IN THE SINGAPORE INTERNATIONAL COMMERICAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 01

Suit No 1 of 2015

Between

(1) BCBC Singapore Pte Ltd
(2) Binderless Coal Briquetting Company Pty Limited

… *Plaintiffs*

And

(1) PT Bayan Resources TBK
(2) Bayan International Pte Ltd

… *Defendants*

JUDGMENT

[Contract] — [Breach]

[Contract] — [Remedies] — [Damages]

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BCBC Singapore Pte Ltd and another
v
PT Bayan Resources TBK and another

[2019] SGHC(I) 01

Singapore International Commercial Court — Suit No 1 of 2015
Quentin Loh J, Vivian Ramsey IJ and Anselmo Reyes IJ
2 October 2018; 29 October, 5, 15 November 2018

9 January 2019 Judgment reserved.

Quentin Loh J, Vivian Ramsey IJ and Anselmo Reyes IJ:

Introduction

1 The facts of this case have been set out in our First and Second Tranche Judgments, reported in *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 4 SLR 1 and *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2017] 5 SLR 77 respectively. There was no appeal against our First Tranche Judgment. The Defendants appealed against our Second Tranche Judgment. Unless otherwise specified, we will use here the abbreviations defined in the Court of Appeal's Judgment on the Defendants' appeal (reported in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2018] SGCA(I) 6).

2 Save on one ground, the Court of Appeal dismissed the Defendants' appeal. The one ground related to the issue of whether BCBCS could fund KSC

on its own up to the point when commissioning and testing of the Tabang Plant was completed or until June 2012. The Court of Appeal held that we should have determined that issue on the evidence before us during the Second Tranche hearing. If there was insufficient evidence on the issue, the Court of Appeal held that we should have determined the same on the burden of proof. The Court of Appeal consequently remitted the matter back to us for a decision on that one issue.

3 This Judgment is consequently our determination on the remitted issue of whether BCBCS was able to fund KSC until the completion of commissioning and testing at the Tabang Plant or until June 2012. To assist in our decision, the parties provided two rounds of written submissions on the issue. In the first round they set out their respective cases on how we should determine the outstanding issue. In the second round, they responded to each other's submissions. Thereafter, the Defendants sought (and were granted) leave to submit a brief written submission in further reply to the Plaintiffs. Upon considering the parties' written submissions, we did not feel that it was necessary to hear oral submissions from the parties and informed them accordingly.

Background

4 There is a dispute between the parties as to what precisely the Court of Appeal remitted to us to determine. It is therefore convenient to set out here what the Court of Appeal said in the relevant paragraphs of its Judgment. Those were as follows:

> 64 The Court declined to find, in any event, that only nominal damages could be awarded to BCBCS. Among other things, it found that it was not open to it, at that stage, to exclude the possibility of the Tabang Plant reaching commercial production within a reasonable time. Although the short-term

contractors at the plant had been asked to suspend the modification works there on 22 November 2011, more than 300 regular employees of KSC continued to carry out the modification works. Further, while the plant had been put into care and maintenance on 15 December 2011, it could have been reactivated within a matter of days (*Second Tranche Judgment* at [210]–[212]).

65 The above factors were not, however, conclusive because a critical element of BR's case in this respect was that KSC would not have been funded to the point where the testing and commissioning of the Tabang Plant was completed, and this in fact rendered the question of damages theoretical. As to this, the Court found that on the evidence before it, it appeared likely that BCBCS would have been prepared to fund KSC unilaterally, and that BR would not have objected to such funding by BCBCS (*Second Tranche Judgment* at [223]). Indeed, BR had known since at least June 2010 that BCBCS was funding KSC on its own and had not objected to such unilateral funding by BCBCS (*Second Tranche Judgment* at [217]–[219]). The Court, however, concluded that there was insufficient evidence before it to determine whether BCBCS was indeed in a financial position to continue funding KSC on its own all the way until the completion of the testing and commissioning of the Tabang Plant. It therefore reserved its decision on this question to the next tranche of the trial, which it observed would be "specifically devoted to causation of damage and quantum" (*Second Tranche Judgment* at [223]–[224]).

…

Whether BCBCS was able to fund KSC unilaterally

168 This brings us to the question of whether BCBCS *could* have funded KSC by itself. As we noted earlier (at [65] above), the Court reserved its decision on this issue to the next tranche of the trial on the basis that there was insufficient evidence before it (*Second Tranche Judgment* at [223]). It also reserved to the next tranche its decision on whether BCBCS was in substance claiming KSC's reflective loss (*Second Tranche Judgment* at [230]–[231]), and whether BCBCS could rely on what might have happened pursuant to the Expansion MOU in its claim for damages (*Second Tranche Judgment* at [232]; see also [66] above).

169 The Appellants submit that the Court ought to have disposed of the three aforesaid issues instead of deferring them to the next tranche of the trial. They argue that the burden falls on the Respondents to establish causation and show that BCBCS would have suffered the loss that it is claiming. Thus, if the Court was of the view at the end of the second tranche of

the trial that the evidence adduced was insufficient to establish causation, it ought to have found against the Respondents and held that either the loss claimed by BCBCS was not made out or the damages awarded for such loss should be limited to certain time periods. The Appellants submit that they have been prejudiced by the Court's failure to determine the three above-mentioned issues based on the evidence before it because the Respondents have effectively been given another chance to establish causation at the next tranche of the trial.

…

175. Respectfully, however, we consider that the Court was not entitled to defer to the third tranche the issue of BCBCS's *ability* to fund KSC unilaterally. Given that this issue was intricately tied to the question of whether KSC had sufficient funds to keep operating the Tabang Plant, it seems to us to have been squarely before the Court. Moreover, looking at the Respondents' submissions for the second tranche of the trial, it is clear to us that they were happy to address this point based on the evidence that was adduced at that tranche. For example, the following argument was made in their written submissions:

> … [I]t is untrue that … BCBCS was not prepared to further fund KSC on its own. BCBCS was the sole shareholder cash funding the joint venture from October 2009 onwards, and had every intention to continue doing so had BR complied with its continuing obligation to supply coal to KSC. Far from not being prepared to further fund KSC on its own, from 19 August 2011, BCBCS had demonstrated that it was *willing and able* to further fund KSC of its own accord, beyond the US$49 million it had committed under the PLFA. Mr Flannery further testified that BCBCS was further *willing and able* to continue cash funding the project until the Tabang Plant reached commercial production.… [emphasis added]

176. Accordingly, while the Court was correct to defer the issues regarding the reflective loss principle and the Expansion MOU to the third tranche of the trial, it ought to have decided the question of whether BCBCS had the financial wherewithal to fund KSC by itself. To the extent that there was insufficient evidence to arrive at a finding on this issue, it should have been determined according to who bore the burden of proof.

Conclusion on the Causation Issue

177. For these reasons, we find that BCBC was *willing* to fund KSC by itself. But we consider that the Court ought to have decided the issue of whether BCBCS had the *ability* to do

> so, and we remit the issue to the Court for determination. Save as aforesaid, we dismiss the Appellant's submissions on the remaining aspects of the Causation Issue.
>
> **Conclusion on the appeal**
>
> 178. In conclusion, we dismiss the Appellants' appeal in relation to all of the four main issues set out at [68] above, save only that in respect of the Causation Issue, we remit to the Court the question of whether BCBCS had the *ability* to fund KSC on its own.

5 In its judgment the Court of Appeal referred to what we had stated at paragraphs 223 and 224 of our Second Tranche Judgment. For completeness, we set out here what we said in those paragraphs, with the addition of paragraph 222 for context:

> 222 By reason of the foregoing, we do not accept that key assumptions that underpin Mr Singh's argument have been established. In particular, we find that it has not been established that BCBCS would not have funded KSC unilaterally or that BR would have objected to BCBCS funding KSC unilaterally.
>
> 223 Whilst on the current evidence, it seems likely that BCBCS would have been prepared to fund KSC unilaterally and BR would not have objected, we leave open the question whether as a matter of fact BCBCS was in a financial position to fund KSC unilaterally to the completion of testing and commissioning, or until June 2012, or whether BR would have objected to that funding and, if so, what the effect of that objection would have been.
>
> 224 Therefore, we do not think that what we have called Mr Singh's strikeout argument is made out. We are not convinced that damages would only be nominal. They may or may not be. We are not persuaded that the Plaintiffs did not (and could not have) suffered significant expectation loss by reason of the Defendants' repudiatory breach on 21 February 2012. In our judgment, a Tranche 3 specifically devoted to causation of damage and quantum cannot be avoided.

Discussion

6 We deal here with the following questions:

(a) What precisely did the Court of Appeal remit to us to decide? The Plaintiffs contend that it remains open to us to decide whether, on the totality of evidence in the Second Tranche, BCBCS had the ability to fund KSC. If and only if we conclude that the evidence was insufficient to reach a conclusion, then in accordance with paragraph 176 of the Court of Appeal's judgment, the Plaintiffs submit that we should determine BCBCS's ability to fund by recourse to the burden of proof. The Defendants, in contrast, submit that the Court of Appeal has precluded any consideration by us of the sufficiency or insufficiency of the evidence of BCBCS's ability to fund. The Defendants say that the Court of Appeal has precluded any such consideration because it expressly referred, in paragraphs 65 and 168 of its Judgment, to our having deferred our decision on BCBCS's ability to fund due to there being "insufficient evidence" on that matter in the Second Tranche. On that basis, the Defendants argue that the only issue that has been remitted for us to decide is whether BCBCS's ability to fund has been made out by the party having the burden of proof.

(b) If it is open for us to decide on the matter, did the evidence in the Second Tranche establish that BCBCS had the ability to fund KSC? If there is insufficient evidence, either because we now so find after having considered the material available to us during the Second Tranche, or because the Court of Appeal has by its Judgment precluded us from considering the evidence now, there is no dispute that we would be entitled to (and should) have regard to the burden of proof.

(c) In light of our decisions on Questions (a) and (b) above, what should be the way forward in these proceedings?

Question (a): What precisely did the Court of Appeal remit to us to decide?

7 We are unable to accept the Defendants' contention that the Court of Appeal has limited us to determining whether, in light of an insufficiency of evidence on BCBCS's funding ability, one or the other party has or has not discharged its legal or evidential burden, as the case may be. We reject the Defendants' contention on Question (a) for two reasons.

8 First, the Court of Appeal's judgment has to be read as a whole. In our view, the Court of Appeal could not have been clearer. In paragraph 177 it expressly found that BCBCS "was *willing* to fund KSC by itself". It made no finding on BCBCS's ability to fund, but instead expressly remitted that question for our determination. This is consistent with its paragraph 176 in which the Court of Appeal held that we "ought to have decided the issue of whether BCBCS had the financial wherewithal to fund KSC by itself". It continued: "To the extent that there was insufficient evidence to arrive at a finding on this issue, it should have been determined according to who bore the burden of proof." In our view, the expression "[t]o the extent that there was insufficient evidence" acknowledges that it remains open to us to determine whether the evidence that was adduced during the Second Tranche was sufficient to support a finding on BCBCS's financial wherewithal. It is only "to the extent" that we conclude that the evidence was insufficient that we are to determine the issue "according to who bore the burden of proof".

9 Second, it is true that in paragraph 65 of its Judgment the Court of Appeal stated: "The Court ... concluded that there was insufficient evidence ... to determine whether BCBCS was indeed in a financial position to continue funding KSC... (*Second Tranche Judgment* at [223]–[224])." In paragraph 168, it similarly observed: "[T]he Court reserved its decision on this issue [that is,

whether BCBCS *could* have funded KSC by itself] to the next tranche of the trial on the basis that there was insufficient evidence before it (*Second Tranche Judgment* at [223])." However, if one looks at the paragraphs in our Second Tranche Judgment (namely, paragraphs 223 and 224) mentioned by the Court of Appeal in support of a purported finding by us that there was insufficient evidence of BCBCS's funding ability, it will be seen that there is actually no such finding in those paragraphs.

10 In those paragraphs of our Second Tranche Judgment, we were explaining why we rejected what we called "Mr Singh's strikeout argument". That was the Defendants' argument that a Third Tranche was unnecessary because BCBCS would not have been ready, willing or able to fund the Tabang Plant through to the end of commissioning and testing or until June 2012. At our paragraph 216, we observed that there were difficulties with that argument. In the succeeding paragraphs, we stated why we thought that there were difficulties. In paragraphs 217 to 219, we pointed out that it was unlikely on the evidence that BR would object to BCBCS unilaterally funding KSC. In paragraphs 220 to 221, we held that BCBCS was willing on the evidence to fund KSC unilaterally. In paragraph 222, we concluded from the foregoing that key assumptions underpinning Mr Singh's argument (namely, that BCBCS was unwilling to fund and that in any event BR would object to a unilateral funding by BCBCS) had not been made out. In paragraph 223 we then stated:

> Whilst on the current evidence, it seems likely that BCBCS would have been prepared to fund KSC unilaterally and BR would not have objected, we leave open the question whether as a matter of fact BCBCS was in a financial position to fund KSC unilaterally to the completion of testing and commissioning, or until June 2012, or whether BR would have objected to that funding and, if so, what the effect of that objection would have been.

11 In other words, we were leaving open two matters for the Third Tranche: (1) whether BCBCS was in a position to fund KSC unilaterally until completion of testing and commissioning of the Tabang Plant or until June 2012, and (2) whether BR would actually have objected (as opposed to merely being "unlikely" to object) to such unilateral funding by BCBCS. We left those matters to the Third Tranche, because we thought that it would be fairer to the Defendants to leave open the same, as we had doubts at the time whether those two matters had been squarely put in issue in the Second Tranche. Nowhere did we say that the evidence on one or other matter was insufficient. Indeed, on the second matter that we left open, we were of the view (as we stated in paragraphs 217 to 219) that the weight of the available evidence in the Second Tranche was against the Defendants' case. We deliberately expressed no view on the first matter (that is, BCBCS's ability to fund) so as to avoid conveying the impression of having preconceived views on the question of BCBCS's funding ability in advance of the Third Tranche. Read in context, it is therefore difficult to see how paragraphs 65 and 168 of the Court of Appeal's judgment can be construed as precluding us from now considering the issue of BCBCS's ability to fund. Contrary to the precautionary view that we had taken at first instance and apparently at the Defendants' invitation on appeal, the Court of Appeal has held (and we unreservedly accept) that the issue of BCBCS's ability to fund was squarely in issue during the Second Tranche.

12 It follows that there is no constraint on our now considering the available evidence during the Second Tranche with a view to determining BCBCS's financial ability to fund KSC until completion of commissioning and testing or until June 2012.

Question (b): Did the evidence in the Second Tranche establish BCBCS's ability to fund KSC?

13 In our view, far from being insufficient, the available evidence was all one way and clearly established that BCBCS was in a position to fund KSC until June 2012. There are two key pieces of evidence.

14 First, there are WEC's financial statements. BCBCS is an indirect wholly-owned subsidiary of WEC, a publicly listed Australian company. Before us in the Second Tranche, there were the following financial reports of WEC:

(a) WEC's Appendix 5B Mining Exploration Entity Quarterly Report dated 31 October 2011 for the quarter ending 30 September 2011.[1] This showed that WEC held A$167,550,000 at the end of the quarter, with an estimated cash outflow for the next quarter amounting to A$12,250,000.

(b) WEC's Appendix 5B Mining Exploration Entity Quarterly Report dated 31 January 2012 for the quarter ending 31 December 2011.[2] This showed that WEC had cash reserves of A$150,014,000 as at 31 December 2011 and estimated cash outflows of A$6,000,000 for the next quarter, leaving WEC with estimated cash reserves of about A$144,000,000 after 31 March 2012.

(c) WEC's Interim Financial Report 2011 dated 9 March 2012.[3] This audited report incorporated "the assets and liabilities of all subsidiaries of [WEC] as at 31 December 2011 and the results of all subsidiaries for the half-year then ended". This showed that, as at 31 December 2011,

1 Agreed core bundle of documents ("ABOD"), Vol 14, pp 10726–10741.

2 ABOD, Vol 14, pp 11100–11114.

3 ABOD, Vol 14, pp 11138–11157.

> the consolidated current cash assets of WEC were in the region of A$152,082,000. This also showed that, as at 31 December 2011, WEC's current assets (comprising cash and cash equivalents, trade and other receivables) amounted to A$156,113,000, while current liabilities amounted to A$115,821,000. WEC's net assets at the time came to A$238,138,000 (that is, total assets of A$391,382,000 minus total liabilities of A$153,244,000).

15 Second, there was the evidence of Mr Brian Flannery, WEC's Managing Director and Chief Executive Officer, as well as a director of the Plaintiffs and a former director of KSC. In his AEIC dated 28 December 2016, Mr Flannery expressly acknowledged that:

> 167. … [T]he reality was that if KSC were to complete installation and commissioning of the fabricated modifications and achieve commercial production, the additional capital expenditure would have to be funded entirely by WEC through BCBCS. We were willing and prepared to do so…

Mr Flannery continued:

> 168. BCBCS/WEC had budgeted to fund 100% of KSC's operating costs until end 2011, which was the expected date that the plant would achieve commercial production, as of October 2011. From January 2012 onward, its budget provided for 51% of KSC's operating costs … That said, the question of funding beyond commercial production never arose during the material time as the focus was on achieving commercial production. Despite this, I would say that if BR had maintained its refusal to fund post commercial production, BCBCS would have been prepared to provide the necessary funding for the Plant beyond commercial production should this be necessary… given WEC's larger commercial objectives.

Mr Flannery reiterated:

> 169. …WEC was willing and able to put in the full sum required had BR refused to contribute, so long as BR was

> willing to comply with their end of the bargain to supply coal to KSC pursuant to the governing agreements.

In cross-examination, as quoted extensively in paragraph 221 of our Second Tranche Judgment, he maintained his position:[4]

> Q. You see, you're not answering my question. I didn't ask you whether they were blowing it up. My question is a simple one. You proposed an altogether new arrangement, which was if the supplied at HBA and bought at HBA, WEC would fund; correct?
>
> A. We would continue with the project, at least until June of 2012.

The Defendants did not challenge Mr Flannery on the latter response.

16 The Defendants submit that the WEC reports were not in evidence. They complain that BCBCS did not prove their contents, that BCBCS's witnesses did not refer to them in their oral evidence, and that the Plaintiffs did not refer to them in their written or oral submissions. In any event, the Defendants argue that the reports say nothing about BCBCS's financial position between January and June 2012. The reports (the Defendants say) only show WEC's financial position as at 31 December 2011. The Defendants also note that WEC had around 22 subsidiaries and had invested in at least eight different and major coal-related projects, all of which would have had funding needs. There was (the Defendants stress) no evidence of board resolutions, board meeting minutes or other documents to the effect that WEC or BCBCS had set aside 100% of the required funds for KSC. The Defendants consequently suggest that "an adverse inference" should be drawn from the lack of evidence.

17 We are unable to accept the Defendants' contentions.

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4 Certified Transcript, 6 January 2017, p 166.

18 The fact is that the reports were in the hearing bundles and in evidence before the Court. The Defendants agree to their authenticity. Mr Flannery in his AEIC expressly referred to WEC's Appendix 5B Mining Exploration Entity Quarterly Report dated 31 October 2011.[5] He did so to point out the size of WEC's cash reserves as at 30 September 2011. It seems to us that we are entitled to infer, from the size of WEC's available cash reserves as at the end of 2011, that BCBCS (with the backing of its parent) would have had sufficient financial wherewithal to finance KSC until June 2012. If the Defendants were contending that, despite the apparent size of WEC's cash reserves at the end of December 2011, BCBCS would not have been able to fund KSC until June 2012, it was incumbent upon the Defendants to put that point to Mr Flannery in cross-examination. That was not done. Instead, Mr Flannery's statement in cross-examination that BCBCS "would continue with the project, at least until June of 2012" was allowed to go uncontradicted. If anything, an adverse inference should be drawn against the Defendants in so far as they failed to raise the point with Mr Flannery despite repeated and unequivocal statements in his AEIC and in cross-examination that BCBCS was able to fund KSC unilaterally until at least June 2012. This is especially since we had reminded parties at the start of the First Tranche that important points of their case must be put to the relevant witness.[6]

19 We therefore find, on the basis of the evidence before us during the Second Tranche, that BCBCS had the ability to fund KSC until completion of commissioning and testing or until June 2012.

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5 Mr Flannery's AEIC dated 28 December 2018 at para 169.

6 Certified Transcript, 17 November 2015, pp 2–4.

Question (c): What should the way forward be in these proceedings?

20 In light of our Second Tranche Judgment and our finding here, there will need to be a Third Tranche to deal with all outstanding disputes as to causation and quantum of damage. We invite the parties to submit and (if possible) agree on proposals for the conduct of the Third Tranche by 5 pm on 25 January 2019. Those proposals will form the agenda for a Case Management Conference on the Third Tranche to be held on a date to be fixed in consultation with the parties.

Conclusion

21 BCBCS had the financial ability to fund KSC until the completion of commissioning and testing at the Tabang Plant or until June 2012. In light of that finding, there will be consequential directions as set out at [20] above.

22 All questions of costs in connection with this Judgment are reserved.

Quentin Loh Judge	Vivian Ramsey International Judge	Anselmo Reyes International Judge

Francis Xavier SC, Jeremy Gan, Alina Chia, Tng Sheng Rong, Ang Tze Phern and Tee Su Mien (Rajah & Tann LLP) for the plaintiffs; Davinder Singh SC, Tony Yeo, Jaikanth Shankar, Chan Yong Wei, Lydia Ni, Harsharan Kaur and Jerrie Tan (Drew & Napier LLC) for the defendants.