Tembusu Growth Fund Ltd *v* Actatek, Inc and others
[2013] SGHCR 2

Case Number : Suit No 642 of 2012/D (Summons No 6148 of 2012/E)

Decision Date : 22 January 2013

Tribunal/Court : High Court

Coram : Jordan Tan AR

Counsel Name(s) : Daniel Chia Hsiung Wen and Chua Han Yuan, Kenneth (Stamford Law Corporation) for the plaintiff; Renganathan Nandakumar and Vidhi Didwania (RHTLaw Taylor Wessing LLP) for the defendant.

Parties : Tembusu Growth Fund Ltd — Actatek, Inc and others

Civil Procedure

22 January 2013 Judgment reserved.

Jordan Tan AR:

Introduction

1 The plaintiff, Tembusu Growth Fund Ltd ("Tembusu") filed this application under O 14 r 12(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed Sing) for the determination of certain issues which the plaintiff's counsel, Mr Daniel Chia ("Mr Chia"), says is dispositive of the claim vis-à-vis the 1st defendant, Actatek, Inc ("AI").

Background

2 The background facts as pleaded and stated in the affidavits of the parties are as follows. Tembusu is a venture capitalist and fund management company. AI provides identification management solutions through its various subsidiaries, one of which is the 3rd defendant, Actatek Pte Ltd. The 2nd defendant, Thomas Wan, is one of the founders and directors of AI. He oversees the strategic direction of AI's group of companies. The 4th and 5th defendants, Hectrix, Inc and Thomrose Holdings (BVI) Ltd respectively, are shareholders of AI. Paul Hung, a non-party who features in this dispute, is a director of AI.

3 Tembusu invested $1.5m in AI via a Convertible Loan Agreement dated 6 January 2012 ("the Agreement"). The purpose of the investments was to keep the AI group functioning as a going concern, to facilitate expansion and restructuring of the group and to ensure that it had sufficient funds to achieve its goal of being listed on the New Zealand Stock Exchange Alternative Market ("NZAX"). Clause 3.1(d)(ii) of the Agreement reads as follows:

> **3. CONDITIONS PRECEDENT**
>
> 3.1 The advancement of the Loan and the obligation of the Lender to subscribe for the Warrants is conditional upon the following conditions having been fulfilled:
>
> ...

(d) delivery to the Lender of the following

...

(ii) a detailed use of proceeds of the Loan and execution plan for the expansion of the borrower;
...

4 The Agreement also contained an entire agreement clause in the form of cl 14.1.

5 AI delivered to Tembusu a document in accordance with cl 3.1(d)(ii) ("the manner of use document"). The manner of use document reads as follows:

Use of Proceeds

Sales & Marketing Expenses	SGD 300k
R&D expenditure	SGD 300k
IPO	SGD 200k
Working Capital	SGD 900k
	SGD 1.5mil

6 This document was appended to the Agreement as an annexure. The parties agree that there is a calculation error in the total figure as the figures add up to $1.7m and not $1.5m.

Parties' position

7 Tembusu argues that it was a condition precedent of the Agreement that AI deliver the manner of use document stating a detailed use of the proceeds to Tembusu and that it was also a condition that AI not deviate from the use stated in that document. Tembusu asserts that in using the moneys to repay Thomas Wan and Paul Hung's salaries (which were structured in the manner of a debt to be repaid with interest) in January and March 2012 respectively, AI was in breach of contract.

8 AI argues that while it accepts that it was a condition precedent of the Agreement that it deliver such a document, there was no condition limiting the use of the proceeds to the use as stated in the document. It further argues that even if there was such a condition, it had not deviated from the uses as stated in the manner of use document.

The questions raised for determination

9 In the light of the divergent positions taken, Tembusu applied for an O 14 r 12 determination of the following issues:

(a) Whether there is an express or implied term in the Agreement that the proceeds from the loan would only be used in the following manner unless with the prior consent of Tembusu:

(i) Sales and Marketing Expenses;

(ii) R&D expenditure;

(iii) IPO related expenses;

(iv) Working capital.

(b) Whether there was an express or implied term that AI would ensure that its subsidiaries, to which the loan proceeds were disbursed to, would use the loan proceeds in a manner consistent with the manner of use as stated in the foregoing question.

(c) Whether use of the loan proceeds to pay the salaries of (i) Thomas Wan and/or (ii) Paul Hung is a breach of any express or implied term concerning the manner of use of the loan proceeds.

My decision

10 AI objected to the application on the ground that it was filed out of time and thus contrary to O 14 r 14 having been filed later than the prescribed period, *ie*, later than 28 days after the close of pleadings. Tembusu accepted that the application was filed out of time but sought an extension of time. I note that it was once thought that the prescribed period in which an O 14 r 12 application could be filed cannot be extended by the court or by the parties' consent (see *Singapore Civil Procedure* (Singapore: Sweet & Maxwell Asia, 2013) at para 14/14/1). But, this position has changed in the light of the Court of Appeal's decision that the court has the power to extend time for the filing of an O 14 r 12 application (see *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR(R) 540 ("*Obegi Melissa*") at [35]-[37]).

11 This objection was raised after the parties' were close to the completion of their substantive arguments. Having heard the substantive arguments, I took the view that the application being suitable for disposal by O 14 r 12 and one which I would grant, the granting of an extension of time is appropriate. This is so, as one of the key considerations militating against the granting of an extension of time is the further delay of the trial of the matter should the applicant be unsuccessful (see *Obegi Melissa* at [37]).

12 Turning now to the substance of the application, having heard the parties, I found that this was a matter suitable for determination by way of an O 14 r 12 application. With regard to the first and third question (stated at [9(a)] and [9(c)] above), I found that it was an implied condition of the Agreement that the proceeds be used only in accordance with AI's stated manner of use in the manner of use document and that the use of the loan proceeds to repay Thomas Wan and Paul Hung was a breach of that condition. It was unnecessary to answer the second question (stated at [9(b)] above) in the light of my decision.

Whether this application is suitable for a determination by way of O 14 r 12

13 The legislative history of O 14 r 12 has been comprehensively set out by Chong J in *ANB v ANF* [2011] 2 SLR 1 and need not be rehearsed. For present purposes, it will suffice to observe that issues of construction are capable of constituting an issue suitable for disposal under O 14 r 12 (see *Payna Chettiar v Maimoon bte Ismail & Ors* [1997] 1 SLR(R) 738 at [35]). The issues raised essentially concern the construction of a contract and are suitable to be determined.

14 I was initially concerned that in considering the relevant factual matrix relevant to construing the terms of the contract and in determining whether there had been a breach, I would have to decide factual issues which should be left for trial. However, it appeared that the negotiations leading

to the conclusion of the Agreement are almost entirely on email, as is largely the case for the circumstances concerning the alleged breach as well. These emails have been made available to the court. AI had sought to raise several factual matters and these I will address later. But, as a preliminary observation I should emphasise that although the court will be careful to ensure that in sanctioning the O 14 r 12 application it does not trample on the rights of a party to a full trial and to have all the factual issues ventilated, raising the ghost of possible but improbable factual controversies should not prevent the court from granting an O 14 r 12 determination.

15 Last, I found that the determination of the questions raised will dispose of the claim *vis-à-vis* AI. In the circumstances, I find that this application is suitable for disposal by way of O 14 r 12.

Whether it is a condition of the contract that AI conform to the uses stated in the document it had provided Tembusu

16 AI had argued that cl 3.1(d)(ii) (reproduced above at [3]) only required it to deliver to Tembusu the manner of use document and imposed no obligation on it to actually conform with the use as stated in that document. I agreed with AI that cl 3.1(d)(ii) imposed only an obligation to deliver the manner of use document and no more. However, I accept Tembusu's argument that it is nonetheless an *implied term* that AI would not deviate from the use as stated in that document. AI had argued that the existence of the entire agreement clause in the form of cl 14.1 precluded the finding of any implied terms. I disagree for the following reasons.

17 First, while it may be possible for an entire agreement clause to exclude implied terms, this would depend on the wording of the entire agreement clause. In this regard, Andrew Phang JA's observations in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 ("*Westcomb Securities*") are apposite:

> 31 However, we would also pause to observe that, even if there is no reference to implied terms in an entire agreement clause, it is arguable that the presence of such a clause in a contract would not, as a matter of general principle, exclude the implication of terms into that contract for several reasons. First, an implied term, by its *very nature* (as an *implied* term), would *not*, *ex hypothesi*, have been in the contemplation of the contracting parties to begin with when they entered into the contract. Secondly, if a term were implied on, so to speak, a "broader" basis "in law" (as opposed to on a "narrower" basis "in fact"), it would follow, *a fortiori*, that such a term would not have been in the contemplation of the parties for ... a term which is implied "in law" (*unlike* a term which is implied "in fact") is *not* premised on the presumed intention of the contracting parties as such. Thirdly, it is clearly established law that a term *cannot* be implied if it is *inconsistent with* an *express* term of the contract concerned. This principle is, of course, both logical as well as commonsensical. Finally, as pointed out by Nigel Teare QC (sitting as a deputy judge of the English High Court) in *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2004] 1 All ER (Comm) 435 at [27]:
>
> > It [is] ... arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by [an] entire agreement clause *because* it could be said that such a term is to be found *in* the document or documents forming part of the contract. [emphasis added]
>
> 32 That having been said, we are *not* prepared to state that an entire agreement clause can *never* exclude the implication of terms into a contract. However, for an entire agreement clause to have this effect, it would need to *express* such effect in *clear and unambiguous language*. Further, if the effect of the language used renders the entire agreement clause, in *substance*, an

exception clause, the clause would be subject to both the relevant common law constraints on exclusion clauses as well as the UCTA (reference may also be made to Elisabeth Peden & J W Carter, "Entire Agreement - and Similar - Clauses" (2006) 22 JCL 1 at 8-9; *cf* (not surprisingly, perhaps) a similar approach towards the utilisation of the factual matrix of a contract as an interpretative tool where the contract contains an entire agreement clause ...). However, this was clearly not the situation in the present appeal.

[emphasis in original]

18 Let us now consider cl 14.1 which reads as follows:

Entire Agreement. This Agreement embodies all the terms and conditions agreed to by the Parties and supersedes and cancels all previous representations, warranties, agreements and understandings between the Parties with respect to subject matter herein whether such be written or oral.

19 In my view, cl 14.1 does not contain "clear and unambiguous language" so as to exclude implied terms. Clause 14 may be contrasted with the clause the court had to consider in *Westcomb Securities* which reads as follows:

Entire Understanding

This Agreement embodies the entire understanding of the parties and there are no provisions, terms, conditions or obligations, oral or written, expressed *or implied*, other than those contained herein. All obligations of the parties to each other under previous agreements ([if] any) are hereby released, but without prejudice to any rights which have already accrued to either party.

[emphasis in original]

20 In contrast to this clause, cl 14.1 in the present case does not make express reference to implied terms and in the absence of any such reference or language to equal effect, it is difficult to conclude that the parties intended by way of cl 14.1 to exclude implied terms.

21 In addition, the manner of use document was not just any document separate from the Agreement. It was appended as an annexure to the Agreement *prior* to it being signed. The manner of use document is a part of the Agreement and it is in my view, not merely *descriptive* but, by virtue of an implied term, *prescriptive* of the way in which the proceeds are to be used. Such a term would be implied by virtue of the "officious bystander" test (see Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para 06.064-06.065 for the genealogy of this test and its relationship with the "business efficacy" test).

22 In my view, an officious bystander witnessing the negotiations would have received, upon asking whether AI was bound to use the proceeds in accordance with the manner of use document, the response from the parties that of course AI was so bound. This is so for the following reasons.

23 Tembusu is a venture capitalist and had no interest in AI other than to sustain and even grow AI's business until it is successfully listed on the NZAX following which it would be able to convert its loan into shares in the company. It follows that Tembusu was not merely extending a loan with a view to obtaining repayment and benefit in the form of interest so that it matters little what AI does with the money so long as it repays the loan. In fact, in the words of Thomas Wan, who controls AI and its group of companies:

> The purpose of [Tembusu's] investments in AI was inter alia to help keep the [AI] Group functioning as a going concern, to facilitate expansion and restructuring of the Group, and to ensure the Group had sufficient funds to achieve its commercial goal of getting listed on the NZAX.

24 Tembusu had a direct interest in the use of the proceeds and in fact considered it so important that the delivery of the manner of use document was made a condition precedent of the Agreement (see cl 3.3.1(d)(ii) reproduced above at [3]). Tembusu also had a direct interest in the business of AI and included in the Agreement in the form of cl 6, a right to veto and appoint directors in AI.

25 More importantly, the parties had directed their minds to the question of the repayment of loans to Thomas Wan and Paul Hung. In this regard, the following email correspondence which was exchanged at a very late stage in the negotiations, on 22 December 2011, barely two weeks before the conclusion of the Agreement, is pertinent:

> [Email from Thomas Wan to Mahim A Chellappa ("Mahim") and Lee Renhui of Tembusu]
>
> Hi Mahim,
>
> I have revised the term sheet and put back the terms of converting the loans owe to me and Paul prior to Dec 31, 2010. Please comment.
>
> ...
>
> [Reply from Mahim to Thomas Wan]
>
> Hi Thomas,
>
> Thanks – we will review. I do not understand why you are commenting on the Term Sheet, when we are already on the Definitive Legal Agreement.
>
> Also, what is the basis for the penny warrants (5% and 3% of shareholdings) to you and Paul? This was never discussed.
>
> [Reply from Thomas Wan to Mahim]
>
> We can have it in a separate in a different agreement. We can discuss this later today.
>
> [Reply from Mahim to Thomas Wan]
>
> Hi Thomas,
>
> Feel free to call [me] this afternoon. However, we will not be able to agree to issue you and Paul penny warrants unless we are issued the same.
>
> I suggest we move forward with the financing and stop adding new material items so we can proceed. We cannot agree to anything that would dilute us, such as this.
>
> [Reply from Thomas Wan to Mahim]
>
> Mahim,

We did discuss. The reason I then choose not to mention in the term sheet is because of this. I know there will be a lot of discussions.

[Reply from Mahim to Thomas]

Thomas,

I'm afraid we may not be interested in this investment if we continue on this path. Please decide what you want to do. We will not agree to this and we did not ever discuss it.

[Further email from Andy Lim, a principal of Tembusu, to Thomas Wan]

Dear Thomas

I hope we can proceed to complete this investment based on what we agreed earlier. *As for yr loan to company, perhaps we can find ways to have it repaid within 6-9 months or at IPO.*

[emphasis added]

26 The parties then proceeded to conclude the Agreement. From the above correspondence at the final stage of negotiations, it is clear that Thomas Wan sought for a mechanism to be included to repay him and Paul Hung but was rebuffed.

27 It is clear then, from the context, in particular the roles of the parties, the negotiations which almost immediately preceded the completion of the Agreement, coupled with cl 3.1(d)(ii), that there was an implied term in addition to the obligation imposed on AI to deliver the manner of use document by way of an express term (cl 3.1(d)(ii)), that AI would use the proceeds only in the manner stipulated in the manner of use document.

28 For these reasons, I answer the first question raised by Tembusu in the affirmative in that there is an implied term in the Agreement that the proceeds of the loan will be used in the manner stated in the manner of use document. If AI wanted to use the proceeds for a different purpose, it was free to obtain Tembusu's consent to vary the contract in that regard.

29 As for the third question, I find that AI was in breach of the implied term in using part of the proceeds to repay Thomas Wan and Paul Hung. AI had sought to argue that the use of the proceeds to repay AI's debts falls under the category of "working capital" as stated in the manner of use document. It is clear, however, that it does not. The email correspondence (reproduced above at [25]) makes it clear that the parties did not intend for any of the proceeds to be used to repay Thomas Wan and Paul Hung and that the discussion of the issue of repayment was to be deferred to after the IPO. Furthermore, AI was unable to offer any good explanation for its email of 7 May 2012 from Daniel Wong of AI to Mahim which did not deny the accusation of a breach of contract and instead sought to make good that breach. Daniel Wong's email stated as follows:

Hi Mahim,

ACTAtek's Holding company could repay the USD265k back to ACTAtek and that USD265 will be settled by conversion of NZ shares at the same valuation as Tom&Paul converting their loan. If so, we need to inform [the accountants] immediately. Kindly advise.

30 Tembusu argued that this offer of repayment of the proceeds is tantamount to an admission.

Whether it amounts to an *admission* per se or not, it demonstrates the inherent implausibility of AI's case that its use of the money falls under the category of "working capital".

31 More relevant perhaps, is that in the financial statement for the first quarter of 2012 sent by Daniel Wong of AI, the category "working capital" is stated as encapsulating "inventories", "trade and other receivables" and trade and other payables". In the same financial statement, the repayment of debts is stated as an altogether different category.

32 In a nutshell, the email correspondence at the negotiations stage which showed that the parties had never envisaged that the proceeds would be used to repay the debts, AI's response to make good the breach instead of denying it and AI's own categorisation of the repayment of debts as being separate from "working capital" in its financial statement demonstrate the inherent implausibility of its present case that the repayment of the debts falls within the category of "working capital" as stated in the manner of use document.

33 Finally, I will deal with AI's reliance on an expert report it had commissioned which stated that the proceeds were not actually used to repay the debt. As Tembusu had pointed out, this expert report was not admitted by way of an affidavit made by the expert. Instead, it was exhibited as part of Thomas Wan's affidavit. This expert report by Stone Forest Corporate Advisory also contained the following caveats:

> 2.3 A list of documents that were provided to us for this review is enclosed as **Appendix 2**. We have relied on the documents provided and have not independently verified the information therein with any third parties.
>
> ...
>
> 3.4 The contents and findings set out in this report are based on information made available to us up to the date of this report. We have no undertaken any due diligence or audit of the information provided to us. As such, we do not warrant, whether expressly or impliedly, the accuracy, veracity and / or completeness of such facts and information provided to us and relied upon in our report.
>
> [emphasis in original]

34 Quite apart from the way in which the report had been admitted, the caveats rendered this report unhelpful as it was based on unverified information and the authors eschew any responsibility for the accuracy, veracity and/or completeness of the facts and information relied upon in the report.

35 As I had observed above (at [14]), the court will be cautious not to summarily determine a matter in which there are real factual controversies which should be left to trial, but at the same time, it will not be spooked by the mere ghost of factual controversies into refusing to make an O 14 r 12 determination.

36 For the foregoing reasons, with regard to the third question, I found that AI was in breach of the implied term to use the proceeds in accordance with the manner of use document.

37 I will hear the parties on the issue of consequential orders and on costs.