THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 32 OF 2012

BETWEEN:

DARBY INVESTMENTS SERVICES INC.

Claimant

AND

INGUETBERG S.A.

Defendant

Appearances: Ms Elizabeth Weaver for the Claimant, Darby Investment Services, Inc
Mr Stephen Midwinter and Mr Robert Nader for the Defendant, Ingeutberg SA

2013: 5, 6, 14 February

JUDGMENT

(Funding agreement – whether agreement to lend money or to make investment – whether agreement complete – whether to be construed as incorporating term requiring repayment in events not expressed in the agreement as requiring repayment to be made – **Attorney General of Belize v Belize Telecom**[1] applied)

[1] **Bannister J [Ag]:** In these proceedings the Claimant, Darby Investments Services Inc ('Darby'), claims US$3,072,703 together with interest from the Defendant, Inguetberg SA ('Inguetberg'). Each company is incorporated here in the BVI.

[2] Darby's statement of claim pleads that in late 2007 Mr Selivanov, the principal behind Inguetberg, approached Darby to provide funds by way of loan to assist Inguetberg in acquiring a minority shareholding in a Cyprus incorporated company called Dratam Holdings Limited ('Dratam'). The other shareholder in Dratam was to be a company

[1] [2009] 1 WLR 1988

called Rinterino Investments Limited ('Rinterino'), which was owned or controlled by a Mr Grigorishin. The intention was that Dratam would itself enter into a joint venture with a company called Nervia Trading Limited ('Nervia') for the acquisition of the entire issued capital of yet another company, called Perduk Enterprises (Cyprus Limited ('Perduk'), with Rinterino taking 70% of Perduk and Nervia the remaining 30%. Perduk owned the ultimate object of these arrangements, a Russian chemical company called Samaraorginstez LLC ('Samara').

[3] Once these arrangements were in place, therefore, Inguetberg would be the owner of 28.57% of Dratam, which would own, through Perduk, 70% of Samara. Inguetberg would thus be the indirect owner of just under 20% of Samara.

[4] Darby pleads that it agreed to make the requested loan, in the sum of US$3,072,703, and it is common ground that Darby paid that sum to Inguetberg sometime in late 2007. The amount of the loan originally agreed upon was US$3 million. The odd figure is the result of adjustments which had to be made on account, as I understand it, of currency exchange fluctuations. I shall refer to the amount, as it was referred to at trial, as US$3 million.

[5] In fact, although this is not pleaded,[2] the US$3 million was merely the first instalment of the sum of US$8 million which Inguetberg was going to have to pay to acquire its 20% stake in the overall structure. Mr Grigorishin/Rinterino was to pay US$20 million, the balance of the overall US$28 million cost of the acquisition.

[6] Returning to the pleading, it is alleged at paragraph [7] that the loan was made pursuant to a written investment agreement ('the IA') dated 5 December 2007. Recitals to and provisions of the IA are then set out. It is probably best at this point if I turn to the IA itself and summarise the relevant provisions in my own language.

[7] The IA is made between Inguetberg (described as 'Investor 1') and Darby (described as 'Investor 2') and is dated 5 December 2007. It is made subject to the law of Great Britain, which the parties have rightly agreed to treat as a reference to the law of England and Wales. It contains an entire agreement clause and the preamble and recitals are expressed to be an integral and inseparable part of its body.

[8] The first recital explains that Inguetberg and Rinterino[3] are to acquire 100% of Dratam and thus 70% of of Perduk by 20 December 2007

> 'provided that [Inguetberg] acquires in its own name 10.71% of shares in [Dratam] using the funds provided thereto by [Darby]'

[9] The 10.71% Dratam shares are defined in Recital 1 as 'the Shares.'

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[2] there was no need for it to be pleaded

[3] referred to not by name but as 'Inguetberg's partners'

[10] Recital 1 then continues by stating that Inguetberg acquires [i.e. will acquire] the Shares using the funds provided pursuant to the IA by Darby which, for its part, agrees to provide the funds for purchasing the Shares on the terms of the IA (defined as 'the Project'). Inguetberg's remaining 17.86% Dratam shares were to be purchased later.

[11] Clause 1 of the IA provides that all previous obligations of the parties relative to the implementation of the Project shall terminate.

[12] Clause 2 provides, in its first paragraph, (it was referred to as clause 2.1 at the hearing and I shall refer to the seven subdivisions of clause 2 in the same way in this judgment) that all the rights to the Shares acquired by Inguetberg shall belong to Inguetberg alone. Clause 2.2 says that Darby is to provide Inguetberg with the US$3 million in cash 'to acquire the Shares.' Clause 2.3 sets out that all income and dividends received by Inguetberg in relation to the Shares shall be divided between the parties 50/50, with the parties being responsible for their own tax.

[13] Clause 2.4 gives Inguetberg the right, within the three years following Inguetberg's acquisition of the Shares, to repurchase, as it is put, from Darby the right to receive 100% of the dividends, etc, relative to the Shares for (in round figures) US$4.5 million. Any dividends, etc, previously received by Darby pursuant to clause 2.3 of the IA are to be set off against the US$4.5 million. The provision is not happily worded but the meaning is plainly that upon such repurchase Inguetberg will be solely entitled to dividends, etc, generated by the Shares. If such right of repurchase is exercised, the IA terminates. The right of repurchase is to be lost if the entire 70% Samara holding [indirectly] held by Inguetberg and its partners is disposed of.

[14] It is common ground that (a) no dividends have been received by either party for sharing pursuant to clause 2.3; (b) the clause 2.4 option has not been exercised; and (3) it is now too late for Inguetberg to exercise it.

[15] Clause 2.5 provides that if all or part of the [indirect] 70% shareholding held by Inguetberg and its partners in Samara is sold to third parties, Darby will receive, by reference to the proportion of the Shares comprised within the disposal, the price at which the disposed of parcel of Shares was originally purchased by Inguetberg. If the disposal generates any 'income', that 'income' is to be shared 50/50 between Inguetberg and Darby. It was common ground that 'income' in clause 2.5 was to be taken as meaning 'profit.' It is also common ground that no sale within the meaning of clause 2.5 has occurred.

[16] By clause 2.6 the parties agreed that sale, transfer, or incumbrance of the Shares (or accordingly of a share in Samara) by virtue of the general law or under any bankruptcy or insolvency law was to be treated as a sale of the Shares to third parties. It is clear (and I think that it was common ground) that this meant that charges or sales of direct or indirect interests in Samara, insofar as they disposed of the interests represented by the Shares, were to be treated as sales for the purposes of clause 2.5.

[17] Clause 2.7 provided (straightening out the language a little) that the fact that Darby had financed the acquisition of the Shares did not give it 'any preferential right or privilege of Inguetberg to the Shares.'

[18] The final paragraph of numbered clause 4 of the IA provides that if Dratam had not acquired its 70% interest in by 1 June 2008, Inguetberg was obliged to repay the US$3 million to Darby. That provision is spent.

[19] Numbered clause 7 deals with termination. It provides that the agreement shall come into force on 5 December 2007 and will continue indefinitely unless the parties agree in writing to determine it; or Inguetberg has exercised its right of repurchase under clause 2.4; or if the 70% stake in Samara is sold; or if Samara is wound up or dissolved. None of those things has happened.

[20] Returning to the statement of claim, having set out the terms of the IA substantially as I have done above, it proceeds to allege that it was an implied term of the IA

> 'that the Loan would be repayable on reasonable notice either on the termination of the [IA] or in the event that the joint venture between Inguetberg and Rinterino (namely to acquire and hold the 70% interest in Samara through Dratam) came to an end.'

[21] The joint venture being referred to here is the joint venture pursuant to which Rinterino and Inguetberg agreed to acquired Dratam as the vehicle for purchasing 70% of Perduk from Nervia. The joint venture was covered by an agreement between Rinterino and Inguetberg dated 5 February 2008, but nothing turns on the terms of that agreement for present purposes. What is said on behalf of Darby is that the joint venture has come to an end because of the fact that Rinterino subsequently sold its Dratam shares to Darby, so that it ceased to be a co-owner, together with Inguetberg, of Dratam.

[22] In support of the implication of the term which is set out above, the statement of claim relies upon the following matters:

1. the provision of the US$3 million was by way of loan, and did not give Darby any interest in the Shares
2. the loan is unsecured
3. Darby's only return is by way of income or profit generated by the Shares
4. The loan was made on the express basis that Inguetberg and Rinterino would be the holders of the 70% stake
5. unless the term is implied Darby cannot be repaid its loan except under clause 2.4 or 2.5 of the IA
6. it would be contrary to the parties' intentions for Darby to have made the loan on the basis that it would not be repaid even if the IA was terminated or the joint venture came to an end.

The law

[23] The law on the implication generally[4] of terms into contracts has undergone a radical overhaul since 1998. In a series of decisions, the most significant of which are perhaps Investors **Compensation Scheme v West Bromwich Building Society**[5] and **Attorney General of Belize v Belize Telecom**,[6] it is now settled that the implication of terms into contracts does not involve the insertion into an agreement of new or additional material. The implied terms results, if at all, as a result of the process of establishing what the agreement necessarily means. The law as it now stands was economically summarized by Aikens LJ in **Crema v Kenkos Securities Plc**[7]:

> The principles are (1) a court cannot improve the instrument it has to construe to make it fairer or more reasonable. It is concerned only to discover what the instrument means. (2) The meaning is that which the instrument would convey to the legal anthropomorphism called "the reasonable persons", or the "reasonable addressee". That "person" will have all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. The objective meaning of the instrument is what is conventionally called the intention of "the parties" or the intention of whoever is the deemed author of the Instrument. (3) The question of implication of terms only arises when the instrument does not expressly provide for what is to happen when some particular (often unforeseen) event occurs. (4) The default position is that nothing is to be implied in the instrument. In that case, if that particular event has caused loss, then the loss lies where it falls. (5) However, if the "reasonable addressee" would understand the instrument, against the other terms and the relevant background, to mean something more i.e. that something is to happen in that particular event which is not expressly dealt with in the instrument's terms, then it is said that the court implies a term as to what will happen if the event in questions occurs. (6) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means. It is an exercise in the construction of the instrument as a whole. In the case of all written instruments, this obviously means

[4] I say this, because the recent authorities do not affect the law on implications arising from the nature of the parties' relationships (e.g. buyer and seller, landlord and tenant) or the law as to implication by reason of mercantile custom

[5] [1998] 1 WLR 896

[6] [2009] UKPC 10

[7] [2010] EWCA Civ 144 at paragraphs [38] and [39]

> that term is there from the outset, i.e. from the moment the contract was agreed, or the articles of association were adopted or the statute was passed into law.
>
> Lord Hoffmann went on to make two further points, at paras 21-27. The first is that the phrases which courts have used as "tests" to decide whether a term should be implied "(e.g. that the term is necessary to give "business efficacy" to the contract, or that the term is one that was "obvious") can detract from the task that the court has to undertake. That is to see whether the proposed implication spells out what the instrument would reasonably be understood to mean. Lord Hoffmann emphasized that those tests are not freestanding. Secondly, the oft-expressed requirement that an implied term must not just be reasonable but be "necessary" simply reflects the requirements that the court has to be satisfied that the term must be implied because that is what the contract must mean.

[24] The law on the evidence which is admissible for the purposes of construing agreements remains as stated by Lord Wilberforce in **Prenn v Simmonds**[8]:

> 'evidence of negotiations, or of the parties' intentions . . . ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction.'

[25] Although the precise extent and scope of this rule has subsequently been debated, there is no doubt that it is impermissible for the Court to inquire into the parties' intentions or to admit evidence as to the terms for which they were severally negotiating. Similarly, there can be no doubt that, where the construction of an agreement entirely in writing is concerned, evidence of subsequent conduct is inadmissible as an aid to construction.

[26] In this case a mass of evidence was put in by Darby as to the negotiations which culminated in the IA. Although Inguetberg itself had also put in evidence as to that stage of the process, it issued an application, for hearing on the first day of the trial, for significant parts of Darby's evidence to be struck out. In the end the application was not moved, because I indicated that it seemed to me to be more economical of time to hear the witnesses and decide for myself what evidence was admissible and, therefore, of assistance and what was not and which I should accordingly ignore. On that basis, I heard the evidence of Mr Spiridonov, for Darby and of Mr Selivanov, for Inguetberg. Each witness did his best to assist and I am grateful to them for their trouble, but none of

[8] [1971] 1 WLR 1381

their evidence helped me. There was reference, for example, to a scrap of paper annotated by Mr Selivanov during a meeting at a restaurant at a particular stage in the negotiations. But in a case where the genesis and aim of a transaction is sufficiently plain from the very terms of the document itself, I found none of the evidence of assistance in deciding whether, as a matter of construction, the IA had to be read as including provision for what was to happen if the Rinterino/Inguetberg joint venture came to an end and, if so, what that provision was.

Discussion

[27] I start with the observation that the IA is clearly not a home made document. It is professionally drafted. Equally clearly, it is not a contract of loan. Professionals (or for that matter businessmen of the sophistication of Mr Spiridonov and Mr Selivanov drafting an agreement for a loan of US$3 million by themselves) would not produce a document described as an investment agreement. They would produce a document which provided (a) for payment of money from lender to borrower; (b) for the terms upon which that money would be repayable; (c) for security, if any; and (c) for the payment of interest.

[28] It is plain, in my judgment, from the terms of the IA that its description as an investment agreement is an accurate one. Mr Spiridonov/Darby was investing US$3 million in the Samara project. The investment was indirect, in the sense that Darby did not acquire a proprietary interest in any shares - that, in my judgment, is the intention of clause 2.7. What Darby obtained was the right to be repaid its investment at cost plus 50% of any profit (clause 2.5), although it was liable to be bought out within the first three years at 150% of the money invested (clause 2.4). In other words, if Mr Selivanov thought, within the first three years, that the Shares were going to be worth more than US$4.5 million, he could buy Mr Spiridonov out. After that period had expired, the arrangement was that Darby would get its money back together with half the uplift, if any. If the project foundered, Darby would get back nothing, because there would be no sale. If the project produced a return equal to, say, 50% of the cost of the Shares, Darby would not make a loss, because it would still be repaid the total sum invested (clause 2.5).

[29] There is no need to construe the IA as providing for a straight repayment of the money advanced on termination of the joint venture between Rinterino and Inguetberg. The IA works perfectly well without it. The relationship between Inguetberg and Rinterino was irrelevant to the purposes of the IA. The IA does not refer to Rinterino by name – it refers merely to 'Inguetberg's partners.' As minority shareholder of Dratam, Inguetberg was ultimately going to have to follow Rinterino's wishes when it came to a sale, or not, of Samara. Nothing has changed in that regard except the identity of the majority owner of Dratam.[9] Darby's rights under the IA are unaffected by the fact that Mr Grigorishin sold out to Mr Spiridonov.

[30] There is no need to read the IA as requiring the insertion of an additional trigger, on the grounds that otherwise it would continue indefinitely. The IA itself provides that, unless

[9] which happens to be Darby

one of the clause 7 events happens, it is to continue indefinitely. A contract cannot be construed so as to contradict one of its express terms.

[31] In my judgment it is impossible to say that this is a case where some eventuality has not been foreseen, so as to require the Court to attempt, against the relevant background, to gather from the other terms of the document (if that were possible) what the intention of the parties was in case the event occurred. There is no unforeseen event. The document speaks for itself without any need for judicial manipulation.

Conclusion

[32] This claim accordingly fails.

Commercial Court Judge
14 February 2013