

China-Related Investment Dispute Resolution

Three Documents and an Oral Agreement: Singapore Court of Appeal Determines if a Specific Term is Part of an Agreement

Introduction

Disagreements as to the existence of contractual terms frequently occur between contracting parties. In *Lim Siau Hing @ Lim Kim Hoe and another v Compass Consulting Pte Ltd and another appeal* [2023] SGCA 39, the Court of Appeal was required to determine two related appeals concerning whether a specific term formed part of the agreement between the parties. Unfortunately, the agreement was primarily contained in three different documents, which – on their face – did not appear to bear an obvious nexus with each other and were not drafted by lawyers.

Mr Lim Siau Hing @ Lim Kim Hoe and Mr Lim Vhe Kai (collectively, "**Lims**") had appointed Compass Consulting Pte Ltd ("**Compass**") to structure a reverse takeover of a company ("**RTO**"). The Lims agreed to pay a success fee of S\$1.1 million to Compass upon completion of the RTO. In addition, at a subsequent meeting, the parties agreed that Compass would be paid incentives in the form of bonus shares ("**Bonus Shares**") and a cash fee ("**Cash Fee**") for its services in respect of the RTO ("**Agreement**") provided certain conditions were satisfied, namely that the Lims' shares would be worth at least S\$30 million and constitute at least 65% of the shares in the listed entity. The three material documents ("**17 July Documents**"), which contained the Agreement, were drafted by a representative of Compass and without any advice from lawyers. The parties agreed that the Agreement was partly written and partly oral. Following the completion of the RTO, the Lims duly paid the success fees of S\$1.1 million. However, the Lims did not pay Compass the Bonus Shares and the Cash Fee, as the conditions had not been fulfilled.

When deciding the appeals, the Court of Appeal considered it imperative to consider the totality of the evidence surrounding the signing and preparation of the 17 July Documents and found that the 17 July Documents were meant to collectively evidence an oral agreement that was reached between the parties. The Court of Appeal agreed with the Lims and found that the Bonus Shares and the Cash Fee were not due to Compass as the agreed conditions relating to the RTO had not been fulfilled.

Kelvin Poon SC, Mark Cheng and Tan Tian Hui of Rajah & Tann Singapore LLP successfully represented the Lims, the Appellants in the appeal and Respondents in the cross-appeal.

Brief Facts

The Lims are executive directors and controlling shareholders of Knit Textiles Mfg Sdn Bhd ("**KTM**") and



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had appointed Compass to structure a RTO of Lereno Bio-Chem Ltd ("**Lereno**"), in order to list KTM and its related companies on the Catalist board of the Singapore Exchange Securities Trading Ltd. The directors of Compass are Mr Kelvin Chin Wui Leong ("**Kelvin**") and Ms Chong Lee Ching ("**Ms Chong**"). Compass entered into a corporate advisory agreement ("**First LOE**"), under which it was appointed as project manager for the RTO. Shortly after a kick-off meeting between the Lims, Kelvin and Ms Chong, Compass entered into an addendum to the First LOE ("**Second LOE**"), which expressly provided that the fees for services provided by Compass were estimated to be S\$1.1 million.

Kelvin and Ms Chong facilitated separate discussions with the Lims and the then Managing Director and CEO of Lereno, Mr Ong Puay Koon ("**Mr Ong**"), regarding the structure of the RTO. At a meeting on 17 July 2017, the Lims, Kelvin, Ms Chong and Mr Ong finalised the structure of the RTO ("**17 July Meeting**"). They also agreed that upon successful completion of the RTO, Compass would be paid incentives in the form of S\$500,000 worth of Bonus Shares in Lereno and a S\$480,000 Cash Fee ("**Agreement**"). However, the parties disagreed as to why the Bonus Shares and Cash Fee were promised to Compass. The Lims took the position that it was agreed that they will only be obliged to pay the Bonus Shares and Cash Fees if the Lims' shares are valued at least S\$30 million and constitute at least 65% of the shares in the listed entity. Compass alleged that the Agreement was only subject to the latter condition.

During the 17 July Meeting, the three 17 July Documents were signed by the Lims:

- (a) Document titled "Project Libra: Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)" ("**Document 1**"), which stated that the Lims "*being the directors and shareholders of KTM, hereby agree to the sale of KTM to [Lereno] provided our net share of equity in the listed issuer ... is no less than 65% at completion of the Transaction*".
- (b) Document titled "Project Libra – Corporate Service Agreements" ("**Document 2**"), which stated that the Lims, "*being the directors and shareholders of KTM, hereby agree to provide both [Mr Ong] and [Kelvin] and/or their nominated representatives a corporate advisory service agreement (Agreements) for a period of 2 to 3 years from completion of Transaction (the Period). The total fees for the Agreements for both Mr Ong and [Kelvin] is no less than S\$480,000 per person for the Period*".
- (c) Document titled "Project Libra: Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)" ("**Document 3**"), which stated that the Lims, "*being the directors and shareholders of KTM, hereby agree to the sale of entire equity in KTM to [Lereno] for a consideration of S\$30 Million*".

The RTO was completed with the Lims holding a 77.79% stake in Lereno and their shares being worth S\$26.4 million. The Lims paid Compass S\$1.1 million for its services, via the issuance of shares in Lereno. However, Compass was not paid the Bonus Shares and the Cash Fee as the S\$30 million condition was not met. Compass commenced an action claiming the Bonus Shares and the Cash Fee.

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High Court Decision

Despite both parties accepting that the Agreement was partly written and partly oral, the High Court Judge ("**Judge**") held, among others, that the Agreement was wholly written and comprised only Documents 1 and 2 and not Document 3, and that the S\$30 million condition did not form part of the Agreement. As Compass had satisfied the 65% condition, the Judge found that Compass was entitled to the Bonus Shares. However, the Judge found that Compass was not entitled to the Cash Fee, as Document 2 contemplated that Compass was to enter into a separate corporate advisory service agreement to earn this sum, but no such agreement was entered into.

The Lims and Compass each filed appeals. The Lims appealed against the Judge's decision regarding the Bonus Shares. Compass appealed against the Judge's decision regarding the Cash Fee.

Court of Appeal Decision

The Court of Appeal allowed the appeal by the Lims, reversing the Judge's decision to allow the claim by Compass for Bonus Shares under the Agreement, and dismissed the appeal by Compass.

The appeals had been transferred from the Appellate Division of the High Court to the Court of Appeal because the parties relied upon evidence of subsequent conduct as an aid to contractual interpretation, an issue which has yet to be authoritatively decided by the Court of Appeal. However, the Court of Appeal stated that this issue did not strictly arise for consideration in these appeals. As the key issue in these appeals concerned the existence of a specific term, and not the interpretation of a term, there was no restriction on the evidence which may be considered. The Court of Appeal was not concerned with the parol evidence rule or the principles that govern the admissibility of extrinsic evidence in a case of contractual interpretation. Whether evidence of subsequent conduct may be admitted for the purposes of contractual interpretation remains an open question.

Appeal by the Lims

The key issue was whether the Agreement was subject to both the 65% condition and the S\$30 million condition, or only the 65% condition. The Court of Appeal reasoned that to answer this issue it was necessary to consider the totality of the evidence surrounding the signing and preparation of the 17 July Documents. The Court of Appeal noted that it was both parties' positions in the proceedings below, and their final position in the appeals, that the Agreement was partly written and partly oral.

The Court of Appeal held that:

- The Agreement was partly written and partly oral.
- The Judge erred in failing to consider whether there was a set of oral terms in light of which the 17 July Documents were meant to be construed, and if so, what these terms were.

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- As the 17 July Documents did not set out the entire agreement pertaining to the Bonus Shares and the Cash Fee, regard must be had to the parties' evidence of what was orally discussed and agreed at the 17 July Meeting.

The Court of Appeal found that:

- Compass had not satisfactorily accounted for why the Lims would have agreed to the payment of the Bonus Shares and Cash Fee, if not for the S\$30 million condition. The explanation submitted by Compass that the Bonus Shares and Cash Fee were promised in exchange for Kelvin achieving the 65% condition was not supported by the evidence.
- The Lims contention that the parties agreed to payment of the Bonus Shares and Cash Fee because Kelvin had promised that he could also achieve the S\$30 million condition was more plausible, their account of events was corroborated by the evidence of Mr Ong and such an outcome was also more commercially sensible for the Lims and would justify the increase of fees to Compass.
- The 17 July Documents supported the Lims' case that both the 65% condition and the S\$30 million condition were part of the Agreement:
 - Document 1 evidenced the 65% condition and Document 3 evidenced the S\$30 million condition.
 - Document 3 not detailing the S\$30 million condition in full was consistent with the finding that the Agreement was partly written and partly oral.
 - Given that the 17 July Documents were prepared solely by the Compass representative, Kelvin, without the benefit of legal advice, it was insignificant that the S\$30 million condition was reflected in a standalone document such as Document 3.

The Court of Appeal found the factual background preceding the conclusion of the Agreement, plus the contents of the 17 July Documents, weighed in favour of a finding that the parties did agree to the S\$30 million condition at the 17 July Meeting.

Cross-appeal by Compass

The Court agreed with the Judge's decision to disallow the claim by Compass for the Cash Fee. The case submitted by Compass that the parties had intended for the Cash Fee to be payable upon completion of the RTO, and not pursuant to any corporate advisory service agreement, was not borne out by the evidence. As a corporate advisory service agreement was not entered into, Compass could not claim the Cash Fee.

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Concluding Words

The Court of Appeal's decision highlights the importance of ensuring that all contractual terms are carefully and clearly drafted, within one document or a set of documents between which the nexus is clear, and with the benefit of trusted legal advice.

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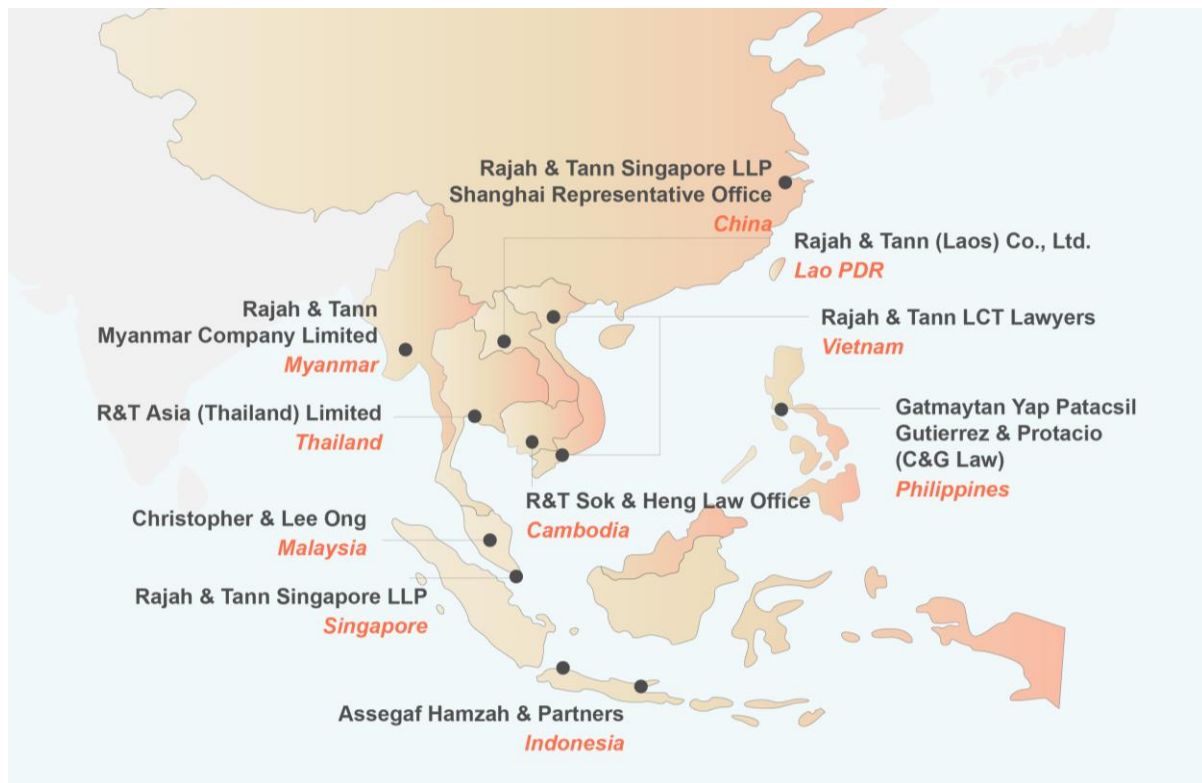
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