhere in the contract and there is no basis to imply such a term.

Implied Term

12. The defendants submit that the following terms should be implied in the contract:

> "(a) that the delivery of MYR depended on the continuing free and unimpeded operation of the off-shore market;
>
> (b) that in the event that MYR could not be delivered because the off-shore market for that currency had been eliminated or ceased to exist, an alternative currency could be delivered through the off-shore market; and
>
> (c) that the US$ was an acceptable alternative currency for that purpose."

The classic propositions as to when a court would imply a term into a contract are set out in an assembly of well known cases including The Moorcock (1889) 14 PD 64, and Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 with MacKinnon LJ's "officious bystander test", at p.227. Naturally, the more complex the term, the less likely it will be to cajole the officious bystander into the resounding "but of course" reply that is so essential to the application of that test. Consequently, there appears to be another test, sometimes referred to as an alternative test, based on the interests of "business efficacy". There are also distinguished authorities such as Lister v Romford Ice & Cold Storage Co Ltd [1957] 1 AER 125,133 and Liverpool City Council v Irwin & Anor[1977] AC 239, 254 which draw a distinction between implying a term on the basis of business efficacy and implying a term from the nature of the contract itself. And it will be seen from the opinion of Lord Bridge in Scally v Southern Health & Social Services Board [1992] 1 AC 294, 307 that the two forms are clearly separate and distinct. Finally, Chao Hick Tin JA in Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd [2001] 2 SLR 458 emphasized that "in considering the question of implied terms, it must be borne in mind that the touchstone is necessity and not merely reasonableness." Karthigesu JA in an earlier decision in Bethlehem Singapore Pte Ltd v Ler Hock Seng [1995] 1 SLR 1 was of the same view. I need not refer to the numerous other authorities on this point save to say that general point is that the courts do not imply a term merely because it is reasonable, but because the necessity of doing so was so obviously necessary.

13. Mr. Ang submitted on behalf of the defendants that the accounts of the plaintiffs with the

defendants were expressed in their respective contracts to be "multi-currency" and "various currency" accounts. As such, he submitted that this "is one factor in favour of an implied term that performance of the obligation to pay the currency obligation can be undertaken in an alternative acceptable currency."(sic) I am unable to agree with that. In the absence of evidence explaining what those words mean, the reference to "multi-currency" and "various currency" in such accounts must mean that the plaintiffs may deposit various currency in the one account. If there is any implied term it is probably more likely that one should imply that the payment should be in the same currency. In an ordinary case, when a depositor makes a foreign currency deposit he would expect to be repaid in that currency unless there is prior agreement to the contrary. I think that that would be the reasonable response of MacKinnon LJ's officious bystander. If the bank is permitted to pay out in a different currency the exchange rate must have been agree before hand otherwise disputes are likely to arise. The customer may also have personal reasons why he wants payment in the same currency; for example, he may, as in this case, have committed himself in a forward contract elsewhere. Therefore, I am of the view that the law and the facts do not sustain a defence based on the implied terms as pleaded.

Frustration Of Contract

14. I now come to the third and final defence, that is, frustration of the contract by reason of the Malaysian economic control measures of 1 September 1998. The doctrine of frustration of contract is a well-developed and matured principle. In its basic form the doctrine appears to arise by way of an implied term, but the inadequacy of this basis is neatly exposed by the "escaped tiger" illustration in Lord Sands' judgment in James Scott & Sons Ltd v Del Sel [1922] S.C. 592, 597. Lord Reid in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, 720 was equally emphatic that it would hardly be reasonable to imply a term into a milk contract that the milkman is not obliged to deliver milk in the event of an escaped tiger, or as he puts it, "tiger days excepted". The better approach, in my view, is to regard it as a question of construction. Lord Reid was of the view that "frustration depends, at least in most cases, not on adding an implied term, but on the true construction of the terms which are in the contract read in the light of the contract and of the relevant surrounding circumstances when the contract was made." Ibid, p.721. Lord Radcliffe gave a broad working definition in these general words: "frustration occurs whenever the law recognizes that without default on either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." p.729. He went on to emphasize that "it is not hardship or inconvenience or material loss itself which calls the principles of frustration into play". It is clear that the Law Lords preferred to keep the doctrine of frustration within very narrow limits, and I humbly believe that good sense requires that to be so.

15. In classic cases of frustration a specific article under contemplation by the contracting parties becomes unavailable through no fault of either party. Such cases are more conducive to the application of the doctrine than cases, for example, where a seller has promised to deliver general goods. In the latter situation, it will obviously be difficult for the seller to claim that his inability to deliver was due to an unexpected catastrophic destruction of the goods leading to a worldwide shortage, whether or not he was at fault. But all contracts turn on their own terms and circumstances. In this case, one of the unchallenged facts is that the money in questioned were deposited in MYR in an off-shore account with the defendant bank. It is not an ordinary deposit account. One of the unusual features of this case is that although the subject matter appears ostensibly as just a sum of money in Malaysian denomination, the truth, from the unchallenged evidence of the experts, is that the real subject matter is the MYR in the off-shore market - not MYR in Malaysia or MYR in a moneychanger's counter at Robinson Road. That being the case, the fact (unchallenged) established by the experts, is that the entire off-shore market for MYR was wiped out

by the announcement of the ECMs of 1 September 1998. I should point out that the "fact" of market destruction is well within the purview of Prof. Riehl and Mr. Rolf Willi. The evidence which I also accept is that the subsequent announcements increased the uncertainty rather than allay them. The one stark fact therefore, was that when the plaintiffs' deposits matured there were no MYR available for payment. That situation was brought about directly by the economic control measures of the Malaysian government in pursuing its legitimate national objective. The fall-out effect, however, affected parties like the plaintiffs and the defendants in this case, but the situation cannot be regarded as a fault attributable to either party to the contract, and in such circumstances, I am inclined to find that the contract was frustrated. I accept that this consequence came about as the end of a spectrum but the evidence so ably led by Prof. Riehl and Mr. Rolf Willi put it beyond doubt that if this was a question of degree, it could not have been any worse. Hence, this is not a case of a foreseeable risk come to pass by reason of a government action in which an off-shore currency becomes depleted and scarce but the complete eradication of the off-shore market in MYR at that time..

The Rate Fixed By the SFEMC

16. Having found as I do above, I ought for completeness, now consider whether the exchange rate of MYR 4.00 to one US$ a fair and reasonable rate. This rate was recommended by the Singapore Foreign Exchange Market Committee after consultation with the representatives of the major banks as well as the Monetary Authority of Singapore. It was not the plaintiffs' case that the recommendation was unfair, but that it resulted in a loss to them. As Mr. Ang pointed out, what one customer loses, another gains. The SFEMC intervened in order to re-stabilize the market, and its recommendation was based on the need to find a fair rate all-round. And consequently, the Committee in its wisdom concluded that the rate of MYR 4.00 to the US$ was fair. Individual redress for everyone adversely affected was obviously impossible. In the circumstances, the can be no question that the rate used by the defendants to settle the plaintiffs' accounts was correct.

17. For the reasons above, the plaintiffs' claim fails and is accordingly dismissed. I shall hear the question of costs at a later date if the parties are unable to agree between themselves.

- Sgd -

Choo Han Teck
Judicial Commissioner

Singapore, 5 September 2001.