Trans-Cab Services Pte Ltd *v* Smart Automobile Pte Ltd and another [2012] SGHC 110

Case Number : Suit No 755 of 2010

Decision Date : 22 May 2012

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Leo Cheng Suan (Infinitus Law Corporation) and Lim Khoon (Lim Hua Yong LLP) for the plaintiff; Anthony Soh (Engelin Teh Practice LLC) for the defendants.

Parties : Trans-Cab Services Pte Ltd — Smart Automobile Pte Ltd and another

Contract – Breach

22 May 2012

Tay Yong Kwang J:

Introduction

1 This case concerns an agreement for the plaintiff to buy over from the defendants a company which owns two compressed natural gas ("CNG") refueling stations in Singapore for $25m. The defendants are the only shareholders of the said company. A "good faith deposit" of $1m was paid by the plaintiff to the defendants for this purpose. However, the sale was not completed and the plaintiff wanted a refund of the $1m. The issue for decision is whether or not the "good faith deposit" is refundable in the circumstances of this case.

2 After hearing the parties' submissions, I held that the plaintiff succeeded its claim for the refund of the $1m and the defendants failed in their counterclaim in respect of three matters.

Statement of agreed facts

3 On the first day of trial, after some discussions, the parties decided that there was no real factual dispute and agreed to proceed on a question of interpretation of contract based on a set of agreed facts. They produced a statement of agreed facts the next day. The following facts emerged from that statement:

4 The defendants own Smart Energy Pte Ltd ("the Company"), holding 100% of the 6,000,001 shares of the Company. At all material times, the plaintiff was represented by Teo Kiang Ang ("Teo"), who is the majority shareholder of the plaintiff and of Union Energy Corporation Pte Ltd ("Union Energy"). The first defendant was represented by Johnny Harjantho ("Harjantho") and the second defendant was represented by William Aw ("Aw").

5 Part of Union Energy's business includes the retail of CNG in Singapore. Both Union Energy and the Company are supplied CNG by Gas Supply Pte Ltd ("GSPL"), a company owned by Temasek Holdings (Private) Limited. Apart from Union Energy and the Company, the only other company registered as a retailer of CNG in Singapore is Sembcorp Gas Pte Ltd.

6 Part of the plaintiff's taxi fleet runs on CNG supplied by Union Energy while part of the first

defendant's taxi fleet runs on CNG supplied mainly by the Company. Union Energy has one CNG refueling station in Singapore (in Old Toh Tuck Road) while the Company has two (one at Mandai Link and the other at Serangoon North).

7 In early April 2010, Teo asked Harjantho about the possibility of the plaintiff buying over the two stations owned by the Company. Harjantho and Aw discussed this matter and offered to sell the Company to Teo for S$32 million. A counter offer of $25 million was made by Teo, which the parties eventually agreed on, on the basis that Teo would buy 100% of the issued and paid up shares in the Company ("the Sale Shares") and consequently buy the two stations. This agreement essentially allowed the plaintiff to acquire the Company along with its assets and businesses as they were at that point in time, excluding any receivables and deposits up to the completion date of the acquisition (which would belong to the defendants) as well as any debts of the Company up to the date of completion (which the defendants would have to settle).

Memorandum of Understanding (MOU)

8 Initially, the defendants wanted the $1m deposit to be paid on a non-refundable basis. After some discussions and four draft MOUs, the parties executed the MOU on 16 April 2010, Clause 3 of which reads:

> 3.1 The Purchase Price payable by the Purchaser to the Vendors for the Sale Shares shall be cash of S$25,000,000 (Twenty Five Million Dollars Only).
>
> 3.2 The Purchaser shall at the time of the execution of this MOU, pay to the Vendors a good faith deposit of S$1,000,000 (One Million Dollars) ("the Deposit) in the following manner:-
>
> To SAPL: $500,000
>
> To BSPL: $500,000
>
> 3.3 In the event that the parties enter into a definitive Sale and Purchase Agreement, the Deposit shall be applied towards part payment of the Purchase Price.
>
> 3.4 If the parties fail to enter into a definitive Sale and Purchase Agreement by 30 April 2010 the Deposit shall be refunded by the Vendors to the Purchasers within seven (7) days.
>
> 3.5 If the Purchaser is allowed, under the terms of the Sale and Purchase Agreement not to complete the sale and purchase of shares and elects not to complete, the Deposit shall be refunded by the Vendors to the Purchasers within seven (7) days of such election

9 Other key clauses of the MOU state:

> Recital (D): The parties intend to enter into this MOU in order to govern their relationship prior to the execution of the definitive documentation for the sale and purchase of the Shares.
>
> 4.3 Except where otherwise agreed by the parties, all liabilities of the Company (including all indebtedness due and owing by the Company to its related corporations, directors and shareholders) shall be fully settled on or before the Completion Date.
>
> 4.5 The completion of the sale and purchase shall be conditional upon the satisfactory results from a legal and financial due diligence exercise undertaken on the Company.

4.7 The completion of the sale and purchase shall be conditional upon the Vendors obtaining all the necessary consents (where applicable and necessary) from Gas Supply Pte Ltd ("GSPL") before the Completion Date to ensure that GSPL will continue with all their existing agreements with the Company for the supply of CNG after completion.

6 During the term of this MOU, the Vendors shall not take any action either alone or with any third party, to solicit or enter into any understanding, contracts or agreements with any third party with the intention of entering into any transaction similar to that specified in Clause 1.1 above and shall negotiate exclusively with the Purchasers in relation to the subject matter of this MOU.

7 This MOU shall be valid for a period of fourteen days from the date hereof, unless terminated earlier or extended by the mutual consent of the parties. This MOU shall be superseded to the extent that any definitive agreement is made between the Vendors and the Purchaser in relation to the subject matter herein.

9 Any dispute arising out of or in connection with this MOU, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Centre ("SIAC Rules") for the time being in force which rules are deemed to be incorporated by reference to this clause. The tribunal shall consist of one arbitrator to be appointed by the Chairman of SIAC.

10 It was agreed that payment would be made in two stages: S$1 million to be paid as a refundable "good faith deposit" upon the signing of the MOU and the balance of S$24 million to be paid upon the completion of the transfer of all the Sale Shares. Accordingly, the Plaintiff paid S$500,000 to each of the two defendants (S$1 million in total) when the MOU was signed [note: 1]. The plaintiff commenced the legal and financial due diligence exercise on the Company on the day the MOU was signed. It asked for the CNG supply agreement with GSPL, the JTC leases and valuation of the defendants' two stations and relevant licenses and permits for the Company's business [note: 2].

11 On 22 April 2010, the defendants informed the plaintiff that the documents asked for would be sent after the share purchase agreement was signed. On 23 April 2010, Aw sent an email to the defendants' then solicitors and the plaintiff's solicitors stating that the Company would need to request GSPL officially for permission to release information on the CNG supply agreement. On 26 April 2010, the defendants sent an email to the plaintiffs attaching copies of the Building Agreements between the Jurong Town Corporation and the Company with respect to its two stations. On27 April 2010 [note: 3], the defendants wrote to GSPL to request permission to release information to the plaintiff regarding their CNG supply agreement with GSPL. On 17 May 2010, GSPL wrote the Company objecting to the disclosure of the Terminated GRA to any prospective buyers. However GSPL agreed to disclose the letter dated 5 April 2010 [note: 4] for the interim supply of gas to the plaintiff, subject to the Plaintiff providing a written confidentiality undertaking.

Share Purchase Agreement (SPA)

12 On 21 April 2010, the plaintiff sent an email to the defendants, attaching the first draft of the Share Purchase Agreement [note: 5] ("the SPA") for comment. On 30 April 2010, after some negotiations on the terms, the SPA was executed by the parties with the following key clauses:

Recital (D): Pursuant to a Memorandum of Understanding dated 16th April 2010 entered into

between the Parties, the Purchaser has paid the Vendors a good faith deposit of S$1,000,000 that will be applied towards the purchase price for the Sale Shares.

3.1 The Consideration for the sale of the Sale Shares shall be the sum of S$25,000,000 payable by the Purchaser to the Vendors as follows:-

(a) the sum of S$1,000,000 being good faith deposit ("the Deposit") paid pursuant to the terms of the Memorandum of Understanding dated 16 April 2010 between the Parties; and

(b) the sum of S$24,000,000 shall be paid in cash on Completion in accordance with Clause 5.3.

4.1 Completion is conditional upon:

(a) the Purchaser being satisfied with the results of the legal and financial due diligence exercise carried out on the Company;

(h) the Vendors obtaining all the necessary consents and approvals from Gas Supply Pte Ltd to ensure the continuation of the supply of compressed natural gas to the CNG Stations after the Completion Date notwithstanding the transaction contemplated herein;

(k) the Company settling all its liabilities on or before the Completion Date (including without limitation, any liabilities arising from the termination of the employment of the Employees);

(l) the Company as at the Completion Date having no indebtedness to any party (including but not limited to, its related corporations, directors and shareholders);

(m) all existing services contracts between the Company and third parties being subsisting and in full force and effect as at Completion Date and none of such services contracts being capable of being terminated by reason of the transaction contemplated herein;

(n) no notice or other indication (whether written, verbal, contingent or otherwise) from any third parties of an intent to terminate or request material concession with respect to any service contract with the Company or to otherwise terminate or curtail in any material respect any of their business dealings or relationships with the Company;

(p) there being no material adverse change (as reasonably determined by the Purchaser) in the financial condition of the Company occurring on or before the Completion Date;

4.3 If any of the conditions set out in Clause 4.1 shall not have been fulfilled (or waived in accordance with Clause 4.2) on or before the Completion Date or such other date as the Parties shall mutually agree, this Agreement and everything herein contained shall cease to be of any effect except clauses 1, 8, 9, 10, 11 and 12, which shall remain in full force and effect.

7.1 The Vendors shall severally procure that, from the date of this Agreement until Completion (subject to any express instructions from the Purchaser), the Company will carry on business only in the ordinary course consistent with past practices.

7.2 Without prejudice to the generality of Clause 7.1, the Vendors jointly and severally undertake to procure that, from the date of this Agreement until Completion, the Company shall

not, without the prior written consent of the Purchaser:

(a) enter into or vary any contract or assume any liability;

…

7.5 Vendors shall procure that the Company repays all indebtedness of the Company (including all indebtedness to banks and financial institutions) on or before the Completion Date. Subject to such repayment, the Purchaser agrees and undertakes to discharge all guarantees and indemnities given by the Vendors or the Vendors' directors in relation to the Company's indebtedness.

8.1 Each Party to the Agreement undertakes with the other Party that it will not (save as required by law or by any securities exchange or any supervisory or regulatory body to whose rules any Party to the Agreement is subject) make any announcement in connection with this Agreement unless the other Party shall have given its consent to such announcement (which consent may be given either generally or in a specific case or cases and may be subject to conditions).

8.2 Each Party to this Agreement undertakes with the other Party that it shall treat as strictly confidential all information received or obtained by it or its employees, agents or advisers as a result of entering into or performing the Agreement including information relating to the provisions of this Agreement, the negotiations leading up to this Agreement, the subject matter of this Agreement or the business or affairs of the Vendors, the Company or the Purchaser, and subject to the provisions of Clause 8.3, that it will not at any time hereafter make use of or disclose or divulge to any person any such information and shall use its best endeavours to prevent the publication or disclosure of any such information.

10.2 This Agreement (together with any documents referred to herein or executed contemporaneously by the Parties in connection herewith) constitutes the whole agreement between the Parties hereto and supersedes any previous agreements or arrangements between them relating to the subject matter hereof and it is expressly declared that no variations hereof shall be effective unless made in writing signed by duly authorized representatives of the Parties.

13 In the course of the due diligence exercise, the defendants forwarded its financial statements and accounts to the plaintiff and its response to a due diligence questionnaire [note: 6] ("Due Diligence Questionnaire"). On 3 May 2010, the plaintiff asked for the CNG supply agreement between GSPL and the Company [note: 7].

Letters from GSPL

14 On 8 July 2010, the defendants disclosed the letter dated 5 April 2010 from GSPL to the Company for the interim supply of gas. The letter states:

We refer to our letter dated 23 March 2010 wherein we have inter alia, terminated the Gas Retail Agreement between GSL and SMART dated 22 May 2007 ("the Terminated GRA") with immediate effect.

Following your subsequent payment to us for the sum demanded in the said letter within the stipulated timeframe and your expressed wish to enter into a new gas retail agreement (the "New GRA") for the continual supply of gas to your business, GSPL and SMART are currently in the

midst of negotiating the terms of the New GRA.

Notwithstanding that GSPL would have discharged its obligation to supply Gas under the Terminated GRA by 7 April 2010, GSPL is willing to continue supplying Gas to SMART from the Start Date (defined below) until the Expiry Date (defined below) or until GSPL terminates this Letter ("the Interim Period") on the following principle terms:-

1. Start Date: "Start Date" shall mean 01 April 2010

2. Expiry Date: Expiry Date shall mean the date on which the Condition Precedents are fulfilled.

3. Condition Precedents: Conditions to the expiry of this Letter shall include:-

(i) payment of all outstanding amounts incurred under the Terminated GRA including interests, if any;

(ii) execution of the New GRA; and

(iii) provision by SMART to GSPL of the requisite security deposit and/or bank guarantee under the new GRA.

…

10. Suspension: In the event that SMART defaults in its payment in full of the amount due under a Weekly Statement by the respective Due Date, GSPL shall have the right to suspend immediately delivery of gas under this Letter and terminate this Letter without further notice to SMART.

11. Termination: Subject to paragraph 10 hereinabove, GSPL may in its sole and absolute discretion and for whatever reason, terminate this Letter upon giving SMART at least three (3) days' notice.

Upon termination of the Letter and if no New GRA has been executed by then, SMART shall, in addition to all outstanding sums owing under the Terminated GRA and the Letter, be liable to pay to GSPL the Early Termination Sum and Termination Fee payable under the Terminated GRA.

...

We hereby expressly reserve all our rights under the Terminated GRA.

15 On 9 July 2010, the defendants disclosed a letter dated 23 March 2010 from GSPL to the Company setting out the notice of termination of the GRA, the relevant paragraphs of which are:

2. You have as such failed, refused and/or neglected to fulfill your payment obligations to us in respect of gas delivered to you from 1 to 31 January 2010 under the GRA. Accordingly we hereby terminate the GRA with immediate effect pursuant to GC 17.1 of the GRA.

3. Pursuant to GC 17.6 of the GRA we hereby give you notice of our intention to suspend and cease delivery of Gas under the GRA on 30 March 2010

6. Please take note that you are also liable to pay to us the Early Termination Sum and Termination Fee pursuant to GC 17.7 and this letter shall constitute the requisite notice referenced at GC 11.4. Accordingly the Early Termination Sum and Termination Fee shall be due and payable on 6 April 2010. The Early Termination Sum based on an average HSFO price for the preceding 12 months from March 2009 to February 2010 of 406.950 USD/MT, is USD 746,473.54. We shall provide details of the Termination Fee in the invoice referenced at paragraph 5 hereinabove.

7. Notwithstanding the above WE HEREBY DEMAND that you pay to us the outstanding amount of USD 226,793.00 together with all interests incurred within seven (7) days of the date of this letter (i.e. by Tuesday, 30 March 2010). Please note that any payment by you of the amounts demanded herein shall not in anyway compromise or change our positions and intentions set out at paragraphs 2, 3 and 6 hereinabove.

Due Diligence Questionnaire

16 Financial and legal due diligence were carried out by different teams appointed by the plaintiff. Prior to disclosure of the abovementioned two letters dated 23 March 2010 and 5 April 2010 from GSPL, the defendants gave the following answers to the Due Diligence Questionnaire provided on 11 June 2010 prior to the disclosure of the abovementioned two letters:

4. Has the Company entered into any agreements or arrangements, which are subject to termination or variation, require prior consent or notification, or will be contravened or otherwise affected by the transfer of shares of the Company.

Answer: Yes.

If yes, please provide copies of the agreement and/or details of arrangements

INFORMATION OF GSPL AGREEMENT CANNOT BE REVEALED WITHOUT THE CONSENT OF GSPL.

5. Has the Company received any correspondences or documentation evidencing details or threat of any non-compliance by the Company in respect of any agreements or contract (whether reduced in writing or otherwise) entered into by the Company.

Answer: Yes.

If yes, please provide documentation evidencing details.

INFORMATION WILL ONLY BE GIVEN IF GSPL GIVES APPROVAL OF THE SAME.

17 The defendants did not provide a copy of the Terminated GRA to the plaintiff. There was a letter dated 17 May 2010 from GSPL. It was decided by Assistant Registrar Crystal Tan (in Summons No. 2259/2011/9) and on appeal before Philip Pillai J (in RA 208/2011/F) that the Terminated GRA need not be produced by the defendants for the purposes of the trial because of the confidentiality issue raised by GSPL.

Plaintiff's Election Not to Complete

18 In a letter dated 16 August 2010 [note: 8] (wrongly dated as 2 August 2010) from the plaintiff's solicitors Lim Hua Yong to the defendants' then solicitors Lau & Gur, the plaintiff informed the

defendants that it was not going ahead with the completion of the sale and purchase of shares on the basis that the defendants had failed to fulfill some conditions precedent of the SPA. The plaintiff also asked for the return of the S$1m deposit.

19 On or about 15 October 2010, UOB debited $20,000 from the Company's account for payment of a facility fee [note: 9].

Plaintiff's case

The $1m deposit is refundable

20 Following negotiations leading to the MOU, it was agreed by the parties that the $1m deposit would be refundable and this was eventually set out in the MOU. The SPA, signed 14 days later, did not change that, much less suggest that the plaintiff would have to pay the huge amount of $1m to conduct a due diligence exercise. After all, the due diligence exercise could have proved to be wholly unsatisfactory, as was the case here.

21 It was apparent from Clause 3.1 of the SPA that the $1m would form part of the consideration for the shares. Hence, without the transfer of the shares, there would be a total failure of consideration. Moreover, it was also clear that the plaintiff was primarily concerned with the continuity of CNG supply from GSPL. Given the defendants' failure to produce a GRA with GSPL to ensure this continuity and with the Letter of Termination and the Interim Arrangement by GSPL falling short of the condition precedent in the SPA Clause 4.1 (h), (m) and (n), the plaintiff submitted that it was entitled to rescind the agreement and to receive the refund of the $1m deposit because of total failure of consideration.

Bad faith

22 The bad faith on the part of the defendants could be demonstrated from the following:

(a) Signing an MOU without disclosing the termination of the GRA, while knowing full well the importance of the continuity of CNG supply to the plaintiff;

(b) Not getting a new GRA and asking that the plaintiff negotiate directly with GSPL for a new GRA when the MOU (at Clause 4.7) and the SPA (at Condition 4(h)) both clearly imposed that obligation on "the Vendors";

(c) Disclosing GSPL's letters of termination and the interim arrangement only after a 12-week delay from the signing of the MOU even though these were critical documents. Had the plaintiff been aware of the termination, the plaintiff would not have signed the MOU, much less paid the $1m deposit directly to the defendants (as opposed to paying their solicitors as stakeholders); and

(d) Asserting that the $1m good faith deposit was "non-refundable" in spite of the fact that such a term was never used in the SPA and was contrary to the specific terms of the MOU as well.

23 Hence, the plaintiff prayed for the $1m deposit to be returned with interest thereon running from 23 August 2010, i.e. 7 days after the letter dated 16 August 2010, together with costs (including costs of the summary judgment applications).

Defendants' case

Defendants' case

There exists no clause in the SPA that allows for a refund

24 The defendants submitted that the plaintiff's reliance on Clause 3.5 of the MOU as a basis for the refund was incorrect. Clause 7.1 of the MOU clearly stated that the MOU would only be valid for fourteen days unless extended (which did not happen) and that it would be superseded by any subsequent definitive agreement. This would have taken place on 30 April 2010 when the parties signed the SPA. Moreover, considering Clause 10.2 of the SPA which stated that the SPA "supersedes any previous agreements or arrangements between them relating to the subject matter hereof", quite clearly the SPA was the only contract that governed the parties.

25 The SPA itself did not contain any provision for the refund of the S$1m at all. By trying to read an entire paragraph from the MOU into the SPA, the plaintiff was trying to "add" to or to "vary" the SPA, an act clearly prohibited by the presence of an 'Entire Agreement Clause'. Given that the SPA was first drafted by the plaintiff's solicitors, such a refund clause could easily have been inserted by them. No amount of pre-MOU negotiations could negate the fact that there was no provision in the SPA for a refund.

26 To rely on some parts of the superseded MOU and incorporate them into the SPA would amount to cherry-picking on the plaintiff's part, an act contrary to the principle of having finality in agreements. Relying on only one clause of the MOU regarding the refund, the plaintiff ignored the rest of the MOU, including parts like Recital (D) which expressly stated that the MOU only governed the parties' relationship prior to the execution of the definitive documentation for the sale and purchase. Clause 9 of the MOU also stated that all disputes arising out of or in connection with the MOU should be resolved by way of arbitration, yet the plaintiff chose to commence this suit.

27 The defendants also argued that even if the plaintiff could show its entitlement to elect not to proceed with the completion of the purchase, based on the conditions precedent listed in Clause 4.1 of the SPA not being fulfilled, there was still nothing in the SPA that provided for a refund of the $1m.

Conditions Precedent

28 The plaintiff based its right to rescind the SPA on the fact that sometime in February or March 2010, the Company had failed to make payment in time for the supply of CNG from GSPL, which eventually caused GSPL to terminate the existing GRA and replace it with interim supply arrangements. In response the defendants submitted that the 4 clauses relied on by the plaintiff, namely Clause 4.1 (a), (h), (m) and (n), were not triggered for the following reasons:

(a) Upon receiving the letter dated 23 March 2010 from GSPL stating that the GRA was going to be terminated, the Company paid up all the outstanding sums owed within the stipulated 7 days, further providing a US$200,000 deposit. Subsequently, the interim supply arrangements were confirmed via a letter dated 5 April 2010;

(b) Given that the MOU was only entered on 16 April 2010, any terminated GRA prior to the 5 April 2010 letter should not be relevant to the plaintiff under the SPA. Accordingly there was no contractual obligation on the defendants' part to have in place terms of the old GRAs for the purpose of completion contemplated by the SPA; and

(c) The defendants were as open with the plaintiff as they could be legally and had no intention of hiding anything. GSPL objected to disclosing the letter of termination of the previous GRA and subsequent court applications by the plaintiff for its disclosure were also disallowed.

Further, the delay in disclosing the 5 April 2010 letter containing the interim supply arrangements was due to GSPL's instructions that a written undertaking be procured from the plaintiff first.

(d) In relation to the plaintiff's claim under Clause 4.1 (h) of the SPA, the existence of the 5 April 2010 letter stating the interim arrangements and the events which took place in July and August 2010 were sufficient to show that all the necessary consents and approvals from GSPL to ensure the continuation of CNG supply to the Company were obtained due to the following reasons:

(i) Where the plaintiff was buying 100% of the shares, legally there would be no change of entity involved, as far as the 5 April 2010 letter was concerned, since the Company would still be a party to that letter even after the plaintiff takes over. Hence no consent or approval would be necessary from GSPL;

(ii) There were no prohibitions in the 5 April 2010 letter to stop the defendants from selling all the shares in the Company and neither was there any mention of termination or a contractual end date. Arguably the arrangements were quite permanent despite the term "interim" being used;

(iii) Even if GSPL's consent was necessary, the parties' correspondence from 15 July 2010 to 27 August 2010 showed such consent. Moreover, the fact that GSPL wanted to meet the plaintiff to work out a new GRA showed its consent to continue supplying CNG after the ownership change of the Company. Since the plaintiff refused to meet GSPL, the blame could not fall on the defendants;

(iv) The SPA did not require the defendants to procure a new GRA, much less one that was on terms satisfactory to the plaintiff. The SPA requirement for "continuation of CNG supply" is different from "continuity" which connotes a longer and uninterrupted supply of gas; and

(v) There was nothing in evidence that would have caused the plaintiff to think that GSPL would not consent to a continuation of the gas supply till after the date of completion.

(e) In relation to the plaintiff's claim under Clause 4.1(a) that the plaintiff must be satisfied with the results of the due diligence, even though the defendants admitted that there may be some ambiguity in reading Clauses 10 and 11 of the 5 April 2010 letter together, the plaintiff failed to use the opportunity to clarify the meaning directly with GSPL when it was offered the meeting. The plaintiff's refusal to meet GSPL was unreasonable and hence it had no objective basis for taking the position that it was not satisfied with the results of the due diligence exercise;

(f) Since the interim arrangements contained in the 5 April 2010 letter were still subsisting and in full force at the date when the MOU was executed and those arrangements were not capable of being terminated by reason of the purchase of the Sale Shares, arguably the plaintiff's claim under Clause 4.1 (m) must fail too; and

(g) Given the subsisting interim arrangements and the absence of any further notice or other indication from GSPL that those arrangements would be terminated or modified, the plaintiff did not have a claim under Clause 4.1 (n) either.

Not a case of total failure of consideration

29 Firstly, since the $1m was paid as a "good faith deposit", it must necessarily have been capable of being forfeited once the contract was terminated by the depositor's breach. This is due to the fact that deposits are inherently forfeitable and whether there exists a right to its return depends on the conditions of the contract (See *Howe v Smith* (1884) 27 Ch D 89 at 97-98). Merely calling the sum paid a "deposit" did not entitle the plaintiff to an automatic right of refund upon the failure to complete the contract. Since the SPA did not expressly provide for a refund, the plaintiff must show that it is entitled to such a refund.

30 Also, there was no total failure of consideration as the defendants had performed their contractual duties by, among other things, furnishing voluminous documents, many of which were confidential and sensitive in nature, in response to the plaintiff's due diligence exercise. Moreover, considering the fact that the parties were rivals in the same business, the revelation of internal management accounts and other confidential legal documents meant that the plaintiff would now know how the defendants ran their business and how much their cost centres incurred. Such an advantage to the plaintiff and its corresponding detriment to the defendants could not be ignored.

The real reason for the plaintiff's election not to complete

31 The defendants further submitted that the real reason for the plaintiff's non-completion of the SPA was its inability to secure sufficient financing [note: 10]. In fact, subsequent to the execution of the SPA, the plaintiff found other means of expanding its CNG business and hence decided not to proceed with the purchase of the Sale Shares [note: 11].

Counterclaim

Confidentiality with regards to the Company's tenant and Urban Redevelopment Authority("URA")

32 The defendants submitted that pursuant to Clause 8 of the SPA, there were confidentiality obligations owed between the parties and that such were breached by the plaintiff. The plaintiff approached the Company's tenant, Kar Engineering Pte Ltd ("Kar Engineering"), at the gas refueling station at Serangoon North Ave 5 and informed the tenant of the impending sale and purchase of the Company, asking it to move elsewhere. In so doing, the plaintiff caused loss and damages to the defendants. Additionally, the defendants submitted that the same confidentiality obligations in Clause 8 of the SPA were breached by the plaintiff's exchange of letters with the URA as the correspondence had nothing to do with the due diligence exercise. The URA confirmed via letter that CWM Consulting Engineers had submitted redevelopment plans for the station and that clearly went beyond an exercise to test if the URA would grant permission for redevelopment. It was a submission for reconstruction and it took place long before the scheduled completion date of 31 July 2010 without the approval of the defendants.

33 The plaintiff replied that there had been a tripartite agreement between Kar Engineering, the plaintiff and the defendants, under which all parties were aware of the fact that the plaintiff was going to buy over the Company. There could not therefore be any breach of confidentiality. Further, the inquiry sent to the URA was only about whether some alterations could be made and that was part of the due diligence exercise.

Refusal to consent to repair works and conversion of trailers

34 After the SPA was executed, the defendants wanted to carry out repairs to a component of the Company's CNG system called the "HPU". Pursuant to Clause 7 of the SPA, they had to obtain the

written consent of the plaintiff but the plaintiff withheld such consent. As such, the repairs could only take place after the plaintiff's alleged rescission of the SPA which resulted in more loss and damages as it caused a loss in productivity in the CNG supply.

35 Additionally, after the SPA was executed, the defendants wanted to carry out a conversion of two of the Company's trailers to facilitate working with the "NeoGas System" so that it could go into 24-hour operation. Once again, the plaintiff refused to give the written consent required pursuant to Clause 7 of the SPA, resulting in loss and damages to the defendants.

36 The plaintiff replied that the defendants were duty-bound under Clause 7.1 of the SPA to carry on their business as per normal and carrying out repairs to equipment was part of that business. There was therefore no need for its consent to be obtained.

S$20,000 cancellation fee from United Overseas Bank ("UOB")

37 The defendants were under an obligation to redeem all their loans from the Company's bank, UOB, as part of the sale and purchase exercise and the necessary notification for the redemption of loan was given to UOB accordingly. The plaintiff's subsequent refusal to complete the sale and purchase resulted in the defendants having to reinstate the bank loans and having to pay a reinstatement fee of S$20,000 to UOB.

Decision of the court

38 In deciding whether the $1m deposit was refundable or not, it is important to first determine whether the agreement set out in the MOU continued to be binding upon the parties even after the SPA was executed. Based on Clause 3.5 of the MOU, it was clear that the deposit was refundable:

> 3.5 If the Purchaser is allowed, under the terms of the Sale and Purchase Agreement, not to complete the sale and purchase of shares and elects not to complete, the Deposit shall be refunded by thee Vendors to the Purchasers within seven (7) days of such election.

39 While the MOU stated in Clause 7 that it "shall be superseded to the extent that any definitive agreement is made between the Vendors and the Purchaser in relation to the subject matter herein" and Recital (D) stated that "the parties intend to enter into this MOU in order to govern their relationship prior to the execution of the definitive documentation for the sale and purchase of the Shares", the MOU was not the last word on this matter.

40 The SPA itself contemplated other related agreements in Clause 10.2, the 'Entire Agreement Clause', which reads:

> 10.2 This Agreement (together with any documents *referred to herein* or executed contemporaneously by the Parties in connection herewith) *constitutes the whole agreement* between the Parties hereto and supersedes any previous agreements or arrangements between them relating to the subject matter hereof and it is expressly declared that no variations hereof shall be effective unless made in writing signed by duly authorized representatives of the Parties. [emphasis added]

41 The SPA specifically referred to the MOU at Recital D:

> Pursuant to a Memorandum of Understanding dated 16th April 2010 entered into between the Parties, the Purchaser has paid the Vendors a good faith deposit of S$1,000,000 that will be

applied towards the purchase price for the Sale Shares.

42 It was also mentioned in Clause 3.1 of the SPA:

> 3.1 The Consideration for the sale of the Sale Shares shall be the sum of S$25,000,000 payable by the Purchaser to the Vendors as follows:
>
> (a) the sum of S$1,000,000 being the good faith deposit (the "Deposit") paid pursuant to the terms of the Memorandum of Understanding dated 16 April 2010 between the Parties; and
>
> …

43 Hence, on the face of Clause 10.2 of the SPA, it was clear that the MOU, being one of the documents referred to in the SPA, constituted part of the whole agreement between the parties. This did not contradict Clause 7 of the MOU, which simply meant that if and when inconsistencies arose between the SPA and the MOU, it would be the SPA that prevailed. Clause 7 should not be read, as the defendants argued, to mean that the MOU would be automatically and completely extinguished upon the signing of the SPA. That would be an unreasonably restrictive and narrow reading in the light of the SPA itself mentioning the MOU.

44 This reading is consistent with cases like *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] SGHC 88, where Chan Sek Keong CJ held that a term sheet and a preliminary agreement which were referred to in a franchise agreement formed part of the parties' legal agreement and that they should have been given legal effect. This was so even though there was a similar "entire, full and complete" agreement clause in the franchise agreement. Also, in *Ng Giap Hon v Westcomb Securities Pte Ltd and other* [2009] SGCA 19, the Court of Appeal stated that it was "not prepared to state that an entire agreement clause can never exclude the implication of terms into a contract", further adding that "for an entire agreement clause to have this effect, it would need to express such effect in clear and unambiguous language". On that point, where the SPA is silent on whether or not the deposit is refundable, Clause 10.2 of the SPA cannot be read to exclude the MOU entirely when the MOU spelt out the parties' agreement on an issue not mentioned in the SPA and which issue is still alive and not spent.

45 In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27, a permissive stance was taken by the Court of Appeal towards extrinsic evidence which can explain and illuminate written words of an agreement so that the court can better give effect to the intention of the parties. Similarly, in *Lee Chee Wei v Tan Hor Peow Victor and others* [2007] SGCA 22, it was held that "the courts will strive to give effect to the parties' expressed intent and their legitimate expectations. The courts seek to honour the legitimate expectations that the parties hold when they enter into a contract." In the present case, the evidence of the parties' negotiations leading to the execution of the MOU showed that the $1m was meant to be a refundable deposit [note: 12] and to decide otherwise by excluding the MOU would certainly defeat the parties' legitimate expectations. It was therefore from both the expressed intention and the negotiations that the MOU was indeed still in force and binding upon the parties at least in so far as the deposit was concerned.

46 Having decided the issue of whether the MOU was in force or not, I now consider "if the Purchaser (was) allowed, under the terms of the Sale and Purchase Agreement, not to complete the sale and purchase of shares" (Clause 3.5 of the MOU) in order to determine if a refund should be made by the defendants.

47 The wording of Clause 4.1 (h) placed the onus on "the Vendors", that is, the defendants collectively, to "ensure the continuation of the supply of compressed natural gas to the CNG Stations after the Completion Date notwithstanding the transaction contemplated herein". It was plain that the defendants had failed to do this and the plaintiff was accordingly entitled to invoke Clause 4.3 and elect non-completion. The fact that plaintiff had been given opportunities to meet GSPL in order to negotiate further did not detract from the defendants' duty. There was no doubt that the plaintiff had put a high premium on making sure that the CNG supply would carry on after the takeover and the defendants, despite being cognizant of that, did not discharge the burden of producing a GRA with GSPL to ensure the continuation of the supply.

48 The defendants' contention that the interim arrangements put in place by the 5 April 2010 letter from GSPL were more than sufficient to satisfy the continuation requirements was not acceptable. Clause 11 of that letter shows why the interim arrangements were cold comfort for the plaintiff. It reads:

> 11. Termination: Subject to paragraph 10 hereinabove, GSPL may in its sole and absolute discretion and for whatever reason, terminate this Letter upon giving SMART at least three (3) days' notice.

49 With the very real possibility of GSPL terminating the supply at will, the interim arrangements fell far short of giving any assurance of having a continuation of the supply of CNG. The inability to have any confidence in the continuation of the supply of CNG from the dominant CNG wholesaler in Singapore would defeat the very purpose of buying the two CNG stations and that would surely give the plaintiff the right not to complete the sale. The defendants' contention that the fault lay with the plaintiff refusing to meet directly with GSPL to clarify the meaning of ambiguous clauses and to negotiate a new GRA shifted their obligation of ensuring the continuation of supply of CNG to one of merely providing an opportunity to the plaintiff of ensuring a continuation of the supply.

50 The first two heads of the defendants' counterclaim can stand whether or not the plaintiff succeeds in its claim whereas the third head of the counterclaim would automatically fall if the plaintiff's claim succeeds.

51 The first head of the counterclaim fails as the plaintiff's actions were within the scope of conducting a reasonable due diligence exercise. The plaintiff therefore did not breach Clause 8.2 of the SPA. Given that Kar Engineering would eventually be the plaintiff's tenant if the agreement had been completed, contacting Kar Engineering would certainly have been a reasonable part of the plaintiff's due diligence exercise. The same conclusion applies to the disclosure to the URA as the correspondence was nothing more than part of the plaintiff's due diligence in making sure that their future plans for the stations would be viable. In any event, I do not see what damages could have been suffered by the defendants by the disclosure of an impending sale to a public authority.

52 The second head of the counterclaim concerns whether Clauses 7.1 and 7.2 of the SPA required the plaintiff to obtain the defendants' consent for repairs work to be done on the HPU and for the conversion of trailers. While it was disputed by the parties whether consent was even sought or not, I do not think that consent was required if the work was indeed repair work, that is, work that would be required in order for the defendants to "carry out business only in the ordinary course consistent with past practices" as prescribed in Clause 7.1. Such a move would not "make any change in the nature, scope or organization of its business or dispose of the whole of its undertaking or property…" (Clause 7.2 (b)) and hence would not require the plaintiff's written consent. Moreover, in the light of the impending sale, it was hard to see why the defendants would engage in anything more than repair and maintenance works that would allow them to continue running the business in

the ordinary course. I therefore dismiss this head of the counterclaim too.

53 The last head of the counterclaim regarding the $20,000 reinstatement fee charged by UOB is contingent on my ruling on the plaintiff's claim. As the plaintiff has succeeded in its claim, this last head of the counterclaim fails since the plaintiff was not at fault in not completing the sale and purchase.

54 In summary, the plaintiff succeeds in its claim against the defendants for the refund of the $1m good faith deposit paid pursuant to the MOU. Notwithstanding the fact that the statement of claim pleaded a claim of $500,000 against each defendant, the MOU and the SPA treat both defendants collectively as "vendors" and Clause 3.5 of the MOU provides for the deposit of $1m to be refunded by the said "vendors", i.e. both defendants jointly. I also award the plaintiff interest on the said $1m at 5.33% per annum from the date of writ until judgment, as pleaded, and thereafter interest at the same rate until payment. The defendants' counterclaim is dismissed in its entirety. The defendants are to pay the plaintiff the costs of the claim and the counterclaim.

55 Both defendants have appealed against this decision.

56 I thank counsel for both parties for having agreed to proceed with the trial by way of a statement of agreed facts. It was a sensible move which saved time and costs for everyone involved.

[note: 1] Defendants' Core Bundle of Documents ("DCB") at pp 9-14

[note: 2] Agreed Bundle of Documents ("AB") at 206

[note: 3] AB at pp 279

[note: 4] AB at pp 320

[note: 5] DCB at pp 48-79

[note: 6] Ab at pp 108-166

[note: 7] Teo's Affidavit, p216

[note: 8] DCB at pp 88-89

[note: 9] AB at pp 630

[note: 10] Aw's AEIC para [37]

[note: 11] AB page 631-633, 635

[note: 12] Teo's AEIC at pp 138-176