IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 126

CA 107/1993

Between

MK (Project Management) Ltd

… *Appellant*

And

Baker Marine Energy Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Appeals; Civil Procedure — Trial; Civil Procedure — Pleadings; Contract — Contractual terms; Words and Phrases

Version No 1: 29 Oct 2026 (23:45 hrs)

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MK (Project Management) Ltd v Baker Marine Energy Pte Ltd

[1994] SGCA 126

CA 107/1993
Goh Joon Seng J; Karthigesu JA; L P Thean JA
12 November 1994

1 ***The facts***

2 The respondents are a company which was engaged in offering projects for the setting up of oil rigs. By a written agency agreement dated 16 June 1989 (the agency agreement), the appellants were appointed as the respondents` non-exclusive agents to market the respondents` projects in the People`s Republic of China. The following terms of the agency agreement, in which `BMEPL` stands for the respondents, were of consequence to our inquiry:

> *4.1 In consideration of the services herein to be performed by the agent, BMEPL shall pay to the agent such commissions as the parties shall mutually agree in writing, on a case by case basis, such commission shall be due and payable to the agent even when the order is placed directly with BMEPL and not through the agent. In any event, having regard to the non-exclusive nature of this agreement, commissions will only be due to the agent where the agent`s interest in any particular contract or order has been acknowledged in writing by BMEPL and commission rate agreed.*
>
> 4.2 The said commission shall be paid in United States Dollars within fifteen (15) days after BMEPL`s receipt of payment from the buyers. Commission shall be paid in respect of only those invoices which have been paid in full by the buyers except that where payments for purchases are made in instalments the

> agent shall be paid a proportionate part of the commission on receipt by BMEPL of each such instalment.
>
> …
>
> 4.4 No commission shall be payable to the agent in respect of any order received by BMEPL after the termination or expiry of this agreement howsoever caused notwithstanding that the agent may have been responsible for or concerned in the obtaining of that order and notwithstanding that quotations may have been submitted during the continuance in force of this agreement.

3 On 22 September 1989, the parties entered into another written agreement (the project agreement) which related to a specific project, namely, the Weizhou 11-4 and SZ 36-1 FPSU project. The relevant terms of that agreement were as follows:

> *It is hereby agreed that Baker shall pay the agent a commission upon successful execution of the project in accordance with cll 4.1, 4.2 and 4.3 of the agreement. The rate of commission shall be calculated in accordance with the formulae detailed below:*
>
> *Contract Value Rate of Commission*
>
> Up to US$25m 2.00%
>
> Up to US$50m 1.75%
>
> Up to US$75m 1.50%
>
> Above US$75m 1.25%
>
> *Baker shall pay the agent twenty (20) percentum of the agreed commission, thirty (30) days after being awarded the project. The balance shall be pro-rated in accordance with the agreement.*

4 On 24 October 1989 the appellants sent the respondents a fax referring to the project agreement and stated that:

> *Should your quoted price need further reduction to maintain competitive we are willing to reduce the percentage on pro-data basic in accordance to your percentage reduced.*

5 On 27 February 1990 the respondents signed two agreements with the China National Offshore Oil Corp (CNOC) which were called the Offshore

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Field Development Contract (OFD contract) and the Crude Oil Repayment Contract (CSR contract). It is clear that the project contemplated by these contracts was worth about US$100m. The recitals to both the OFD and CSR contracts set out the scheme of the project: the respondents were taking on the obligation of providing funds to prepay all the costs necessary for the Wei 11-4 Oil Field Development Project and CNOC would subsequently repay the funds prepaid by the respondents out of the income from crude oil sales under the terms of the two contracts. Importantly, the OFD contract also provided as follows:

> *21.1.1 Contractor hereby agrees to provide an irrevocable bank guarantee payable on first demand of company to guarantee the performance of contractor`s obligations under the contract.*
>
> …
>
> 21.1.4 … Should contractor fail to provide such satisfactory bank guarantee within thirty (30) days from effective date, company shall have the right at any time without prior notification and without any liability whatsoever to suspend and/or terminate the contract under sub-art 23.2 and/or 24.3 respectively.

6 The appellants felt that the signing of the OFD and CSR contracts entitled them to their commission and they had a meeting with the respondents on 5 March 1990 which resulted in the following communication being sent to the respondents the next day:

> *Further to our meeting yesterday, we are pleased to accept your proposal in accepting the fix commission at US$750,000 for the above-captioned project.*

7 Meanwhile, please forward to us by return fax/telex your confirmation of the 20% said commission - amount US$150,000 will be remitted to us 30 days after the official signing contract on 27 February 1990 as per our contract agreement.

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8 There was no response from the respondents. On 27 April 1990, the appellants sent another letter which read as follows:

> *Further to our fax dated 6 March 1990, we would like to have your acknowledgement and confirmation the below:*
>
> *(1) Fix commission at US$750,000 as agreed for the above-captioned project.*
>
> (2) The initial 20% of the commission payable after 30 days of the contract signing date. For which we have further extended 30 days is now due [sic].
>
> *Your immediate response to the above would be highly appreciated.*

9 The respondents replied to this letter on the same day as follows:

> *Your fax 0531 dated 27 April 1990. We confirm that your commission for the above captioned project is US$750,000 of which 20% will be paid in due course.*

10 As explained Baker will endeavour to expedite your payment. Presently due to the unexpected delay in our financing package, we will have to place our priority on financing the project kick-off ourselves.

11 We trust you will understand this and rest assured we will make appropriate transfer as soon as we could.

12 The appellants expressed their disappointment with this reply and wrote the following to the respondents on 10 May 1990:

> *We are fully perturbed and concerned about the delay in Baker`s finance package for captioned project.*

13 As you are aware, we have taken our initiative in voluntarily reduce our commission from 1.25% to approximately 0.75%; which amounts to US$750,000. This big amount of savings for Baker clearly reflects our concern and contribution to reduce Baker`s burden.

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14 To follow up in this project from our end, we have incurred big expenses for the last many months. As a result, it has gone beyond our budget for this job, hence, we sincerely hope that you could remit immediately the agreed 20% of US$750,000 to our account as it is now 45 days overdue.

15 Your prompt attention to the above request is greatly appreciated.

16 In the event, the respondents were unable to obtain the necessary financing for the project and CNOC sent a communication dated 19 July 1990 to the respondents stating:

> *According to the `Contract for Wei 11-4 Oilfield Development Project` ... Baker Marine Energy Pte Ltd is responsible for providing the bank guarantee within 30 days from the effective date of the OFD contract; but you fail to do so ... I regret to formally inform you that the above two contracts shall be terminated from the date of your receipt of this letter according to art 21 and 24.3 and other provisions stipulated in the OFD contract.*

17 No commission was paid by the respondents to the appellants. On 30 November 1990, the appellants brought this action against the respondents for the payment of 20% of the US$750,000 commission (ie US$150,000) which they claimed had fallen due on the award of the contract. They did not claim for the other 80% of the commission, as it had not fallen due because of the termination of the contract.

18 **The proceedings in the High Court**

19 In the High Court, the appellants began their case by pleading and proving the agency and project agreements. In particular, they relied on the fact that the project agreement provided for 20% of the agreed commission to be paid 30 days after the respondents were awarded the project. They then

contended that the total commission payable in respect of the project was subsequently fixed at US$750,000. To evidence this fact, they relied on the communications between the parties from 6 March 1990 to 10 May 1990. Finally, they claimed that 20% of this (ie US$150,000) was due 30 days after the respondents signed the OFD and CSR contracts with CNOC, that being sufficient to constitute an award of the project.

20 The respondents did not dispute the agency and project agreements. However, their pleaded defence was that the project agreement was subject to the agency agreement and the latter stipulated that commission was only payable after the respondents had been paid by CNOC. Perhaps realizing that the pleaded defence was a little beside the point in the fact of an express term in the subsequent project agreement granting the appellants 20% of the commission on the mere award of the project, the respondents approached the matter from a different angle at trial. Tan Wah Tong (Tan), the respondents` managing director at the material time and Raymond Ng (Ng), an employee of the respondents at the material time, testified that in early March 1990 the appellants had not only agreed to fix their commission at US$750,000 but had also agreed that this commission would only be payable when the respondents managed to obtain financing for the project and not before. This would have meant that the 20% was not due as the financing was never actually obtained. The respondents also argued that the project was never awarded to them. The evidence of Tan and Ng was that CNOC only signed the contract to facilitate the respondents` efforts to obtain financing for the project. They said that the understanding with CNOC was that the project would be awarded to them only if they were successful in obtaining the necessary financing. Thus, they submitted that without such financing the project was never actually awarded to

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them. Thus the condition precedent to the payment of the first 20% of the commission to the appellants, in their opinion, never occurred.

21 **The decision in the High Court**

22 The learned judicial commissioner GP Selvam (as he then was) found in favour of the respondents. In his written judgment, the learned judicial commissioner said that the appellants had two basis for their claim. The first was an alleged oral agreement by the respondents to pay the commission of US$150,000 as evidenced by the communications of 6 March 1990 and those following. It appears that the learned judicial commissioner treated the appellants` reliance on the dealings between the parties in early March 1990 as an assertion of a separate and distinct contract to pay US$150,000 commission and not as an assertion of a variation to the terms of the existing written contracts. As such, he stated that the appellants had to prove the terms of this agreement as well as the fact that they had provided some consideration for the contract.

23 The learned judicial commissioner then held that the letters between the parties only evidenced the fact that they had agreed to fix the quantum of the commission at US$750,000 but `when and whether it was payable was left in a nebulous state. There was no certainty on this point.` Since the appellants were unable to evidence the other terms of this agreement besides quantum, the learned judicial commissioner said that the principle of certainty had not been satisfied and therefore the appellants could not succeed.

24 Further, the learned judicial commissioner held that the appellants had failed to plead the consideration for this subsequent oral agreement. He also stated that on the evidence before him, he could find no such consideration. This

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was another reason he felt that this alleged agreement could not entitle the appellants to the US$150,000 in commission.

25 Turning to what he described as the second basis for the appellants` claim, the learned judicial commissioner discussed the appellants` entitlement to the commission under the project agreement itself. He said that the appellants` case at trial was that the commission became due when the project was awarded to the respondents when they signed the OFD and CSR contracts on 27 February 1990. However, he noted that this was not the position pleaded as the statement of claim stated that the project was only procured in April or May 1990. Since the appellants were not able to explain this inconsistency, the learned judicial commissioner said that he was `led to the inevitable conclusion that no agreement to pay US$150,000 was concluded on 27 February 1990 or in April or May 1990.`

26 Importantly, the learned judicial commissioner also held that the project had never actually been awarded. He said that `award` in this context must mean that the respondents were placed in a position to be able to work on the project but this never happened because the respondents were unable to arrange the financial package.

27 Thus, the learned judicial commissioner found in favour of the respondents and dismissed the appellants` claim. The appellants then appealed to this Court.

28 **The appeal**

29 On appeal, the appellants challenged each of the learned judicial commissioner`s grounds for finding against them. They contended that the

learned judicial commissioner had erred in finding firstly, that the agreement to pay US$150,000 commission was lacking in certainty and in consideration, and secondly, that the project was never awarded to the respondents. It was clear to us from the cases filed by both parties and from the submissions of counsel that there were two areas of dispute between the parties in this appeal. The first area concerned the question of what was actually agreed orally between the parties just prior to the communication of 6 March 1990 and the legal effect, if any, thereof. The second matter contested in this appeal was the simple question of whether the project was ever `awarded` within the meaning of that word in the project agreement.

30 **The oral agreement**

31 We noted that the learned judicial commissioner treated the oral agreement between the parties as a fresh contract, separate and distinct from the written project agreement of 22 September 1989. However, it appeared to us that since the oral agreement concerned the same substance as that covered by the project agreement, ie the amount and availability of commission, the former cannot be taken in isolation from the latter. In our view, the oral agreement was an attempt to vary the terms of the project agreement, at the very least as far as quantum of commission goes. Under the written agreement, the appellants would have been entitled to 1.25% commission but the correspondence between the parties makes it crystal clear that this figure was varied to 0.75%. Therefore, despite the fact that the appellants did not use this terminology, we preferred to approach the oral agreement between the parties from the view point that it was a variation of the terms of the written project agreement rather than a separate and distinct agreement that should be taken in isolation.

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32 Of course, a variation to an existing contract must also respect the principles of certainty and consideration that the learned judicial commissioner placed emphasis on in his judgment. But the different approaches have a significant impact when one considers the issue of certainty. On this point, the learned judicial commissioner held that the evidence clearly established that the parties had agreed to fix the quantum of the commission at US$750,000 but `when and whether it was payable was left in a nebulous state`. However, this lack of certainty disappears if one approaches this question from our point of view that this is a variation. Taking this approach, we began with the written terms of the project agreement which set out the amount of the commission and when it is to be paid. We did not find the terms of this contract to suffer from any lack of certainty. Subsequently, the oral agreement only varied the project agreement by reducing the quantum of the commission to US$750,000. It was clear to us that, seen as a variation, this reduction in quantum did not affect the question of when the commission was to be paid which was governed by the other terms of the project agreement left untouched by the subsequent oral variation. In short, there was no uncertainty about when and whether the US$750,000 in commission was to be paid as this was governed by the written project agreement.

33 It must also be pointed out that it was neither the appellants` nor the respondents` case in the High Court that the oral agreement lacked certainty as found by the learned judicial commissioner. The appellants` case was that the oral agreements only varied the project agreement vis-a-vis quantum. The respondents` contention was that the oral agreement not only reduced the quantum of the commission but also contained a term that no commission would be paid if the financing package was not obtained. Thus, both parties asserted different versions of what was agreed in early March 1990 but neither claimed

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any lack of certainty. Clearly, the learned judicial commissioner did not find the evidence in favour of either version of the oral agreement particularly compelling. But to conclude from this that the contract lacked certainty was perhaps to confuse the issue of certainty with the question of evidential burden. It is one thing to say that the appellants failed to prove the terms of the oral agreement and quite another to say that the agreement proved lacked the requisite certainty. In any event, when one approaches the matter from the point of view of a variation, the appellants cannot be criticized for failing to discharge their burden of proof as far as the terms of the agreement go. They pleaded and proved the relevant terms of the project agreement. They also pleaded and proved that there was a variation to the quantum (only) of the commission. Having done so, their burden of proof seemed to have been discharged.

34 As already mentioned, the respondents` version of the oral agreement was that the appellants had agreed to a fixed commission of US$750,000 ***and*** that no commission would be payable if the financing package for the project never materialised. The learned judicial commissioner drew a fine line by saying, on the one hand, that there was no certainty as to when the commission was to become payable and, on the other hand, that `when the correspondence is read as a whole it is clear that much depended on the financial package and until that was finalized no commission would be payable.` This was a finding of fact by the learned judicial commissioner. However, we noted that the learned judicial commissioner did not ground this finding of fact on the credibility of a particular witness. Instead, he expressly stated it to be based on the correspondence before the court. Though appellate courts are exceedingly slow to overturn findings of fact based on evidence given by witnesses which the trial judge had the advantage of hearing first hand, this reluctance is not quite so pronounced when the findings of fact are actually inferences made from primary

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facts which are not in dispute. The latter is the case here. Having read the correspondence in question, we were of the opinion that it was far from clear that these letters suggested that the commission would only become payable if the financial package was finalized. If anything, the letter from the respondents dated 27 April 1990 strongly suggested that the respondents were seeking the appellants` indulgence for a delay in payment of a sum already due.

35 It was also noted that the respondents never pleaded that the parties had agreed to the commission being conditional upon the financial package being arranged. We found this failure to plead to be highly significant as it concerned a defence which, if proved, would of itself have denied the appellants their remedy. Clearly, if this was the true reason why the respondents refused to pay the appellants the commission, it should have been pleaded in the defence. Since it was not, it was not open to the learned judicial commissioner to make this finding of fact in the absence of an amendment to the pleadings; see 1 at p 276 per Rajendran J.

36 Besides saying that the oral contract lacked certainty, the learned judicial commissioner also said that the evidence before him failed to show that the appellants had provided consideration for this agreement. With the greatest of respect to the learned judicial commissioner, once one looks at the oral agreement as a variation rather than a separate contract, it is quite clear that the reduction of commission from 1.25% of the project value to only 0.75% constituted such consideration. If anything, it is the respondents who do not appear to have given any consideration for this variation. However, since the appellants have not seen fit to raise this point to say that the variation as to quantum was purely gratuitous, we felt it inappropriate to make any findings on those lines.

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37 The learned judicial commissioner also said that the appellants had not pleaded any consideration. However, we disagreed. Para 2 of the appellants` statement of claim said: `It was also agreed ... that ... the defendants would pay the plaintiffs commission ... with the rates of commission as specified under the second paragraph of the project agreement ... .` Later, at para 4 of the statement of claim, it was averred in respect of the commission that the respondents `further agreed to the value thereof at US$750,000 and that 20% thereof would be paid to the plaintiffs in due course.` These two portions of the statement of claim sufficiently set out the appellants` allegation of fact that the quantum of the commission had been varied by agreement from that provided under the project agreement to US$750,000. Though the appellants did not then go on to explicitly characterize this as consideration for the variation, it was clear to us that this was not necessary. As Lord Denning MR put it in at p 321: `It is sufficient for the pleader to state the material facts. He need not state the legal result.` In that case, Lawton LJ came to the same conclusion and based it on the following words of O 18 r 7 of the English Rules of the Supreme Court which also appear in O 18 r 7(1) of our Rules of the Supreme Court: `... every pleading must contain, and contain ***only*** , a statement in a summary form of the material facts` [emphasis added]. Clearly, though material facts must be pleaded, the legal conclusions to be drawn from them need not. Scrutton LJ in at pp 582-583 said:

> *In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at trial.*

38 In the present case, it was clear to us that it was sufficient for the appellants to plead the material fact that the quantum of the commission had

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been reduced and it was no defect that they did not then aver that this constituted consideration for the oral agreement.

39 **Whether the project was `awarded`**

40 The second area of dispute was whether the project was actually awarded to the respondents. The learned judicial commissioner held that:

> *the project was never awarded to the defendants and that the word `award` in this context meant that the defendants were placed in a position to be able to work on the project. That never happened because the defendants were unable to arrange the financing package which CNOC required before the project could be awarded to the defendants.*

41 However, we were persuaded by the arguments of the appellants to the contrary. It was our view that the project was awarded to the respondents when they signed the contract with CNOC on 27 February 1990. Even if one accepted the definition of the word `award` to mean that the respondents were to be placed in a position to be able to work on the project, it must be that everything had to be done ***by the party awarding the project*** to enable the respondents to work on the project. Here, CNOC had done all that it could to enable the respondents to start work. True, the financing never came through but that was not CNOC`s responsibility. It was apparent to us that CNOC had to be taken to have awarded the project to the respondents because they had done everything within their obligation to enable the respondents to start work.

42 The position would have been radically different if the Chinese had said that they would award the project to the respondents only if the financing was arranged. This they did not say. Instead, they entered into binding contracts with the respondents. When CNOC terminated these contracts by their communication of 19 July 1990, the projects must have been in the hands of the

respondents or else there would not have been anything to terminate. The way in which this communication was worded showed that CNOC considered the respondents` failure to arrange financing as a breach of a term of the contract and not the failure of a condition precedent to the award of the project. The project had been in the respondents` hands and CNOC withdrew it from them.

43 It was also interesting to note, in this respect, the testimony of Tan where he said: `I agreed to sign the contingent agreement, as I got from the great [sic] vine that my unsuccessful competitors were still trying to offer better terms to the Chinese authorities.` This showed that the object of the signing of the contracts was to tie CNOC down to a binding arrangement to fight off competition. It certainly did not sit well with this that the respondents then said that the project was never awarded to them inspite of the signing of the agreement.

44 The learned judicial commissioner also said that the appellants` pleadings did not accord with the appellants` subsequent contention that the project was awarded on 27 February 1990. Again, we disagreed. Para 5 of the statement of claim read:

> *The defendants ... neglected to pay the plaintiffs ... within 30 days from the date on which the said project was awarded, ie in or about the month of April and/or May 1990.*

45 By this averment, the appellants had stated that the payment was due in or about the month of April or May 1990, this being 30 days after the date of award. That seemed to us to isolate the date on which the project was awarded sufficiently close to 27 February 1990.

46 **Conclusion**

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47 The project agreement expressly created the appellants` entitlement to 20% of the agreed commission 30 days after the award of the project. In our view, the subsequent oral agreement between the parties constituted a variation to the quantum only of the commission, leaving the timing of the payment intact. To our mind, the correspondence did not support any allegation that the entitlement to commission was dependant on the respondents obtaining financing for the project.

48 We were also of the opinion that the signing of the OFD and CSR contracts prima facie constituted an award of the project in question. We could find no evidence to support the respondents` contention that the project would only have been awarded on the respondents` successfully obtaining the requisite financing. Clearly, the project had been awarded to the respondents on 27 February 1990 and 20% of the US$750,000 became due and payable 30 days thereafter.

49 For these reasons, we allowed the appeal and gave judgment for the appellants for US$150,000 with interest at 6% pa from the date of the writ. We also granted the appellants their costs both here and below.

50 ***Appeal allowed.***

Goh Joon Seng J
Karthigesu JA
L P Thean JA

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Lawrence Hussein (Ng Thin Wah & Pnrs) for the appellants
Goon Hoong Seng (Low Yeap & Co) for the respondents
