IN THE APPELLATE DIVISION OF THE HIGH COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 12

Civil Appeal No 39 of 2021 and Summons No 14 of 2021

Between

Ishan Anoop Sakraney

… *Appellant*

And

Ameet Nalin Parikh

… *Respondent*

In the matter of Originating Summons No 1281 of 2020

Between

Ameet Nalin Parikh

… *Plaintiff*

And

Ishan Anoop Sakraney

… *Defendant*

GROUNDS OF DECISION

[Contract] – [Contractual terms]

Ishan Anoop Sakraney
v
Ameet Nalin Parikh and another matter

[2021] SGHC(A) 12

Appellate Division of the High Court — Civil Appeal No 39 of 2021 and Summons No 14 of 2021
Belinda Ang Saw Ean JAD, Quentin Loh JAD, and See Kee Oon J
20 September 2021

21 September 2021

See Kee Oon J (delivering the grounds of decision of the court):

1 The plaintiff-respondent ("Ameet") was engaged by the defendant-appellant ("Ishan") to help liquidate and monetise certain assets, pursuant to a Letter of Engagement ("LOE") as modified by an Addendum of 1 April 2017 ("Addendum") (collectively, "the Contract"). There was no dispute that Ameet had rendered services which resulted in the successful completion of the asset sale ("the Sale"), and that Ameet had been paid up till 30 September 2019.

2 The only issue in dispute was whether Ameet was entitled to fees for his services for completing a sale before 30 September 2019, even if Ishan had not received the Sale proceeds before 30 September 2019. Ameet claimed that he was, and sought a declaration to that effect. Ishan disagreed. Central to this disagreement was the interpretation of Clause 4.2 of the LOE as amended by the Addendum ("Clause 4.2"). The judge below ("the Judge") interpreted

Clause 4.2 in Ameet's favour. He held that Ameet was entitled to fees for services rendered between June 2013 to September 2017 in relation to the completion of sale of assets held under two holding companies, Portillo Holdings Corporation and Prime Target Development Inc (collectively, "the Companies"). Ishan held one-third of the beneficial interest of the share capital in the Companies through Shorai Holdings Inc, of which he was the sole shareholder.

3 On appeal, Ishan's position was that on a proper construction of Clause 4.2, Ameet's entitlement to the fees would only arise upon Ishan's *receipt of the sale proceeds*. His main argument was that he could not have been expected to be saddled with payment obligations years after the Contract was terminated on 30 September 2017, and beyond the two-year tail period set out in Clause 4.4 of the LOE ("the Tail Period Clause"). To that end, Ishan pointed to the plain language of the Contract, the commercial context of the Contract and the parties' conduct between the start of the Contract on 14 June 2013 and the last day of the tail period *ie.* 30 September 2019 ("the Relevant Period"). Ameet, in turn, argued that the same factors pointed to the contrary.

The issues and parties' positions

4 The present dispute turned on:

(a) the plain language of the Contract (specifically, the interpretation of Clause 4.2);

(b) the commercial context surrounding the Contract; and

(c) the parties' conduct during the Relevant Period.

5 In our view, the plain language of the Contract supported Ameet's interpretation and neither the commercial context nor the parties' conduct urged a different interpretation. Our reasons were as follows.

AD/SUM 14/2021

6 As a preliminary matter, we allowed Ameet's application in AD/SUM 14/2021 ("SUM 14"). SUM 14 was Ameet's application to strike out the Appellant's Reply filed by Ishan. Ameet correctly pointed out that an appellant is only allowed to file a reply to address a respondent's contention that "the decision of the Court below should be varied" or that the decision should be affirmed on other grounds not relied upon below: O 56A r 9(7) and 9(8) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). Ameet accepted the Judge's decision in full. The Respondent neither sought to vary the Judge's decision nor to affirm it on other grounds not relied upon below. We therefore saw no grounds for the Appellant's Reply.

7 Moreover, Ishan raised new arguments in the Appellant's Reply. The three highlighted in Ameet's submissions for SUM 14 were: (a) the suggestion that the true scope of Ameet's work was to "move funds out of the Companies… into the hands of the Appellant"; (b) the suggestion that the Companies and its operating subsidiaries are separate entities and that therefore Ameet would not be entitled to fees in respect of sales of assets of the Companies' subsidiaries; and (c) a resurrection of certain arguments which had already been rejected in proceedings below and which were not raised in the Appellant's Case. We agreed with Ameet fully and the new arguments canvassed only fortified our view that SUM 14 should be granted.

8 We turn then, to the appeal proper.

The plain language of the Contract

9 At the outset, we should state that the applicable law on contractual interpretation was uncontroversial and undisputed (see the Judge's *ex tempore* judgment ("the Judgment") at [25] – [27]). The relevant clauses of the Contract were (i) Clause 4.2, (ii) the Tail Period Clause, and (iii) Clause 4.2(a) of the Addendum to the LOE ("the Pune Bungalow Illustration").

Clause 4.2

10 Clause 4.2 states:

> 4.2 Fees for such services will be computed and paid on the basis of
>
> > a. 1% (One percent) of the value realized by Ishan [the defendant] upto [*sic*] US$20 million
> >
> > b. 15% (Fifteen percent) of the value realized by Ishan in excess of US$20 million
>
> For the purposes of this letter, "value realized by Ishan" will be **value or amounts received from the Companies by Ishan** or Shorai Holdings Inc., or any other holder of the shares currently held by Shorai Holdings Inc**., in any form whatsoever** commencing from the date of this Addendum, including but not limited to sales proceeds form [*sic*] the sale of the assets of the Companies, dividends, royalties, non-compete fees or **any similar such payments / fees** that are linked to or arise from Ishan's ownership of 1/3rd share of the Companies. However, for the avoidance of doubt, this will not include any monthly dividends (US$25,000) received by Ishan and will not be counted as "value realized by Ishan". These fees will be paid immediately upon Ishan receiving **the monies described above**…
>
> (emphasis added in bold)

11 Essentially, the interpretation of Clause 4.2 turned on how one interpreted the words "value realised". Ameet's fees arose upon, and were calculated by reference to "value realised" from the contract. Ishan's submission

was that value was only truly realised when he (Ishan) received the Sale proceeds.

12 We disagreed with Ishan. Firstly, the words "value" and "realised" were themselves, broad terms – "value" need not be purely monetary and "realisation" of the same need not be limited to *receipt* of monies. "Value" was not necessarily just money in Ishan's pockets: overcoming practical difficulties of selling large assets spread across multiple jurisdictions, representing Ishan's interest in what Ishan described as a "full blooded family dispute" and ultimately, securing a good selling price for the Companies assets – all these qualified as "value" as well. Secondly, the phrases highlighted above all indicated that a narrow construction of "value realised" should not be adopted. Value could take "any form whatsoever" and was not restricted to cash amounts received by Ishan within the two-year tail period after the termination of the Contract. If anything, Clause 4.2 treated "value" and (cash) "amounts" as *alternatives* ("'value realized by Ishan' will be value *or* amounts received"), suggesting that the two were not as synonymous as Ishan contends. It stood to reason that parties would not have included the words "or amounts" if they ultimately regarded "value" and "amounts" as synonymous. A canon of contractual interpretation after all, is that parties are assumed to have intended every word in a given contract. There is a presumption against redundant words: *Travista Development Pte Ltd v Tan Kim Swee Augustine and ors* [2008] 2 SLR(R) 474 at [20]. The preferred interpretation is one which eschews redundancy in the contract. This was Ameet's, rather than Ishan's interpretation of the Contract.

13 We were also unpersuaded by Ishan's arguments. Four deserved attention:

(a) Ishan explained that the words "in any form whatsoever" in Clause 4.2 merely "clarif[ied] the transactions that [Ameet was] expected to act upon in order to receive fees". But this was a bald assertion, and there was no explanation why those words should have been read in the manner that Ishan urged. If anything, the syntax of Clause 4.2 suggested that "in any form whatsoever" was truly intended to amplify the words "value or amounts". The real intention – evident from the ordinary language of the Contract – was to expand what the Contract recognised as "value realised" beyond pure cash items.

(b) Ishan also contended that the Judge failed to consider that the four items described in Clause 4.2 (sale proceeds, dividends, royalties and non-compete fees) were *cash* items, showing that the parties had intended to equate "value" with cash. Ishan's argument was misconceived. Firstly, these were purely *illustrative* examples nestled within what the Contract explicitly described as an inclusive and non-exhaustive list ("including but not limited to"). Secondly, there was good reason why cash items were used as illustrations. Ameet's remuneration was essentially a percentage-based commission. The basis for that commission had to be grounded in something quantifiable. Cash items were the natural candidate. But all these went merely towards identifying the *amount* that Ameet should be paid, and not whether Ameet was entitled to be paid *at all*. The latter question was the relevant one here, and was answered by reference to a broader definition of "value realised".

(c) Ishan further relied on another line in Clause 4.2 which specified that Ameet's fees "[would] be paid immediately upon Ishan receiving

the monies described above". However, this did not assist Ishan either as it conflated the question of Ameet's entitlement in principle to the fees with when Ishan's payment obligation arose.

(d) Ishan's final argument was that Ameet's interpretation created an entitlement to fees in perpetuity. First, there was no entitlement in perpetuity. Ameet's fee entitlement ends when Ishan has finished paying up. Ishan finishes paying up when he has given 15% of the remaining value realised from the Sale. What made the arrangement "perpetual" was not an unreasonable interpretation of Clause 4.2 but the entirely ordinary fact of a *debt*. It was only as "perpetual" as there was a continuing obligation to pay off a debt. Second, there were clear limits to Ameet's fee entitlement. For example, if the Sale had not completed within the Relevant Period, Ameet acknowledged that he would not be entitled to any fees. He also acknowledged that if the proceeds from the Sales were never distributed to Ishan, he (Ameet) would not be entitled to any fees ("If [Ishan] does not collect, [Ameet] does not collect"). Third, and in any case, Ishan's interpretation – that Ameet is only entitled to fees upon Ishan's receipt of the Sale proceeds – made no commercial sense. The Judge below tested Ishan's theory by posing a hypothetical scenario. Assuming that Ameet had fully rendered his services (this being undisputed) and assuming that the Sale had been fully completed within the Relevant Period (again, undisputed), what would happen if the Companies had not distributed the Sale proceeds through dividends until *after* the Relevant Period? Ishan's response was: "no payment if no dividends declared until after 2 years". That plainly could not have been the case. That would mean an individual could have done all he was expected to under a contract, and yet remain unpaid due

to factors completely beyond his control. That would not have made commercial sense. The Judge observed as much at [34] of the Judgment and we fully agreed.

The Tail Period Clause

14 For convenient reference, we reproduce the Tail Period Clause:

> 4.4 This clause 4 will survive the termination of this agreement for a period of 2 years except if the agreement is voluntarily terminated by me [*ie*, the plaintiff] in which case clause 4 is terminated with immediate effect.

15 Of the two competing explanations for the Tail Period Clause, we found Ameet's more plausible and persuasive. Ameet's explanation (which the Judge ultimately accepted) was that the Tail Period Clause accounted for "lag" time between the provision of his services, the completion of the Sale, and the receipt of the Sale proceeds by Ishan. For a transaction of such complexity as the Sale, it was crucial to secure fair remuneration for Ameet for his services, even if the Sale did not complete before 30 September 2017 (the Contract's termination date). Ishan's explanation was that the Tail Period Clause provided a separate and independent entitlement to payment upon receipt of the Sale Proceeds. His explanation proceeded on the assumption that Clause 4.2 only entitled Ameet to fees upon receipt of the Sale proceeds. The Tail Period Clause then, extended that entitlement for a further two years. At the end of that, all entitlement to fees were extinguished.

16 Ameet's explanation was more consistent with the nature of tail period clauses. Tail period clauses (sometimes referred to as "tail gunner clauses") are not uncommon. Tail period clauses have been variously discussed in cases such as *Eminent Investments (Asia Pacific) Ltd v DIO Corporation* [2020] HKFCA

38, *African Minerals Limited v Renaissance Capital Limited* [2015] EWCA Civ 448, and *Carriage Hill Management LLC v Boston Lobster Feast Inc* [Case No. GJH-17-2208] where the Hong Kong Court of Final Appeal, the English Court of Appeal and the United States District Court (Maryland, Southern Division) have respectively confirmed Ameet's explanation of the commercial purpose behind such clauses. The gist is that these clauses guard against advisors/consultants being unfairly deprived of a transaction fee which they have substantially earned. These clauses prevent situations where an advisor/consultant has done everything necessary to bring a deal to fruition, but in the absence of a tail period clause, might be excluded from compensation should the sale complete only *after* the advisory/consultancy agreement is terminated. There was no reason to believe that Ameet's situation was any different.

The Pune Bungalow Illustration

17 Clause 4.2 of the Addendum to the LOE is as follows:

> 4.2 … For the purposes of this paragraph, besides value realized by Ishan from the Companies, the following assets / receivables will be counted as 'value realized by Ishan' upon receipt by Ishan or by his immediate family or entities owned or for the benefit of Ishan or his immediate family
>
> **a. Sale proceeds from the sale of Ishan's 1/3rd share or the acquisition by Ishan of the remaining 2/3rd share in the Pune Bungalow (located at Pot No. 365 Sindh Society, Aundh, Pune) For the purposes of calculation of my fees, in either of the abovementioned situations, the "value realized by Ishan" shall be the transacted value of Ishan's 1/3rd beneficial share in the Pune Bungalow.**
>
> b. Receipt of assets/amounts from the loan amount extended to Vishwanathan Ganapathy of approximately USD 1m less any additional amounts extended by Ishan to Vishwanathan Ganapathy.

> c. Assets/amounts from the loan/investment amount extended to Ravi Subramaniam/Silverline of approximately USD 2m less any additional amounts extended by Ishan to Ravi Subramaniam/Silverline
>
> d. Any amount from or related to Allied Properties Snd Bnd (*sic*) Malaysia.
>
> e. Sale proceeds from the Office proper5ty in 4C Court Chambers Mumbai.
>
> f. Amounts pursuant to court orders or settlements with regard to litigation with the Companies in the BVI
>
> g. Any amounts from or related to Watanmal Holdings Inc.
>
> h. Any amounts from or related to Watanmal Boolchand Partnership (for the avoidance of doubt this does not include repayment of any loans extended by any of the partners)
>
> (Pune Bungalow Illustration emphasised in bold)

18 The parties had differing interpretations of the Pune Bungalow Illustration found in Clause 4.2(a). Under the Pune Bungalow Illustration, Ishan had the choice to either sell his 1/3 share in the Pune Bungalow or to acquire the remaining 2/3 share from the other members of his family. Obviously, if he had opted for the latter option, that would have involved him *paying* rather than receiving any monies. Notwithstanding this, the Contract treated this as "value realised" for the purposes of calculating Ameet's fees. As such, Ameet regarded this as an illustration of how "value realised" under the Contract encompassed more than monies *received*. Ishan, on the contrary, argued that the Pune Bungalow Illustration was simply an exception to the general rule that "value realised" *was* indeed synonymous with "value received".

19 In our view, the Pune Bungalow Illustration was just that – an illustration. As such, it was difficult to draw any firm conclusions that could definitively close off one particular interpretation or another. In any case, Clause 4.2 made clear that the illustrations enumerated under Clauses 4.2(a) – (h) were

special provisions setting out how *specific* situations were to be treated ("*besides* value realised by Ishan from the Companies, the following assets/receivable will be counted as 'value realised by Ishan'…"). It was not clear what guidance these *special* provisions offered about how the Contract regarded "value realised" in *general*. In our view, the interpretation of Clause 4.2 did not require resort to these illustrations at all. The plain language of the Contract amply supported Ameet's case and the Judge's finding below.

The commercial context

20 The commercial context did not assist Ishan's case either. The thrust of Ishan's argument was that the entire *raison d'etre* of the Contract was to put money in his pocket. That is why Ameet's fee entitlement had to be tied to Ishan actually receiving the Sale proceeds. That Sale proceeds would make their way into Ishan's hands may well have been a happy (and even *necessary*) consequence of the Contract. But Clause 2 of the LOE made clear the scope of Ameet's obligations and what he was expected to do:

> 2. Scope of Work
>
> 2.1 Alternate Director
>
> [Ameet] will act as Alternate Director only when Ishan is otherwise pre-occupied and unable to attend Board meetings or attend to matters requiring the attention of the Directors of the Companies. [Ameet] will perform all the responsibilities expected of a director of the Company and as specifically directed by Ishan. This role would require, inter alia, [Ameet's] attendance at Board meetings and/or participating in other discussions and correspondence by and amongst the directors of the Companies. It is understood that this is a non-executive role in that there is no requirement for the day-to-day supervision of the management of the Companies; which is the responsibility of the Operations Committee of the Board that has been appointed to perform these supervision activities.
>
> While there will be every endeavor (*sic*) to consult and agree with Ishan the specific actions and positions on all matters the

> Board of Directors of the Companies, [Ameet] would have the flexibility of making judgments and decisions especially at Board Meetings which [Ameet] would attend in the absence, and as an Alternate, of Ishan.
>
> Nothing contained above is meant to limit the roles, responsibilities, rights and obligations of an Alternate to a Representative Director of the Company that have been prescribed under the Articles of association of the Companies or the BVI Business Companies Act 2004.
>
> 2.2 Member of the Sales Committee
>
> In [Ameet's] role as member appointed to the Sale Committee, [Ameet] will act in accordance with the mandate provided to the Sales Committee, by the Board of Directors and the Shareholders of the Companies. [Ameet] will provide [his] consent of such appointment to, and execute the confidentiality Agreements with, (*sic*) the Companies in the form attached to this letter as Annexures 3 and 4 respectively.

Clauses 2.1 and 2.2 made it clear that Ameet was to act as Ishan's Alternate Director on the Companies' board of directors, and participate as a member of the Sales Committee responsible for liquidating the assets of the Companies. Ameet did so, and as part of these duties, the Sale was completed within the Relevant Period. This was undisputed. Ishan's arguments appeared merely to be an invitation to look beyond the corners of the Contract. That is ultimately an approach only to be taken in situations when a contract proves incapable of explaining itself. That was not the case here.

Parties' conduct

21 As for the parties' conduct, two facts deserved attention: first, the fact that Ameet's fees were only paid upon distribution of the Sale proceeds to Ishan and second, the language in their correspondence during the Relevant Period where the terms "received" and "realised" were occasionally used interchangeably. In our view, both facts said little about when the parties intended for Ameet's fee entitlement to arise.

22 The fact that Ameet was only paid whenever dividends/director's fees were distributed to Ishan was ultimately equivocal. It supported both parties' theories. It supported Ishan's theory that Ameet's fee entitlement arose only upon actual distribution of the Sale proceeds. But it also supported Ameet's theory that there was a distinction between *whether Ameet*'s fee entitlement arose and *when Ishan* was obliged to pay – a distinction that Ishan himself conceded. The two, according to Ameet, arose at different junctures. Ishan's obligation to pay only arose upon receipt of dividends/director's fees. That was why Ishan paid only when he was able to. On balance, the Judge was entitled to prefer Ameet's version, given the plain language of Clause 4.2 itself and Ameet's far more believable explanation of the Tail Period Clause.

23 We also noted that the parties did not seem to have clearly distinguished between the terms "realise" and "receive" in their course of dealings. This in turn, may have suggested that the Contract *itself* used the terms "realise" and "receive" interchangeably, and ultimately, that Ameet's fee entitlement really only arose upon Ishan's receipt of dividends/director's fees from the Companies.

24 Admittedly, the parties did on occasion use the terms "realise" and "receive" interchangeably in various email exchanges from January 2019 onwards. In our view however, these too were equivocal. There was no sustained or consistent conduct by the parties showing that they regarded "realisation" and "receipt" as one and the same thing. But more importantly, Ameet and Ishan's loose language did not change the fact that the Contract also recognised *value* realised (not just *amounts* realised) and fastened Ameet's fee entitlement to such *value* realised. As discussed above, "value" as a term was

broad enough to cover not just actual cash received but also to recognise the value generated in securing a good sales price for the Companies' assets.

25 It bears repeating that the parties did not dispute that Ameet had rendered his services fully, and that the Sale was completed within the Relevant Period. Ameet deserved to be paid for completing those services, and further, to be paid according to the terms of the Contract, even if the precise quantum was to be calculated at a later date.

The contra proferentem rule and its applicability

26 Finally, we should state that contrary to Ishan's contentions, the *contra proferentem* rule had no application in the present case. The Court of Appeal in *LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 stated (at [56] – [58]) that this doctrine operates in two stages:

> (a) first, the court must determine if there is ambiguity in the contract; and
>
> (b) second, the contract must identify the person against whose interest the ambiguous term should be read ("the *proferens"*). The *proferens* is either the person who seeks to rely on the term or the person who proposed the term for inclusion in the contract in the first place.

27 The present case failed at the first stage. In our view, there was little ambiguity in the contractual terms. The scope of Ameet's work was clear. It was also clear that he had fulfilled his contractual obligations. The manner of calculating his fees was clear too – it was set out in a formula at Clause 4.2. The only dispute was whether that entitlement was tied to Ishan's receipt of the Sale proceeds or the simple fact that Ameet's work did indeed bring value to Ishan

within the Relevant Period. That did not, by itself, generate sufficient ambiguity for the doctrine of *contra proferentem* to operate. Disagreements alone do not equate to ambiguity, more so where the dispute is capable of being resolved by ordinary principles of contractual interpretation.

Conclusion

28 For the reasons above, we allowed SUM 14 and dismissed the appeal with the usual consequential orders. As for costs, we awarded Ameet $40,000 (all-in) for both SUM 14 and the main appeal.

Belinda Ang Saw Ean
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

Tito Isaac, Wong Hui Min and Shalini Rajasegar (Tito Isaac & Co LLP) for the appellant;
Prakash Pillai, Koh Junxiang and Charis Toh (Clasis LLC) for the respondent.