



Easter Term  
[2022] UKPC 17  
Privy Council Appeal No 0116 of 2019

## **JUDGMENT**

### **Gem Management Ltd (Appellant) v Firefox Ltd and 21 others (Respondents) (Mauritius)**

**From the Supreme Court of Mauritius**

before

**Lord Briggs  
Lord Sales  
Lord Hamblen  
Lord Leggatt  
Lord Stephens**

**JUDGMENT GIVEN ON  
9 May 2022**

**Heard on 5 April 2022**

*Appellant*  
Stephen Donnelly  
(Instructed by Berkeley Rowe)

*Respondents*  
Hervé Duval  
(Instructed by Sheridans)

**Respondents:**

- (1) Firefox Ltd
- (2) Francois d'Hotman
- (3) Michel Pitot
- (4) Jason Ltd
- (5) Société Jason
- (6) Bertrand Rey
- (7) Bernard Piat Dalais
- (8) Jean Francois Bernard Rousset
- (9) Odile James
- (10) Celina Piat Dalais
- (11) Marie Lise Douyere
- (12) Succession Jacques Piat Dalais
- (13) Francois Rousset
- (14) Société Frenesie
- (15) Marie Alice Desvaux de Marigny
- (16) Dominique Rousset
- (17) Société Du Cap Fleurie
- (18) Société Zorba
- (19) Marie Antoinette Benedicte d'Hotman de Villiers
- (20) Louis Henri Georges Wiehe
- (21) Pascale May Françoise d'Hotman de Villiers
- (22) Louis Christian Herbert Wiehe

## **LORD LEGGATT:**

### **Introduction**

1. This appeal raises a short question of interpretation of a written “undertaking agreement” (“the Agreement”) made between the appellant, Gem Management Limited (“GEM”), and a group of shareholders who owned some 35% of the shares in a Mauritian company, Deep River Investment Ltd (“Deep River”). These shareholders (“the Shareholders”) or in some cases their successors are the respondents to the appeal.

2. The Agreement contained an “irrevocable and unconditional undertaking” by the Shareholders, referred to as “the Commitment”, to pay to GEM a sum described as a “Commitment Consideration” upon the sale of their shares in Deep River to any party other than GEM (or its nominees) at any time during the “Commitment Period”. It is not in dispute that the Shareholders did subsequently sell their shares in Deep River to a third party. The issue on the appeal is whether it is plain that GEM is not entitled to be paid the Commitment Consideration (calculated as 2% of the proceeds of sale of the shares) because, on the proper interpretation of the Agreement, the “Commitment Period” had expired before the sale took place.

3. The issue arises on a plea in limine litis to set aside GEM’s plaint with summons claiming the Commitment Consideration from the Shareholders. For the purpose of this plea, the facts averred in the plaint with summons are assumed to be true. No evidence is admissible on a plea in limine litis except by agreement between the parties. The only document which has been admitted in evidence is a copy of a letter dated 10 February 2012 to GEM from the Shareholders, signed by the parties, which records the terms of the Agreement.

### **The assumed facts**

4. The background to the Agreement was an approach made by the Shareholders to GEM some time in 2011 inviting GEM to make an offer to buy the entire shareholding of Deep River, including the Shareholders’ own shares. This led to the Agreement and to GEM making an offer on 5 March 2012, as contemplated in the Agreement, to Deep River’s board and shareholders to acquire up to 100% of its shares.

5. GEM received no response to its offer. At some point between 31 December 2012 and 12 November 2013, and without notifying GEM, the Shareholders sold their shares in Deep River to a third party for Rs 1,410,870,480.

6. On 12 November 2013, GEM served a notice on the Shareholders of its intention to exercise its right under the Agreement to extend the Commitment Period to 31 December 2013. GEM then claimed from the Shareholders the Commitment Consideration under the Agreement, in the amount of Rs 28,217,409.50 (being 2% of Rs 1,410,870,480). The Shareholders have not paid that amount.

7. It is averred in the plaint with summons, and is therefore to be assumed for present purposes, that the Agreement was drafted by the Shareholders or their agents.

### **The proceedings below**

8. In support of their plea in limine litis, the Shareholders say that they have no obligation to pay the Commitment Consideration because the obligation to pay it arose only upon any sale of shares during the Commitment Period, which had ended on 31 December 2012 before the sale took place. The Shareholders argue that, under the Agreement, the right to extend the Commitment Period could not be exercised after it had ended, and the extension notice served on 12 November 2013 was therefore served too late and had no effect. It follows that the sale of the Shareholders' shares did not trigger the Commitment and GEM's claim cannot succeed.

9. The judge, Angoh J, accepted the Shareholders' argument and set aside the plaint with summons. GEM appealed and the Court of Civil Appeal upheld Angoh J's decision. From that decision GEM has appealed to the Board.

### **The material terms of the Agreement**

10. After reciting GEM's engagement in discussions concerning its potential acquisition of shares in Deep River in accordance with an offer letter referred to as "the Proposal", the Agreement states:

"In consideration of the substantial direct and indirect benefits to the Shareholders flowing from GEM's engagement with Deep River through the Proposal, but irrespective of whether or not GEM ultimately succeeds in

acquiring some or all of the shares in Deep River whether in terms of the Proposal or any other process, we, the Shareholders, hereby wish to confirm our irrevocable and unconditional undertaking to pay to you a Commitment Consideration following any sale, whether in whole or in part, of our shareholding in Deep River at any time during the Commitment Period to any party other than GEM or its nominees ('the Commitment'). The Commitment shall be binding, irrevocable and unconditional from the date of signature hereof for the duration of the Commitment Period."

11. The duration of the Commitment Period is specified in the following key provision:

"The Commitment Period shall initially endure until 31 December 2012, and the parties agree and hereby record that GEM shall be entitled, but not obliged, to further extend the Commitment Period until 31 December 2013 in its sole discretion. Should GEM so elect, it shall communicate its election to extend in writing to the Shareholders."

12. Also relevant are the following provisions which refer to "the Termination Date":

"The Commitment shall be triggered upon the sale of the whole or any part of the Shareholders' shareholding in Deep River during the Commitment Period, whether such disposal occurs in one transaction or a series of transactions by one or all of us ... For the purposes of this Agreement, and depending on GEM's right to further extend the Commitment Period, 31 December 2013 shall hereinafter be referred to as 'the Termination Date'."

The phrase is used only once in the rest of the Agreement, in a provision which states:

"This Agreement is a continuing agreement and shall remain in full force and effect until the earlier of (i) the payment and

performance in full of the Commitment Consideration and (ii) the Termination Date.”

13. The Agreement contains a number of provisions which, broadly speaking, seek to foreclose any defence which the Shareholders might otherwise have to a claim by GEM under the Agreement for the Commitment Consideration. GEM relies, in particular, on two of these provisions which have been referred to as the “Late Notice Waiver” and the “Delayed Exercise Clause”. These clauses provide as follows:

“The Shareholders hereby waive promptness, diligence, notice of acceptance and any other notice with respect to the Commitment and any other document related thereto. We furthermore waive any right to revoke this Agreement, and acknowledge that this Agreement is continuing in nature.”

(the “Late Notice Waiver”)

“No failure on the part of GEM to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right ...”

(the “Delayed Exercise Clause”)

### **The applicable legal principles**

14. The Agreement is expressly subject to the law of Mauritius.

15. The relevant principles of Mauritian law are not in dispute and chiefly comprise the following provisions of the Mauritian Civil Code (followed below by agreed informal translations):

**Article 1156:** “On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s’arrêter au sens littéral des termes.” (“One must ascertain the contracting parties’ common intention, rather than merely the literal meaning of the terms.”)

**Article 1157:** “Lorsqu’une clauses est susceptible de deux sens, on doit plutôt l’entendre dans celui avec lequel elle peut avoir quelque effet, que dans le sens avec lequel elle n’en pourrait produire aucun.” (“When a clause can bear two

meanings, it must be understood as having that which gives it some effect, rather than that which produces none.”)

**Article 1161:** “Toutes les clauses des conventions s’interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l’acte entier.” (“Each clause in the contract must be interpreted in light of the others, giving each the meaning which arises from the instrument as a whole.”)

**Article 1162:** “Dans le doute, la convention s’interprète contre celui qui a stipulé, et en faveur de celui qui a contracté l’obligation.” (“In case of doubt, the contract is interpreted against the party who has stipulated and in favour of the party who contracted the obligation.”)

16. The essential approach to contractual interpretation, flowing from article 1156, is encapsulated in the following statement of Mungly-Gulbul J in *Bahemia MH & Partner Ltd v Production Menuiseries Industrielles Ltd* [2016] SCJ 66, at p 6:

“The court should not restrict itself to a literal interpretation of the contract but rather ascertain the common intention (volonté commune) of the parties bearing in mind the context in which the contract was drawn up (le contexte de l’acte) as well as the surrounding circumstances (les circonstances de la cause). The court may draw appropriate inferences to give effect to the ‘volonté commune’ of the parties ...”

It is not alleged that in this case there is any relevant context in which the contract was drawn up or relevant surrounding circumstances apart from the circumstances referred to at paras 4-7 above.

### **GEM’s submissions**

17. Counsel for GEM, Mr Stephen Donnelly, accepted that, in order to exercise the right to extend the Commitment Period until 31 December 2013, GEM was required to communicate its election by serving a written notice (which we will call an “extension notice”) on the Shareholders. He nevertheless submitted that, on a proper interpretation of the Agreement, it was not necessary, in order to exercise the right, to serve such a notice before the Commitment Period (as defined in the clause quoted at

para 11 above) ended on 31 December 2012. Rather, the right could be exercised by serving an extension notice at any time before 31 December 2013.

18. In developing this argument, Mr Donnelly placed particular emphasis on the Delayed Exercise Clause and the Late Notice Waiver. He submitted that the function of these provisions must have been to ensure that the right to serve an extension notice would not be lost if no such notice was served before 31 December 2012 and that the right to serve the notice would continue until the Termination Date of 31 December 2013. If this were not the effect of these provisions, they would serve no meaningful purpose at all. Mr Donnelly pointed out that the right to extend the Commitment Period was the only primary right that GEM could exercise under the Agreement. Unless the Delayed Exercise Clause and the Late Notice Waiver applied to this right, there was therefore nothing to which they could apply. It is plain from the Agreement and common ground that, if GEM served an extension notice on any day up to and including 31 December 2012, the notice would be timely and it could not be said that there had been delay by GEM in exercising (or failure on the part of GEM to exercise) its right to extend the Commitment Period. Therefore, the intention underlying these clauses must be to ensure that the right to serve an extension notice would not be lost if GEM did not serve a notice until after 31 December 2012.

19. While contending that it was not necessary to his argument, Mr Donnelly further submitted that the intended effect of the Delayed Exercise Clause and the Late Notice Waiver in turn informs the meaning of the "Termination Date". Seen in light of those clauses, the most natural and straightforward reading of the definition is simply that the Termination Date was 31 December 2013, whether or not the Commitment Period was extended to that date.

20. Relying on Civil Code articles 1161 and 1157 which require courts to construe the contract as a whole and to favour an interpretation which renders each clause effective rather than ineffective, Mr Donnelly accordingly submitted that a proper interpretation of the Agreement as a whole, which gives effect to the Delayed Exercise Clause and the Late Notice Waiver, compels the conclusion that GEM was entitled to exercise its right to extend when it did.

21. Finally, Mr Donnelly argued that if, contrary to GEM's primary case, there is any ambiguity in the relevant provisions of the Agreement, then that ambiguity must be resolved in favour of GEM in accordance with article 1162 of the Civil Code, because (on the assumed facts) it was the Shareholders who drafted the Agreement.



## **The Board's reasons for dismissing the appeal**

22. Despite the resourcefulness with which Mr Donnelly advanced GEM's case in both his written and oral submissions, the Board did not find it necessary to call on the Shareholders' counsel, Mr Hervé Duval SC, in reply.

23. It is true that the Agreement does not state in terms that the right of GEM to extend the Commitment Period until 31 December 2013 cannot be exercised after 31 December 2012. But in the Board's view that is the only reasonable interpretation of the Agreement.

24. As the Court of Civil Appeal said in its judgment:

“It is common sense that the written notice for extension would have to be served during the lifetime of the Agreement before the expiry of the first Commitment Period unless there was an express contractual provision to the contrary or the parties had agreed otherwise, which was not the case. Here, the purported written notice was sent 11 months after the expiry of the first Commitment Period and one month prior to the expiry of the purported extension.”

25. The Board agrees. The reason why it is common sense that any extension notice would have to be served before the expiry of the initial Commitment Period is that the Agreement was clearly intended - and was expressly stated - to be continuing in nature. It cannot sensibly be supposed that the parties intended that a situation could arise in which, if a sale of the Shareholders' shares to a third party took place during 2013, there was no determinate answer when the sale occurred to the question whether the Commitment was still in force or not because the answer was contingent on a future event which might never happen. Yet that is the effect of the interpretation for which GEM contends. On GEM's case, even if no extension notice had been served by 31 December 2012 so that the Commitment Period had ended, GEM could still elect at any time until 31 December 2013 to serve an extension notice which would have the effect of retrospectively reviving the Commitment Period. The result would then be that the Commitment Period would be treated as having continued after 31 December 2012 such that the Commitment was triggered retrospectively and the Shareholders became liable to have paid the Commitment Consideration on the date when the sale had occurred. No reasonable person could have intended the contract to operate in such a capricious way.

26. The inference that it was not intended that the right to extend the Commitment Period could be exercised after the initial Commitment Period had expired is reinforced by the obligation on GEM, if it wishes to exercise the right, to communicate its election to do so by serving a written extension notice on the Shareholders. The obvious purpose of this requirement is to enable the Shareholders to know whether or not, if they sell their shares between 1 January 2013 and 31 December 2013, the Commitment Consideration will be payable. That purpose would be defeated if it were open to GEM to wait and see whether any sale took place during this period and, if it did, at that point to serve an extension notice which would retrospectively impose an obligation to pay the Commitment Consideration.

27. An interpretation which has this effect is all the more unreasonable because it would potentially subject the Shareholders to a payment obligation of which they would already have been in breach for several months before it arose. As stated in the clause quoted at para 12 above, the Commitment (to pay the Commitment Consideration) is triggered by the sale of any of the Shareholders' shares in Deep River. The Agreement also contains a provision that:

“The Shareholders hereby unconditionally and irrevocably undertake and agree with and for the benefit of GEM to cause the due and punctual performance and observance by it of its Commitment.”

It is, however, impossible for the Shareholders punctually to perform the Commitment to pay the Commitment Consideration upon the sale of shares if the obligation to have made the payment at that time only comes into existence on the happening of a later event. It is reasonable to presume that the parties did not intend the Shareholders to undertake an obligation with which compliance would be impossible.

28. Counsel for GEM criticised the Court of Civil Appeal for equating the lifetime of the Agreement with the duration of the Commitment Period. In our view, that criticism is misplaced. The effect of the second provision quoted at para 12 above is that the Agreement ends, at the latest, on the Termination Date. That provision cannot be read entirely literally, as it cannot have been intended that, if the Commitment Consideration had become payable but had not been paid before the Termination Date, the obligation to pay it should thereupon be extinguished. But we take the intended effect of the “termination” of the Agreement on that date to be that, if the right to extend the Commitment Period had not been exercised, or the obligation to pay the Commitment Consideration had not been triggered, that primary right and obligation would cease to have effect. The identification of the Termination Date as 31 December 2013 is preceded by the words “depending on GEM’s right to further extend

the Commitment Period”. Those words qualify the identification of the Termination Date as 31 December 2013 and clearly signify that it is conditional on GEM having extended the Commitment Period until that date. Thus, if GEM does not exercise its right to extend the Commitment Period, the Termination Date will not be 31 December 2013 but, by implication, will be 31 December 2012 when the initial Commitment Period ends. It follows that the lifetime of the Agreement (in the above sense) and the duration of the Commitment Period are indeed coextensive.

29. We do not consider that the Late Notice Waiver and the Delayed Exercise Clause detract from this analysis. Those clauses are only capable of applying while the Agreement is in “full force and effect” - which is to say before the Termination Date and during the Commitment Period, because it is only during this period that the right to extend the Commitment Period is capable of being exercised and could therefore, at least theoretically, be waived. Furthermore, the Shareholders are not complaining of any lack of promptness, diligence etc by GEM in exercising its right to extend the Commitment Period, nor are they alleging that any failure on the part of GEM to exercise that right or delay in exercising it operated as a waiver of the right. Their contention is simply that, after the Commitment Period came to its natural end in accordance with the Agreement, there was no right to exercise, promptly or otherwise.

30. We accept that, as we interpret the Agreement, it is difficult to see that these clauses serve any useful purpose. That is on any view true, however, of some provisions of the Agreement. For example, the second sentence of the Late Notice Waiver is not actually concerned with late notice but states that the Shareholders “waive any right to revoke this Agreement, and acknowledge that this Agreement is continuing in nature”. Since the undertaking given by the Shareholders is in several other places stated to be irrevocable and the Agreement is elsewhere stated to be continuing, this provision is clearly superfluous. It is not uncommon, however, for commercial agreements to adopt a “belt and braces” approach that seeks to protect a party against every possible risk by addressing possibilities that do not realistically exist. The principle that effect should be given to each part of the document, which exists in English law as it does in Mauritian law, is of very little value in such cases. It would be back to front to allow boilerplate clauses of the kind placed at the forefront of GEM’s argument to dictate the meaning of core provisions of the contract - such as in this case the key clause which specifies the duration of the Commitment.

31. The Board agrees with GEM that, if there were any relevant ambiguity in the Agreement, article 1162 of the Civil Code would require it to be resolved in favour of GEM and against the Shareholders as the party assumed to be responsible for drafting the Agreement. The courts below were wrong to hold otherwise. But in the Board’s opinion there is no relevant ambiguity. Any extension notice, to be effective, had to be

served by 31 December 2012. As GEM did not serve an extension notice on or before that date, the Commitment Period ended on 31 December 2012 and could not afterwards be resurrected. It follows that no sum is payable to GEM in respect of the Shareholders' subsequent sale of their shares to a third party and that GEM's plaint with summons was rightly set aside.

## **Conclusion**

32. For these reasons, the appeal is dismissed.