Dynamic Investments Pte Ltd v Lee Chee Kian Silas and Others
[2007] SGHC 216

Case Number : OS 1421/2007

Decision Date : 13 December 2007

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Lawrence Tan Shien-Loon and Sandra Tan Pei May (Drew & Napier LLC) and Clarence Tan (UniLegal LLC) for the plaintiff/appellant; Deborah Barker SC, Chia Ho Choon and Spring Tan (KhattarWong) for the defendants/respondents

Parties : Dynamic Investments Pte Ltd — Lee Chee Kian Silas; Pan Tien Chor; Sim Hock Cheng

Land – Strata titles – Collective sales – Meaning of "transaction is not in good faith" – Section 84A(9) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

Land – Strata titles – Collective sales – Whether method of distributing proceeds of sale unfair – Whether collective sale in good faith given method of distributing proceeds of sale

Land – Strata titles – Strata titles board – Appeal to High Court on Board's decision – Whether Board in error of law – Meaning of "point of law" – Section 98(1) Building Maintenance and Strata Management Act 2004 (Act 47 of 2004)

13 December 2007

Andrew Ang J:

1 This was an appeal against the decision of the Strata Titles Board ("the Board") approving the collective sale of a condominium known as Holland Hill Mansions ("HHM") under s 84A of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA").

2 HHM comprises 118 apartment units with a total gross floor area of 21,695m^2 and a total share value of 452.

3 The plaintiff is the owner of unit 05-15 which has a strata area of 642m^2 and a share value of 6.

4 The defendants are members of the Sale Committee ("SC") and authorised representatives of the majority owners of HHM.

5 The dispute herein concerned the method of distribution of the sale proceeds in the collective sale. Whilst not objecting to the collective sale price, the plaintiff contended that the method of distribution of the sale proceeds among the owners ("the SA–SV method" whereby 50% of the proceeds was to be divided among them based on the strata area of their respective apartment units and the other 50% was to be divided in proportion to their respective share value) was unfair to it and betrayed a lack of good faith.

6 Section 84A(9) of the LTSA provides that the Board shall not approve an application –

(a) if the Board is satisfied that —

(i) the transaction is not in good faith after taking into account only the following factors:

(A) the sale price for the lots and the common property in the strata title plan;

(B) the method of distributing the proceeds of sale; and

(C) the relationship of the purchaser to any of the subsidiary proprietors …

7 The plaintiff contended that the Board erred in law in failing to find that the transaction (*ie*, the collective sale) was not in good faith taking into account the method of distributing the proceeds of sale.

8 It was essential that the Board's alleged error was one of law because s 98(1) of the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004) ("BMSMA") provides that no appeal shall lie to the High Court against an order of the Board except on a point of law.

9 Counsel for the defendants contended that the grounds of appeal set out in the originating summons herein did not disclose any question of law. She cited *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494 ("*Northern Elevato*r") where the Court of Appeal considered the meaning of the expression "question of law" in s 28(2) of the Arbitration Act (Cap 10, 1985 Rev Ed) which read:

> Subject to subsection (3), an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement …

The court then ruled at [19] that

> … [A] question of law must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

10 The Court of Appeal, in arriving at the above ruling, cited with approval the following statement by GP Selvam JC in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 ("*Ahong Construction*") at [7]:

> A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is [a] matter of substance the determination of which will decide the rights between the parties. The point of law must substantially affect the rights of one or more of the parties to the arbitration. If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court.

11 Counsel for the plaintiff, however, cited an earlier decision by Selvam JC in *MC Strata Title No 958 v Tay Soo Seng* [1993] 1 SLR 870 ("*Tay Soo Seng*"), a case involving an appeal from a decision of the Board as in the present case where the learned judicial commissioner considered the then s 108(1) of the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed) which read as follows:

> No appeal shall lie to the High Court against an order made by a Board except on a point of law.

Selvam JC quoted with approval the following statement in *Halsbury's Laws of England*, vol 1(1) (Butterworths, 4th Ed Reissue, 1989), para 70:

> Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons; and misdirecting oneself as to the burden of proof.

This apparent inconsistency was considered in [15] to [27] of my recent decision in *Ng Swee Lang v Sassoon Samuel Bernard* [2007] SGHC 190. In the interest of expedition, I shall merely refer to the conclusion reached, *viz*:

(a) that the Court of Appeal's ruling in *Northern Elevator* ([9] *supra*) and that of Selvam JC in *Ahong Construction* ([10] *supra*) were given in the context of an application for leave to appeal from an arbitral award and must be understood in that context; and

(b) for the purposes of s 98(1) of the BMSMA, guidance as to the meaning of "point of law" may be found in the passage from *Halsbury's Law of England* referred to by Selvam JC in *Tay Soo Seng* and Lord Radcliffe's statement in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 ("*Edwards v Bairstow*") where he said:

> My Lords, I must apologise for taking so much time to repeat what I believe to be settled law. But it seemed to be desirable to say this much, having regard to what appears in the judgments in the courts below as to a possible divergence of principle between the English and Scottish courts. I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. … If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it ***may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination upon appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law.*** [emphasis added]

12 The question whether a transaction is "not in good faith" is a question of mixed law and fact. It is a question of law what meaning is to be given to the words "good faith". The statute, however, does not supply a precise definition of "good faith": much less does it prescribe a set of rules to apply to any factual matrix.

13 Be that as it may, determining whether a transaction is lacking in good faith is not as difficult as determining questions of degree where it could not be said to be wrong to arrive at a conclusion one way or the other. Typical of this latter type is the question in income tax law whether a payment is in the nature of capital or income, so much so that it has been said somewhat cynically that –

> … [I]n many cases it is almost true to say that the spin of a coin would decide the matter almost

as satisfactorily as an attempt to find reasons.

(*per* Sir Wilfrid Greene MR in *Commissioners of Inland Revenue v British Salmson Aero Engines, Limited* [1938] 2 KB482 at 498). The question before us, whether the transaction is "not in good faith", does not, in my view, suffer from this uncertainty. This is because, as I shall explain below, the words "good faith" have a core meaning.

14 But in a particular set of circumstances the question whether a transaction is lacking in good faith nevertheless requires an application of the primary facts to the legal criteria as to what "good faith" is. As such, it is traditional (if somewhat inexact) to describe it as a question of fact. The Board's holding that it was not satisfied that the transaction was not in good faith (regard being had to the method of distributing the proceeds of sale) was a decision on the facts of the case and could not be challenged unless there was an error of law either *ex facie* (as to which there was none) or such as was described in *Edwards v Bairstow* ([11(b)] *supra*).

15 I note also that whether or not the transaction was lacking in good faith was something on which the Board had to be "satisfied". To my mind, that further suggested that the legislature, recognising an element of subjectivity in such a decision, intended to preclude challenge to the Board's finding save where there was an error of law.

16 Adopting the broader formulation in *Edwards v Bairstow* ([11(b)] *supra*) as to what constitutes an error in point of law, it was for the plaintiff to show that the finding of the Board was such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal".

17 Is it an inevitable conclusion that in arriving at its decision the Board misapprehended what "good faith" is? The term "good faith" has been characterised as a "protean one having longstanding usage in a variety of statutory and, for that matter, common law contexts": *per* Finn J in *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127 at 130. It is thus characterised because, like Proteus in Greek mythology, it takes different forms in various legal contexts. However, whichever form it takes, there appears to be a core meaning to the expression involving honesty or absence of bad faith.

18 *Black's Law Dictionary* (Thomson West, 8th Ed, 2004), p 713 defines "good faith" compendiously as:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation; (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. – Also termed *bona fides*.

19 The essential element of honesty is similarly imported in the definition of "good faith" in s 61(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) –

> A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not.

20 In *Medforth v Blake* [1999] 3 WLR 922 which was quoted with approval in *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR 237, Sir Richard Scott said at 937–938:

I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith. It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart. Equity has not always done so. The equitable doctrine of "fraud on a power" has little, if anything, to do with fraud. Lord Herschell in *Kennedy v De Trafford* [1897] AC 180 gave an explanation of a lack of good faith that would have allowed conduct that was grossly negligent to have qualified notwithstanding that the consequences of the conduct were not intended. In my judgment, the breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established.

21 The meaning of the words "in good faith" was also considered by Lord Denning MR in *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 ("*Central Estates*") in the context of Schedule 3, paragraph 4(1), to the English Leasehold Reform Act 1967. His Lordship's remarks at [55] were as follows:

How then are we to decide whether the tenant's claim to buy the freehold is made in good faith, or not? The words "in good faith" are often used in statutes but rarely defined. A good instance is the Larceny Act 1916, which speaks of "a claim of right made in good faith", but does not tell us what "good faith" means. Other instances come readily to mind. The Limitation Act 1939, section 26, speaks of cases when a right of action is concealed by "fraud", but does not define what is meant by "fraud" in this context. It is left to the courts to work it out from case to case: see *Applegate v Moss* [1971] 1 QB 406. In all such cases, when a word or phrase goes undefined, the judges have to work out for themselves the meaning of it, doing the best they can to interpret the will of the legislature in regard to it. That is the principle I stated in *Seaford Court Estates v Asher* [1949] 2 KB 481, 499. To my mind, under this statute a claim is made "in good faith" when it is made honestly and with no ulterior motive. It must be made by the tenant honestly in the belief that he has a lawful right to acquire the freehold or an extended lease, and it must be made without any ulterior motive, such as to avoid the just consequences of his own misdeeds or failures. If the landlord asserts that the tenant's claim is not made in good faith, the burden is on the landlord to satisfy the court that the tenant, in making the claim, was acting dishonestly or with an ulterior motive.

22 In *Smith v Morrison* [1974] 1 WLR 659, the court had to consider the meaning of "good faith" in the context of r 2(2) of the English Land Registration (Official Searches) Rules 1969, which defined the word "purchaser" as any person who in good faith and for valuable consideration acquires or intends to acquire a legal estate in land. Plowman J followed Lord Denning's remarks in *Central Estates* ([21] *supra*) observing that they were in general terms. He then continued at 676:

The question of good faith then is partly one of law and partly one of fact. So far as law is concerned, in my judgment, if a purchaser acts honestly he is acting "in good faith" within the meaning of rule 2 of the rules of 1969, and I so hold.

23 In *Mogridge v Clapp* [1892] 3 Ch 382 at 391, Kekewich J had this to say:

… what does "good faith" mean? What is meant by those two English words which are the exact equivalent in every sense of the expression which is perhaps more commonly used, though not more correctly or properly, *bona fides*? I think that the best way of defining the expression, so far as it is necessary or safe to define it, is by saying that it is the absence of bad faith – of *mala*

fides.

24 Therefore, in order to succeed in the appeal, the plaintiff had to show that in arriving at the SA–SV method, the subsidiary proprietors who signed the collective sale agreement were actuated by dishonesty or bad faith so that the Board's holding that there had been no lack of good faith could not stand. This requires our looking into the facts.

The facts

25 As noted earlier, HHM comprises 118 apartment units with a total gross floor area of 21,695m^2 and a total share value of 452. As can be seen from the chart below, the apartments are of various sizes ranging from the smallest at 57m^2 to the largest (that being the plaintiff's) at 642m^2.

Sale Proceeds – S$292,000,000.00
Total Share Value – 452 Shares
Total Strata Area – 21,695m^2

No. of Units	Strata Area (m^2)	Share Value	Amount by 50% Share Value & 50% Strata Area (A) [S$]	Amount by 100% Share Strata Area (B) [S$]	Amount by 100% Share Value (C) [S$]	Difference (B) – (A) [S$]	Difference (C) – (A) [S$]
1	57	3	1,352,617.17	767,181.24	1,938,053.10	(585,435.93)	585,435.93
5	120	3	1,776,585.75	1,615,118.40	1,938,053.10	(161,467.35)	161,467.35
25	122	3	1,790,045.07	1,642,037.04	1,938,053.10	(148,008.03)	148,008.03
1	**141**	**3**	**1,917,908.61**	**1,897,764.12**	1,938,053.10	**(20,144.49)**	20,144.49
2	145	3	1,944,827.25	1,951,601.40	1,938,053.10	6,744.15	(6,774.15)
1	150	3	1,978,475.55	2,018,898.00	1,938,053.10	40,422.45	(40,422.45)
1	151	3	1,985,205.21	2,032,357.32	1,938,053.10	47,152.11	(47,152.11)
1	153	3	1,998,664.53	2,059,275.96	1,938,053.10	60,611.43	(60,611.43)

20	174	4	2,462,996.24	2,341,921.68	2,584,070.80	(121,074.56)	121,074.56
5	179	4	2,496,644.54	2,409,218.28	2,584,070.80	(87,426.26)	87,426.26
10	180	4	2,503,374.20	2,422,677.60	2,584,070.80	(80,696.60)	80,696.60
5	**182**	**4**	**2,516,833.52**	**2,449,596.24**	2,584,070.80	**(67,237.28)**	67,237.28
1	196	4	2,611,048.76	2,638,026.72	2,584,070.80	26,977.96	(26,977.96)
1	200	4	2,637,967.40	2,691,864.00	2,584,070.80	53,896.60	(53,896.60)
1	203	4	2,658,156.38	2,732,241.96	2,584,070.80	74,085.58	(74,085.58)
1	204	4	2,664,886.04	2,745.701.28	2,584,070.80	80,815.24	(80,815.24)
1	205	4	2,671,615.70	2,759,160.60	2,584,070.80	87,544.90	(87,544.90)
1	207	4	2,685,075.02	2,786,079.24	2,584,070.80	101,004.22	(101,004.22)
1	211	4	2,711,993.66	2,839,916.52	2,584,070.80	127,922.86	(127,922.86)
1	213	4	2,725.452.98	2,866,835.16	2,584,070.80	141,382.18	(141,382.18)
15	218	4	2,759,101.28	2,934,131.76	2,584,070.80	175,030.48	(175,030.48)
1	234	4	2,866,775.84	3,149,480.88	2,584,070.80	282,705.04	(282,705.04)
1	244	4	2,934,072.44	3,284,074.08	2,584,070.80	350,001.64	(350,001.64)
10	249	5	3,290,729.59	3,351,370.68	3,230,088.50	60,641.09	(60,641.09)
1	275	5	3,465,700.75	3,701,313.00	3,230,088.50	235,612.25	(235,612.25)
3	295	5	3,600,293.95	3,970,499.40	3,230,088.50	370,205.45	(370,205.45)

1	339	5	3,896,398.99	4,562,709.48	3,230,088.50	666,310.49	(666,310.49)
1	642	6	6,258,494.82	8,640,883.44	3,876,106.20	2,382,388.62	(2,382,388.62)

26 The share value for the apartments range from 3 (for the smallest unit) to 6 (for the largest). As will be observed, the share value assigned to the units are not in proportion to the strata area of the apartments. If the total sale proceeds in the collective sale were divided amongst the apartments in proportion to the share value ("SV method"), the smallest unit (the only one with a strata area of 57m^2) would receive half that allocable to the largest unit (the only one with a strata area well above all the other units).

27 In contrast, if the distribution was based purely on strata area ("SA method"), the largest unit would receive more than 11 times that which the smallest would obtain despite the fact that the smallest unit had half the share value of the largest unit. The contrast between the two units at opposite ends of the range is of course quite stark. But in between these two extremes, the picture is more diverse.

28 In respect of those units with a share value of 3, only those whose strata area was 141m^2 or less would benefit from the SV method, the remaining units standing to gain more from a distribution based on the SA method.

29 Similarly, for units with a share value of four, only those with a strata area of 182m^2 or less would benefit from a distribution based on the SV method, the others standing to gain more from a distribution based on the SA method. In contrast, ***all*** units with a share value of five or more, would benefit more from a distribution based on the SA method rather than the SV method.

30 The plaintiff's unit was therefore not alone, there being 45 other units which would have benefited from a distribution based solely on the SA method, though not to the same extent.

31 Under s 13(1) of the LTSA, the common property is held by the subsidiary proprietors as tenants-in-common proportional to their respective share value. The land on which HHM sits is, of course, the main part of the common property and the only component of the entire development that a purchaser under an *en bloc* sale would be interested in since the value to the purchaser is in the redevelopment potential. It stands to reason that a distribution based solely on the SV method is not nearly as egregious as it might initially appear. It is, in my view, at least more defensible than one based solely on the SA method; the purchaser is not interested in the size of the apartment but the share of the land that comes with the apartment.

32 If the SA method of distribution was applied, it would favour 46 units and work against the remaining 72. The "Valuation Guidelines for Collective Sales" issued by the Singapore Institute of Surveyors and Valuers ("SISV Guidelines") which was produced before the Board lists the SV method as one of the methods used in collective sales. In contrast, the SA method which is not listed has apparently not been used at all. It is not difficult to see why.

33 The SA–SV method serves as a compromise between the two methods. The SISV Guidelines point out that this method "would even out the differences in strata areas and share values where there are big discrepancies in both among the various units". It is therefore not surprising that all five groups of property agents who made presentations to the SC recommended the SA–SV method. In

the result, this was the method adopted in the collective sale agreement signed by subsidiary proprietors holding between them more than 80% of the share value. It represented the fairest of the three methods under discussion, serving to moderate the extremes which either of the other two methods would have led to.

34 Counsel for the plaintiff repeatedly stressed that the plaintiff had been deprived of about $2.38m in sale proceeds because of the adoption of the SA–SV method. I am firmly of the view that the alleged loss is purely hypothetical because the SA method would never have been accepted as it would have disadvantaged the owners of 72 out of 118 units in HHM. While dealing with hypothesis, the plaintiff should consider that if the SV method was used instead, the plaintiff would have received $2.38m less than under the SA–SV method! Clearly, the SA–SV method was a compromise.

35 One other point deserves mention. Under s 30(2) of the LTSA, the share value of a lot determines –

(a) the voting rights of the subsidiary proprietors;

(b) the quantum of the undivided share of each subsidiary proprietor in the common property; and

(c) the amount of contributions levied by a management corporation on the subsidiary proprietors of all the lots in a subdivided building.

For reasons best known to the developers, the plaintiff's lot was allocated a share value of 6 despite its strata area being preponderantly greater than all the other units. Of advantage to the plaintiff was that its share of contributions levied by the management corporation was lower than it would have been if a higher share value had been allocated. The plaintiff has benefited in this respect over the years from the start. However, the downside to allocation of a low share value was that the voting rights and the quantum of the undivided share in the common property were, likewise, reduced. This was a trade-off which would have been obvious from the start.

36 The plaintiff's director and shareholder, Mr Chen Kung, who was also a director of the developer, admitted under cross-examination that he was involved in the development of HHM and was aware of the allocation of share values. As such, it lies ill in his mouth to allege that the distribution was inequitable.

37 I pause for a moment to consider another method of distribution listed in the SISV Guidelines, *viz*, that based on valuation of the units. Clearly, with an *en bloc* sale (and therefore the demolition of the building(s)) in mind, the valuation of the units could not realistically be based purely on the strata area. The valuer would likely take into account what, in his view, each unit should receive in the distribution of sale proceeds. In the result, the difficulty in seeking a compromise between the SA method and the SV method would merely be transferred into the valuation of the units.

38 The reason for my brief detour at [37] above is only to demonstrate the fact that, from amongst the methods identified in the SISV Guidelines, there is no method obviously superior to the SA–SV method. In these circumstances, it escapes me how the plaintiff could have expected the Board to arrive at a finding that the choice of the SA–SV method was lacking in good faith.

39 In the result, I dismissed the appeal with costs.