The Covid-19 Pandemic as a Supervening Event in the Assessment of Damages: *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302

I. Executive Summary

When a contract is breached, the general rule in assessing damages for breach of contract is that the innocent party should be compensated with a sum of money that would place them in the same position they would have been in had the contract not been breached. Often, those damages will be calculated based on the conditions at the time of the breach, a rule known as the "breach-date" rule. But what happens if disruptive external events occurring *after* the breach ("**supervening events**") cause the innocent party to suffer losses that would have occurred even if there had been no breach? Can the court take into account such events and reduce the amount of damages the innocent party receives?

In *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others*, the Court of Appeal ("**CA**") shed light on these questions, holding that a court may consider evidence of supervening events if, among other things, they rendered false basic assumptions common to both sides. Further, the court may do so even when the supervening events occur after trial but before judgment is given.

Applying these principles, the CA found two of the respondents, Big Bus Singapore City Sightseeing Pte Ltd ("**Big Bus**") and Singapore Ducktours Pte Ltd ("**Ducktours**"), jointly and severally liable for iVenture Card Limited's ("**iVenture Card**") loss of profits caused by breaching agreements to sell tourist passes in 2020. However, the CA found that the Covid-19 pandemic (in particular, its effect on tourism) was a supervening event which would have significantly reduced the value of Big Bus's contractual performance of the agreements in 2020, and reduced the damages awarded accordingly.

II. Material Facts

The appellants, iVenture Card, iVenture Card International Pty Ltd and iVenture Card Travel Ltd, were part of the iVenture Group, which developed and marketed tourist packages worldwide. The first two respondents, Big Bus and Ducktours, were part of the **Duck and HiPPO Group** of tourism-related companies. Since 2006, the Duck and HiPPO Group operated a local Tourist Attractions Aggregator Pass ("**TAAP**") called the "Singapore Pass", which granted access to various local tourist attractions. The third respondent was an individual who was a director and the chief executive of Big Bus and Ducktours.

The iVenture Group and the Duck and HiPPO Group agreed to a business collaboration in which the iVenture Group's Smartvisit technology solution would be used in a new co-branded TAAP, the **"Singapore iVenture Pass"**. To that end, the parties entered into three related agreements. A **Licence Agreement** provided that iVenture Card would sell the Singapore iVenture Pass on its online website and granted Big Bus a licence to operate the Singapore iVenture Pass business and use the iVenture brand in Singapore. Under a **Service Level Agreement** between Big Bus, iVenture Card and Smartvisit Pty Ltd ("**Smartvisit**", a related company of iVenture Card), iVenture Card and Smartvisit would provide Big Bus with technical services and access to the "Smartvisit System", a TAAP transaction management system, a major component of which was the "**SORSE System**", which allowed the user to "access data and reports, update information or process transactions". Finally, the parties

entered into an informal **"Reseller Arrangement"** under which the iVenture Group would resell Singapore iVenture Passes on behalf of Big Bus in return for commissions.

After the launch of the Singapore iVenture Pass, the parties' relationship deteriorated due to Big Bus's unhappiness about iVenture Card's lateness in making payments which had fallen due under the Reseller Arrangement. This culminated in a heated exchange of emails, following which Big Bus suspended the sales, activation and redemption of the Singapore iVenture Pass on 8 November 2017 (the "**Pass Suspension**"). iVenture Card retaliated that same day, locking out Big Bus from access to the SORSE System (the "**SORSE System Suspension**"). On 9 November 2017, Big Bus followed up with another suspension (the "**Second Suspension**"). iVenture Card subsequently paid one of the overdue invoices. However, Big Bus did not lift the Pass Suspension and instead demanded that iVenture Card comply with further conditions as well as lift the SORSE System Suspension. iVenture Card refused to do so.

On 10 November 2017, Ducktours launched the HiPPO Singapore Pass, a TAAP listing similar attractions as the Singapore iVenture Pass. Letters were subsequently exchanged between the solicitors of both parties. A few months after these events, the appellants launched a replacement TAAP business in collaboration with Luxury Tours and Travel (the "**Replacement TAAP Business**") to mitigate their loss of profit as a result of Big Bus's actions.

III. Key Issues on Appeal

A. CA's findings on breaches of the contractual agreements

The CA arrived at a different decision from the High Court ("**HC**") and found that by imposing the Pass Suspension, Big Bus had indeed repudiated the Licence Agreement and the Reseller Arrangement.[1] Therefore, it was jointly and severally liable in damages for iVenture Card's loss of profits from the three agreements (the "**Lost Profits**"). However, the CA agreed with the HC's finding that iVenture Card had breached the Service Level Agreement by imposing the SORSE System Suspension. As this was not found to be repudiatory in nature, the CA affirmed the HC's award of nominal damages to Big Bus for this breach.[2]

B. CA's assessment of iVenture Card's damages

The next issue was how the Lost Profits were to be quantified in the light of the Covid-19 pandemic, which had unprecedented effects on tourism and consequently the profits that could have been made. While the parties had put forth competing expert testimony on the valuation

[1] The HC found that due to the Pass Suspension and the Second Suspension, Big Bus had repudiated the Licence Agreement and the Reseller Arrangement, but not the Service Level Agreement. Further, the HC held that iVenture Card had repudiated the Service Level Agreement (but not the Licence Agreement) by imposing the SORSE System Suspension. However, this repudiation was not accepted by the Second Suspension but by way of a letter sent by solicitors for Big Bus to the iVenture Group dated 6 December 2017. The HC held that this letter terminated all three agreements.

[2] Other issues discussed on appeal included: (1) who was the proper contracting party to the Reseller Arrangement (iVenture Card or iVenture Travel); (2) whether a 30-day credit term applied to the invoices under the Reseller Arrangement; (3) whether the director and chief executive of Big Bus and Ducktours was entitled to protection against personal liability for Big Bus's breaches of contract under the rule in *Said v Butt* [1920] 2 KB 497; and (4) whether the HC had erred in dismissing iVenture Card's breach of confidence claim in deciding whether Big Bus and Ducktours had misused confidential information belonging to iVenture Card to launch a competing business.

methods of quantifying the Lost Profits, the HC Judge had preferred iVenture Card's expert, Mr Oliver Watts ("**Mr Watts**"), and this was not challenged on appeal.

Mr Watts had projected the loss of profits based on two scenarios:

1. The first scenario was the "**But-For Scenario**", which projected iVenture Cards' profits that would have been earned from the Singapore iVenture Pass business if Big Bus had not repudiated the agreements. This was projected on the basis of historical financial data for the sales of the Singapore iVenture Pass, forecast data from the International Monetary Fund ("**IMF**") for estimated future Singapore inflation rates, as well as various contractually agreed fees.
2. The second scenario was the **"Actual Scenario"**, which projected iVenture Card's profits from the Replacement TAAP Business that iVenture Card had formed to mitigate its damage. This was projected on the basis of published financial information of competing TAAP businesses, forecast data from the IMF and Euromonitor for estimated future Singapore inflation rates as well as growth rate in Singapore tourist arrivals, as well as actual sales and financial data for the Replacement TAAP Business.

Mr Watts had calculated iVenture Card's Lost Profits as the difference between these two projections, discounted to present value using iVenture Card's cost of equity capital, plus the additional costs to mitigate iVenture Card's losses and establish the Replacement TAAP Business.

However, in estimating the profits under both scenarios, Mr Watts had relied on one key assumption – that the sales of TAAPs by the Replacement TAAP Business and the Singapore iVenture Pass business would fluctuate in a manner which could be sufficiently predicted by historical data. Big Bus and Ducktours challenged this, arguing that it was based on overly optimistic assumptions about the levels of tourism in Singapore, since the Covid-19 pandemic had severely curtailed tourism activity in Singapore in 2020.

In assessing iVenture Card's damages, the CA had to consider four key issues:

1. Whether supervening events post-dating the breach, such as the Covid-19 pandemic, could be taken into account when assessing damages;
2. Whether the CA could take judicial notice of the Covid-19 pandemic when fresh evidence of the pandemic had not been brought by either party;
3. Whether damages awarded could be adjusted on the basis of facts known to appellate courts but not to trial courts; and
4. Whether, in application to the facts, the Lost Profits could be adjusted for Covid-19.

(1) Events post-dating breach could be taken into account when assessing damages

The first issue faced by the CA was whether damages for breach of contract could be assessed by reference to events post-dating the breach, such as the Covid-19 pandemic. The overall compensatory principle in assessing damages for breach of contract requires an innocent party to be put in as good a position as if the contract had been performed. Under the traditional "breach-date" rule, damages are assessed as at the date of the breach. The underlying assumption is that the innocent party would be able to immediately obtain substitute performance from the market, so the court need not be concerned with subsequent price movements.

However, the CA held that this was not an absolute rule, especially if following it would lead to injustice. The court had the power to fix such other date as may be appropriate in the circumstances. As such, there are exceptions where this rule is not followed and, on some occasions, the court takes the date of the trial as the relevant date to assess damages.

In some instances of anticipatory breach of contract, whereby parties forgo their contractual obligations to another party before having to perform them, a court might have the benefit of knowing the actual loss the claimants had suffered by the time of the trial. If so, the court was not precluded from awarding damages on an actual, as opposed to a prospective or speculative, basis from the date of the anticipatory breach. In essence, "the court should not speculate when it knows". While this may undermine commercial certainty, this would not in itself justify a departure from the compensatory principle so as to award a claimant windfall damages for breach of contract which represented benefits it would not have obtained had the contract been performed. Accordingly, the CA could take into account subsequent events such as the Covid-19 pandemic.

(2) The CA could take judicial notice of the Covid-19 pandemic to adjust the damages awarded

The quantum experts appointed by both parties had completed their respective reports toward the end of November 2019. The HC trial had taken place between January and March 2020 and the HC Judge had handed down his written judgment on 26 May 2020. However, the effect of Covid-19 on damages had not been raised at trial, nor had it been raised in the appellants' trial closing submissions. On appeal, neither party had brought an application for the introduction of fresh evidence of the pandemic on appeal.

It was trite that all facts in issue and all relevant facts must be substantiated by evidence and proved before they could be considered by the court. Notwithstanding this, the CA held that, at common law, the court could take judicial notice of facts which were so notorious or so clearly established that they were beyond the subject of reasonable dispute, or of facts which were capable of being immediately and accurately shown to exist by authoritative sources. The existence of the Covid-19 pandemic, the circuit breaker restrictions and different levels of containment measures, fell within both categories given that the entire population of Singapore had lived through those measures and the end of the pandemic was not yet in sight. Accordingly, the CA could take judicial notice of the Covid-19 pandemic in deciding on the proper measure of the Lost Profits.

(3) Damages awarded could be adjusted on the basis of facts known to appellate court but not to trial courts

The CA then turned to consider whether the basis for the award of damages had to be adjusted to take into account supervening events which occurred *after* the trial, or after the decision below was handed down. The supervening event in question, which was the Covid-19 pandemic, started after the evidential tranche and became manifest during the written closing submissions and before judgment was issued. The HC Judge would not have been able to foresee, when he handed down his judgment in May 2002, how long the pandemic would last.

The CA held that an appellate court could have regard to evidence of events which were known to the appellate but not the trial court *if* such events falsified some basic assumptions common to both sides or where it would affront common sense or a sense of justice if the court failed to take cognizance of them. However, the appellate court should not take into account matters

falling within the field or area of uncertainty in which the trial judge's estimate of damages had previously been made as this would undermine finality in litigation.

(4) Application to the facts: the Lost Profits should be adjusted to account for the Covid-19 pandemic's effects on tourism

The CA found that the effect of the Covid-19 pandemic on the assessment of damages had to be taken into account as failure to do so would affront common sense. Mr Watts's assumption that the loss of profits could be estimated by reference to historical data was completely untenable in the light of the Covid-19 pandemic which had an unprecedented impact on tourism in Singapore and around the world. The onset of the pandemic had ushered in a period in which tourist activity declined markedly and must have dropped to nil during the circuit breaker. It certainly would have persisted during the period up to 26 September 2020, the contractual end-date of the three agreements. As such, this was clearly a supervening event that would have significantly reduced the value of Big Bus's contractual performance of all three agreements in 2020. It would indeed affront common sense if the CA awarded iVenture Card damages on the assumption that tourism in Singapore was unaffected by the pandemic, instead of requiring an adjustment to his assessment to take the effect of Covid-19 into account.

The CA ordered that, unless parties could agree on the quantum of the reduction, the matter would be remitted back to the HC Judge to receive evidence and make the appropriate reduction. In this respect, the CA noted that two dates were significant and relevant in considering when tourists would have stopped coming to Singapore. The first was **11 March 2020** when the World Health Organisation declared Covid-19 a pandemic. Following this declaration, countries successively closed their borders to non-citizens or non-residents. The second date was **7 April 2020**, when Singapore entered into the circuit breaker mode or lockdown. In the CA's judgment, a fair date to assume tourists stopped arriving in Singapore by would be a mid-point between these dates, which the CA fixed as **25 March 2020**. It was to be assumed that there would be no tourists in Singapore from 25 March 2020 up to 26 September 2020 when the agreements would have expired.

IV. Lessons learnt and concluding thoughts

The CA's decision sensibly reflects the commercial reality that supervening events such as pandemics can significantly reduce the profits made from a commercial venture or business, and any award of damages would need to reflect these reductions accordingly. Otherwise, a plaintiff could be left better off than if there had been no breach, a result which would arguably offend commercial practicality and fairness.

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