

China Women Industry Development Corporation v Singapower Development Pte Ltd
[2001] SGHC 57

Case Number : Suit 736/2000/S
Decision Date : 23 March 2001
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : G Raman / Ong Bock Kee (G Raman & Partners) for the plaintiffs; Choy Chee Yean / Chua Bor Jern (Rajah & Tann) for the defendants
Parties : China Women Industry Development Corporation — Singapower Development Pte Ltd

JUDGMENT:

Cur Adv Vult

1. In this case, the plaintiffs, China Women Industry Development Corporation (CWI), claimed from the defendants, Singapower Development Pte Ltd (SD), a commission of US\$500,000.00 for services allegedly rendered to resolve problems faced by SD in relation to their investments in China. SD acknowledged that they requested CWI to perform specified services. However, they asserted that CWI were not entitled to the sum claimed because the required services were not performed.

A. BACKGROUND

2. SD, a company incorporated in Singapore, was formed to invest in power and gas infrastructure projects in the Asian region. It invested in three power projects in partnership with Chinese parties in Jiangsu Province, at Wuxi, Nanjing and Kunshan. Jiangsu was chosen because it was identified as the growth area in China.

3. In Wuxi, SD and a Chinese company, Yangtat Realty Co Ltd, formed a joint venture company, Sing-Yang. SD, held 70% of the shares of Sing-Yang while Yangtat owned the remaining 30%. Under the joint venture agreement for the Wuxi project, SD was assured that they would receive an annual return of 29% on their investment for four years with effect from a specified date.

4. In Kunshan, SD partnered a Chinese company, Kunshan City Electric Construction and Development Co, and an American company, Asia Pacific Energy and Environmental Technology Inc, in a joint venture company, Sing-Kun. SD held 70% of the shares of Sing-Kun while the Chinese company and the American company held 10% and 20% of the shares respectively. Under the joint venture agreement for the Kunshan project, SD was assured an annual return of 30% on their investment for four years with effect from a specified date.

5. In Nanjing, SD and a Chinese company, Nanjing Third Steel, set up a joint venture company, Sing-Su. SD held 60% of the shares of Sing-Su while the Chinese partner held the remaining 40% of the shares. Under the joint venture agreement for the Nanjing project, SD was assured that as from 19 months after the incorporation of Sing-Su, they would receive an annual return of 29% on their investment for four years.

6. Things did not run smoothly in the three power projects. Various problems began to surface from 1996. SDs money was misappropriated and promises made by their Chinese joint venture partners, especially with respect to the guaranteed annual return on SDs investments, were not fulfilled. After it became known that SD had some difficulties in China, a number of "China consultants" approached them, offering to help and professing that they were well connected to government officials in China. Eventually, CWIs general manager, Mr Shu Ji Fa, met SDs officers in April 1997. He offered to start work immediately and asked for a letter authorising him to deal with the problems arising out of the implementation of the joint venture agreements for the three power projects.

7. Regrettably, the business arrangement between CWI and SD was not documented with sufficient clarity. For the purpose of determining the respective rights of the parties, reference must first be made to SDs letter dated 9 June 1997 to CWI. The letter stated as follows:

We had also reported to the Board about seeking your assistance recently regarding recouping the sum invested and the funds of our Thermal Power Stations in Jiangsu Province.

Attached herewith are the various commission proposal schedules concerning recouping the sum invested in the various Thermal Power Stations (See annexure 1, this proposal schedule is still subject to approval by our Board). The initial payment for resolving the various issues (see annexure 2) concerning the 3 thermal power stations project is USD60,000.00. As for subsequent payments, they shall be paid after recouping every year from the various items. The total amount of commission is limited to USD500,000.00. (Separate discussions shall be made for the details of the payment such as currency unit, payment unit and so on).

We have already arranged for an Extraordinary Meeting of the Executive Committee of the Board to be held on 20 June and it is hoped that Mr Shu would give your comments concerning the proposal schedules before 11 June.

8. The tasks which CWI had to carry out and the problems which SD faced in Jiangsu were listed in an annex to the letter of 9 June 1997. CWI were required to provide SD with the following:

- (a) general management consultancy services;
- (b) assistance in resolving outstanding issues with SDs Chinese partners; and
- (c) assistance in negotiations on future potential projects.

9. As SD had no intention at the relevant time to expand their portfolio of investments in China, CWI were in fact only required to assist in resolving SDs problems in Wuxi, Kunshan and Nanjing. These problems, which were specifically listed by SD in their letter of 9 June 1997, will be referred to in detail later on in this judgment. All that has to be borne in mind at the moment is SD made it plain that a common problem which had to be resolved in all the three power projects was their Chinese partners failure to honour their contractual obligation to provide SD with the guaranteed annual return on their investments.

10. Note must also be taken of the schedule for the payment of the proposed commission, which was enclosed with SDs letter of 9 June 1997. The schedule is as follows:

	PROPOSED COMMISSION				
PROJECT	INITIAL PAYMENT	INVESTMENT RETURN			
		1 st YEAR	2 ND YEAR	3 RD YEAR	4 TH YEAR

Wuxi Sing- Yang	15,000	24,000	24,000	24,000	24,000	111,000
Kunshan Sing-Kun	10,000	20,000	20,000	20,000	20,000	90,000
Nanjing Sing-Su	35,000	66,000	66,000	66,000	66,000	299,000
Total (US\$)	60,000	110,000	110,000	110,000	110,000	500,000

11. On 11 June 1997, CWI replied to SDs letter of 9 June 1997. In the letter, its general manager, Mr Shu, stated as follows:

1. "Singapower" entrusts our company to provide three services. Our company is able to accede to the first item of "General operating management advisory services" and the third item of "Assistance in negotiations on future potential projects."

As for the second item of "Assistance in resolving outstanding issues with Chinese partners", owing to the fact that parts of the contents of the feasibility study reports on the three existing projects in Jiangsu provided by the Chinese partners during the initial stage of co-operation were not true, and on top of that, some objective conditions have since changed, for example, state enterprises are facing recession with insufficient work, leading to a big gap between the originally conceived rate of return of investment and the reality. According to our view, it is very difficult to expect the Chinese parties to strictly honour the 28% rate of return of investment in the original contract. Therefore, our company is more confident with the other problems in the second item. With regard to the execution of the article on rate of return of investment, all we can do is to work hard to help.

With regard to commissions, in principle, we agree to what you have proposed. However, as more expenses are required at the early stage of work, we suggest that the initial payment of commission be increased to US\$100,000.00.

12. SD did not respond to CWIs request for an increased initial payment. On 14 October 1997, Mr Shu was granted a Power of Attorney to act for SD in handling and co-ordinating the "matters relating to the three electrical plants in Jiangsu".

13. In due course, SD found CWI to be ineffective in resolving their problems. By early 1998, SD accepted that other courses of action had to be taken to break the impasse in Jiangsu. On 20 March 1998, SD wrote a letter to Mr Shu, which made it plain that SD contemplated other means of resolving their problems. The letter was couched in the following terms:

Based on the present situation of the power plants, we have decided not to invest any more funds and we will be working to stop the operation and

construction of the plants and recover our investment.

The decisions of the Board of Directors are summarised as follows:

(I) The Singapore party will not invest any more fund or have any more undertaking unless there is an improvement of the situation.

(II) We will recover our investment through various channels.

We hope that you could put forward your views as soon as possible.

14. On 26 March 1998, Mr Shu replied to SD. In his letter, he stated as follows:

Our views on the decisions of the Board of Directors of Singapower concerned are as follows:

1. Basically, we agree with the views of your Board of Directors to settle the relevant problems of the three projects through legal means as soon as possible.

4. Employ a professional lawyer in the area of electrical power investment to commence early preparatory work for court action.

The above are our views for your consideration.

15. According to SD, the above letter of 26 March 1998 was the last communication between them and Mr Shu. After a deafening silence of almost two years, CWI's counsel, Mr G Raman, wrote a letter to the Chairman of Singapore Power, Mr Ho Kwon Ping, on 9 February 2000. In this letter, Mr Raman stated as follows:

We are instructed that our clients have discharged their duty as agreed upon and have obtained payments for [SD] from the relevant Chinese parties.

As agreed therefore payment has to be made by [SD].

16. As SD did not pay CWI the amount claimed, CWI instituted this action to recover US\$500,000.00, which they said was commission due to them for having discharged their obligations to SD.

B. WHEN WAS THE COMMISSION PAYABLE?

17. CWI contended that the payment of commission by SD was not dependent on whether or not they succeeded in resolving SDs problems in Jiangsu. In his written submissions, Mr Raman stated as follows:

It will be obvious that the Plaintiffs services were of a general nature and not specific. If I may use a shorthand, it was to use the "political clout" that the Plaintiffs had with the authorities in China.

18. In contrast, SD contended that they hired CWI on a "no cure no pay" basis. In view of this, the first instalment of the agreed commission, referred to in the agreement as the "initial payment", is not due to CWI until and unless SDs problems in the Jiangsu projects have been resolved. SD added that as CWI failed to achieve results, the question of payment of commission

did not arise. If this is right, there would be no necessity to consider whether the parties finally agreed that the initial payment was to be US\$60,000.00, as SD proposed in their letter to CWI dated 9 June 1997, or US\$100,000.00, as CWI suggested in their reply dated 11 June 1997.

19. In view of SDs stand, it would be useful at the outset to determine the circumstances under which CWI is entitled to the initial payment referred to in the schedule of payments and when SD is obliged to make the subsequent payments.

20. SD contended that their approach on the date of payment of commission was reflected in their letter of 9 June 1997 to CWI, which provided as follows:

The initial payment *for resolving* the various issues (see annexure 2) concerning the 3 thermal power stations project is USD60,000.00. As for subsequent payments, they shall be paid *after recouping every year from the various items*.

(emphasis added).

21. SDs former chairman, Mr Lai Park On, explained SDs position as follows during cross-examination:

Q. You wanted Mr Shu to continue to help?

A. It was quite clear from the start that Mr Shu had to resolve outstanding issues and the most important of the outstanding issues was SDs guaranteed annual return on investments. This was contained in the joint venture agreement. When we discussed how to proceed, Mr Shu made a number of suggestions but we maintained all along that payment was to be for achieving the guaranteed rate of return. Mr Shu said that it was best left to him to adopt the methods that would be effective in China in the Chinese way. I made it very clear that it was payment by results and left him to follow whatever methods he felt effective in China.

22. The concept of a result-oriented plan for the payment of commission to CWI was also reflected in the minutes of the meeting of SDs Board of Directors on 13 June 1997. It is important to note that in para 10 of his affidavit of evidence-in-chief, Mr Shu referred to and relied on the said minutes of SDs Board of Directors to show that SD did offer him a commission plan. The following extract of those minutes was reproduced by Mr Shu in his affidavit of evidence-in-chief:

Exco deliberated on the proposed commission plan for [CWI]. *In the result-oriented plan*, an initial payment amounting to US\$60,000 would be payable *upon settlement of all outstanding issues encountered with our Chinese partners* and thereafter subsequent commission would be directly based on yearly investment return received by Singapower. Total commission to [CWI] would be kept at US\$500,000.

(emphasis added)

23. In his eagerness to hold SD to the commission plan, Mr Shu did not, when reproducing the above-mentioned extract from the minutes of SDs Board of Directors in his affidavit of evidence-in-chief, say that he disagreed with any aspect of the said minutes. As such, he must be taken as not having disagreed with the following points made in the said minutes:

(a) CWI was offered a "result-oriented plan" for the payment of commission.

(b) An initial payment would only be made upon settlement of the outstanding

issues encountered with SDs Chinese partners.

(c) Subsequent commissions would be directly based on yearly investment returns received by SD.

24. In view of the aforesaid, it is surprising that CWIs counsel, Mr G Raman, asserted that the initial payment promised by SD was due immediately upon signing the contract and that the remaining four instalments were due on the 1st, 2nd, 3rd and 4th year following the due date for the first payment.

25. Mr Shus secretary, Mr Liu Feng, did not support Mr Ramans contention that the initial payment promised by SD was due immediately after the consultancy agreement was entered into. When cross-examined, he said as follows:

Q. How much did the defendants promise to pay the plaintiffs?

A. US\$500,000.00

Q. Any particular date of payment?

A. I do not remember they mentioned a specific date.

26. Mr Raman attempted to support his contention that the initial payment was immediately due after CWI was appointed SDs consultants by asserting that SD had already paid CWI part of the initial payment when they remitted RMB160,000.00 to Mr Shu in November 1997. This assertion is flawed for the simple reason that in para 11 of his affidavit of evidence-in-chief, Mr Shu complained that SD had failed to pay even the initial payment due to CWI. Besides, if the RMB160,000.00 was part of the initial payment due from SD to CWI, it is pertinent to note that after the said sum was remitted to Mr Shu in November 1997, CWI did not write to SD to claim the balance of the sum allegedly due as the initial payment for their services.

27. In fact, the RMB160,000.00 forwarded to Mr Shu by SD in October 1997 was intended to be an advance sum to cover expenses of third parties involved in assisting SD in resolving the problems faced in Jiangsu. In his letter dated 20 October 1997 to SD, Mr Shu himself referred to the need for a fund for expenses when he said as follows:

Solving the problems of Sing-Kun is a kind of complex system engineering that involves a number of issues and requires a long time to work on. Moreover, the relevant work of the working group requires a certain amount of fund. Therefore, we suggest that [SD] come up with a starting fund that includes transport expenses.

28. In his affidavit of evidence-in-chief, Mr Lai Park On, the then chairman of SD, shed light on why Mr Shu was paid RMB160,000.00 in November 1997 when he said as follows:

33. . Mr Shu had proposed forming a task force to further investigate the approach to resolve the outstanding issues in Sing-Kun and requested for funds to defray the expenses and costs of this task-force.

34. . since a significant sum would be incurred in the engagement of third parties (e.g. lawyers and other experts) and not CWIDC themselves, it was fair to reimburse Mr Shu the expenses paid out. [Our general manager] suggested an advance payment of US\$40,000.

36. In the end, the figure of US\$20,000 (or about RMB160,000) was agreed

29. I thus find that the RMB160,000.00 paid to Mr Shu was to cover expenses and was not a part payment of the initial sum referred to in the schedule on payment of commission in SDs letter of 9 June 1997. I also find that it was agreed between SD and CWI that the initial and subsequent payments promised to CWI were to be made only after CWI has succeeded in resolving the problems referred to in SDs letter dated 9 June 1997.

C. DID CWI PERFORM THEIR OBLIGATIONS?

30. As it has been established that CWI is not entitled to the commission claimed unless they performed the tasks undertaken by them, it would be appropriate at this juncture to determine whether the said tasks were performed.

31. CWI claimed in para 7 of their statement of claim that they had rendered services in resolving the disputes which SD had with their Chinese partners but this claim was not supported by facts.

-

The guaranteed annual return on SDs investments

32. As has been mentioned, the joint venture agreements between SD and their Chinese partners guaranteed a hefty annual return on SDs investments. To SD, the most important problem to be resolved by CWI was the Chinese parties failure to honour the joint venture agreement provisions on the guaranteed annual return on their investments. Mr Lai Park On, who was SDs chairman from 1994 to September 1998, explained that if Mr Shu had managed to obtain for SD the guaranteed annual return on their investments, SD would have been quite happy to pay CWI the commission claimed.

33. I am mindful of the fact that as far as the question of the guaranteed annual return on SDs investments is concerned, Mr Shu said in his letter to SD dated 11 June 1997 that it was very difficult to get the Chinese parties to strictly honour their promise in relation to the guaranteed rate of return on SDs investments and all he could say was that CWI would work hard to get the Chinese parties to honour this contractual obligation. However, SD contended that they did not agree with CWI that the latter was only required to do their best to ensure that the guaranteed annual return on investments was paid. This assertion is not without foundation. After all, the basis for hiring CWI as consultants was to ensure that SD received the guaranteed annual return on their investments. It would have been of no comfort to SD if their other problems in Jiangsu were resolved without them obtaining the guaranteed annual return on their investments. I thus find that it was a term of the contract that CWI was required to obtain for SD the guaranteed annual return on their investments before they were entitled to any commission.

34. To date, SD has not received the guaranteed annual return on their investments in the three Jiangsu power projects. Although CWI claimed to have obtained payments for SD from the relevant Chinese parties, Mr Shu was not sure as to what this meant in the context of the guaranteed annual return on SDs investments. When cross-examined, he said as follows:

Q. On the guaranteed returns in Wuxi, Kunshan and Nanjing, is it your case that you managed to get the defendants guaranteed returns in all four years?

A. Part of the returns.

Q. How did you know there are returns?

A. SDs representative in Kunshan told me.

Q. Do you really know whether SD made a profit or had returns for their investment?

A. I dont know.

35. Mr Shus answers to questions relating to the guaranteed annual return on SDs investments in Jiangsu and his evidence on CWIs efforts to resolve SDs other problems in Jiangsu, which will be discussed below, led me to conclude that even if CWIs obligation was merely to do their best to ensure that SD obtained the guaranteed annual return on their investments in Jiangsu, this obligation has not been performed.

SDs other problems in Jiangsu

36. Apart from failing to secure for SD the payment of the guaranteed annual return on their investments, Mr Shu was woefully unaware of the magnitude of the other problems which he had undertaken to resolve. What is more alarming is that he did not think that it was his task to resolve the problems listed in SDs letter of 9 June 1997 to CWI. During cross-examination, he said as follows:

Q. What did you do in Kunshan after May 1997 on behalf of the defendants?

A. To co-ordinate relationship with local officials. I did not give an undertaking to resolve these problems. These were problems listed by the Singapore party. They raised these problems so that I could understand the situation. Based on the situation, I would put up a proposal to resolve the problem of the entire plant.

37. Mr Shus assertion cannot be accepted. After all, in his reply to SDs letter of 9 June 1997, he had stated that apart from the question of the guaranteed returns, his company was "more confident with the other problems" listed in the annex to the letter of 9 June 1997. In any case, if, as Mr Shu claims, his task was merely to understand the problems so that he could put up a proposal to resolve the problem of the entire plant, he did not reveal how his proposals were to be implemented and how "the problem of the entire plant" was resolved.

38. A short discussion of the problems faced in SDs three power projects in Jiangsu will show that despite the hiring of CWI, most of the problems remained unresolved.

-

Problems in the Wuxi project

39. SDs problems in Wuxi, as outlined in SDs letter of 9 June 1997, are as follows:

- a. Land
- b. Final construction cost
- c. Unauthorised bank transaction
- d. Honoring contractual obligations eg. min power offtake, guaranteed return, paying loan interest and management fees
- e. Monitoring the operation and maintenance
- f. Liaise with authorities.

40. The first problem mentioned above, namely land use, was not resolved by CWI. When cross-examined, Mr Shu said as follows:

Q. Regarding the Wuxi land problem, what was this problem about?

A. The defendants asked us to assist in going through formalities on the land certificate.

Q. Did they get the land certificate ultimately?

A. No.

41. As for the second problem in Wuxi, which concerned the finalisation of the construction cost, Mr Shu again shed very little light on the issue. When cross-examined, he said as follows:

Q. What is the problem of the final construction cost about?

A. To finalise the construction cost with the Chinese partners.

Q. Has the issue of finalisation of the construction cost been resolved?

A. I dont know.

42. The third problem in Wuxi concerned unauthorised bank transactions. Mr Shus answers were rather unhelpful. In reply to questions put to him during cross-examination, he said as follows:

Q. What is the problem concerning unauthorised bank transactions?

A. The Chinese party took a loan without consulting the Singapore party.

Q. How much was the loan?

A. I dont know.

Q. Did you solve the problem?

A. Someone from the municipal authority said they would solve the problem.

Q. Do you agree that the problem remains unresolved?

A. It was resolved in 1999.

Q. According to you, the municipal authorities resolved this problem in 1999?

A. Yes.

43. In the face of such unhelpful answers, I intervened and Mr Shus reply was unequivocal. He said as follows:

Ct. Do you really know whether the problem concerning unauthorised bank transactions has been resolved?

A. I dont know.

44. As for the next problem in Wuxi, namely the obligation to ensure that there was a minimum power offtake, Mr Shu conceded that the problem has not been resolved.

45. As for the monitoring of the operation and maintenance of the Wuxi plant, a problem which vexed SD, Mr Shu conceded that CWI did nothing. When cross-examined, he said:

Q. The next problem relates to the monitoring of operation and maintenance. What was this problem about?

A. We did not monitor the operation and maintenance.

46. In short, notwithstanding Mr Shu's claim that he had talked to government officials and SDs' Chinese partners to further SDs' interests, CWI failed to carry out the task of solving the many problems faced by SD in the Wuxi project, the most important of which was to ensure that SD obtained the guaranteed annual return on their investments.

Kunshan Project

47. A review of CWI's role in resolving disputes in the Kunshan project will also show that CWI failed to accomplish the tasks they had undertaken on behalf of SD. The problems in this project, which were made known to Mr Shu in SDs' letter of 9 June 1997, are as follows:

- a. Fund recovery/Project completion
- b. Honoring contractual terms eg. guaranteed completion, minimum power offtake, guaranteed return.
- c. Monitoring the operation and maintenance
- d. Liaise with authorities.

48. The first task in Kunshan entrusted to Mr Shu, as listed above, was "fund recovery". This concerned a misappropriation by SDs' Chinese partner of more than US\$2m of SDs' funds. Mr Shu's evidence merits attention. When cross-examined, he said as follows:

Q. Did you succeed in getting the funds recovered?

A. Yes.

Q. How much was recovered?

A. RMB1.5m was the first sum. I did not deal with the management so I don't know what happened afterwards. No need for me to know all this.

49. Mr Shu's evidence on the recovery of the misappropriated funds was clearly unreliable. To begin with, it appears that the sum of RMB1.5m referred to by him had nothing to do with the recovery of the money which had been misappropriated. Instead, it was a sum injected into the project. More importantly, it is surprising that Mr Shu said that there was no need for him to know "what happened afterwards". As he was entrusted with the task of recovering more than US\$2m in misappropriated funds, how can he be satisfied merely because the sum of RMB1.5m was recovered? His answers to further questions on the subject of misappropriation showed why his evidence could not benefit CWI's case. He said as follows:

Q. You dont know what else was recovered?

A. Further sums were recovered but I dont know how much.

Ct. Do you know whether the entire sum was recovered?

A. I understood this from Mr Tai, the general manager of Shipai Town.

Q. When did he tell you?

A. I forgot. Middle of 2000.

Ct. Do you really know whether the entire sum was recovered?

A. I dont know.

50. As for the second problem in Kunshan, namely the delayed completion of the project, there was concern that the delay would make it more difficult for SD to obtain an early return on their investments. Mr Shu, who knew little about this problem, even suggested that it was not his responsibility to resolve it. When cross-examined, he said as follows:

Q. Do you know when the project was supposed to start?

A. I emphasize that I do not deal with specific work. I do not know when the project was to start.

Q. Do you know when the project was supposed to end?

A. It was in two phases. The second phase commenced with our assistance but I did not know when it commenced.

Q. When was Phase Two supposed to be completed according to the contract?

A. SD did not give me such a contract. I did not know the actual date.

Q. Your agreement states that this is a problem to be resolved. Please answer the question.

A. In early 1997.

Q. I put it to you that as you do not even know the date of completion and installation, you did not have much to do with this.

A. Disagree. I did not know the details.

51. From the above answers, it is evident that Mr Shus claimthat CWI assisted in the commencement of the second phase of the project cannot be accepted.

52. As for the problem of minimum power offtake in Kunshan, Mr Shu knew that the authorities had to be persuaded to purchase the electricity that was generated by the plant. However, he denied that he was asked to resolve this problem even though it was listed as a problem to be resolved in SDs letter of 9 June 1997 to CWI. When pressed to state whether he had solved the problem, he claimed to have solved this problem "indirectly". However, he did not know when this problem was resolved and he based his evidence on information received from a third party. Notwithstanding this, he claimed credit for

resolving this problem.

53. As for the question of monitoring the operation of the plant and its maintenance, Mr Shu confirmed that he had nothing to do with these.

54. In the face of the problems which the Kunshan project faced notwithstanding the entry of CWI into the scene, SD concluded, with justification, that Mr Shus meetings and liaising with the authorities had borne no fruit.

Nanjing Project

55. SDs relationship with CWI with respect to their Nanjing project was also an unhappy one. SDs problems in Nanjing, as outlined in SDs letter of 9 June 1997 to CWI, are as follows:

- a. State energy loan/Project completion
- b. Land
- c. 35 KVA supply lines
- d. Comprehensive energy utilization plant application
- e. Power/steam offtake
- f. Honoring contractual terms eg. guaranteed completion, guaranteed return
- g. Liaise with authorities.

56. With respect to the first of the abovementioned problems, namely the securing of a state energy loan, SD wanted the joint venture company to have the benefit of a state energy loan and CWI was required to ensure that the loan was forthcoming. Apparently, Mr Shu knew very little about this issue. When cross-examined, he was imprecise and inaccurate. He said as follows:

Q. State energy loan. What was this issue about?

A. Defendants requested a loan.

Q. Did they get a loan?

A. Yes.

Q. When did they get a loan?

A. I did not know the details.

Q. How much was the loan?

A. I dont know.

Q. You were given copies of the Nanjing project accounts. From these, can you tell us whether a loan was obtained?

A. I never looked at the accounts.

Q. Having looked at the accounts for the Nanjing project, have you found anything regarding the energy loan?

A. Not in the accounts. As the Chinese partner of SD did not have funds to inject into the project, I assisted them to get a loan.

Q. You are saying that the loan was to the Chinese party?

A. Yes. Not the joint venture company but the Chinese partner in the joint venture company.

57. At this juncture, I intervened and Mr Shu's answer clearly showed that CWI did not resolve the problem in relation to the energy loan. He said as follows:

Ct. A loan to the Chinese party is very different from the energy loan presently being discussed. Was an energy loan obtained?

A. No, there was no energy loan.

58. As for the problem of land in Nanjing, this concerned the question of land use, which SDs Chinese partners failed to settle with the authorities. Again, Mr Shu conceded during cross-examination that the problem was not resolved. On the next day, Mr Raman pointed out that it appeared from SDs own internal documents that a land use right certificate for 22 years had been issued for the Nanjing project on 31 March 1998. This does not help Mr Shu very much as it reveals that he did not take a sufficient interest in an important matter such as land use.

59. With regard to the problem of the 35 KVA supply lines, Mr Shu knew little about it and conceded that it was not resolved.

60. The next problem in Nanjing to be discussed concerns the comprehensive energy utilisation plant application. Mr Shu admitted that he had the task of ensuring that the application was successful. However, he did not even know the outcome of the application. When cross-examined, he said as follows:

Q. Why were you asked to handle this?

A. To get the government to use the energy produced by the plant.

Q. Was the application for comprehensive energy utilisation plant successful?

A. I am not sure.

Q. You do not know whether the problem was solved?

A. I am not sure.

61. With respect to the honouring of contractual terms, apart from their failure to receive the guaranteed annual return on their investment in Nanjing, the problems faced by SD in getting their Chinese partners to abide by the contractual terms were many. When cross-examined, Mr Shu said that he was aware of SDs problems but his answers to questions during cross-examination showed that he really did not know much about the problems. He said as follows:

Q. On the question of honouring the contractual terms, the Chinese party did not put in the amount required, there was a delay in completion and there were

general problems such as that concerning power and steam off-take. These cover most of the problems?

A. Yes.

Q. Do you know whether the problem of the unpaid contribution of the Chinese party was resolved?

A. I dont know.

Q. The guaranteed completion date of the plant was a major problem. It was raised with you on numerous occasions. Do you know whether this problem was finally resolved and whether the plant has been completed?

A. I dont know.

Q. Has the problem of the power and steam offtake been resolved?

A. I dont know.

62. To sum up, Mr Shu knew so little about the problems in the Nanjing project that it may be said, with justification, that his services could not have been of much use to SD and were certainly not of a level that required any payment of commission under the terms of CWIs agreement with SD.

What CWI claimed to have achieved

63. What CWI claimed to have achieved on behalf of SD was summarised by Mr Shu in para 14 of his affidavit of evidence-in-chief, in which he made three claims, one each with respect to the Kunshan, Wuxi and Nanjing projects.

64. In relation to the Kunshan project, Mr Shu stated that his achievement was evident from the following internal memorandum dated 3 February 1998 from Mr Lucas Lee, SDs general manager:

Singapower appointed a Shu Jifa ("Shu") based in Beijing to help expedite the fund and project recovery using contacts in Beijing, Provincial and local governments. Through his initial contact, the deputy mayor of Kunshan city arranged for RMB1.5m contribution for the fund recovery programme.

65. The question of the fund recovery programme in Kunshan has already been discussed. All that needs to be said here is that Mr Shu admitted during cross-examination that the RMB1.5m did not have anything to do with the fund recovery project. As such, his claim in para 14 of his affidavit of evidence-in-chief is baseless.

66. In relation to the Nanjing project, Mr Shu summarised his achievement by pointing out that SD conceded in an internal memorandum from Mr Lucas Lee dated 25 September 1998 that "there has been much improvement in the operating environment since the senior teams visit" in April 1998. Again, this claim is without foundation. The senior team comprised senior staff of SD, such as their then chairman. Mr Shu was not a member of the team and he cannot claim credit for the improvement in the operating environment which resulted from the senior teams visit. His task was to ensure that the overall operating environment for SD improved to the extent that SD could recover the guaranteed annual return on their investment in the Kunshan project. There is no question that his performance in this regard fell far short of what he had been required to do.

67. In relation to the Wuxi project, Mr Shu stated his success in the following terms:

The net income for the year ended 31.12.1999 has been shown as RMB22,684,808.33 which has put the operations in the black. This vital information is found in the Accounting Statements by Wuxi Gongzheng Certified Public Accountants Co Ltd for the said period.

68. It was pointed out to Mr Shu that the figure of RMB22,684,808.33 in the company's accounts was nothing more than an accounting entry which balanced the receivables for the past few years. In short, the net income of the company for the year in question was not RMB22,684,808.33. Mr Shu conceded his error when he said as follows during cross-examination:

Q. Do you agree that in 1999, there was no cash inflow of RMB22.6m?

A. Yes.

Q. I put it to you that there was actually no money flowing in because the receivables were never received.

A. I do not know. I am not sure because the accounts were kept from me.

Ct. Do you really know whether the company had a net income of RMB 22.6m?

A. I am not sure.

69. Mr Shu also highlighted in paras 15 and 16 of his affidavit of evidence-in-chief some other achievements of CWI. Again, these proved to be illusory. In para 15 of his affidavit of evidence-in-chief, he stated as follows:

15. The Defendants have more than benefited from the service that the Plaintiffs have rendered. I would refer to the report by their own auditors to support this fact. In the report by [Price Waterhouse] for the year ended 31.12.1999 on the project in Kunshan they have referred to the re-structuring that had taken place in the company operating the Kunshan Project and have stated in very clear terms that "management had prepared a cash flow forecast for the next financial year and believe that the bank loan of RMB2,500,000 can be extended and the company will not have cash flow problems in the next 12 months so that the company can be operated as a going concern." These changes in the fortunes of the Defendants have been made possible by the involvement of the Plaintiffs.

70. Mr Shu quoted the report in question out of context. It was one which was based on the assumption that the Chinese parties would fulfil their part of the bargain. The same forecast had been made in the previous years accounts and had proven to be wrong. When cross-examined, Mr Shu conceded that he had referred to a mere forecast and not a fact. He said as follows:

Q. Do you agree that your statement in para 15 of your affidavit of evidence-in-chief regarding the absence of cash flow problems is meaningless because it was based on a forecast that was also made in the previous year and proved to be untrue.

A. I agree that it was a forecast and that it was one that did not come true in the previous year.

71. Mr Shu's claim in para 16 of his affidavit of evidence-in-chief must next be considered. He stated as follows:

16. In the report on the Wuxi Project, [Price Waterhouse] is more upbeat. In their report for the year ended 31.12.1998 they have stated that, "in 1998, the company has obtained the approval of State Foreign Exchange Bureau to remit an amount of US\$220,000 (equivalent to RMB1,822,857) to the foreign investor as part of the annual return of investment." The Defendants have thereby benefited directly from what the Plaintiffs had done for them.

72. When it was pointed out to Mr Shu that the relevant documents did not reveal that there had been a return on SDs investments in Jiangsu, Mr Shu conceded that he was wrong. During cross-examination, he said as follows:

Q. Having seen the documents, do you still maintain that the US\$220,000 is a return on the defendants investments?

A. . The US\$220,000 was not a return on the defendants investments in Wuxi.

D. SUMMARY OF MY FINDINGS

73. As I have found that CWI is only entitled to claim a commission after they have succeeded in resolving SDs problems in Jiangsu, the most urgent of which was to obtain the guaranteed annual return on their investments, CWI cannot be remunerated because SDs problems in relation to the joint venture agreements were not resolved.

74. Mr Shu claimed to have done much for SD. However, he was unable to furnish evidence of what he claimed CWI had accomplished. All he could provide as evidence of his work were vague references to meetings with local officials and he sought to credit every advance made in the three power plants in Jiangsu to his meetings with important persons. He made references to reports which he prepared but failed to reveal how useful they were. In fact, he was not even sure as to how many reports he prepared. When cross-examined, he said:

Q. You attended meetings and put up reports in 1999?

A. 1997, 1998 and 1999.

Q. Where is the 1999 report?

A. My last report was on 26 March 1998 and my other report was to remind on 14 September 1999.

75. The claim with the forwarding of reports on 26 March 1998 and 14 September 1999 is absolutely baseless. In fact, the alleged report of 14 September 1999 was nothing more than a letter requesting SD to pay money to CWI. It stated as follows:

Ever since we accepted the assignment to resolve investment problems in the three power plants, we have done a lot of work. At the moment, problems of the three plants, especially in the Kunshan plant, have been settled and have started to generate electricity. Unfortunately, your company has not honoured the promise by your chairman and general manager during the initial stage of operation. While co-operating with you, we have reported this matter to the company and obtained their support. After that, your company has not made any response to our achievement and we are not able to explain to the leadership. If your company is not able to deal with the matter, we will take legal action to resolve the matter. We hope that your company will take a decision so

as not to affect the friendly ties between the two companies.

Why Mr Shu called his letter of 14 September 1999 a "report" is beyond comprehension.

76. CWI's case was also not helped when Mr Shu was not even clear as to when CWI stopped providing services to SD. It is not in dispute that SD did not formally terminate CWI's services. Although SD should have put on record that the consultancy arrangement was over, they thought this to be unnecessary since payment of the agreed commission was on the basis of results achieved by CWI. Mr Shu accepted that by the second half of 1998, he had no contacts with SD on any matter. When questioned by me, he answered as follows:

Ct. Why did you go to the plant?

A. In the second half of 1998, SD had little contact with me. I did not know what was going on. When I passed by, I would definitely take a look.

Ct. Are you saying that SD had "little" contact with you or no contact at all?

A. No contact at all. We did not know why.

77. The above answers by Mr Shu show that by the second half of 1998, CWI should have realised that SD no longer had any faith in them. In view of the cessation of communications between SD and CWI by the second half of 1998, Mr Shu's inconsistent answers regarding the date when CWI ceased to work for SD merit close scrutiny.

78. On the first day of the trial, Mr Shu accepted that CWI stopped working for SD in August 1998. When cross-examined, he said:

Q. You stopped assisting the defendants in March 1998?

A. No, I continued to work for that company.

Q. When did you work for the defendants until?

A. Until August 1998.

79. On the second day of the trial, Mr Shu gave two cessation dates. During cross-examination, he first offered June 1998 as the cessation date. He said as follows:

Q. When did you stop working for the defendants?

A. Basically, I stopped working for them in June 1998.

80. When further cross-examined, he changed the cessation date to September 1999. He said as follows:

Q. After June 1998, all activities were carried out in your personal capacity and not as the defendants' consultants?

A. No. I was their consultant because no one informed me to discontinue my work. I ceased working after 14 September 1999, when we sent a fax message to Lucas Lee.

81. When the inconsistency in the cessation dates was pointed out to Mr Shu, he said that after June 1998, CWI's involvement with SD did not cease as he continued to co-ordinate SD's legal suits. During cross-examination, he explained as follows:

After June 1998, all work in relation to business operations ceased after SD decided to take legal action. Legal work had to be done after that. We still had to work on the legal proceedings.

82. Mr Shu claimed to have instructed a Shanghai law firm, Xiaoyun, to handle SDs proposed law suit. However, SD has, to date, never dealt with this law firm and Mr Shu admitted that he did not inform SD about his consultations with Xiaoyun in relation to SDs legal matters. When cross-examined, he said as follows:

Q. After meeting the Shanghai lawyers, did you inform the defendants about this?

A. I tried to contact the defendants by phone. Subsequently, we requested the defendants representative in Kunshan to contact the defendants chairman to let him know that we would like to meet him to discuss preparatory work for the law suit.

Q. You never wrote to the defendants about the plans for the law suit.

A. I did not write to them.

83. Mr Shus evidence cannot be taken seriously. It is unbelievable that he would spend time at a law firm no one asked him to instruct in order to co-ordinate a law suit without receiving any instructions on the matter from SD and without informing SD as to what he was doing.

84. Whatever Mr Shu may have claimed to have done, his concession that SD wanted to withdraw from the Jiangsu projects because their problems were not resolved cannot but be unhelpful to CWIs claim. In reply to questions which I posed, he said as follows:

Ct. Why did the defendants sell their shares?

A. They felt that the problems were hard to resolve.

Ct. This means that the problems were not resolved?

A. Yes.

Ct. Why then did you say earlier on that the problems were resolved?

A. In my view, once they got back their investments, problem would be resolved.

85. As it was evident that SD did not get back the expected returns on their investments in Jiangsu and most of their other problems in Wuxi, Kunshan and Nanjing were not resolved, CWI must be taken to have failed to accomplish the mission in respect of which they were retained as consultants. In the circumstances, CWI is not entitled to the commission referred to in SDs letter of 9 June 1997.

E CWIS ALTERNATIVE CLAIM

86. Reference must now be made to CWIs alternative claim. In their statement of claim, CWI pleaded that it was an express or implied term of the contract that SD would pay CWI a reasonable sum for their services.

87. CWI did not even attempt to prove that there was an express term to the effect that SD would pay them a reasonable sum for their services. As for an implied term, it is clear that a term will only be implied if it is necessary to give business efficacy to the contract and that a term will not be implied if it is inconsistent with the express terms of the contract. (See, for instance, *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 4 SLR 559, 570, a decision of the Court of Appeal, and *Lynch v Thorne* [1956] 1 WLR 303.) In the present case, the contract between SD and CWI clearly provided for the payment of remuneration only after CWI has resolved SDs problems in the Jiangsu projects. There is thus no room for CWI to claim from SD a reasonable remuneration for their services on the basis of an implied term.

F. SECTION 116 OF THE EVIDENCE ACT

88. Finally, reference must be made to CWIs assertion that an adverse inference should be drawn from the fact that SD did not call Mr Lucas Lee, their former general manager, as a witness.

89. Section 116 of the Evidence Act (Cap 97) provides as follows:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

90. CWI contended that as Mr Lee played an important role in SDs dealings with Mr Shu, he should have been called as a witness. SD pointed out that by the time CWI instituted the present action, Mr Lee was no longer their employee and that he was very reluctant to give evidence. SD explained that Mr Lees assistance was not required to prove their case because they had other witnesses who could prove that their problems in Jiangsu were not resolved by CWI. It was also pointed out that CWI could have subpoenaed Mr Lee if they thought this to be necessary.

91. The circumstances under which an adverse inference may be drawn from a failure to call a witness have been discussed in many cases. In *Chua Keem Long v PP* [1996] 1 SLR 510, 523-524, Yong Pung How CJ explained:

In determining whether or not that presumption ought to be drawn, the court will have regard to all the circumstances, but particularly and importantly the materiality of the witnesses not produced. The adoption of any other approach would be to encourage the adducing of unnecessary evidence, prolonging the trial and confusing the issues.

92. In *Yeo Choon Huat v PP* [1998] 1 SLR 217, the Court of Appeal held, in the context of a criminal case, that the prosecutions failure to call a witness does not give rise to a presumption under s 116(g) of the Evidence Act unless it constitutes a withholding of evidence from the court.

93. In the present case, the available documents and witnesses provided ample evidence which made it impossible for CWIs claim to succeed. It is pertinent to note that it is not CWIs case that Mr Lee had altered or had the authority to alter the terms of the agreement between SD and CWI. Taking all the circumstances into account, I hold that the fact that Mr Lee was not called

as a witness did not have an adverse effect on SDs case.

G. CONCLUSION

94. For the reasons stated above, CWIs claim against SD is dismissed with costs.

Tan Lee Meng

Judge

Copyright © Government of Singapore.