SUPREME COURT OF SINGAPORE

29 August 2018

Case summary

PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another ***[2018] SGCA(I) 6***
Civil Appeal No 154 of 2017

Decision of the Court of Appeal (delivered by Chief Justice Sundaresh Menon):

Outcome: CoA dismisses appeal against SICC's finding that there was a repudiatory breach of the joint venture deed, but remits matter to SICC to determine whether the first respondent had the financial ability to fund the joint venture company.

Pertinent and significant points of the judgment

- *Seldon v Davidson* [1968] 1 WLR 1083 ("*Seldon*") was wrongly decided insofar as it held that where a party admitted to having received a sum of money, there was *prima facie* an obligation to repay. The relevant question was not whether a party had admitted to receiving a sum of money, but whether it had admitted to incurring a debt (at **[141]–[144]**).
- Where an issue was squarely and properly placed before the court, the court ought to decide it. Where the evidence was incomplete such that the court could not make a finding one way or the other, the question of fact raised was to be decided on the basis of who bore the burden of proof (at **[170]**).

Background

1 This appeal arose out of a dispute between the appellants ("the Appellants") and the respondents ("the Respondents") over their joint venture to upgrade and sell the Appellants' coal. The matter was heard by the Singapore International Commercial Court ("the Court") in separate tranches, and this appeal concerned only the Court's decision in the second tranche.

The material facts

2 The Appellants were PT Bayan Resources TBK ("BR") and Bayan International Pte Ltd ("BI"). BR owned a number of coal mining subsidiaries in Indonesia, including PT Bara Tabang ("Bara") and PT Fajar Sakti Prima ("FSP").

3 The Respondents were BCBC Singapore Pte Ltd ("BCBCS") and Binderless Coal Briquetting Company Pty Limited ("BCBC"). Both of them were indirect wholly-owned subsidiaries of White Energy Company Ltd ("WEC").

4 In 2006, BCBC and BI entered into a joint venture deed ("the JV Deed") for the construction and commissioning of a coal briquette processing plant in Indonesia ("the Tabang Plant"). Pursuant to a deed of novation executed in 2009, BCBCS and BR were substituted for BCBC and BI respectively as the parties to the JV Deed. In connection with the joint venture, the parties incorporated an Indonesian joint venture company, PT Kaltim Supacoal ("KSC"), with BCBCS holding 51% and BI, 49% of the issued shares.

5 Friction between the parties started to develop by November 2007, when they realised that they had underestimated the costs of the Tabang Plant. To exacerbate matters, in October 2010, a piece of legislation which set the benchmark price for the sale of minerals and coal in Indonesia ("the HBA Price") came into force.

6 These developments led the parties and KSC to enter into a series of agreements, which included:

(a) A "Priority Loan Funding Agreement" ("the PLFA") between KSC, BR and BCBCS. Under the PLFA, BCBCS was to advance a revolving working capital facility of up to US$20m (later increased to US$40m) to KSC; while BR was to provide KSC with a "Coal Advance", which entailed BR supplying coal to KSC at the market price but requiring payment of only US$8 per tonne upon delivery.

(b) Coal supply agreements ("the 2010 CSAs") between KSC and BR's coal mining subsidiaries, Bara and FSP. Under the 2010 CSAs, Bara and FSP were to supply coal to KSC at the HBA Price. However, pursuant to the "Coal Advance" under the PLFA, KSC only had to pay US$8 per tonne upfront.

7 Things came to a head in the last quarter of 2011. At a KSC board meeting in early November 2011 ("the November 2011 Board Meeting"), the Appellants indicated that they wanted to exit the joint venture, and that they were willing to sell their shares in KSC to the Respondents and WEC (collectively, "the WEC Parties"). The Appellants were happy for the WEC Parties to continue with the joint venture on their own, and while BR remained willing to supply coal to KSC, this would have to be on arms' length terms and "at commercial rates". On 7 November 2011, shortly after the November 2011 Board Meeting, KSC requested for "a lot of coal" from Bara and FSP.

8 On 9 November 2011, WEC made a public announcement on the Australian Stock Exchange to the effect that BR had formed the view that the joint venture might not be economically viable. On the same day, after WEC's announcement, BR instructed Bara and FSP to stop supplying coal to KSC.

9 Following the cessation of coal supply to KSC, a meeting between the parties was held on 17 November 2011 ("the 17 November 2011 Meeting"). During the meeting, the Appellants reiterated their desire to exit the joint venture, and again raised the possibility of the WEC Parties buying out their share of the joint venture for US$45m, which was the amount that they had invested up to that point in time. The only contemporaneous notes of the meeting suggested that the understanding between the parties was that BR would not resume the supply of coal to KSC until the Appellants' shares in KSC were bought out ("the Buyout Condition").

10 On 6 December 2011, an extraordinary general meeting of KSC's shareholders ("the 6 December 2011 EGM") was held. At that meeting, the Appellants reiterated their intention to exit the joint venture, and intimated their desire to liquidate KSC unless their stake in KSC was bought out. They also denied having imposed the Buyout Condition, and maintained that BR would continue supplying coal to KSC at the HBA Price. It is undisputed that the meeting also touched on the possibility of putting the Tabang Plant into care and maintenance,

although the parties were divided as to whether there was an agreement to do so. On 15 December 2011, the Tabang Plant was put into care and maintenance.

11 On 27 December 2011, the Respondents commenced legal proceedings against the Appellants. Approximately two months later, on 21 February 2012, BR wrote to BCBCS purporting to terminate the JV Deed. Among other things, BR alleged that BCBCS had breached the terms of the JV Deed by unilaterally causing KSC to exceed its budget by about US$7m ("the Excess Expenditure"), and to exceed the US$40m PLFA facility limit by extending a further loan of about US$6m to KSC ("the Excess Debt"). On 2 March 2012, BCBCS replied stating that BR's purported termination constituted a wrongful repudiation of the JV Deed, which it accepted.

The issues on appeal

12 There were four main issues on appeal, namely (at **[68]**):

(a) whether BR was obliged to procure and/or ensure the supply of coal to KSC during the period from November 2011 to 2 March 2012 ("the Obligation Issue");

(b) if BR was under such an obligation, whether BR breached that obligation, and if so, whether that breach constituted a repudiation of the JV Deed ("the Breach Issue");

(c) whether BR repudiated the JV Deed by issuing the termination notice in its letter of 21 February 2012 ("the Repudiation Issue"); and

(d) if BR repudiated the JV Deed, whether such repudiation caused any loss to BCBCS, and if so, what was the period for which BCBCS was entitled to damages ("the Causation Issue").

The decision on appeal

The Obligation Issue

13 In respect of the Obligation Issue, the Court of Appeal ("the CoA") rejected the Appellants' argument that BR was not contractually obliged to procure and/or ensure the supply of coal to KSC under the JV Deed and/or the PLFA during the period from November 2011 to 2 March 2012.

14 The CoA first held that the "Business" defined in the JV Deed remained in operation during the aforesaid period despite the Tabang Plant having been put into care and maintenance, and thus, BR's obligation under the JV Deed to procure the supply of coal "for the operation of the Business" continued to apply. In this regard, the CoA pointed out that cll 7.1(x) and 11 of the JV Deed undercut the Appellants' contention that either party to the JV Deed could unilaterally bring about the cessation of KSC's operations and business simply by refusing to provide funding (at **[74]–[77]**).

15 Second, the CoA rejected the Appellants' argument that Art 7.1 of the PLFA did not impose a separate and free-standing obligation on BR to ensure that Bara and FSP supplied coal to KSC pursuant to the 2010 CSAs. It noted that Art 7 of the PLFA refined BR's coal supply obligation to include an obligation to ensure that KSC was liable to pay only US$8 per

tonne upfront for the coal supplied. It was difficult to see how BR could have advanced coal to KSC at this stipulated upfront payment price without also simultaneously having an obligation to ensure the supply of coal to KSC (at **[78]–[80]**).

16 Third, the CoA found that BR's coal supply obligation under the JV Deed and the PLFA was not affected by whether KSC could have paid Bara and FSP for the coal supplied under the 2010 CSAs. This was because cll 10.8 and 10.14 of the 2010 CSAs indicated that Bara's and FSP's coal supply obligations, and, in turn, BR's obligation to ensure that Bara and FSP fulfilled those obligations, were independent of KSC's payment obligation (at **[81]–[82]**).

17 Fourth, the CoA rejected the Appellants' argument that Bara and FSP were not obliged to supply coal to KSC because the latter already had sufficient coal for testing the Tabang Plant. In this regard, the CoA upheld the Court's finding that as at November 2011, the Tabang Plant was close to the stage of commissioning that required coal for testing and did not have sufficient coal in its stockpile for this purpose. The CoA agreed with the Court that the evidence of KSC's site operations manager ("Mr Reilly") on these matters was more probative than that of the Appellants' expert witness ("Mr Alderman"), given that Mr Reilly was present at the site at the material time in November 2011 whereas Mr Alderman was not. The CoA also held that the Court had correctly ignored those parts of Mr Alderman's report on the Tabang Plant which concerned the deficiencies in the plant's design since those deficiencies were not in issue before the Court (at **[83]–[97]**).

18 Fifth, the CoA rejected the Appellants' contention that KSC's request for "a lot of coal" on 7 November 2011 was too vague and open-ended to trigger Bara's and FSP's coal supply obligations under the 2010 CSAs. It pointed out that cl 3.9 of the 2010 CSAs did not require KSC to specify a particular quantity in its requests for coal for testing purposes (at **[98]**).

The Breach Issue

19 With regard to the Breach Issue, the CoA held that there was no merit in the Appellants' argument that BR was justified in instructing Bara and FSP to cease supplying coal to KSC on 9 November 2011 due to an impasse as to the price of coal. It was clear from the documentary evidence that this instruction was given on the basis that the Appellants had decided to withdraw from the joint venture, and not because of any impasse as to price. Further, there was in fact no impasse on price as FSP's monthly invoices for the coal supplied in 2011 showed that the price had been set at US$29.70 per tonne. Even if there had been any impasse on price, this ought to have been resolved by the price setting mechanism under cl 8.2 of the CSAs instead of by ceasing coal supply to KSC (at **[103]–[104]**).

20 The CoA also found, based on the notes of the 17 November 2011 Meeting, that BR had imposed the Buyout Condition at that meeting. Among other things, the CoA held that it was incongruous for the Appellants to aver that the Buyout Condition had not been imposed when they maintained during the 6 December 2011 EGM that BR would insist on liquidating KSC if its stake in KSC were not bought out. The CoA thus upheld the Court's finding that BR had breached its coal supply obligation. As this obligation was fundamental to the joint venture, BR's breach was repudiatory of the JV Deed (at **[105]–[112]**).

The Repudiation Issue

21 The Repudiation Issue centred on whether BR was justified in issuing its termination notice of 21 February 2012. This in turn depended on whether, as the Appellants contended, BCBCS had repudiated the JV Deed by unilaterally causing KSC to incur the Excess Debt and

the Excess Expenditure, and by unilaterally causing the Tabang Plant to be put into care and maintenance on 15 December 2011. The CoA found that none of these alleged grounds for terminating the JV Deed were valid.

22 With regard to the Excess Debt, the CoA found that BCBCS did not unilaterally cause KSC to incur this debt, albeit for slightly different reasons from those of the Court. Construing cl 7.1 of the JV Deed as a whole, the CoA considered that this clause differentiated between member funding and third party funding. Where a party unilaterally caused KSC to receive member funding, this would constitute a breach of cl 7.1 (specifically, cl 7.1(hh)) only if the member concerned created an obligation on KSC's part to repay the funds advanced. The US$6m extended by BCBCS to KSC on top of the US$40m PLFA facility did not result in an obligation on KSC's part to repay BCBCS, and it therefore could not be said that there was a breach of the JV Deed (at [**119]–[147]**).

23 In reaching the aforesaid conclusion, the CoA rejected the Appellants' reliance on *Seldon v Davidson* [1968] 1 WLR 1083 ("*Seldon*") to argue that the onus was on the Respondents to show that KSC had no obligation to repay BCBCS. The CoA cast doubt on the correctness of *Seldon* insofar as it stood for the proposition that where a party admitted to receiving a sum of money, there was *prima facie* an obligation to repay. The relevant question, the CoA held, was not whether a party had admitted to receiving a sum of money, but whether it had admitted to incurring a debt. On the facts, the Respondents' pleadings denied the Appellants' Excess Debt argument. This meant that the Appellants bore the burden of proving that KSC had incurred the Excess Debt, which burden they had failed to discharge (at **[134]–[146]**).

24 As for the Excess Expenditure, the CoA dismissed the Appellants' contention that BCBCS had unilaterally caused KSC to incur that expenditure. It highlighted that KSC was itself responsible for making decisions on its expenditure; moreover, BR had control over KSC's expenditure by way of its ability to refuse to sign KSC's cheques (at **[148]–[151]**).

25 The CoA also found that BCBCS had not unilaterally placed the Tabang Plant into care and maintenance. The evidence showed that the parties had agreed at the 6 December 2011 EGM to implement a care and maintenance program, with possibly only the apportionment of the costs of the program left open (at **[152]–[156]**).

The Causation Issue

26 The Causation Issue concerned the Appellants' argument that any breaches of the JV Deed by BR had not caused BCBCS any loss because KSC lacked funding and thus would have been unable to get the Tabang Plant to the point where it could undertake commercial production (at **[158]**).

27 The CoA held that the key question at the heart of the Causation Issue was whether BCBCS was willing and able to fund KSC by itself. It agreed with the Court that BCBCS was willing to fund KSC unilaterally, noting, among other things, that BCBCS had continued to fund KSC even after BR first expressed its desire to withdraw from the joint venture (at **[161]–[167]**).

28 As for whether BCBCS was able to fund KSC by itself, the CoA observed that the Court had reserved its decision on this point to the next tranche of trial on the basis that there was insufficient evidence before it, and held that the Court was not entitled to do so. The issue of BCBCS's ability to fund KSC had been squarely and properly before the Court as it was

intricately tied to the question of whether KSC had sufficient funds to keep operating the Tabang Plant. The Court therefore ought to have decided the issue. Consequently, the CoA remitted this issue to the Court for its determination (at **[168]–[177]**).

This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's judgment.