Yeo Boong Hua and Others v Turf City Pte Ltd and Others and Another Suit [2008] SGHC 93

Case Number : OS 1634/2002, SUM 4117/2007, Suit 703/2004

Decision Date : 23 June 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Timothy Tan Thye Hoe and Wendy Leong Marnyi (AsiaLegal LLC) for the plaintiffs; Kelvin Poon and Farrah Salam (Rajah & Tann LLP) for the defendants

Parties : Yeo Boong Hua; Lim Ah Poh; Teo Tian Seng — Turf City Pte Ltd; Singapore Agro Agricultural Pte Ltd; Tan Huat Chye; Ng Chye Samuel; Koh Khong Meng

Civil Procedure – Amendments – Orders – Circumstances where court can interfere with consent orders – Inherent powers of the court to interfere with consent orders – Whether court ought to interfere with consent order upon a proper construction of the order

23 June 2008 Judgment reserved.

Choo Han Teck J:

Introduction

1 By way of Summons No 4117 of 2007, the plaintiffs filed an application for further orders and/or clarification and/or variation of a consent order this court had granted on 22 February 2006 ("the Consent Order"). The case alleged by the plaintiffs against the defendants in Originating Summons 1634 of 2002 ("the OS") consolidated with Suit No 703 of 2004 ("the Suit") which eventually culminated into the Consent Order was essentially one of minority oppression under s 216 of the Companies Act (Cap 50, 2006 Ed). The plaintiffs are minority shareholders of Turf City Pte Ltd ("TCPL") and Turf Club Auto Emporium Pte Ltd ("TCAE") (collectively called "the Companies"). The defendants in these proceedings, Singapore Agro Agricultural Pte Ltd ("SAA") and Koh Khong Meng ("Koh"), are the majority shareholders of the Companies.

2 The relationship between the parties had its genesis in a Memorandum of Understanding signed in 2001 ("the MOU") whereby the parties agreed to jointly lease, develop and operate the site of the former turf club at Bukit Timah. It was further agreed that the Companies would be the joint venture vehicles operating the project and that the plaintiffs would be the minority shareholders. SAA had obtained a three-year lease from the Singapore Land Office ("the SLO") of the Bukit Timah site ("the 2001 Head Lease") and it sub-leased the land to the Companies pursuant to the joint venture agreement. The Companies in turn gave out licenses to the ultimate operators at the site and the license fees formed the Companies' main revenue stream.

3 Shortly after the joint venture began, disputes arose between the parties which resulted in the OS and the Suit being filed against the defendants. In the course of those proceedings, the 2001 Head Lease expired. Under the 2001 Head Lease, the SLO may at its absolute discretion grant SAA a lease for a further period of three years under terms and conditions at the SLO's absolute discretion. Instead of renewing the 2001 Head Lease under that option, it appeared that SAA entered into a fresh three-year lease with the SLO ("the 2004 Head Lease") which contained a similar option to renew.

4 At the same time, SAA renewed its sub-leases with the Companies but did not grant the Companies any option to renew even though it enjoyed such an option in its 2004 Head Lease with

the SLO. That was different from the sub-lease the Companies previously enjoyed, which had contained a clause where SAA was bound to offer an option to renew to the Companies on terms and conditions at SAA's discretion should the Companies make a request in writing.

5 At the time the Consent Order was negotiated, the plaintiffs were unaware that the Companies no longer enjoyed any option to renew under the sub-lease. The plaintiffs were also unaware that SAA had actually entered into a fresh lease (the 2004 Head Lease) with the SLO. They had assumed that SAA simply renewed the 2001 Head Lease and that no further option to renew was granted by the SLO.

6 Before the matter proceeded to trial, parties reached a settlement the terms of which were encapsulated in a Consent Order recorded on 22 February 2006. The Consent Order was a product of negotiations undertaken at arm's length by counsel. Under the Consent Order, valuation reports would be prepared by KPMG as independent valuer for the share price of each of the Companies. The valuation reports were envisaged to have been released sixty days from the date of the consent order (ie, May 2006) and both parties would treat the reports as final and conclusive for the purposes of engaging in a closed bidding exercise for each other's shares in the Companies. If the plaintiffs were the sole or higher bidder, SAA would use its best endeavours to procure the assignment of SAA's "head lease with the Singapore Land Office" to the plaintiffs. Unfortunately, the valuation reports which were due to be issued in May 2006 were only released on 10 August 2007. On 23 August 2007, the plaintiffs discovered that SAA had renewed its lease with the SLO from 1 September 2007 to 31 August 2010 ("the 2007 Head Lease") but did not sub-lease the same to the Companies. The valuation reports did not take into account the 2007 Head Lease.

7 This move by the defendants effectively denuded TCPL and TCAE and made any bidding exercise meaningless. The plaintiffs therefore made the present application to vary the Consent Order and sought, inter alia, the following amendments:

(i) that a re-valuation exercise be carried out after valuation reports are re-issued at the defendants' expense to take into account SAA's current lease with the SLO;

(ii) if the plaintiffs win the bid for the Companies, the defendants shall use their best endeavours to facilitate the transfer of SAA's current lease with the SLO or to sub-lease the site to the Companies, together with a transfer of the licenses with the ultimate tenants to the Companies; and

(iii) that if the plaintiffs win the bid for the Companies, the defendants shall make a full account of all profits the Companies made from 1 June 2006.

Alternatively, the plaintiffs sought to clarify the Consent Order in a manner necessary to give effect to it.

Jurisdiction

8 A preliminary issue this court raised when parties first appeared for the present application was whether this court had jurisdiction to hear the application. The defendants' contentions in this regard are essentially threefold. First, they raised a procedural argument that when a main action is spent, no further applications of a fresh and substantial nature may be made by way of a summons save those specifically permitted or directed by the original orders of the court. However, an incorrect mode of commencement of proceedings is not necessarily fatal unless the defendants can show that this court has no jurisdiction or ought not exercise its jurisdiction in this matter. Hence, the

defendants argue that even if the court has inherent jurisdiction to vary consent orders, it is limited to making further orders of an incidental nature. Thirdly, the defendants argue that the "liberty to apply" clause in the Consent Order is inapplicable in the present case because the plaintiffs are not seeking any clarification but are, in effect, seeking to vary the order substantially.

9 The plaintiffs cited O 92 rr 4 and 5 of the Rules of Court (Cap 322, R5, 2006 Rev Ed)("Rules of Court") as well as the authorities of Fivecourts Limited v JR Leisure Development Co Ltd [2000] WL 141246 (QBD) ("Fivecourts") and Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd [2001] CP Rep 31 ("Ropac") in support of their argument that this court has jurisdiction to make further substantive orders in this case. They also characterise the further orders sought as consequential for which the "liberty to apply" clause is operable.

10 In so far as this court's jurisdiction to make further substantive orders is concerned, Fivecourts and Ropac are of limited assistance to the plaintiffs. In both cases, the party who was stipulated to perform a task within a certain time under a consent order applied for an extension of time from the court. Gray J and Neuberger J respectively held that in exceptional cases, a court has jurisdiction to interfere with a consent order by granting a time extension but refused to grant the application. Neuberger J opined that one of the circumstances where a court would grant a time extension was when one party suffered an accident that rendered him unable to doing anything for the relevant period. This is a fortiori in light of our O 3 r 4 of the Rules of Court which allows the court to extend the time within which a person is required or authorised by a judgment, order or direction, to do any act. The present application however is not an application for an extension of time.

11 Both Fivecourts and Ropac recognise that whilst there may be exceptional circumstances where a court may interfere with a consent order (eg, granting an extension of time), in general, a consent order represented a contract with which the court has no jurisdiction to interfere, save in circumstances in which the court has to interfere with a contract. This contractual underpinning of a consent order has been adopted locally by MPH Rubin J in CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd [2002] 3 SLR 281. The plaintiffs argued that the amendments are necessary to remedy the following breaches of the Consent Order by the defendants:

(a) the defendants entered into the 2007 Head Lease with the SLO but allowed the sub-lease with the Companies to expire; and

(b) the defendants failed to disclose that: (i) SAA had entered into the 2007 Head Lease; and (ii) that the 2004 Head Lease contained an option to renew but the sub-lease to the Companies did not.

Any allegation of breach of the Consent Order ought to be brought in a separate action. Nonetheless, it will become apparent upon a proper construction of the Consent Order that both allegations are unfounded because no such obligations existed on the part of the defendants.

12 I am also not persuaded that there are exceptional circumstances as contemplated by Fivecourts and Ropac which warrant the making of further substantive orders. In this regard, the plaintiffs' general allegations of continued oppression by the defendants are more visceral than cerebral as their contention that the amendments are in accord with the original intent and purpose of the Consent Order is incorrect upon a proper construction of the Consent Order.

13 In light of the foregoing discussion on Fivecourts and Ropac, the plaintiffs' next argument that this court should exercise its inherent jurisdiction under O 92 rr 4 and 5 of the Rules of Court is similarly dismissed. This argument may have been applicable if the Consent Order was inaccurate in

reflecting the true intentions of the parties. I have already mentioned that the plaintiffs failed to show that the amendments are necessary to reflect accurately the consensus reached at the time the Consent Order was entered into.

14 Furthermore, I do not accept the plaintiffs' characterisation that all the amendments are merely consequential or incidental and do not alter the substantive rights of the parties. The key amendments centre on the defendants bearing the expenses for new valuation reports to be issued and that the defendants will use best endeavours to transfer the current 2007 Head Lease to the plaintiffs if the plaintiffs won the bid for the Companies' shares. I find that these key amendments alter the substantive rights of the parties upon a proper construction of the Consent Order. It is hornbook law that the "liberty to apply" clause is inoperable for substantive amendments: Koh Ewe Chee v Koh Hua Leong & anor [2002] 3 SLR 643.

15 In this regard, it is not disputed that the "liberty to apply" clause in the Consent Order allows the court to construe its own orders and provide clarification: Jeffrey Pinsler, Singapore Court Practice 2006 (LexisNexis, 2006) ("Pinsler") at para 42/1/16. I now discuss the proper construction of the Consent Order, upon which the plaintiffs' case hinges.

Construction of the Consent Order

16 A purposive interpretation of the Consent Order shows that at the time the Consent Order was entered into, both parties envisaged that the valuation reports would be ready by May 2006 and accordingly did not expressly or impliedly provide for events occurring after May 2006, viz the expiry of the 2004 Head Lease in September 2007. Put simply, the scope of the Consent Order does not encompass the current lease, viz the 2007 Head Lease between SAA and the SLO.

17 We begin with an examination of the relevant provisions of the Consent Order, which read as follows:

> 4 For the purpose of the Valuation Exercise, the Plaintiffs and the Defendants *may* refer any and all matters which they deem relevant to the Independent Valuer for his consideration and review (including, without limitation, the facts and allegations raised in the Originating Summons and the Suit).
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> 5 The Independent Valuer shall have unfettered and absolute discretion in conducting the Valuation Exercise as he deems fit and the Plaintiffs and Defendants undertake not to interfere, impede, obstruct or do anything to prevent or hinder the Independent Valuer's discharge of its duties in respect of the Valuation Exercise. Without prejudice to the generality of the foregoing, the Independent Valuer shall in arriving at a fair valuation take into consideration and review, inter alia, the following:-
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> …
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> (b) the future earning capacities of the Companies including but not limited to the expected revenue and income from the remaining tenure of the sub-tenancy agreements entered into by the Companies respectively with [SAA].
>
> …
>
> 6 To assist the Independent Valuer in this regard, the Plaintiffs and Defendants shall provide the Independent Valuer and/or KPMG Business Advisory Pte Ltd with full access to all cause

papers, documents referred to in the respective List of Documents and Supplementary List of Documents (if any), existing expert or such other reports and such other documents that the Independent Valuer and/or Messrs KPMG Business Advisory Pte Ltd may require for the purpose of conducting the Valuation Exercise, and the Plaintiffs, Defendants and/or the Defendants' agents and/or servants, and/or the Companies' employees, agents and/or servants shall assist the Independent Valuer and/or Messrs KPMG Business Advisory Pte Ltd with any or all enquiries in this regard.

…

9(g) Further, in the event that the Sole Bidder or Higher Bidder are the Plaintiffs, the Defendants, in particular [SAA], shall use its best endeavours to facilitate and procure the assignment/transfer/novation of [SAA's] head lease with the Singapore Land Office, to the Companies (subject always to the consent, if required, of Singapore Land Office).

…

11 The Plaintiffs and the Defendants undertake not to do anything or cause anything to be done which would in any way affect, vary and/or alter the status quo of the Companies, both in terms of on-going liabilities/obligations to which the Companies are subject to, and assets and/or benefits which the Companies presently enjoy, including but not limited to doing anything to affect the head lease between [SAA] and the Singapore Land Office and sub leases presently entered into between [SAA] and the Companies. In particular, the Plaintiffs and Defendants undertake that in respect of the respective sub leases presently entered into between the Companies and [SAA], the Plaintiffs and Defendants and/or their agents and/or employees and/or servants shall not do anything that would alter or affect the said sub leases including doing anything to effect, procure or cause the termination of the said agreements. [emphasis added]

18 It is apparent from the foregoing clauses and especially clause 11 that the language chosen focuses on the "present", which at the time the Consent Order was entered into, encompassed the 2004 Head Lease and its attendant sub-lease between SAA and the Companies. The undertaking in clause 11 is a negative one where parties undertake not to do anything that would affect the "on-going liabilities/obligations" and "present assets" of the Companies, which in essence referred to the sub-lease in place at that time for which the Companies had to pay monthly rent. The focus of clause 11, signified by the phrase "in particular", is to ensure that that sub-lease would not be affected. Once that sub-lease has expired through the natural passage of time, there is nothing left for clause 11 to protect. There is no language obliging the defendants to pro-actively renew the sub-lease upon its expiry.

19 Clause 11 of the Consent Order was drafted in this manner because parties had envisaged that the valuation reports would be ready by May 2006. At the time the Consent Order was negotiated, both parties knew full well that the 2004 Head Lease was expiring in September 2007. It did not strike parties at that time to make provision for the expiry of the 2004 Head Lease since the expiry was only due more than a year later in September 2007. This is made apparent from clause 5(b) where in referring to the future earning capacities of the Companies, the only example listed was that of the "remaining tenure" of the sub-lease, and not a more general reference to any sub-lease that may be entered into between the Companies and SAA. The object of the entire Consent Order was simply to preserve the then-existing tenancies through clause 11 whilst the valuer prepared the valuation reports for the valuation exercise. Clause 9(g) would then operate such that the defendants had to use best endeavours to transfer the 2004 Head Lease to the plaintiffs should the plaintiffs be the winning bidders. This machinery contemplated by the parties in the Consent Order does not go so far

as to prohibit the defendants from entering into the 2007 Head Lease nor mandate a pro-active renewal of the sub-lease.

20 The plaintiffs' key contention is that an integral part of the joint venture between the parties is the lease of the Bukit Timah site and the benefit accruing from the lease thereby belonged to the joint venture Companies. In other words, SAA was holding the lease for the benefit of the Companies. An allegation of a trust relationship is easy to make but difficult to prove. Under the MOU signed between the parties, the parties had agreed to "jointly operate" the Bukit Timah site. There is no evidence that the parties had agreed to "jointly lease" the site.

21 The plaintiffs' startling submission is that clauses 9(g) and 11 of the Consent Order evidence that beneficial ownership of the site lies with the Companies. That begs the question because it subverts a position reached through negotiation and asserts as fact that that was what parties had intended when they entered into the joint venture. If beneficial ownership of the site by the Companies was indeed an "integral part" of the joint venture as alleged by the plaintiffs, then it is strange that the plaintiffs cannot produce any other relevant evidence to support their case.

22 In the absence of evidence establishing that a trust relationship was contemplated by both parties when entering into the Consent Order, Standard Chartered Bank v Neocorp International Ltd [2005] 2 SLR 345 at [34] is apposite:

> 34 In Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004), the learned author summarises the legal position (after a review of all the relevant authorities, including *Prenn v Simmonds* [1971] 1 WLR 1381, *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 and the *Investors Compensation* case) on the admissibility of the factual background known to the parties at or before the date of the contract as an aid to construction at pp 85–86, para 3.11:
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> > *It may, therefore, be concluded that the admissible evidence of background is limited to objective facts, and that save in exceptional circumstances those facts exclude evidence of the negotiations between the parties, and direct evidence of their actual intentions.* Further, the object or aim of a transaction is something which the court must ascertain on the evidence. It is not something which the court is able to determine from its own knowledge.
> >
> > It is, of course, the case that facts which were not known to either party at the date of the contract are not relevant to the construction of their contract, for if the facts were unknown they cannot have played any part in forming the presumed intention which is embodied in the contract. However, where a fact is known to one party and not to the other, in theory it may well have played a part in forming the intention of the party who knew that fact. *However, unless a fact was known to both parties, it will not be admitted in evidence, because what the court is seeking is not the actual intention of one party to the contract, but the presumed mutual intention of both of them.*
> >
> > However, *the court must be careful to ensure that the evidence of background is used to elucidate the contract, and not to contradict it.*
>
> [emphasis added]

23 This leaves us with the plaintiffs' last argument. During the hearing before this court on 22 February 2006 on whether additional clauses should be included in the Consent Order, this court had refused to grant any consideration to be paid by the plaintiffs if the Head Lease was assigned

under clause 11. The plaintiffs emphatically contend that that amounts to recognition by the court that the Head Lease belongs to the Companies. The defendants pointed out that the court had dismissed all the proposed additions to the Consent Order and the court might very well have held the view that clauses which could not be agreed upon should not be grafted into the Consent Order. The plaintiffs' position is disingenuous for ignoring the fundamentals of proving a trust and playing on the apparent silence of the court instead. In the absence of evidence, the plaintiffs did not discharge the burden of proving their contention that the Companies had a beneficial interest in the Head Lease.

24 The issue of non-disclosure raised at [11] above also falls away once we scrutinise clauses 4 and 6 of the Consent Order closely. Both clauses do not impose a mandatory obligation on the defendants to volunteer full disclosure. Clause 4 states that both parties may provide any such information that they think is relevant and Clause 6 only mandates both parties to provide unfettered access to any document the independent valuer may require. Having said that, any allegation as to failure by the defendants to provide proper discovery in the OS and the Suit is a matter extraneous to this proceeding.

25 Another issue raised by the plaintiffs is that SAA breached clause 11 of the Consent Order by sending out letters in July 2007 (before the valuation reports were released) to the ultimate operators stating that their "lease" would be assigned to SAA and that their security deposit would be transferred from the Companies to SAA with effect from 1 September 2007. This allegation is an allegation of a breach of the Consent Order which similarly should be the cause in a separate action. In any event, even if the allegation is made out, it does not in any way affect the valuation reports in light of the proper construction of the Consent Order and therefore does not warrant the amendments sought.

26 The last issue raised by the plaintiffs is that since the prize of the bidding exercise the 2004 Head Lease contained a renewal clause, this ipso facto entailed that the Consent Order encapsulated the 2007 Head Lease since the 2007 Head Lease is but a mere extension of the 2004 Head Lease. This argument grasps at straws because under the renewal clause in the 2004 Head Lease, the SLO may in its absolute discretion grant a fresh tenancy subject to new terms and conditions. This is not a situation where the SLO must grant the tenant an option to renew upon the expiry of the 2004 Head Lease.

Conclusion

27 For the foregoing reasons, the plaintiffs' application is dismissed. I will hear the question of costs on a subsequent date.