Tan Yong Hui *v* Aasperon Venture Pte Ltd and another
[2015] SGHC 169

Case Number : Suit No 1209 of 2014 (Summons No 326 of 2015)

Decision Date : 03 July 2015

Tribunal/Court : High Court

Coram : Lai Siu Chiu SJ

Counsel Name(s) : Kesavan Nair and Leong Kit Ying Melissa (Genesis Law Corporation) for the plaintiff; Yeo Choon Hsien Leslie (Sterling Law Corporation) for the defendants.

Parties : Tan Yong Hui — Aasperon Venture Pte Ltd and another

Procedure – Summary Judgment

3 July 2015

Lai Siu Chiu SJ:

1 In this application, Tan Yong Hui ("the plaintiff") applied under Summons No 326 of 2015 ("the Application") for summary judgment against Aasperon Venture Pte Ltd ("the first defendant") and Tan Yong Seng ("the second defendant"). The plaintiff prayed that the following orders be granted:

(a) The terms of a Settlement Agreement dated 21 July 2014 ("the Settlement Agreement") be specifically performed and carried into execution and that the two defendants, within seven days from the date of the order, procure and furnish to the plaintiff a banker's guarantee on terms acceptable to the plaintiff.

(b) In the event that the first and second defendants fail to comply with order (a) above, judgment be entered for the plaintiff in the sum of $720,000, with costs and interest.

(c) That the first and second defendants be directed to procure the discharge of any and all personal guarantees provided by the plaintiff in favour of the first defendant forthwith.

(d) That damages be awarded.

(e) That interest on all sums found to be due and owing at such rate as the court deems fit be awarded.

2 After hearing the parties' arguments, this court granted, on 6 March 2015, all the orders sought in [1] above (except for the order for damages under prayer d) subject only to one modification: the two defendants were given fourteen (instead of seven) days in which to furnish a banker's guarantee. The plaintiff was awarded interest on the judgment sum at the rate of 5.33% per annum as well as costs of $5,000, which were to be borne solely by the second defendant and paid to the plaintiff.

3 The defendants failed to furnish a banker's guarantee in compliance with the order in [1(a)] by the deadline of 20 March 2015. On 25 March 2015, this court rejected, as completely unmeritorious, the defendants' request for further arguments (which was made on 13 March 2015) as the proposed arguments were not novel and had already been canvassed at the hearing held on 6 March 2015.

4 This court settled the issue of costs for the entire proceedings on 30 April 2015. On 13 May 2015, the plaintiff entered final judgment against the two defendants for a sum of $720,000 plus interest and costs (fixed at $7,500 excluding disbursements, which were to be awarded on a reimbursement basis) payable by the second defendant only.

5 The defendants, being dissatisfied with the orders made by this court, filed a Notice of Appeal (in Civil Appeal No 87 of 2015) against the same. However, as there was no application for a stay of execution pending appeal, the plaintiff was not precluded from entering final judgment against them on 13 May 2015.

The facts

6 According to the plaintiff's statement of claim ("SOC"), he was a director and shareholder of the first defendant who once held 300,000 fully paid shares ("the plaintiff's shares"). The second defendant is the plaintiff's older brother who was and still remained a director and shareholder of the first defendant at the time of the hearing. He initially held 1m fully paid shares. The first defendant is in the business of manufacturing structural metal products as well as the import and export of machinery and equipment.

7 According to the SOC, on or about 6 August 2013, the second defendant appointed himself the first defendant's secretary and, in breach of the memorandum and articles of association of the first defendant, unilaterally increased the share capital in the first defendant by one share from 1,300,000 to 1,300,001 shares. The newly issued share was allotted to Tew Siang Kian ("Tew"), whom the second defendant appointed as a director on 7 August 2013.

8 On 14 August 2013, the second defendant appointed himself as the first defendant's managing-director and removed the plaintiff as a director on the same day. The second defendant then transferred 299,999 of the plaintiff's shares to himself, increasing the number of shares held by the second defendant from 1m to the present figure of 1,299,999, and the remaining one share to Tew, bringing the total number of shares held by Tew to two.

9 The second defendant's actions prompted the plaintiff to commence Suit No 1209 of 2014 ("S 1209/2014") against the two defendants as well as Originating Summons No 1156 of 2013 ("the OS") against the first defendant. The plaintiff also sued the second defendant and three others in a separate action (Suit No 127 of 2014). For his part, the second defendant (together with Aasperon Investment Pte Ltd ("Aasperon Investment"), a related company), commenced Suit No 11 of 2014 against the plaintiff.

10 Eventually all three actions were settled by mediation resulting in a settlement agreement dated 21 July 2014 ("the Settlement Agreement") executed by the various parties which contained, *inter alia*, the following terms:

(a) The first defendant would pay the plaintiff $750,000 ("the Settlement Sum") in fifty monthly instalments of $15,000 each ("the Instalment Payments") commencing on 25 August 2014.

(b) The Settlement Sum would be secured by a banker's guarantee ("the Bank Guarantee") to be furnished by the first defendant within four weeks of the date of the Settlement Agreement on terms acceptable to the plaintiff.

(c) Within seven days of the plaintiff's receipt of the Bank Guarantee, the plaintiff would file a

notice of discontinuance of the OS. The plaintiff would also execute transfer deeds in respect of all his shares in the second defendant and the second defendant's group of companies for a nominal consideration of $1.00.

11 The plaintiff alleged (though this was denied by the defendants at para 9 of their Defence) that the following two implied terms were part of the Settlement Agreement:

(a) The second defendant, as a director and shareholder of the first defendant, would take the necessary steps to give effect to the Settlement Agreement, including the procuring of the Bank Guarantee and the discharge of the plaintiff from existing bank guarantees issued in the first defendant's favour.

(b) Failure to pay any Instalment Payment would result in the entire (balance of) the Settlement Sum being due and payable immediately.

12 Save for the payment of two Instalment Payments on 25 August and 25 September 2014 respectively, the first defendant did not comply with the Settlement Agreement. The first defendant failed to furnish the Bank Guarantee by the deadline of 18 August 2014. The second defendant and Aasperon Investment also failed to procure the release of the plaintiff from all existing bank guarantees he had issued in their favour. Furthermore, the plaintiff received a demand from Oversea-Chinese Banking Corporation ("OCBC") for payment of an outstanding instalment on a machinery loan for which he stood as guarantor as the first defendant had defaulted on repayment.

13 Consequently, the plaintiff commenced S 1209/2014 to seek specific performance of the Settlement Agreement.

14 The two defendants raised no valid defences. The defendants admitted to all the terms of the Settlement Agreement as set out in [10] above but contended that the release of the plaintiff from the existing bank guarantees issued in favour of the first defendant would only be possible if the banks in question agreed, which they did not. OCBC would not release the plaintiff unless the loan was discharged in full. United Overseas Bank ("UOB") would only agree to release the plaintiff from the guarantee he had provided to Aasperon Investment on condition that the plaintiff withdraws as the latter's director and shareholder. However, under the terms of the Settlement Agreement, such withdrawal was only to take place (through the execution of the necessary share transfers) *after, and not before*, the plaintiff had received the Bank Guarantee, which could not be obtained (see [15] below). Furthermore, the defendants' attempts to obtain refinancing from the Development Bank of Singapore ("DBS") to take over the loan from UOB were unsuccessful.

15 The defendants complained that, because the plaintiff refused to discharge the consent injunction he had obtained on 26 December 2013, the first defendant was unable to sell or charge a piece of property located at No. 13 Neythal Road ("the Neythal property") or conclude a sale for the machinery for which the plaintiff stood as guarantor (see [12] above). This was critical for two reasons. First, the defendants submitted that the first defendant's promise to procure the Bank Guarantee was made on the understanding that it would be able to use the Neythal property as collateral to secure the facility. However, the Neythal Property could not be used as security because of the plaintiff's injunction order. Second, OCBC refused to release the plaintiff as guarantor (which the Settlement Agreement required) unless the loan was discharged, which it could not unless the machinery was purchased.

16 The defendants also argued that DBS refused to issue the Bank Guarantee because it required the withdrawal of all legal actions commenced against the first defendant as well as the withdrawal of

a police report lodged by the plaintiff against the second defendant (which related to an allegation of forgery in connection with a loan of $100,000 purportedly taken by the plaintiff from Aasperon Investment) before it would do so.

17 In summary, the defendants raised impossibility of performance and frustration as their defence — they argued that their failures to perform their obligations under the Settlement Agreement were due to no fault on their part. The defendants also submitted that the plaintiff had unreasonably refused to discontinue the OS even though he had received two Instalment Payments.

18 Not surprisingly, the plaintiff's response to the defence was to file the Application. The plaintiff's affidavit in support of the Application was essentially a repeat of his SOC; similarly, the second defendant's "show cause" affidavit ("the second defendant's affidavit") largely rehashed the contents of the Defence.

19 The second defendant proposed, in his second affidavit, that the Bank Guarantee be substituted with a personal guarantee provided by him *and* the provision of a piece of property at No 36 Ah Hood Road #18-02, Casa Fortuna ("the Ah Hood Road property"), which was owned by Aasperon Investment, as security for the payment of the Settlement Sum. The second defendant revealed that the first defendant had stopped the Instalment Payments because of the plaintiff's refusal to file the notice of discontinuance for this suit (see [17] above). He deposed that the payments would resume once the plaintiff was more cooperative and reasonable.

The decision

20 This court granted the Application as there were no valid defences raised in the second defendant's affidavit to deny the plaintiff the relief claimed. To put it succinctly, the defendants had breached the terms of the Settlement Agreement and the plaintiff was entitled to come to court to obtain judgment for such breach.

21 I would first refer to cl 2 of the Settlement Agreement, which states:

> In the event of a default of any instalment payment, the plaintiff shall be entitled to call upon the guarantee furnished in paragraph 1 above for the balance of the Settlement Sum.

22 In my view, cl 2 entitles the plaintiff to commence this suit to seek redress for the defendants' default in failing to provide the Bank Guarantee. It cannot be right that the plaintiff would be left without *any* remedy for the defendants' breach because there is no bank guarantee he can call upon. The defendants' solicitor had sought to argue (in his request for further arguments) that allowing the plaintiff to apply for summary judgment for $720,000 would mean putting the plaintiff in a better position than that envisaged under cl 2 — I disagree. Breach of the Settlement Agreement alone would be sufficient for the plaintiff to commence S 1209/2014 (see *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [53]). In the alternative, two terms must be implied to cl 2 (applying the test in *The Moorcock* (1889) 14 PD 64, which was approved of by our Court of Appeal in *Foo Jong Seng v Phua Kiah Mai* [2012] 4 SLR 1267 at [32]–[36]) in order to give business efficacy to the Settlement Agreement. The first implied term is that set out in [11(b)]. The second implied term is if the plaintiff did not have the Bank Guarantee from the first defendant to call upon in the event of default in payment, then he would be entitled to sue both defendants for the balance outstanding of the Settlement Sum.

23 The defence of frustration or impossibility of performance was not available to the defendants. As I had pointedly said to their counsel at the hearing, the second defendant's affidavit did not

produce documentary evidence to support the second defendant's allegations that:

(a) He had attempted to obtain the requisite Bank Guarantee from insurance companies but had been rejected;

(b) DBS required the withdrawal of the OS and all legal proceedings before it would agree to issue the Bank Guarantee;

(c) DBS required the plaintiff's withdrawal of his police report before it would issue the Bank Guarantee;

(d) UOB required the plaintiff's withdrawal from Aasperon Investment as both director and shareholder before it would agree to his release as a guarantor;

(e) There was an offer to purchase the first defendant's machinery and it was the plaintiff's injunction in the OS that was the impediment to the proposed sale (despite, I observe, the plaintiff's specific request for such information through his solicitors).

24 Even more damning was the admission in the second defendant's affidavit that the first defendant had deliberately stopped payment of the Instalment Payments because of the plaintiff's refusal to discontinue the OS. The plaintiff was perfectly entitled not to accede to the defendants' request as cl 4 of the Settlement Agreement provided (see [10(c)] above) that the plaintiff was only obliged to discontinue the OS within seven days *after his receipt of the Bank Guarantee and notice of his release as guarantor* from all the guarantees he had furnished on behalf of the first defendant.

25 The police report (see [23(c)] above) was referred to in cl 12 of the Settlement Agreement which states:

TAN YONG HUI will not pursue his police report of forgery against TAN HOCK SENG.

Clause 12 was found in the section entitled "Other Matters" while the OS, S 1209/2014, Suits 11 and 127 of 2014 were governed by cll 1 to 6. Even if the second defendant's allegation in [23(c)] were true, he could have produced a copy of the Settlement Agreement to DBS and highlighted cl 12 to the bank. It bears noting, too, that until the commencement of S 1209/2014 and the filing of the second defendant's affidavit, the plaintiff was not informed that DBS required him to withdraw his police report nor was he asked to do so by the second defendant.

26 The doctrine of frustration of contract requires that the failure of performance not be due to the act or election of the party seeking to rely on it (see *Chitty on Contracts vol 1* (H G Beale, gen ed) (Sweet & Maxwell, 31st Ed, 2012) at para 23-007). Instead, it must be due to some "outside event or extraneous change of situation" and it must take place "without either the fault or the default of either party to the contract" (see *Paul Wilson & Co. A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 909). This is hardly the case here. As noted at [23] above, the defendants had not proven that their failure to procure the Bank Guarantee was attributable to extraneous events outside their control. In the second defendant's affidavit, he had deposed that the Neythal property was unencumbered and was worth at least $4m. That being the case, why would there be any difficulties in obtaining the Bank Guarantee from any bank, let alone DBS or OCBC? The second defendant contended that DBS had agreed, in principle, to the issuance of the Bank Guarantee (which was to be issued sometime between 17 and 24 October 2014, according to the letter written by the defendants' solicitors to the plaintiff's solicitors) but DBS changed its mind at the eleventh hour because the OS had not been withdrawn. This explanation was unconvincing without

documentary evidence.

27 The second defendant deposed that only about $40,000 remained outstanding on the machinery loan extended by OCBC, yet the plaintiff had (see [12] above) still received a demand as guarantor from OCBC for payment of the outstanding instalment due to the first defendant's default. This would seem to suggest that the second defendant's claim that the first defendant was not in any financial trouble was untrue. In this regard, I note that the cheque issued by Aasperon Academy Pte Ltd ("Aasperon Academy" — another related company) for the first Instalment Payment of the Settlement Sum was dishonoured. I view with some scepticism the second defendant's explanation that it was the plaintiff's stubborn refusal to accept the cheque that prompted the defendants to cancel it. The plaintiff had deposed that when the cheque was dishonoured, the bank had furnished a return advice which stated that the reason for the dishonour was "refer to drawer" and that he understood this to mean that Aasperon Academy had insufficient funds in its account. Given that the matter of the first defendant's solvency is not something which I have to decide, it suffices for me to say that the second defendant's testimony on this had to be viewed with some circumspection.

28 As was rightly pointed out by counsel for the plaintiff, nothing in the Settlement Agreement prohibited the defendants from procuring the Bank Guarantee in any manner or from any source. If (as it was claimed) DBS rejected the defendants' application despite the Neythal property being offered as collateral, any other bank could have been approached. Given that a guarantee for a sum of $750,000 was, in the second defendant's words, "only a fraction" of the value of the Neythal property (which was valued at $4m), it would seem that the Bank Guarantee would not be difficult to obtain. Yet the second defendant did not seem to have made any effort to secure a guarantee from another bank.

Conclusion

29 Consequently, the court was of the view that the defendants had not raised any triable issues, let alone any valid defence to the plaintiff's claim. Accordingly the orders prayed for in the Application were granted. Despite the passage of time and the grant of a fourteen day grace period, the defendants made no effort to procure the Bank Guarantee or to obtain the plaintiff's discharge from guarantees he had issued in the defendants' favour. Final judgment was therefore awarded to the plaintiff for the defendants' persistent default of the terms of the Settlement Agreement.

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