IN THE COURT OF APPEAL OF MALAYSIA

Coram: David Wong, JCA; Iskandar Hashim, JCA; Hasnah Hashim, JCA

OME Resources Sdn Bhd v Bonanza Aycel Mining Sdn Bhd

Citation: [2018] MYCA 202 **Suit Number:** Civil Appeal No. W-02(NCVC)(A)-838-04/2017

Date of Judgment: 24 April 2018

Contracts & commercial – Joint venture agreement – Termination – Whether there was a breach of the Agreement – Guidelines relating to the interpretation of private agreements – Whether the trial court had considered the background factual matrix when interpreting the Agreement – Whether the trial court had erred in relying only on disputing affidavit evidence

JUDGMENT

Introduction:

[1] This appeal relates to a joint venture agreement (JV Agreement) between the Appellant/Plaintiff and Respondent/Defendant in which the learned Judge was called upon to interpret a clause in the JV Agreement which, in essence, provides whose responsibility is to provide additional capital funding for continued mine exploration of an area in the State of Kelantan. That clause is clause 2.1(e).

[2] The learned Judge construed clause 2.1(e) of the JV Agreement to mean that it is the responsibility of the Appellant to provide continued funding of the mine exploration.

[3] We heard the appeal and reserved our decision. We have since further considered submissions from respective counsel and we now give our decision and grounds for the same.

Background facts:

[4] The Respondent had entered into an Exploration and Mining Agreement on 3.3.2010 with Perbadanan Ladang Rakyat Negeri Kelantan (Exploration Agreement) which is a State Corporation of the State of Kelantan and holds a 99-year lease over 5 pieces of state land.

[5] Armed with the Exploration Agreement, the Respondent then entered into a Joint Venture

Agreement with the Appellant on 16.3.2012 (JV Agreement) with the intent to explore, develop and operate mines.

[6] The Appellant holds 60% participating interest in the joint venture in consideration of financing the exploration costs of the same. The Respondent holds a 40% participating interest.

[7] The Appellant's obligation is to invest up to or equal to the sum of USD 2 million over a period of 2 years.

[8] What has given rise to the dispute is the interpretation of Clause 2.1(e) of the Joint Venture Agreement.

[9] It is the contention of the Appellant that it had already invested the sum of USD 2 Million and any further investment in the joint venture project must be proportionate in accordance to their respective interest in the same.

[10] The Respondent's position is simply that it is the Appellant which must fully finance the joint venture project.

Originating summons:

[11] To resolve the contrary stands of the parties, the Appellant took out an originating summons seeking the following reliefs:

i. A declaration that upon a proper construction of the Joint Venture Agreement dated 16.3.2012 between the Plaintiff and the Defendant ("JVA") and Clause 2.1(e) thereof it is for the Plaintiff and the Defendant qua participants to the Joint Venture to mutually pre-agree on the amount to be paid as payment No. 5 under Clause 2.1(e) being the amount required to complete the exploration and feasibility study where the exploration costs of the mine exploration should exceed USD 2,000,000.00.

ii. A declaration that in the event the Plaintiff and the Defendant do not or unable to mutually pre-agree as to the amount to be paid as payment No. 5 under Clause 2.1(e) of the JVA then the Plaintiff and the Defendant qua Participants to the Joint Venture are to make payment under Clause 2.1(e) of the JVA proportionate to their respective Joint Venture Interests pursuant to Clause 2.5 of the JVA whereby the Plaintiff and the Defendant respectively hold a 60% and 40% interest in the Joint Venture.

iii. A declaration that the Plaintiff qua Manager of the Joint Venture had on 30.4.2015 made a valid Cash Call pursuant to clause 7.8 of the JVA.

iv. A declaration and an order that the Defendant shall pay, within fourteen (14) days from the date of this Order, to the Plaintiff qua Manager of the Joint Venture pursuant to the Cash Call dated 30.04.2015, the sum of RM1,146,320.00 being 40% of the estimated budget for 2015 presented during the meeting on 24.1.2015 proportionate to the Defendant's interest in the Joint

Venture.

v. A declaration and an order that the Defendant is to pay the Cash Call made by the Plaintiff (as defined in paragraph 4 above) qua Manager of the Joint Venture with interest pursuant to Clause 7.9 of the JVA at the Prescribed Rate as defined in the JVA from 14.04.2015 to the date of full and final settlement thereof.

vi. A declaration that should the Defendant fail and I or refuse and I or neglect to pay the Cash Call made by the Plaintiff (as defined in paragraph 4 above) qua Manager of the Joint Venture and/or the interest thereupon (as defined in paragraph 5 above), the Defendant shall be in default for the purposes of clause 8.1(a) of the JVA.

vii. A declaration that the Defendant's Notice of Termination dated 8.9.2016 is null and void.

viii. An order for specific performance of the JVA in particular that the Defendant does comply and perform with the terms of the JVA;

ix. Costs.

[12] The Respondent in response took out a counterclaim seeking for the following reliefs:

24. By virtue of Order 28 rule 7, **Rules of Court 2012 [ROC 2012]**, *the Defendant counterclaimed, inter alia, as below:-*

i. A declaration that upon a proper construction of the JV Agreement dated 16.03.2012, between the Plaintiff and the Defendant pursuant to Clause 2.1(e) thereof, it is the obligation of the Plaintiff to wholly finance payment No. 5;

ii. A declaration that in the event that the Plaintiff fails to make the said payment No. 5 under Clause 2.1(e) of the JV Agreement, then the JV Agreement is deemed terminated by the Plaintiff's default;

iii. A declaration that in the event that this court holds that payment No. 5 under Clause 2.1(e) of the JV Agreement was to be proportionate to the Joint Venture interest, then the Plaintiff's failure to pay 60% of the cash call and/or cash contribution made on 30.04.2015 is deemed a termination under the JV Agreement;

iv. A declaration that in the event that the Plaintiff and the Defendant are unable to mutually pre-agree as to the additional amount payable under payment No. 5, then the JV Agreement is deemed terminated;

v. A declaration that in the event it is a valid cash call made on 30.04.2015, then the failure of the participants to make payment within the time prescribed by the JV Agreement is deemed as a default under Clause 8.1(a) of the JV Agreement;

vi. A declaration that in the event that the cash call made on 30.04.2015 is a valid cash call,

then the failure of the Plaintiff to make payment pursuant to the valid cash call is deemed to be a withdrawal from the Joint Venture dated 16.03.2012;

vii. A declaration that the Plaintiff's failure to comply with the express accounting and audit procedure as stated in Clause 14 of the JV Agreement upon due notice is an event of default under Clause 8.1 of the JV Agreement;

viii. A declaration that the Plaintiff's failure to make cash contribution up to USD 2 Million over a period of 2 years from date of the JV Agreement tantamount to a breach of the JV Agreement and withdrawal of the Plaintiff from the said JV;

ix. A declaration that the Clause 2.1 [e] of the JV Agreement dated 16.3.2012 is void for uncertainty and consequently thereof, a declaration that the said JV Agreement is unenforceable; and

x. Damages and cost.

High Court:

[13] The learned Judge dismissed the Appellant's application and allowed termination of the JV Agreement under paragraph 1 and 2 of the Defendant's Counter Claim, inter alia:-

i. A declaration that upon a proper construction of the JV Agreement dated 16.03.2012, between the Plaintiff and the Defendant pursuant to Clause 2.1(e) thereof, it is the obligation of the Plaintiff to wholly finance payment No. 5.

ii. A declaration that in the event that the Plaintiff fails to make the said payment No. 5 under Clause 2.1(e) of the JVA, then the JVA is deemed terminated by the Plaintiff's default;

[14] In essence, the learned Judge found that the Appellant had breached the JV Agreement by not providing the additional funding for mine exploration as required by clause 2.1(e) and hence found that the termination of the same by the Respondent to be valid.

Our grounds of decision:

[15] In the midst of oral submission from learned counsel for the Appellant on 24.11.2017, we asked respective counsel as to whether the USD 2 Million referred to in Clause 2 had been paid by the Appellant as we held the provisional view that until such time that the USD 2 million is fully paid, Clause 2(5) would not kick in, so to speak. Learned counsel for the Appellant informed the Court that as far as his client is concerned, it had been paid. However, learned counsel for the Respondent took the contrary view that it had not been paid. It also appeared to us that the learned Judge had found that the USD 2 Million had not been fully paid.

[16] With such contradictory stands by respective parties, we then informed learned counsel for the Respondent that unless there is a concession on the part of the Respondent that the USD 2 Million

had been paid, we may have to remit the matter to the High Court to determine whether the USD 2 Million had been paid. Learned counsel for the Respondent then sought an adjournment to seek instructions from his client which we duly granted and fixed the next hearing date on 7.12.2017.

[17] Upon resumption of the hearing on 7.12.2017, learned counsel for the Respondent informed the Court that the USD 2 Million had been paid by the Appellant. That being the case, we then proceeded to hear submissions from respective counsel. At the end of that hearing, we also requested further submissions to be submitted on or before 15.1.2018. We did receive such further submissions from respective counsel and have taken them into consideration in our deliberation.

[18] It is undisputed by respective parties that the issue before us is similar to that in the High Court and that is simply this:

Who is to fund the exploration costs after the full payment of USD 2 Million by the Appellant?

[19] It is also undisputed that the answer to this issue depends as to how this Court would interpret Clause 2 which reads as follows:

2.1 Cash Contributions

In order to be entitled to the 60% Participating Interest OMER must finance all the JV exploration up to or equal to the sum of USD two Million [USD 2,000,000] over a period of two [2] years and must be paid as contemplated in clause 2.2 as follows:

[a] Payment 1 - USD 500,000 to earn a 15% project share upon execution of this Agreement.

[b] Payment 2 - USD 500,000 to earn a 15% project share on or before 6 months from the Agreement date.

[c] Payment 3 - USD 500,000 to earn a 15% project share on or before 12 months from the Agreement date.

[d] Payment 4 - USD 500,000 to earn a 15% project share on or before 18 months from the Agreement date.

[e] Payment 5 - Additional amount to complete exploration and feasibility study including metallurgy test work, plant design and infrastructure.

2.2 Revenue Component

Unless the Participants agree otherwise, the Cash Contribution will be used by the Manager exclusively for the purpose of exploration to progress the life of the project, which will include exploration, for gold and all minerals.

[20] The Appellant had taken out an Originating Summons to pursue its rights. Generally, the mode of Originating Summons is normally used when there is no dispute by respective parties as to the factual

matrix to the case and hence made it possible for the trial Judge to make a summary finding of an issue premised on undisputed facts. If however there is substantial dispute of facts between counsel, any summary findings by the learned Judge of any issue would be wholly inappropriate. Put it in another way, affidavits filed by respective parties in an Originating Summons proceeding must not contain dispute of facts relating to the issue to be determined by the learned Judge. Under such circumstances, the appropriate mode to resolve such dispute must be by way of a writ action so that respective witnesses would be given a chance to put forth their respective cases and be subject to cross examination so that the trial Judge would be in a better position to determine which version of events is more credible and probable.

[21] When the Originating Summons was first taken out by the Appellant, we have no doubt that the Appellant's solicitor held a bona fide view that the dispute between the parties could be resolved by the Court by only interpreting clause 2.1 of the JV Agreement. We say that as the Appellant held the view that the USD 2 Million as provided for in clause 2.1 had been fully paid by them and the only dispute between them was who is to bear the additional funding as set out in clause 2.1(e).

[22] The payment of the USD 2 Million as required by the JV Agreement by the Appellant had been highly disputed by the Respondent in their affidavits and the learned Judge was called upon to determine this dispute by way of affidavit evidence. At paragraph 27 of his grounds the learned judge had in fact found that the USD 2 Million had not been fully paid as he found part of USD 2 Million was not utilized for mine exploration. The learned Judge, with respect, once shown that there is a substantial dispute as to the payment of the USD 2 Million, should have been alerted that it may not be appropriate for him to decide on such a dispute by way of affidavit evidence when the application of clause 2.1(e) is anchored on such payment.

[23] At the adjourned hearing, counsel for the Respondent informed the Court that they are willing to concede that there has been a payment of USD 2 Million by the Appellant as required by the JV Agreement. Learned counsel for the Appellant in his further submission stated that such concession would in effect contradict substantially the finding of the learned Judge and hence on this contradiction, the appeal ought to be allowed. With respect to learned counsel for the Respondent, we are not quite sure how this concession would prejudice them.

[24] Be that as it may, having reconsidered the averments in the respective affidavits by parties in the context of the grounds of the learned Judge, we find it appropriate not to accept such concession and our reasons are these.

[25] In our minds, the Judgment of the learned Judge was peppered with findings premised on conflicting claims by respective litigants which eventually led to a finding that there was a lawful termination of the JV Agreement. That finding of course in no uncertain term is a finding of immense importance to the Appellant in that it had lost all its rights under the JV Agreement. What is in dispute here is whether there had been an agreement between the Appellant and Respondent as to what is the further amount required to be paid by the Appellant. Even from the submission of the counsel for the Respondent, one can see that there is substantial dispute as to whether there was a meeting of minds as to the exact amount to be paid.

[26] Further clause 8.2 of the JV Agreement provides for certain conditions to be complied with before a termination can be made. One such condition is a window of 30 days for the defaulting party to remedy any breach. Whether these conditions had been complied with are matters of dispute between the parties and the only avenue to resolve matters is simply through a full trial. It is the contention of the Appellant that it was not given such a window to remedy. On this aspect, we are of the view that the learned Judge had erred when he summarily found that the Appellant had breached in failing payment No. 5 despite the disputed evidence that there may not be an agreement as to the amount to be paid. With such disputed matters by respective parties, the safest and only course available to is simply to turn the Originating Summons into a writ action so that respective witnesses will be subjected to cross examination in a full trial which course of action would better equipped the trial Judge in determining the truth of the matter.

[27] Further in interpreting any agreement, Courts must be mindful of what is stated by the Federal Court in **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd** 2010 1 CLJ 269 where Gopal Sri Ram said as follows:

> ***[42]*** *Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.*

[28] It is our considered view that the learned Judge had erred in not taking into account the factual matrix when interpreting clause 2.1 of the JV Agreement as postulated in **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd** (supra). The learned Judge with respect should not just rely on disputing affidavit evidence to determine the issues before him.

Conclusion

[29] For reasons stated above, we cannot accept the concession of the Respondent as to the payment of the USD 2 Million by the Appellant.

[30] In the circumstance, we allow the appeal with costs in the cause and set aside the orders of the High Court. We also remit this matter back to the High Court with the order that the Originating Summons be converted into a writ for trial before another Judge. We also order that the deposit be refunded to the Appellant.

Dated: 24 April 2018

Sgd

DAVID WONG DAK WAH

Judge
Court of Appeal Malaysia

COUNSEL

For the Appellant: Joshua Kevin, With him Kenzu Goik & Azura Adnan, Messrs. Kevin & Co

For the Respondent: A Silvanathan, With him E Babu Raj Raja Gopal, Messrs. Kean Chye & Sivalingam

LEGISLATION REFERRED TO:

Rules of Court 2012, Order 28 Rule 7

JUDGMENTS REFERRED TO:

Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd 2010 1 CLJ 269