Abdul Jalil bin Ahmad bin Talib and Others v A Formation Construction Pte Ltd [2006] SGHC 171

Case Number : Suit 892/2004

Decision Date : 26 September 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Aloysius Leng (Abrahamlow LLC) for the plaintiffs; Anthony Netto and Michael Yap (Teo Keng Siang & Partners) for the defendant

Parties : Abdul Jalil bin Ahmad bin Talib; Hussen Bin Ahmad Bin Salamah Bin Awad Bin Talib; Waleed Abdul Jalik Talib — A Formation Construction Pte Ltd

Contract – Consideration – Forbearance – Defendant giving up any right to make claim against trustees for damages for breach of terms in lease agreement by accepting compromise offered – Whether such forbearance amounting to consideration for compromise agreement

Contract – Formation – Capacity of parties – Will constituting trust stipulating trust to be managed by two trustees at all times – Sole trustee having power to carry on all necessary business of trust only until new trustees appointed – Business of trust to manage immoveable properties – Whether sole trustee having power to authorise compromise agreement regarding rental arrears of such immovable properties – Whether sole trustee's solicitors having ostensible authority to effect compromise agreement

Equity – Estoppel – Defendant giving up any right to make claim against trustees for damages for breach of terms in lease agreement by accepting compromise offered – Defendant discharging obligations under compromise agreement – Whether inequitable for plaintiffs to refuse to honour compromise agreement on ground that such agreement not lawfully entered into

26 September 2006 *Judgment reserved.*

Judith Prakash J:

The claim

1 The plaintiffs in this action are the present trustees of the trust ("the trust") established under the last will of Shaik Roubayak bin Khalid bin Talib alias Shaikh Roubayak bin Khalid bin Talip alias Shaik Roubayak bin Khalid bin Ghalib bin Thalib alias Shaikh Rubiye bin Khalid bin Ghalib bin Thalib ("the testator"), who died in 1934. The trust is the owner of the premises at 29 and 30 Purvis Street ("the Purvis property") and at 21 Amoy Street ("the Amoy property"). By this action, the plaintiffs seek to recover arrears of rental and other amounts due under the leases of the aforesaid premises from the defendant, A Formation Construction Pte Ltd, the lessee of the same. The complication in the case is that in February 2002, the then trustee of the trust purported to waive the payment of the amounts that the plaintiffs now claim.

2 In December 1996, the trustees of the trust were one Awad bin Omar Harharah ("Mr Awad") and his younger brother, Shaik Mohamad bin Omar Harharah ("Mr Mohamad"). On 9 December 1996, the trust entered into two lease agreements with the defendant. The first lease agreement was in respect of the Purvis property which was leased to the defendant for a period of 25 years commencing 24 months from the date of the lease agreement or on the date of commencement of business by the defendant at the Purvis property, whichever was earlier, at a monthly rental of $10,000. Under the second agreement, the Amoy property was leased to the defendant for a period of 20 years commencing 24 months from the date of the agreement or on the date of commencement of business by the defendant at the Amoy property, whichever was the earlier, at a monthly rental of

$3,000. Each lease also provided for interest to be payable in the event that the rent accruing was paid late.

3 The plaintiffs' claim in this action is for various amounts comprising both rental and interest on late payment. The sum of $127,419.35 is claimed as unpaid rental for the Purvis property for the period from 9 December 1998 to 31 December 1999. Further sums totalling $154,554.83 are claimed as accrued interest due on late payment of rental for both the Purvis property and Amoy property between 9 December 1998 and 31 October 2004. Additionally, the plaintiffs ask for interest at 12% per annum on the sum of $127,419.35 to be awarded to them from 1 November 2004 to the date of payment.

Background

4 At the time of the leases, the properties were occupied by statutorily-protected tenants. The properties were run-down and dilapidated. It was envisaged that the trust would recover vacant possession of the properties from the tenants and that, thereafter, the defendant would redevelop them into modern buildings before commencing business therein. In the event, it took longer than expected to evict the tenants from the properties and because of this, the redevelopment work and, consequently, the occupation of the properties for business purposes was delayed. Thus, by 9 December 1998, the date falling 24 months after the grant of each lease, neither of the properties was ready for occupation.

5 The plaintiffs' claim was based on the position that rental under the leases commenced on 9 December 1998 and was payable in advance on the first day of each calendar month. The defendant did not, however, commence paying the rental for either the Amoy property or the Purvis property on 9 December 1998.

6 In August 1999, the trust acting through its then solicitors, M/s Mallal & Namazie ("M&N"), reminded the defendant via two letters to the defendant's then solicitors, M/s Cheong Hoh & Associates ("CHA"), that the leases of the properties had commenced on 9 December 1998 and that the rental on the same payable from that date was still outstanding. In respect of the Amoy property, the trust asked for payment of $25,600.76 being the net rental (the gross rental due under the lease less the amounts recovered from the statutory tenant of the property) due for the period from 9 December 1998 to 31 August 1999. In respect of the Purvis property, the trust asked for payment of $85,111.49 being the net rental payable for that property for the same period. These requests for payment remained unsatisfied.

7 The next development was on 21 June 2000 when CHA wrote to M&N stating that it had been instructed by the defendant to seek the trust's indulgence to waive the rental payable in respect of both the Amoy and the Purvis properties until the temporary occupation permits ("TOP") for the respective premises had been obtained. On 25 July 2000, M&N replied to this letter and stated that the trust would "only consider [the defendant's] request for [a] waiver of the outstanding rental or at least some part of same after restoration of the above properties commences and [the defendant has] settled [M&N's] outstanding bills". No payment of rental was made thereafter but the trust did not make any further demand for the same until early 2002.

8 Meanwhile, in May 2001, M/s Teo Keng Siang & Co ("TKS") who had taken over from CHA as solicitors for the defendant in respect of the leases, wrote to M&N asking for a meeting with the sole trustee to discuss the rental matter. Specific reference was made to the letter of 25 July 2000 and M&N was informed that the defendant had paid out a huge sum of money in respect of the properties and yet up to that date it had not been able to obtain the TOP to commence business. A further

letter was sent on 23 June 2001 in which TKS reiterated the request for a meeting to discuss the rental question and a change of the commencement date for the rental. In that letter, it was alleged that the TOP for the properties had yet to be issued due to the delay of the trustees. Forwarded with that letter were various documents for signature by the trustee. M&N responded shortly thereafter to state that the trustee had to consult with the beneficiaries of the trust and that had caused some delay. They denied, however, that any delay was due to the death of Mr Awad and stated that they were disturbed by the stand taken by the defendant. They reserved their clients' rights against the defendant. As for the request for a waiver of rental, the same would only be considered after evidence was given that material work had been commenced on the Purvis property. That letter did not contain any demand for payment of rental.

9 It was only on 17 January 2002, that M&N wrote to TKS making such a demand. Their letter stated that in respect of the Amoy property, the sum of $113,374.95 was outstanding as rental for the period from 9 December 1998 to 8 February 2002 and that in respect of the Purvis property the outstanding rental for the same period was $377,692.13. TKS was asked to arrange for payment of the total sum of $491,067.08 immediately failing which they should arrange for the defendant to deliver up vacant possession of the properties without prejudice to the trust's rights to institute recovery proceedings against the defendant and its guarantors.

10 TKS responded on 22 January 2002 to say that in June 2001, the defendant had proposed that the commencement date for the rental should be the date that vacant possession was given to it. The defendant had spent a considerable amount for legal costs, compensation moneys and professional fees and upgrading works. Further, the agreement to pay rent had been based on the assurance that the tenant's compensation issue would be speedily resolved. Vacant possession of the properties had, however, only been delivered on 9 September 2000. Further, the trust had agreed to use its best endeavours so that the defendant could obtain TOP. The defendant had been delayed by circumstances such as the death of one trustee and the departure abroad by the surviving trustee thus leading to difficulties in the defendant obtaining the signatures of the then trustees for applications that needed to be submitted to the relevant governmental authorities. TKS pointed out that the defendant intended to fulfil its part of the bargain and wanted to pay reasonable dues and move on with the upgrading of the premises. It asked that a joint meeting be arranged to discuss the defendant's request that rental should be charged from the date of vacant possession or some other compromise date that would enable the parties to maintain their good relationship.

11 On 28 January 2002, M&N replied to say that their client was not able to agree to rental commencing from the date of vacant possession. The letter also rejected the allegations that there had been delay caused by the death of the co-trustee or by any other matters for which the trustees were responsible. In contrast to the foregoing uncompromising stand, however, three days later, M&N sent out a letter marked "WITHOUT PREJUDICE" in which they stated that as a compromise, their client was prepared to waive rental for the period up to 31 December 1999 subject to all rental from 1 January 2000 to the date of that letter being paid within seven days of such date, time being of the essence. By its reply dated 6 February 2002, TKS stated that as TOP had been obtained for the Amoy property the defendant was willing to pay rental for that property from 1 January 2000 onwards. As for the Purvis property, the defendant needed to inject more than $1m in the next months to obtain TOP and therefore required that rental for that property for the period commencing on 1 January 2000 be paid only at the end of 2002 or on TOP, whichever was the later. TKS stated that if this offer was accepted by the trust, the defendant would pay the rental for the Amoy property within seven days of confirmation.

12 The trust did not find the offer acceptable. On 8 February 2002, M&N sent out notices to quit directly to the defendant in respect of each of the properties. The notices stated that as the

defendant had failed to make payment of the outstanding rental, M&N as solicitors for their client gave notice and demanded that on 8 March 2002, the defendant do quit and deliver up the respective properties to the trust. On the same day, M&N sent a without prejudice letter to TKS, to express their disappointment that the defendant had not accepted, on an unqualified basis, the offer made on 31 January 2002. M&N then set out their client's claim as follows:

Amount due for arrears of rental in respect of No. 21 Amoy Street for the period 9/12/1998 To 8/3/2002 at $3,000 per month	$120,000.00
Interest payable at 12% per annum as per Tenancy Agreement …	$22,999.32
Amount due for rental in respect of Nos. 29/30 Purvis Street for the period 9/12/1998 to 8/3/2002 at $10,000 per month	$400,000.00
Interest payable at 12% per annum as per Tenancy Agreement …	$76,664.38
	$619,663.70
Less: Rental received for the period 9/12/1998 to 31/8/1999 for No. 21 Amoy Street and Nos. 29/30 Purvis Street	- $ 2,932.92
Balance due and payable	**$616,730.78**

After this computation, the letter continued as follows:

> Our client is prepared to resolve matters with your clients on the following terms which are not negotiable:-
>
> 1. in respect of No. 21 Amoy Street, our client would require the entire rental for the period 9th December 1998 to 8th March 2002 amounting to $120,000.00 to be paid within

seven days from the date hereof;

2. in so far as Nos. 29/30 Purvis Street are concerned, our client is prepared to waive rental up to 31st December 1999, all rental thereafter to be paid in the following manner:-

a) rental for the period 1/1/2000 to 31/12/2000 amounting to $120,000.00 to be paid on or before 28th February 2002;

b) rental for the period 1/1/2001 to 31/12/2001 amounting to $120,000.00 to be paid on or before 31/12/2002;

c) rental for the period commencing 1/2/2002 to 28/2/2002 to be paid on or before 28th February 2002;

d) all rental with effect from 1/3/2002 to be paid on its due date;

with the usual default clause.

In consideration of your client's acceptance of the aforesaid and payment of the above amounts in the manner stated, our client is prepared to waive:-

a) rental for Nos. 29/30 Purvis Street for the period 9th December 1998 to 31st December 1999 amounting to more than $120,000.00 less the rental received under the earlier controlled tenancy;

b) the interest accrued for late payment of rental up to 28th February 2002 amounting to $99,663.70.

This offer is open for your clients' acceptance until close of business on Friday, 15th February 2002.

13 The defendant responded positively to this offer. Two of its directors went personally to M&N's office on 15 February 2002 and confirmed acceptance of the offer on the terms in which it was made. They requested until the following Monday, 18 February, to make payment of the sum of $120,000 for the Amoy property. This request was granted and the amount was duly paid on 18 February 2002. With respect to the Purvis property, TKS put forward the defendant's request that the first sum of $120,000 be paid by the end of June 2002 instead of being paid on 28 February 2002. They, however, sent a sum of $10,000 with their letter as rental for the month of February 2002 itself. On the same day, M&N replied to accept the sum of $120,000 as arrears of rental for the Amoy property. It stated, however, that the request in relation to the Purvis property was not acceptable and that its client would accept payment of the arrears of rental of $120,000 for the period between 1 January 2000 and 31 December 2000 by 30 April 2002 and payment of the rental of $120,000 for the period between 1 January 2001 and 31 December 2001 by 31 October 2002. M&N wanted TKS's written and unqualified acceptance of this offer by 1.00pm the next day failing which its client reserved the right to proceed further against the defendant in respect of the Purvis property. On 20 February 2002, TKS replied to confirm that the defendant was agreeable to the counter proposal in relation to the Purvis property. The defendant made payment of the $120,000 due at the end of April 2002 and must have paid the remaining $120,000 by 31 October 2002 since no complaint of delayed payment was made either then or before me though the evidence of such payment was not adduced. In total, by March 2003, the defendant had paid the trust $390,000 as rental for the Purvis property

(including the sum paid in April 2002) for the period from December 1998 to March 2003.

14 At the time of the exchange of correspondence between M&N and TKS referred to above, Mr Mohamad was the only trustee of the trust. Mr Awad had died on 21 January 1999 and his replacement (appointed on 13 April 1999) had retired on 23 November 2000. Between that date and 5 March 2002, no other replacement was appointed and Mr Mohamad acted alone. This situation was considered significant by the plaintiffs because cl 19 of the will of the testator under which the trust was established ("the will") provided:

> There shall always be at least two trustees and any vacancy in the trusteeship shall be filled up as soon as conveniently may be and a single trustee if there shall be only one trustee and the executors or administrators of the last surviving trustee shall only have power to appoint new trustees and to carry on all necessary business of the trust until new trustees or trustee are appointed.

15 By an order of court dated 16 March 2004, Mr Mohamad and his then co-trustee were discharged from acting as the trustees of the trust and the first and second plaintiffs were appointed the trustees of the trust in their place. By a deed made on 19 March 2004, the first and second plaintiffs appointed the third plaintiff as an additional trustee of the trust. The plaintiffs then investigated the issue of the rental due for the properties. On 8 October 2004, their solicitors, AbrahamLow LLC, wrote to the defendant referring to a meeting the solicitors had with Mr Ng Eng Wah ("Mr Ng"), a director of the defendant. Mr Ng had given them to understand that there was no "agreement document [*sic*] on the waiver of rental arrears from 9th December 1998 to 31st December 1999 for the trust properties at 29 and 30 Purvis Street in February 2002 that was signed by [Mr Ng] and the then sole trustee". The letter went on to demand that the defendant pay by Friday, 15th October 2004, the sums that had been waived, namely, rental of $120,000 for the period from 9 December 1998 to 31 December 1999 and $99,663.70 being interest accrued for late payment of rental up to 28 February 2002, together with further accrued interest to date of payment at 12% per annum. The defendant resisted the demand and this action was started in November 2004. In the statement of claim, the amount of rental arrears for the Purvis property was changed to $127,419.35, the amount of interest for late payment of rental up to 28 February 2002 was adjusted to $99,883.84 and two other sums were also claimed as interest on late payments.

The defence and counterclaim

16 The defence was long and made copious references to the terms of the leases and the correspondence. It also set out the background to the leases. The defendant made the following material averments:

(a) that when the lease agreements were executed, the parties had anticipated that the entire process of obtaining permission to develop the properties, obtaining vacant possession from the statutory tenants and redeveloping the premises would take not more than 24 months;

(b) that some time in late 1997, it became apparent to both parties that this period was too short and so, when the date for payment of rent became due, both parties suspended the same until the TOP was granted;

(c) the delay in developing the Amoy property was due mainly to the plaintiffs' failure to negotiate and settle with the statutory tenants within a reasonable time;

(d) the delay in developing the Purvis property was even longer for three reasons:

(i) a similar failure on the part of the plaintiffs to obtain vacant possession within a reasonable time and so that the Purvis property was only vacated in February 2001;

(ii) the plaintiffs' request that the original plan to redevelop the property into a two-storey building be changed so that a five-storey building be built instead; and

(iii) one of the trustees died during the process and the plaintiffs took about four months to appoint a new trustee and as such during this interim period relevant plans and forms could not be submitted as they required the trustees' signatures.

17 The defendants then recited cll 1(3), 1(4), and 1(5) of the lease agreements. To paraphrase, cl 1(3) provided, *inter alia*, that the trustees would use their best endeavours to negotiate and obtain vacant possession of the premises, cl 1(4) provided that if the trustees could not get vacant possession by negotiation, they would apply (at the cost and expense of the defendant) to the Tenants' Compensation Board to obtain the necessary vacant possession, and cl 1(5) provided that the trustees would sign such applications and plans as were necessary to secure the requisite approvals for the restoration works and would render such reasonable assistance as might be necessary to assist the defendant in getting permission to undertake the works.

18 Paragraph 14 of the defence stated that it was only on 17 January 2002, that the plaintiffs for the first time had demanded payment of all arrears of rental pursuant to the leases. In para 15, the defendant set out at length the terms of the without prejudice letter of the same day and paras 16 to 19 detailed the correspondence that followed between the parties' solicitors up to 21 February 2002. The defendant then went on to aver, in para 20, that the correspondence and actions of the parties showed that they had compromised their rights under the lease agreements. Thus the plaintiffs had no basis to bring the present claim.

19 The defendant also put forward defences of estoppel and waiver. The estoppel was based on the defendant having relied on the representations as to waiver made by the trustees' solicitors in the quoted letters and therefore paying the agreed amounts. The defendant asserted that by concluding the compromise agreement and accepting the amounts paid by the defendant, the plaintiffs' right to bring the claim had been waived.

20 After the plaintiffs had put in their reply to the defence, the defendant amended the defence to add a further defence and a counterclaim. The further defence was put forward as being conditional on a court ruling that M&N had no authority to act for the trust at the material time, and that the defendant was not entitled to any indemnity from M&N for negligent misstatement. If that event happened, then the defendant said it would aver that the plaintiffs were not entitled to claim rental for any of the properties until the TOP was issued because it had been agreed between the defendant and the then trustees, some time after December 1998, that the lease agreements be varied so as to make rental payable only after the TOP was issued. The counterclaim was put forward on the (somewhat cheeky) basis that the rental paid by the defendant to M&N on behalf of the trust had been paid under a mistake of fact, namely that M&N had authority to act for the trust and to enter into a compromise with the defendant. If M&N had no such authority, then the plaintiffs would have received the total sum of $510,000 to the use of the defendant and the defendant counterclaimed the said sum. The defendant wisely did not pursue this counterclaim in its closing submissions.

21 In their amended reply and defence to counterclaim, the plaintiffs said that the letter dated 17 January 2002 was sent by M&N as solicitors for Mr Mohamad, who was then the sole trustee. The

plaintiffs averred that they were not bound by the contents of any of the letters sent on behalf of Mr Mohamad to the defendant. Under the terms of the will, a sole trustee acting on his own did not have the authority or power to grant waiver or enter into compromise such as that alleged by the defendant and the defendant knew or ought to have known of the sole trustee's lack of power. The plaintiffs averred that they were not bound by any supplemental agreement, variation, waiver or compromise entered into between the sole trustee and the defendant and that the defendant had provided no consideration for the alleged compromise as it was its contractual obligation to pay the rent in accordance with the terms of the lease without deduction. The partial payment of arrears in rental could not amount to a detriment that entitled the defendant to claim a waiver or estoppel against the plaintiffs.

Issues

22 The main issues that arise on the claim are therefore whether the plaintiffs' claim to recover the arrears of rental and interest for the properties that were due as of February 2002 is enforceable notwithstanding the offer by M&N to waive those sums on certain terms and the acceptance of that offer by the defendant. This depends on whether there was a valid compromise agreement in February 2002 between the trust and the defendant by which the plaintiffs as the present trustees are bound or, alternatively, whether the plaintiffs are estopped from prosecuting this claim. The sub-issues that need to be resolved in connection with the main issues are:

(a) Whether Mr Mohamad as a sole trustee had the power under the will to agree to the compromise or to offer a waiver of the claim.

(b) If Mr Mohamad had no such power, whether, nevertheless, M&N had ostensible authority to make such an agreement on behalf of the trust and bind the trust thereby.

(c) Whether there was any consideration to support the compromise agreement.

Powers of the sole trustee

23 The determination of this question depends on the true construction to be given to cl 19 of the will (quoted in [14] above). In the plaintiffs' submission, Mr Mohamad when he was sole trustee had a duty under this clause to fill the vacancy in the trusteeship as soon as was conveniently possible. On the proper construction of the clause, he was only permitted to carry on business in cases of urgency and necessity where a decision or action was required before a new trustee could conveniently be appointed. He did not have the power to act by himself to waive the rental arrears and the interest that had accrued on the late payment and thereby cause the trust a substantial loss of income. In February 2002, there was no urgency or necessity that would have justified the waiver of the arrears and interest. The offer of 31 January 2002 to the defendant lapsed on 8 February 2002 and, on that date, notices to quit were issued to the defendant. There was no urgent reason to make a new without prejudice offer on that date even though Mr Mohamad had testified in court that he had made the offer to waive the arrears and interest because he was afraid that if he insisted on full payment, the defendant, which was a $2 company, might just abandon the project since, at that time, the property market had deteriorated.

24 The defendant submitted that on its true construction, cl 19 expressly empowered Mr Mohamad as sole trustee to enter into a compromise agreement under the will and that Mr Mohamad had acted upon his belief that a compromise was beneficial to the trust. The meaning of cl 19 had, the defendant said, to be ascertained by looking at the will as a whole. The main purpose of the will was to create a trust of two properties and the trustees were appointed to look after

these properties. It was obviously the testator's intention that in situations where there was, for the time being, only one trustee, that that trustee should be able to resolve all matters outstanding during that period instead of allowing such matters to remain unresolved until a second trustee was appointed. As such, the necessary business of the trust must include receiving rental from the tenants of the properties for the benefit of the trust and settling any dispute that might arise with the tenants from time to time. The plaintiffs' submission had added the word "urgency" to cl 19. That word did not appear in the clause which referred to "all necessary business". The plaintiffs' argument was a forced one. In any case, the situation that existed in February 2002 was a matter of urgency in the sense that the issue of the unpaid rental arrears could no longer be delayed and therefore the sole trustee had the power to deal with the matter. The defendant also relied on the evidence of Mr Mohamad that when he made the decision to grant the waiver and gave instruction to M&N to issue the without prejudice offer, he was aware of cl 19 of the will and was advised by M&N that the decision to waive the rent was legal in law and in fact. He also believed at that time that what he was doing was in the interests of the trust.

25 I have looked at the will. By cl 3, the deceased bequeathed all his immovable properties in the Straits Settlements to his trustees to stand possessed of the same for a certain specified period and out of the rents and income of the said properties to pay their own remuneration and meet the expenses of maintaining the properties and, thereafter, pay the income to his widows and children in certain prescribed proportions. Clauses 4, 5 and 6 of the will go into more detail of how the net income of the trust is to be dealt with, whilst cl 7 deals with the determination of the period of the settlement. Clauses 8, 9, 10 and 11 are further provisions dealing with the application of the income of the trust in the event of certain situations occurring. By cl 12, the trustees are empowered to manage the properties and to grant leases of the same for periods not exceeding five years (it was the existence of this clause that required the trustees to get court sanction for the leases to the defendant since the leases are for longer terms). Clauses 13 and 14 deal with estate duty in relation to the trust and in relation to the death of any beneficiary of the trust whilst cl 15 deals with the remuneration of the trustees. Clause 16 provides that the trustees shall have the power to give a good discharge in the event that the properties are compulsorily acquired and cl 17 deals with how the moneys paid to the trustees in respect of such compulsory acquisition are to be dealt with. Clause 18 specifies that as far as possible trustees should be the male descendants of the testator whilst cl 20 allows the trustees to appoint agents to collect income and manage the properties. Clause 21 deals with accounts and distribution and cl 22 relieves the trustees from liability for the negligence of their agents. By cl 23, the testator bequeathed his moveable property to the trustees for his funeral expenses and payment of his debts with the balance being payable to the persons entitled to the testator's estate under Muslim law.

26 It can be seen in the above brief description of the clauses of the will that the "business of the trust" was basically to manage the immoveable property belonging to the testator and to apply the rentals and other income of the same for the benefit of the beneficiaries named in the will. The trustees were given limited power to lease the properties but were not given power to sell any of the same. The proceeds of any acquired property had to be applied either in improving other properties belonging to the trust or in purchasing immoveable property in the Straits Settlements to form part of the *corpus* of the trust and as replacement for the acquired property.

27 In these circumstances, I agree with the defendant that the term "necessary business of the trust" must be read in relation to the kind of business that the trust carries on. In my judgment, it must be part of the necessary business of a trust that manages property that has been or is to be rented out to decide how and when to collect arrears of rent, if any, and to what extent indulgence should be shown to a tenant in default. In this connection, I note that the plaintiffs made no argument that the sole trustee did not have the power to issue the notices to quit and recover the

properties from the defendant. I find that telling. If the sole trustee was authorised to terminate the tenancies, he would also be authorised to decide whether to take action to recover all or only part of the rentals. Probably, the plaintiffs did not argue that the notices to quit were unauthorised because, if they had, they would have been admitting that the sole trustee was powerless to take an action that would assist the trust in recovering moneys due to it. That was not their stand. Their stand was only that the particular action that the trustee chose to take to recover the money was unauthorised because it was based on a decision that it was better to get part of the money and waive the rest, rather than to continue with the recovery proceedings and risk receiving no money and having to take back premises under construction on which further work had to be done and further expense incurred, before any income could be produced. Further, I do not accept the plaintiffs' argument that a sole trustee was only empowered by this clause to take action if matters were urgent because in the context of a trust holding immoveable property, urgent matters would only cover very limited situations such as where the property was threatened with physical destruction and the term "necessary business" does not imply such a limitation.

What was M&N's ostensible authority?

28 On the basis that I may be wrong in my construction of cl 19 of the will and Mr Mohamad had no power to waive outstanding rentals, I go on to consider the second question, *ie*, whether, nevertheless, M&N as the solicitors for the trust had ostensible authority to put forward Mr Mohamad's proposal such that the trust and all present and future trustees would be bound by the defendant's acceptance of the same.

29 In this connection, it should be noted that M&N had acted as solicitors for the then trustees throughout the transactions which led to the present action. From the beginning when the then trustees decided to lease the properties to the defendant, they were represented by M&N. M&N were the solicitors who corresponded with the defendant's solicitors and conveyed the decisions of the trustees to them. Mr Mohamad testified that during the entire period that he was a trustee of the trust, he had never met any representative from the defendant but had dealt with the defendant through M&N at all times. All correspondence relating to the implementation of the leases, in particular the applications to the Tenants' Compensation Board for the recovery of the properties from the statutory tenants, was handled by M&N on behalf of the trust and all demands for payment of rental and responses to the defendant's allegation of delay were likewise made by M&N on behalf of, first, both trustees and, subsequently, Mr Mohamad alone.

30 On the basis of the above facts, the defendant argued that even if Mr Mohamad did not have the actual authority to compromise the rights of the trust, M&N had ostensible authority at the time of the compromise agreement and there was no reason for the defendant to believe otherwise. It relied on *Waugh v HB Clifford & Sons Ltd* [1982] Ch 374 ("*Waugh*'s case") where the English Court of Appeal held that solicitors without express or implied authority to bind their clients to the terms of a compromise of an action had ostensible authority to do so. This view was echoed in *Harford v Birmingham City Council* (1993) 66 P & CR 468, a Lands Tribunal decision. There, it was observed that the principle that a solicitor had the ostensible authority to compromise proceedings so as to bind his client was long-established. Further, if the solicitor had acted without instructions from the client to do so, then the client would have a remedy against the solicitor.

31 In response, the plaintiffs also cited *Waugh*'s case and argued that the position was that in contentious proceedings, the solicitor for one party would have the authority to compromise the action which he had held out as possessing to the opposing litigant. In non-contentious proceedings, however, the situation of the solicitor would be different. In non-contentious proceedings, a solicitor did not have ostensible authority to agree to a compromise, without the express authority of the

client, which must be proved. The passages relied on from *Waugh*'s case appear in Brightman LJ's judgment at 387–389 of the report. They read:

> The law thus became well established that the solicitor or counsel retained in an action has an *implied* authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter "collateral to the action"; and *ostensible* authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; …
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> …
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> It follows, in my view, that a solicitor (or counsel) may in a particular case have ostensible authority vis-à-vis the opposing litigant where he has no implied authority vis-à-vis his client. I see no objection to that. All that the opposing litigant need to ask himself when testing the ostensible authority of the solicitor or counsel, is the question whether the compromise contains matter "collateral to the suit". The magnitude of the compromise, or the burden which its terms impose on the other party, is irrelevant. But much more than that question may need to be asked by a solicitor when deciding whether he can safely compromise without reference to his client. …
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> …
>
> I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is "collateral" to the action unless it really involves extraneous subject matter, as in *Aspin* v. *Wilkinson* (1879) 23 S.J. 388, and *In re A Debtor* [1914] 2 K.B. 758. So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. …
>
> …
>
> It is however said that there is authority that a solicitor does not have *ostensible* authority to sign a contract of sale or purchase of land on behalf of a client: *H. Clark (Doncaster) Ltd. v. Wilkinson* [1965] Ch. 694. The terms of compromise in the present case involve a sale back of the land to the builders. Therefore, it is argued, the builders' solicitors had no ostensible authority to agree the terms of compromise on the builder's behalf. I do not accept this approach. Of course I agree that a solicitor in a non-contentious matter does not have such ostensible authority. But that is not this case.
>
> [emphasis in original]

32 The difficulty with the plaintiffs' argument in this respect is that the matter with which the parties were concerned at the time was not a clearly non-contentious matter. No doubt the examples given in the above passages by Brightman LJ were all of situations in which a writ had been issued and proceedings initiated. That, however, does not prevent matters where proceedings have not yet been commenced from being contentious. On the contrary, once a claim has been asserted by one side and denied or resisted by the other, a contention will exist.

33 In this instance, the demand for payment of rent was first made by M&N on 28 January 2002. That was followed by the first without prejudice offer. Then the defendant made a counter-offer. That was rejected and immediately notices to quit were issued by M&N. That was a decisive step. It

showed, as M&N's previous actions may not have done, that hostilities had commenced. In my view at that point, at the latest, the matter had become contentious. After the issue of the notices came the second offer to waive certain amounts and it was that offer that eventually, with some minor amendments, resulted in the defendant's acceptance and payment. If M&N had filed suit before sending out the settlement offer, there could have been no argument about their ostensible authority to compromise. I fail to see why their timing in making the offer at a slightly earlier stage should completely change the position on their authority to settle. I therefore hold that M&N did have ostensible authority to settle the claim on the plaintiffs' behalf.

34 The second string to the plaintiffs' bow on the ostensible authority issue is the submission that the defendant cannot rely on this principle because it had actual or constructive knowledge that, as sole trustee, Mr Mohamad could not authorise a waiver or compromise of the rental claim. The plaintiffs have not, however, cited any authority to back up their assertion that constructive or imputed knowledge of lack of actual authority could nullify the defendant's reliance on M&N's ostensible authority. In my view, constructive knowledge cannot be sufficient for this purpose as when you are dealing with an apparent position the only way of nullifying such appearance would, logically, be actual knowledge that what appears to be the case is, in fact, not the case. Accordingly, I will move on to consider whether the defendant had actual knowledge of any limitation in the sole trustee's ability to authorise his solicitors to compromise the claim.

35 The defendant was aware that initially there were two trustees and that one of these trustees subsequently died and a new trustee was appointed in his place. The defendant was also aware that much later on Mr Mohamad became a sole trustee. The plaintiffs submitted that the defendant must have known the terms of the will, including cl 12 on the prohibition of leases exceeding five years and cl 19 on the requirement for two trustees at all times and the limited power of a sole trustee, as it had lawyers acting for it in the negotiation of the tender of the properties and the subsequent leases who would have seen the will before entering into the leases. This was an argument based on constructive knowledge. It was not necessary at the time when the leases were granted for the defendant or its solicitors' attention to be drawn to cl 19 of the will and there is no correspondence that shows that this was ever done. Even if cl 19 had been specifically pointed out, the extent of the power it granted would be a matter of construction and there was no evidence that the defendant was ever advised in terms that a possible construction of the clause would be that a sole trustee would have no power to compromise a rental claim. The plaintiffs also argued that knowledge of the requirement for two trustees was shown by para 11(c) of the amended defence which gave the following particulars of the alleged delay in developing the Purvis property:

> One of the Plaintiffs' trustees died in between and the Plaintiffs took about four months to appoint a new trustee and as such during this interim period relevant plans and forms could not be submitted because they required the trustees' signature.

I think all that that paragraph shows is that the defendant was complaining that relevant forms were not signed because during that period, steps were being taken to appoint a new trustee and, pending such appointment, the sole trustee would not sign the documents. In any case, lack of authority to sign plans to be submitted to a statutory board does not necessarily imply lack of authority to waive a claim for rental due to the trust. Another argument raised was that two trustees had signed all documents and the defendant would have known this because of the correspondence passing between the lawyers. All that shows was that when there were two trustees, both signed the documents. It is also worth noting that on 16 November 2000, M&N sent three sets of signed applications and plans to the defendant's solicitors. The letter explained that Mr Mohamad had just signed the documents as he had only recently returned to Singapore. The letter also notified the defendant that the other trustee had retired from the trust. It would, therefore, have appeared to

the defendant that a sole trustee acting after the retirement of his co-trustee had authority to sign documents. In any case, this again is an argument for constructive rather than actual knowledge.

36 The plaintiffs also submitted that the defendant (having known from 16 November 2000 that there was a sole trustee) was given warnings by M&N as to his limited powers. This argument referred to a letter of 28 June 2001 when M&N informed the defendant's lawyers that as Mr Mohamad was a trustee, he was not the owner of the properties and could not make decisions which were not in the best interests of the trust. He also had to act in consultation with the beneficiaries of the trust who resided in Yemen. Again, in the 28 January 2002 letter sent to reject the defendant's request to have rental start from the date of vacant possession, M&N stated that the defendant should appreciate that Mr Mohamad was acting as a trustee and had a duty to the beneficiaries of the estate. The plaintiffs argued that these letters showed that Mr Mohamad lacked actual authority to agree to a waiver of rental arrears and interest which would cause loss of income to the trust, without consulting the beneficiaries. This was a different argument from the argument based on cl 19 of the will. It is an argument that is not supported, as far as I am aware, by any case law or textbook. A trustee's power to act in connection with the administration of the trust property is limited only by the express limitations of the trust deed, if any, and the legal principle that requires him to act in good faith and in the interests of the trust. There is no general principle that requires him to consult the beneficiaries before taking action, though he might wish to do so to protect himself against claims by the beneficiaries for breach of trust, and transactions between him and third parties who themselves deal with the trustee in good faith would be legally binding. As far as the letter of 28 June 2001 was concerned, in stating that the trustee had to make decisions that were in the best interests of the trust, M&N was simply stating a well-established principle. In stating that he had to act in consultation with the beneficiaries of the trust, they were in fact giving an excuse for the delay rather than stating that he had no power to act without such consultation. There is nothing in the will itself that requires the trustee to consult with the beneficiaries before making decisions in relation to the trust as long as he takes such decisions in good faith believing that they are in the trust's interests. There is good reason for the omission of such a provision as requiring the trustee to consult with a number of different beneficiaries before taking any action could mean completely paralysing the operation of the trust.

37 The plaintiffs also argued that once it became clear from correspondence that there was a sole trustee, the defendant or its lawyer should have sought assurance from its own searches and perusal of the will to obtain confirmation that this sole trustee had the power to waive the collection of moneys due to the trust. In my judgment, this is not a valid argument. As pointed out above, the same set of solicitors represented the trust and the then trustees from 1996 right up to 2002. The fact that M&N, who could be taken to be completely familiar with the terms of the will, continued to act on behalf of the trust during the whole of that period and were as active as ever after Mr Mohamad became the sole trustee would have hushed any warning bells that might otherwise have rung in the minds of the defendant and its solicitors.

38 I therefore hold that even if the sole trustee lacked the actual authority to compromise the claim, M&N had ostensible authority to do so on his behalf so that the trust would be bound by any valid compromise or waiver effected through M&N.

Was there a valid compromise?

39 The plaintiffs submitted that the alleged compromise of the trust's claim for rental arrears and interest was not enforceable and binding on them because it had not been supported by consideration. They cited the statement in *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 28th Ed, 1999) at para 23-013 to the effect that in order to establish a valid compromise, it

must be shown that there has been an agreement which is complete and certain in its terms and that consideration has been given for the promised forbearance to pursue the claim. The plaintiffs did not contend that the agreement contained in the exchange of correspondence between the parties was not complete and certain in its terms. Their attack was aimed only at the element of consideration.

40 In the present case, the plaintiffs asserted that the defendant's payment of part of the rental arrears could not constitute consideration for the compromise because the defendant was already under an existing legal obligation pursuant to the leases to pay such arrears. The other allegation made by the defendant, that it had sacrificed its right to challenge the plaintiffs' claim for rental arising before vacant possession was not sustainable. This was because it was not raised in any of the correspondence on the waiver between June 2001 and February 2002 or pleaded in the amended defence. The plaintiffs considered it to be a belated attempt to create a consideration which did not in fact exist.

41 The defendant submitted that there was consideration because in the present case there was a dispute as to whether the defendant was in fact liable to pay rent from 8 December 1998 in light of the delay in obtaining vacant possession of the premises, a delay which was partly due to default on the part of the then trustees. This default had been pleaded. The defendant further submitted that the plaintiffs were in breach of certain clauses of the lease agreement. First, under cll 1(3) and 1(4), the trustees had agreed to use their best endeavours to negotiate and obtain vacant possession of the properties. They had breached this obligation in that:

(a) The then trustees had failed to inform the defendant of the death of one of the trustees thus causing delay in obtaining the banker's guarantee for submission to the Tenant's Compensation Board. Mr Mohamad, in court, under cross-examination, had admitted this.

(b) Very often, one of the trustees was out of the country for extended periods and could not be contacted, thus causing delay. Mr Mohamad had testified that in 1999, he had left Singapore early in September and returned only at the end of the month. On 18 September 1999, the defendant's solicitors had written to M&N asking for a document to be signed, and M&N had only been able to respond with the signed document on 14 October 1999 because of Mr Mohamad's absence. In 2000, Mr Mohamad had been away between July and the beginning of September and then again between 9 September and the beginning of November.

(c) The trustees often took a longer than reasonable time to reply to the defendant's letters thus causing further unnecessary delay. In this connection, the defendant pointed to Mr Mohamad's admission that in March 2000, his lawyers had taken more than five weeks to respond in relation to a letter required by the bank. Mr Mohamad said he did not know why the response had taken so long. The defendant also relied on other testimony from Mr Mohamad which showed that the matter had been handled rather slowly.

The defendant therefore contended that it had had a right to claim damages against the trustees for delay in complying with their obligations under the leases and that it had given up this right in return for the waiver of part of the arrears of the rental and the late interest. Therefore, the submission that there was no consideration from the defendant should be dismissed.

42 In my view, the evidence shows that the defendant, at the time of the compromise, believed that the trustees had not complied with their obligations under the leases. This was not a new position taken by the defendant. It was a position that it had maintained for a considerable period before the compromise was achieved. It had gone as far as making allegations of delay in correspondence and, whilst it might not have threatened to take legal action against the then

trustee, both M&N and Mr Mohamad were aware that these allegations were on the table and that the defendant believed that they were justified. In accepting the compromise offered by the sole trustee, the defendant gave up any right it may have had to make a claim for damages for breach on the part of the trustees. The fact that such a claim may have been weak and may not have succeeded is not material. What is material is that the defendant considered that it had grounds for its claim. In *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at paras 3-051 and 3-052, it is stated that the compromise of a claim which is doubtful in law is binding as a contract and that this rule applies even if the claim is clearly invalid in law, so long as it was a reasonable claim which was in good faith believed by the party forbearing to have at any rate a fair chance of success. I am of the view that on the facts of this case, the defendant did provide consideration for the compromise and, accordingly, the compromise is binding on the plaintiffs.

Estoppel and waiver

43 I go on to consider the alternative defence of estoppel and waiver on the basis that I may be wrong in finding that consideration moved from the defendant for the compromise. This argument is based on the line of cases arising from the well-known decisions of *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 and *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. In equity, a promise by a contracting party not to enforce his strict legal rights has a limited effect provided certain conditions are met. In so far as such promise relates to an agreement by a creditor to accept payment of a lesser amount in settlement of a debt due to him, these are that there must be a representation by the creditor that he will not enforce his strict legal right to full payment, a reliance by the debtor on the representation and circumstances which make it inequitable for the creditor to go back on his promise.

44 In this case, the first element was definitely satisfied. The second element was also satisfied because the defendant paid the amounts asked for at the dates agreed on. As for the third element, there has been some discussion as to whether there must be "detriment" suffered by the debtor before the creditor is estopped from going back on his promise. In this respect, *Chitty on Contracts* ([42] *supra*) at para 3-135, asserts that the better view is that detriment of the kind required for the purpose of estoppel by representation is not an essential requirement and all that is necessary is that the promisee should have acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act inconsistently with it. *Chitty on Contracts* also states that by making the payment, a debtor would act in reliance on the creditor's promise and so make it *prima facie* inequitable for the creditor to peremptorily go back on his promise. Following that statement of principle, as the defendant paid all moneys required by the sole trustee in the manner and at the times agreed, it would be inequitable to allow the plaintiffs, the present trustees, to go back on it simply because they themselves would not have made a similar offer and think that Mr Mohamad should not have done so. Here also, there is the added factor that after the rental arrears were, in the view of the defendant, settled by its acceptance of the trust's offer, the defendant went on to complete the work on the Purvis property and incurred expense in so doing which it would not have incurred had the lease been terminated. It is also worth remembering that at the time the offer was made, Mr Mohamad was concerned that if he continued to try and enforce payment, the defendant might abandon the project and the trust would be left to carry the burden of completing the work and looking for new tenants.

45 I am satisfied that even if there was no consideration for the compromise, the plaintiffs would be estopped in equity from making their claim for the outstanding rental and the accrued interest by reason of the events that occurred in February 2002 and the payments made by the defendant then and thereafter.

Conclusion

46 In the event, the plaintiffs' claim fails and must be dismissed with costs.

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