# B.A. MALLAL MOOT 2022

## SEMI FINALS
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## FINALS

**IN THE GENERAL DIVISION OF**

**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

HC/OC 18989/2022

**LOUIS G. WARREN LABORATORIES LTD**

vs

**VACCINE ACCESS INC**

**Coram: Dmitri Riboflavin J.**

*Adam Smith* for the Claimant
*Anthony Paxlovid* for the Defendant

**DECISION**

1. The certainty of commercial relations relies greatly on a common understanding between parties of their contractual obligations. Clarity in the drafting of contracts is a paramount consideration, yet no matter how clear the terms of a contract are, the vicissitudes of commerce can place a strain on even the best commercial relationships. When, in the course of negotiations, parties to a contract are optimistic of promised good fortune, and realistic about their abilities to bring about certain conditions, reasonable or best endeavours clauses, or their variations, are relied upon to allow parties to proceed with their commercial venture.

2. This is a case about such a clause, and what the obligation truly entails, particularly in respect of the question whether such a clause requires a party to sacrifice its commercial interests to meet the obligation.

3. The Claimant is a pharmaceutical company based in Singapore which has, in the past three decades, made significant innovations in immunology and virology, with a focus on the origin of zoonotic viruses, i.e. viruses that can spread between humans and animals. In 2019, the Claimant's prescient researchers made strong inroads into the development of vaccines for coronaviruses, in anticipation of a repeat of the SARS outbreak in 2003. As 2019 drew to a close and the news of a new virus began, the Defendant approached the Claimant with a proposal to collaborate and prepare for market a range of vaccines for a wide range of coronaviruses known to infect humans.

4. At the time, the Defendant was a startup with roots in Singapore, but incorporated in the Delaware, which claimed to have ties and influence with the leading health agencies of Asian nations including China, Japan, and Korea.

5. The Chief Executive Officers of both the Claimant and Defendant met regularly, at first on a social basis, usually over golf or deep sea fishing, and then adding to these meetings a business element, with closed door meetings with leading health scientists, and retired government officials with experience in health policy in various Asian nations. By February 2020, both sides had engaged counsel to set up a joint venture for the development of vaccines for the new coronavirus now known as Covid-19. After five days of intense meetings, the Claimant and Defendant signed an agreement to enter into a joint venture to establish manufacturing and distribution avenues for the anticipated vaccines in five key cities in Asia.

6. It was undisputed that both parties anticipated lockdowns on an unprecedented scale as the Covid-19 pandemic developed. It is also undisputed that government support was crucial for the speedy establishment of the facilities required for marketing and distribution in the five key cities. It was therefore a condition precedent to the establishment of the joint venture that government approvals would be obtained from the authorities of all five cities for the joint venture. Further, both parties agreed that they had "*a mutual obligation to use all reasonable endeavours to obtain the requisite approvals*". However, subsequently, it was undisputed that the Chief Executive Officers of the Claimant and Defendant had over a business lunch at the Fullerton Hotel, while sipping on cocktails, orally agreed to modify the clause to instead read – "*both parties will use reasonable endeavours to obtain the requisite approvals*".

7. As the negotiations with the Claimant were proceeding, separately the Chief Executive Officer and Chief Operating Officer of the Defendant capitalised on their existing network and influence with the leadership of the World Health Organization, and in March 2020, the Defendant was appointed as consultant to the WHO on public education, relations, and communications in relation to the roll-out of national vaccination programmes.

8. By August 2020, the Claimant was ready with their Covid-19 vaccine. Government approvals from the five key target cities had been hindered by lockdowns. In a tense online meeting between representatives of the Claimant and the Defendant, for which a transcript was produced, the Claimant insisted that the Defendant capitalise on its role as consultant to WHO to influence the government of Singapore to permit the manufacture and distribution of their vaccine. The Claimant had identified suitable manufacturing and distribution networks based in Singapore, and was eager to begin.

9. The Defendant refused to use its influence as consultant to WHO in furtherance of the joint venture. The Defendant's position was that to do so would jeopardise its commercial interests, not only in respect of the consultancy, but also in respect of future similar consultancies where its neutrality and independence was crucial.

10. The undisputed evidence of the Defendant was that if it had chosen to use its influence in the manner that the Claimant had demanded, it stood to lose the estimated SGD 5 million in consultancy fees from the WHO consultancy, and future consultancies of an estimated SGD 25 million a year.

11. This action was brought by the Claimant against the Defendant for the breach of their

obligation to use all reasonable endeavours to obtain government approvals for the establishment of manufacturing and distribution facilities in Singapore, resulting in the joint venture falling apart. The Claimant's argument was that, because of the extremely lucrative nature of the contemplated joint venture, the obligation was one that had to be achieved at all costs. In this regard it was undisputed that the potential profit from the joint venture would have run in the hundreds of millions for both parties. The Claimant relied on *Jet2.com Limited v Blackpool Airport Limited* [2011] EWHC 1529 (Comm) and *Jet2.com Ltd v Blackpool Airport Ltd* [2012] 1 CLC 605 for this proposition.

12. The Defendant disagreed and relied on the decision of the Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("***KS Energy***") to argue that it could not have been within the contemplation of the parties that either of them would have had to sacrifice their own commercial interests in the pursuit of the joint venture. Further, the Defendant submitted that even if it utilised its role as consultant to WHO to influence the government of Singapore, it not a certainty that the approval would have been obtained from the government of Singapore and therefore the Claimant had failed to prove the alleged loss. In any case, since the obligation had been orally modified to that of using "*reasonable endeavours*", the Defendant argued that this is a lower threshold than to use "*all reasonable endeavours"*, and on that basis, the Defendant had dutifully discharged its obligation.

13. In contrast, the Claimant argued that the *"all reasonable endeavours"* clause was not validly modified orally during the business lunch at the Fullerton Hotel. The Claimant relied on a "*no oral modification"* clause in the agreement which stated that *"[n]o variation, supplement, deletion or replacement of or from this agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party"*. In reply, the Defendant argued that parties had impliedly agreed to depart from the "*no oral modification*" clause when they verbally agreed to modify the reasonable endeavours clause.

14. In my view, the WHO consultancy and the joint venture were two separate contracts, and the Claimant cannot seek to rely on the Defendant's unrelated businesses and contacts to create an obligation in a prior agreement. The pre-contractual negotiations show that both parties were collaborating towards their joint venture, and the fact that the "*all reasonable endeavours*" obligation was a mutual one must mean that the obligations should be an equal burden, rather than a burden assumed by one party for the benefit of the other. In my view, the rule in *KS Energy* applies to permit me to make a finding of fact that it was not within the contemplation of the parties that one or the other party must assume a greater burden than the other.

15. Moreover, in my view, the parties clearly agreed to depart from the "*no oral modification*" clause during the business lunch. The Chief Executive Officers of the Claimant and Defendant companies are sophisticated individuals, and would have understood what they were agreeing to. It is not disputed that they would have the requisite authority to bind the Claimant and the Defendant. The Claimant should not be permitted to rely on the "*no oral modification*" clause when it freely agreed to modify the "*reasonable endeavours*" clause. The Defendant's obligation should thus be read as one to use "*reasonable endeavours*" only and not "*all reasonable endeavours*".

16. Even if there had been a breach of the Defendant (whether of the obligation to use *"all*

*reasonable endeavours"* or just *"reasonable endeavours"*), I find that the Claimant had failed to prove that the Defendant's breach caused the joint the venture to fall apart and therefore loss of the extremely lucrative potential profit. Although it is not disputed that the joint venture would have been established but for the failure to obtain government approvals for the establishment of manufacturing and distribution facilities in Singapore, the Claimant was unable to show that but for the Defendant's breach, the requisite government approvals would have been obtained. After much wrangling between the parties' experts, it was eventually accepted by both parties' experts that if the Defendant had utilised its role as consultant to WHO to influence the government of Singapore, there was only a 50% chance of the requisite government approvals being obtained.

17. Accordingly, I find that the Defendant has not breached the reasonable endeavours clause, or that alternatively the Defendant's breach did not cause the Claimant's alleged loss. The Claimant's claim is accordingly dismissed in its entirety and the Claimant shall pay the costs of this action to the Defendant forthwith, to be agreed or otherwise taxed.

Dmitri Riboflavin J.

30th September 2022