IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 84

Originating Summons No 935 of 2018

Between

(1) Teo Lay Gek
(2) Lok Kexin Melissa

… *Plaintiffs*

And

(1) Hoang Trong Binh
(2) Truong Quang Con
(3) IPMM (Singapore) Pte. Ltd.

… *Defendants*

GROUNDS OF DECISION

[Professions] — [Valuer] — [Judicial review of valuation]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **3**

EVENTS LEADING UP TO THE SETTLEMENT AGREEMENT 3

THE VIETNAM PROJECT 4

EVENTS SUBSEQUENT TO THE EY REPORT 5

THE PARTIES' CASES **6**

THE DEFENDANTS' CASE 6

There were manifest errors in the EY Report *6*

EY exceeded the scope of its contractual mandate *9*

THE PLAINTIFFS' CASE 10

There were no manifest errors in the EY Report *10*

EY did not exceed the scope of its contractual mandate *12*

MY DECISION **13**

ISSUES TO BE DETERMINED 13

ISSUE 1: WHETHER THE EY REPORT WAS MARRED BY MANIFEST ERRORS **13**

THE LAW 13

MANIFEST ERRORS OF LAW 18

MANIFEST ERRORS OF FACT 20

EY FAILED TO CONSIDER THE ADDITIONAL DOCUMENTS 22

ISSUE 2: WHETHER EY EXCEEDED THE SCOPE OF ITS CONTRACTUAL MANDATE **23**

Version No 1: 27 Oct 2020 (22:41 hrs)

THE LAW 23

APPLICATION TO THE FACTS OF THIS CASE 24

WHETHER THE COURT SHOULD HAVE INVITED CBRE TO PROVIDE CLARIFICATIONS 25

SUMMARY 26

CONCLUSION.....28

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Teo Lay Gek and another
v
Hoang Trong Binh and others

[2019] SGHC 84

High Court — Originating Summons No 935 of 2018
Tan Siong Thye J
8 February 2019

27 March 2019

Tan Siong Thye J:

Introduction

1 This case arose from a dispute in a settlement agreement between the plaintiffs and the defendants dated 16 June 2017 ("the Settlement Agreement") regarding the valuation of the plaintiffs' shares in Agape Holdings Pte Ltd ("the Company"), a company incorporated in Singapore, that were sold to the defendants.[1] The plaintiffs hold 19% shareholding in the Company[2] while the defendants hold the remainder of the shares.[3] Pursuant to cl 1.1 of the Settlement Agreement, the parties had agreed to appoint an independent valuer to value and assess the fair market value of the plaintiffs' 19% shareholding in the Company.[4] The purpose of this valuation was for the defendants to purchase all

---

1 Plaintiffs' Bundle of Documents ("PBOD"), Tab 2, p 104.

2 PBOD, Tab 2, p 3 para 4.

3 PBOD, Tab 2, p 3 para 4.

Version No 1: 27 Oct 2020 (22:41 hrs)

of the plaintiffs' shares based on the fair market value (cl 1.5 of the Settlement Agreement).[5]

2 On 14 August 2017, the parties agreed to appoint Ernst & Young Solutions LLP ("EY") as the independent valuer of the Company's shares.[6] EY's valuation report dated 2 January 2018 ("the EY Report") was sent to the parties on 10 January 2018.[7] The EY Report assessed the fair market value of the plaintiffs' shares to be US$4,165,675 as at 31 December 2016 ("the Valuation Date").[8] For the payment of this "Settlement Sum", the defendants were required to make two instalment payments to the plaintiffs in April 2018 and June 2018 respectively (cl 1.6 of the Settlement Agreement).[9]

3 The defendants did not make any payment to the plaintiffs. Accordingly, the plaintiffs commenced Originating Summons No 935 of 2018 ("OS 935/2018") which, *inter alia*, sought the following orders:

(a) A declaration that the EY Report be final and binding upon the parties; and

(b) An order that the defendants are jointly and severally liable to pay the sum of US$4,165,675 (plus accrued interest) to the plaintiffs for the purchase of the plaintiffs' 19% shareholding in the Company, within 14 days of the orders made.

---

4 PBOD, Tab 2, p 107.

5 PBOD, Tab 2, p 107.

6 PBOD, Tab 2, p 8 para 17.

7 PBOD, Tab 2, p 17 para 28.

8 PBOD, Tab 2, p 16 para 26.

9 PBOD, Tab 2, p 16 para 27.

Version No 1: 27 Oct 2020 (22:41 hrs)

4 In contrast, the defendants submitted that the EY Report was not final and binding upon the parties. For these submissions the defendants postulated two main grounds. Firstly, EY had exceeded the scope of its contractual mandate. Secondly, the EY Report was marred by manifest errors. Therefore, the EY Report was liable to be set aside.

5 On 8 February 2019, after hearing the parties' arguments, I granted the plaintiffs' application in OS 935/2018. The defendants are dissatisfied with my decision and filed a notice of appeal on 6 March 2019. I shall now give the reasons for my decision.

Background

Events leading up to the Settlement Agreement

6 On 14 July 2016, the plaintiffs commenced an action against the defendants for minority oppression in Suit No 754 of 2016 ("S 754/2016").[10] Subsequently, the parties attended a mediation session at the Singapore Mediation Centre on 16 June 2017 and entered into the Settlement Agreement in full and final settlement of all matters in S 754/2016.[11] The relevant clauses of the Settlement Agreement are reproduced for ease of reference:[12]

> **1. Settlement Terms**
>
> 1.1 The Parties have agreed, without admission of any liability, to jointly appoint (i) Ernst & Young LLP, PricewaterhouseCoopers LLP or Deloitte & Touche LLP, subject to conflict clearance and in that order of priority, or (ii) any other valuer as the Parties may jointly agree in writing, as an independent valuer (***IV***) to value and assess the fair market value of the Shares (***Value***).

---

10 PBOD, Tab 2, p 4 para 8.

11 PBOD, Tab 2, p 6 para 14.

12 PBOD, Tab 2, p 107.

Version No 1: 27 Oct 2020 (22:41 hrs)

> 1.2 The Parties agree that the IV shall assess the Value on a net tangible assets (***NTA***) basis, incorporating the value of the shares of Agape Vietnam on a NTA basis and taking into account the value of the real estate in the Project, as at 31 December 2016 without any discount for minority shareholding.
>
> …
>
> 1.5 The Majority Shareholders shall purchase the Shares held by the Minority Shareholders at a price of 19% of the Value (***Settlement Sum***).
>
> [emphasis in original]

The Vietnam Project

7 At this juncture, it is necessary to provide further details of the Company in order to better understand EY's valuation exercise. The Company is a holding company and owns 100% of the shares in Agape Vietnam Company Limited ("Agape Vietnam"). Agape Vietnam was incorporated for the purpose of investing in a waterfront city project in Vietnam ("the Vietnam Project"). Since the Vietnam Project was critical to EY's valuation exercise, EY appointed CBRE (Vietnam) Co., Ltd ("CBRE"), a property valuer in Vietnam, to assess the market value of the Vietnam Project. For the purposes of this dispute, one significant fact is that under Vietnam laws, Agape Vietnam has an obligation to set aside part of the residential land in the Vietnam Project to build social houses.[13]

8 CBRE's report was duly completed on 14 November 2017 ("the CBRE Report") and was included in the EY Report.[14] The defendants' arguments focused on the CBRE Report to allege that EY had departed from its contractual mandate and that the EY Report contained manifest errors.

---

13 PBOD, Tab 8, pp 13–14.

14 PBOD, Tab 7, pp 373–462.

Version No 1: 27 Oct 2020 (22:41 hrs)

Events subsequent to the EY Report

9 On 29 March 2018, *after* EY had completed its valuation, the defendants wrote to EY as they were of the view that EY did not have the benefit of all the relevant documents and information required for the purposes of its valuation ("the Additional Documents").[15] Therefore, the defendants invited EY to reassess the valuation of the Company's shares. I note that this letter was sent four days before the deadline for the defendants to make their first instalment payment to the plaintiffs.

10 EY maintained the position that it could only take into account the Additional Documents and conduct a reassessment with the approval of both parties.[16] This position was taken by EY as the parties had already agreed with the timetable to provide all relevant information.

11 The plaintiffs did not consent to a reassessment of the Company's shares.[17] The plaintiffs highlighted that the defendants had sufficient time to submit the Additional Documents during EY's valuation exercise. In fact, EY had granted the defendants' repeated requests for extension of time to submit relevant documents and information.[18] EY also conducted an in-person explanation session with Agape Vietnam's management to explain the information and documents required by EY.[19]

12 Pursuant to cl 12.1 of the Settlement Agreement, the parties attended a mediation session on 9 July 2018 in the light of the defendants' request for

15 PBOD, Tab 7, pp 563–569.

16 PBOD, Tab 7, pp 570–571.

17 PBOD, Tab 7, pp 572–573.

18 PBOD, Tab 7, p 583.

19 PBOD, Tab 7, p 584.

Version No 1: 27 Oct 2020 (22:41 hrs)

reassessment. The attempt at mediation was unsuccessful. Thereafter, the plaintiffs commenced OS 935/2018 on 1 August 2018. In the course of filing their affidavits, the defendants also presented a report prepared by Savills Vietnam Co., Ltd ("Savills") dated 26 September 2018 ("the Savills Report").[20] Savills, like CBRE, is a property valuer in Vietnam. The defendants relied primarily on the Savills Report to convince the court that EY had departed from its contractual mandate and that the EY Report was marred by manifest errors. I shall now elaborate on the parties' cases.

The parties' cases

The defendants' case

There were manifest errors in the EY Report

13 The defendants contended that there were manifest errors in the EY Report. Thus, the EY Report was liable to be set aside. I should emphasise that, strictly speaking, the alleged errors identified by the defendants were in relation to the CBRE Report which, in turn, was relied on by EY in the EY Report.

14 Firstly, the defendants submitted that there were assumptions and statements made in the EY Report that were inaccurate and in contravention of Vietnam laws.[21] The alleged errors were as follows:

(a) CBRE had assumed that all the social houses in the Vietnam Project were to be "sold", when Vietnam's Housing Law No. 65/2014/QH13 ("Housing Law 2014") required at least 20% of the social houses to be "leased" for at least five years. In this regard, the

---

20 PBOD, Tab 7, pp 672–687.

21 Defendants' Written Submissions ("DWS"), paras 78–81.

Version No 1: 27 Oct 2020 (22:41 hrs)

defendants relied on the expert opinion of a Vietnamese lawyer, Mr Nguyen Ba Son ("Mr Nguyen").[22]

(b) CBRE had failed to apply the statutorily prescribed formula for determining the maximum selling price of the social houses ("the Sale Price Formula"). Instead, CBRE merely referred to two comparable projects, made certain adjustments and arrived at the average selling price of US$550 per sqm.[23] The defendants, similarly, relied on Mr Nguyen's expert opinion. The defendants also relied on the Savills Report which applied the Sale Price Formula to determine the maximum selling price of the social houses at US$391 per sqm.[24]

15 Secondly, the defendants submitted that the EY Report was also marred by manifest errors of fact. The purported errors were as follows:

(a) Agape Vietnam had to pay the relevant authority "Land Costs" with respect to the land that had been allocated and handed over to Agape Vietnam. As at the Valuation Date, there was still "Residual Land" which had yet to be handed over to Agape Vietnam. CBRE failed to take into account the Land Costs for the Residual Land, which were yet to be ascertained by the relevant authority.[25]

(b) Agape Vietnam had sold 244 units in the Vietnam Project through a marketing agent known as Mai Anh Co., Ltd ("MACL") as at the Valuation Date. CBRE did not fully take into account all the commission expenses that were payable by Agape Vietnam to MACL

22 DWS, paras 48–63.

23 DWS, para 67; PBOD, Tab 7, p 414.

24 DWS, para 70(a); PBOD, Tab 10, p 35.

25 DWS, paras 83–95.

Version No 1: 27 Oct 2020 (22:41 hrs)

which were not recorded in Agape Vietnam's books.[26] Furthermore, it was not clear if CBRE had accounted for part of the commission expenses which were on Agape Vietnam's books.[27]

(c) CBRE had identified several similar properties to derive the value of the school land in the Vietnam Project ("the Direct Comparison Approach").[28] However, these properties were "wholly dissimilar from the [Vietnam Project] in terms of both location and development type".[29] The defendants highlighted that Savills had calculated the value of the school land in the Vietnam Project based on residual land value ("RLV") and attributed a *negative* value of US$3.3m to the school land in the Vietnam Project.[30]

16 Thirdly, the defendants contended that the EY Report was marred by manifest errors because EY and CBRE had conducted their respective valuations based on incomplete information. EY and CBRE ought to have considered the Additional Documents which the defendants provided after the EY Report was sent to the parties.[31]

EY exceeded the scope of its contractual mandate

17 The defendants' second ground of grievance was that EY had exceeded the scope of its contractual mandate.

---

26 DWS, para 101.

27 DWS, paras 109–114.

28 DWS, para 117.

29 DWS, paras 116–121.

30 DWS, para 121.

31 DWS, paras 122–127.

Version No 1: 27 Oct 2020 (22:41 hrs)

18 The defendants argued that, in determining the scope of EY's contractual mandate, it must be implied that EY's valuation had to be in accordance with all applicable laws.[32] The defendants also relied on the International Valuation Standards' definition of "market value", which states that "the market value of an asset will reflect its highest and best use … that is … legally permissible".

19 The defendants submitted that EY's valuation was not in accordance with all applicable laws, for the reasons stated at [14] above. Therefore, EY had exceeded the scope of its contractual mandate and its determination was liable to be set aside.

The plaintiffs' case

There were no manifest errors in the EY Report

20 The plaintiffs contended that there were no errors in the EY Report, let alone manifest errors.[33] The alleged errors that were identified by the defendants, as stated at [14] and [15] above, were merely differences of opinion. The plaintiffs relied on the expert opinion of a Vietnamese lawyer, Dr Luu Tien Dung ("Dr Luu") and submitted that the EY Report was fully compliant with Vietnam laws.[34]

21 In relation to the assumptions and statements made by CBRE that were said to be inaccurate and in contravention of Vietnam laws (see [14] above), the plaintiffs submitted that:

---

32 DWS, paras 41–43.

33 Plaintiffs' Skeletal Submissions ("PSS"), para 44.

34 PBOD, Tab 4.

Version No 1: 27 Oct 2020 (22:41 hrs)

(a) Social houses disposed through "lease-purchase" counted towards the requirement for at least 20% of the social houses to be "leased". All "lease-purchase" units would eventually be sold to the purchasers. Therefore, CBRE's assumption that all the social houses would be sold was not incorrect. In this regard, the plaintiffs relied on the expert opinion of Dr Luu.[35]

(b) The Sale Price Formula could not be applied to value the Vietnam Project due to insufficient information. Such information included the filing costs, site formation works, external works, and finance and legal expenses.[36] The plaintiffs relied on Dr Luu's expert opinion who opined that CBRE's calculation of the maximum selling price was more reliable than that of Savills, whose calculation was based on hypothetical figures.[37]

22 In relation to the alleged manifest errors of fact, the plaintiffs contended that:

(a) Agape Vietnam's liability for Land Costs in respect of the Residual Land was entirely speculative. It was possible that no Land Costs would be payable for the Residual Land.[38]

(b) Agape Vietnam had fully accounted for all the commission expenses that were payable by Agape Vietnam to MACL which were recorded in Agape Vietnam's books. Any other purported commission expenses were based on the Additional Documents which the defendants

35 PBOD, Tab 4, paras 16–22.

36 PSS, paras 111–112.

37 PBOD, Tab 4, para 31.

38 PSS, paras 115–118.

Version No 1: 27 Oct 2020 (22:41 hrs)

sought to provide to EY after the valuation exercise.[39] In addition, the defendants' contention that CBRE had not accounted for part of the commission expenses recorded in Agape Vietnam's books was a mere assertion.[40]

(c) CBRE's utilisation of the Direct Comparison Approach was made honestly in its professional judgment. CBRE made appropriate adjustments in arriving at its valuation.[41] Although Savills calculated the value of the school land in the Vietnam Project based on residual land value, this was merely a difference in methodology and opinion.[42]

23 In relation to the defendants' contention that EY's valuation was based on incomplete information, the plaintiffs submitted that this was not a ground for setting aside an expert's determination. Furthermore, parties had ample time to submit all relevant documents and information to EY during the valuation exercise. The defendants had only sought to provide the Additional Documents after the valuation exercise had well concluded.[43]

EY did not exceed the scope of its contractual mandate

24 The plaintiffs submitted that EY would only have exceeded the scope of its contractual mandate if it had made "fundamental mistakes".[44] The plaintiffs relied on *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 at 287 for examples of such "fundamental mistakes". These included the situation

39 PSS, para 133.

40 PSS, para 138.

41 PSS, para 147.

42 PSS, paras 151–157.

43 PSS, paras 158–160.

44 For The Record ("FTR"), 8 February 2019, Chamber 6B, 3.01.05pm.

Version No 1: 27 Oct 2020 (22:41 hrs)

where a valuer of shares valued the wrong number of shares, or valued shares in the wrong company. On the facts, EY had valued the plaintiffs' shares in the Company fully in accordance with their terms of engagement.[45] Accordingly, EY could not have been said to have exceeded the scope of its contractual mandate.

My decision

Issues to be determined

25 The two issues that arose for my determination were:

(a) whether the EY Report was marred by manifest errors; and

(b) whether EY had departed from its contractual mandate.

Issue 1: Whether the EY Report was marred by manifest errors

The law

26 The general rule is that the only grounds to challenge a determination of an expert whom the parties agreed are as follows (see *Poh Cheng Chew v K P Koh & Partners Pte Ltd and another* [2014] 2 SLR 573 ("*Poh Cheng Chew*") at [36]):

(a) material departure from instructions;

(b) manifest error; or

(c) fraud, collusion, partiality and the like.

27 Thus, the grounds to challenge an expert's determination are very narrow. This is the correct approach as the fundamental contract between the

[45] PBOD, Tab 2, pp 117–136.

Version No 1: 27 Oct 2020 (22:41 hrs)

parties is that they had agreed to be bound by the opinion and views of their chosen expert. The courts will not allow a dissatisfied party a second bite at the cherry on the merits so as to preserve the sanctity of the joint agreement made by the parties. In doing so, the court is doing no more than to uphold the parties' contractual bargain, since they have contracted for the expert's determination to be final and binding on the merits. As stated by V K Rajah J (as he then was) in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [29]:

> … It is quite inappropriate for a court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination.

28 In this case, the defendants did not allege that there was fraud, collusion, partiality and the like on the part of EY. Therefore, these grounds would not be relevant for the purpose of setting aside the EY Report. However, the defendants argued that there were manifest errors in the EY Report and that there was material departure from instructions by EY. Hence, my decision will deal only with the allegations raised by the defendants.

29 For manifest errors, the dissatisfied party, in this case the defendants, had to show a "manifest error" in the expert's determination, as opposed to a mere error. As stated by Lord Denning MR in *Campbell v Edwards* [1976] 1 WLR 403 at 407:

> … It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. *Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.* … [emphasis added]

Version No 1: 27 Oct 2020 (22:41 hrs)

30 Furthermore, as said by Lawton LJ in *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175 at 181:

> … Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. *Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening.* … [emphasis added]

31 The principles enunciated above are particularly pertinent in this case, where parties were embroiled in litigation but decided to submit to expert determination as part of the Settlement Agreement. The defendants have themselves stated that their motivation for entering into the Settlement Agreement was to avoid protracted litigation.[46] The parties did not dispute that only a manifest error and not a mere error would suffice to set aside the EY Report.

32 There is some debate over the approach the court should adopt with respect to manifest errors. In *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 1256* [2007] 1 SLR(R) 1004 ("*Geowin*") at [16], Rajah J preferred a narrow approach, and explained that the term "manifest error" is "no more than a convenient shorthand reference to a patent error *on the 'face' of the award or decision*" [emphasis added]. This approach was similarly adopted in *Quek Kwee Kee Victoria (in her personal capacity and as executor of the estate of Quek Kiat Song, deceased) and another v Quek Khuay Chuah* [2014] 4 SLR 1 at [33]. The rationale for the narrow approach was stated succinctly by Rajah J in *Geowin* at [19]:

> … the court should not stray beyond the actual report or award in considering how or why the decision was reached. The underlying evidence ought not to be re-examined or referred to as this would be tantamount to an appellate hearing and to that extent contrary to what the parties had solemnly agreed to. *The*

[46] DWS, para 10.

Version No 1: 27 Oct 2020 (22:41 hrs)

> *right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (eg apparent mathematical miscalculations) and to determining whether the expert has complied with his terms of appointment.* [emphasis added]

33 However, in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR 385 ("*The Oriental Insurance*") at [89], Chan Seng Onn J adopted a less strict approach, and opined that there was no absolute rule precluding reference to matters beyond the face of the award or decision to establish a manifest error.

34 In my view, I would respectfully prefer Rajah J's approach in *Geowin* for the following reasons.

35 Firstly, the narrow approach better accords with the fundamental principle that parties would have intended for the expert's determination to be final and binding, except in exceptional circumstances. The narrow approach honours and upholds the concept and importance of the sanctity of contract, which must be adhered to and respected by the contracting parties. It ensures that the courts will only have a limited right of review, which parties would have intended for as a general starting principle.

36 Secondly, the narrow approach is more consistent with the principle that there must be finality to litigation as agreed by the parties. The parties had reflected this desire in appointing a mutually agreed expert valuer to ascertain the market value of the plaintiffs' 19% shareholding in the Company in the Settlement Agreement.

37 Thirdly, the narrow approach recognises that "courts have no greater expertise than expert valuers; and that where parties have chosen voluntarily to

Version No 1: 27 Oct 2020 (22:41 hrs)

commit the determination of valuation to an expert, judicial restraint is an appropriate response" (*Holt v Cox* (1997) 23 ACSR 590 at 597, cited in *Geowin* at [18]).

38 In any event, I note that even on Chan J's approach in *The Oriental Insurance*, the definition of a manifest error still remains narrow. As observed by Vinodh Coomaraswamy J in *Jayanti Nadarajoo v Bronwyn Helen Matthews and another* [2015] SGHC 222 at [73]:

> Even on Chan J's approach, it is clear that not all error is manifest error. Only error which is capable of affecting the outcome of the determination and *admits no difference of opinion* amounts to manifest error. The example provided is a clear arithmetical error. In that case, Chan J found manifest error in the determination of the period of interest because of a technical arithmetical error in the expert's discount calculations. [emphasis in original]

39 To be clear, it is not the law that only a "clear arithmetical error" will amount to a manifest error. However, the example provided in *The Oriental Insurance* is highly indicative of the type of errors that will suffice to reopen an expert's determination. Another example is where the expert valuer refers to a building that does not exist (*Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554 (Ch) at [46]). In *The Oriental Insurance* at [90], Chan J endorsed the definition of "manifest errors" found in *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 All ER 703 at [33]:

> … "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion". [original emphasis omitted]

40 Therefore, there are two requirements that the dissatisfied party has to fulfil before the court will conclude that an error is a manifest error. Firstly, the error must be obvious and admit of no difference of opinion. Secondly, the error must be one that is obviously capable of affecting the expert's determination.

Version No 1: 27 Oct 2020 (22:41 hrs)

41 On the facts, even if I had applied Chan J's approach which was advocated by the defendants, I found that EY had not made any manifest errors. The alleged errors identified by the defendants were not obvious – they required the court to extensively investigate whether or not EY and CBRE had made any error. This was plainly not the appropriate forum for such an inquiry to be undertaken given the court's limited right of review. Furthermore, the alleged errors identified by the defendants were merely differences of opinion between the defendants (relying on Mr Nyugen's expert opinion and the Savills Report) and the plaintiffs (relying on Dr Luu's expert opinion and the CBRE Report). As acknowledged by counsel for the defendants, the defendants would not have been able to identify the alleged errors of law without the benefit of Mr Nyugen's expert opinion and the Savills Report.[47] It was not proper for the court to adjudicate between the *merits* of the contrasting opinions in deciding whether or not to set aside an expert's determination. I shall now explain with reference to each of the alleged errors.

Manifest errors of law

42 The defendants relied on Mr Nyugen's legal opinion and contended that Vietnam's Housing Law 2014 required at least 20% of the social houses to be leased for at least five years.[48] According to the defendants, CBRE erred in stating that all the social houses were to be sold. Therefore, the EY Report was marred by a manifest error of law.

43 However, the plaintiffs relied on Dr Luu's legal opinion which stated that social houses which are disposed through lease-purchase for a term of at least five years will still satisfy the requirement for at least 20% of the social

47 FTR, 3:31:30pm.

48 PBOD, Tab 8, p 15 para 32.

Version No 1: 27 Oct 2020 (22:41 hrs)

houses to be leased.[49] Accordingly, CBRE's assumption that all of the social houses were to be sold was not in violation of Vietnam laws.[50]

44 The other manifest error of law alleged by the defendants was that CBRE failed to apply the Sale Price Formula in arriving at the maximum selling price of the social houses. Instead, CBRE had referred to two comparable projects and arrived at the average selling price of US$550 per sqm after making certain adjustments. Similarly, the defendants relied on Mr Nyugen's legal opinion and the Savills Report.

45 In contrast, the plaintiffs relied on Dr Luu's legal opinion which suggested that the Sale Price Formula could not be meaningfully applied by CBRE. Dr Luu opined as follows:[51]

> 25. The allegations [of Mr Nyugen and the first defendant] that the average selling price of the social housing units adopted by CBRE contravenes Vietnam law and their reliance on the Savills Report for the maximum selling price of the social housing units is completely baseless.
>
> 26. Firstly, Savills' assessment that the maximum selling price of the social houses is US$391 per sqm is based on hypothetical figures without reliance on ***any*** source documents …
>
> …
>
> 30. Secondly … Savills could not have calculated the maximum selling price of the social houses based on the Formula since the ***actual*** total investment cost would not have accrued and been made available.
>
> 31. Thirdly, CBRE's calculation of the maximum selling price is more reliable than that of Savills as it was determined based on a comparison with the average selling price of a completed social housing project in Hai

---

49 PBOD, Tab 4, p 24 para 18.

50 PBOD, Tab 4, p 25 para 22.

51 PBOD, Tab 4, pp 27–29.

Version No 1: 27 Oct 2020 (22:41 hrs)

> Phong City, which was appraised and approved by [the People's Committee Of Hai Phong City].
>
> [emphasis in original]

46 I found the defendants' arguments unmeritorious. There were no manifest errors with regard to the two alleged errors of law identified by the defendants. At best, the defendants could only show that there was a *difference in interpretation of local legislation*. Such differences in legal opinion do not amount to a manifest error of law. This was simply not the proper forum to determine whose interpretation was correct or to be preferred. If the defendants were insistent that their interpretation was correct and that CBRE had not applied the relevant laws, then the proper recourse for the defendants to adopt was to initiate an action against CBRE and/or EY for professional negligence. It is well established that experts, such as EY, owe duties of reasonable skill and care to the parties that appoint them and will be liable in damages should they be negligent in carrying out their professional duties (*Poh Cheng Chew* at [55]).

Manifest errors of fact

47 To recapitulate, the defendants relied on three errors of fact which they alleged were manifest errors. However, I found that there was no basis to set aside the EY Report based on these purported errors.

48 Firstly, the defendants submitted that CBRE failed to take into account the Land Costs for the Residual Land. The plaintiffs rebutted the defendants' submission by stating that the Land Costs for the Residual Land was entirely speculative, since it was possible that no Land Costs would be payable at all.

Version No 1: 27 Oct 2020 (22:41 hrs)

49 In my view, it was open for CBRE, in exercising its honest, independent and professional judgment, not to take into account the Land Costs for the Residual Land since it was possible that there might not be any Land Costs. This was particularly so as Agape Vietnam's liability for Land Costs for the Residual Land was speculative as of the Valuation Date. Moreover, the defendants stated that "land costs in the sum approximately VND 609 billion was payable in respect of *more than half of the area*" handed over to Agape Vietnam [emphasis added].[52] On the defendants' own case, Agape Vietnam was not liable for Land Costs with respect to *some* of the area that was already handed over to Agape Vietnam.

50 Secondly, the defendants contended that CBRE failed to take into account all of Agape Vietnam's commission expenses in its valuation. However, this contention was also unmeritorious. The other commission expenses referred to by the defendants were not found on Agape Vietnam's books. In all fairness to CBRE, the unreported commission expenses were not brought to CBRE's attention by Agape Vietnam during the period of the valuation, notwithstanding the various extensions of time granted by CBRE for Agape Vietnam to provide the relevant information. In fact, the unreported commission expenses formed the subject of some of the Additional Documents provided by the defendants after EY's valuation had concluded.[53] The defendants expressly acknowledged in the letter dated 29 March 2018 that these documents had not been provided to EY previously. Accordingly, it could not be seriously contended that EY had made a manifest error in not taking into account all of Agape Vietnam's commission expenses, when these expenses were not even recorded on Agape Vietnam's books. The defendants' other

---

52 DWS, para 93.

53 PBOD, Tab 2, pp 228–229.

Version No 1: 27 Oct 2020 (22:41 hrs)

assertion that it is "not clear" if CBRE had fully taken into account all the commission expenses recorded on Agape Vietnam's books was also speculative.[54] If there were any omissions, the defendants were entirely to blame as they were dilatory in their rendering of assistance to CBRE during the valuation exercise.

51 Thirdly, the defendants submitted that the Direct Comparison Approach adopted by CBRE to value the school land in the Vietnam Project was a manifest error. In contrast, Savills had valued the school land in the Vietnam Project based on RLV, resulting in a negative value. However, this is merely a *difference in methodology* between CBRE and Savills, both of whom are professional valuers who are entitled to a certain degree of latitude in their valuations. A mere difference in methodology cannot qualify as a manifest error.

EY failed to consider the Additional Documents

52 In my view, the defendants' arguments that EY ought to have considered the Additional Documents were completely unmeritorious. EY acted even-handedly by not granting the defendants' request for reassessment without the plaintiffs' consent. This was the proper course for EY to take in the interests of due process and finality as well as fairness to both parties. Furthermore, I note that EY had, in the course of the valuation exercise, granted various extensions of time to the defendants at their requests.[55] If the defendants were of the view that the Additional Documents were relevant and pertinent for EY and CBRE's valuations, then they should have been provided to EY and CBRE *before* the valuations were complete and not after.

---

54 DWS, para 109.

55 PSS, para 18.

Version No 1: 27 Oct 2020 (22:41 hrs)

Issue 2: Whether EY exceeded the scope of its contractual mandate

The law

53 The defendants submitted that EY exceeded the scope of its implied contractual mandate as its valuation was not in accordance with applicable Vietnam laws. In other words, EY had departed from its instructions to conduct the valuation to reflect its "highest and best use" in a way that was legally permissible (see [18] above). The general inquiry to determine whether an expert has departed from its instructions comprises two steps, as stated in *The Oriental Insurance* at [48]:

(a) Firstly, what did the parties agree to remit to the expert?

(b) Secondly, what was the nature of the mistake? If the expert's mistake constitutes a material departure from instructions, then the expert's determination is not binding on the parties.

54 It is accepted that a departure from instructions must be considered as material unless it can be characterised as trivial or *de minimis* when analysed with respect to the instructions. The expert's determination, even if shown not to be sufficiently different had there been full compliance with the instructions, must still be set aside as it is a nullity and not binding (*Poh Cheng Chew* at [42]).

55 It is critical to recognise that there is a distinction between a departure from instructions and mistakes made by the expert (*Poh Cheng Chew* at [43]). This distinction was expressed in *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 at 108 using the analogy of answering the right or wrong question:

Version No 1: 27 Oct 2020 (22:41 hrs)

> … If [the expert] has answered the right question in the wrong way, his decision will be binding. *If he has answered the wrong question, his decision will be a nullity*. … [emphasis added]

Application to the facts of this case

56 On the facts, the relevant instructions provided by the parties to EY can be found in EY's "Statement of Work". These instructions include:[56]

(a) The appropriate basis of valuing the plaintiffs' 19% shareholding in the Company shall be market value.

(b) EY shall assess the market value of the Company on a net tangible assets ("NTA") basis, incorporating the value of the shares of Agape Vietnam on a NTA basis and taking into account the value of the real estate as at the Valuation Date.

(c) EY shall have the power to determine the appropriate approach for the valuation of the assets and liabilities of the Agape Group once EY has obtained a good understanding of Agape Group's business, assets and liabilities as well as the information that will be available for the purpose of their engagement.

57 It is apparent from EY's Statement of Work that EY had a broad mandate in determining the market value of the plaintiffs' shares. The Statement of Work did not stipulate in granular detail how EY was to conduct its valuation. There was certainly nothing to the effect that EY had to ensure that CBRE valued the Vietnam Project in accordance with the Sale Price Formula, or that CBRE should not assume that all the social houses would be sold. Furthermore, apart from the two alleged errors of law, the defendants also did not allege that

---

[56] PBOD, Tab 2, p 121.

Version No 1: 27 Oct 2020 (22:41 hrs)

EY and CBRE had performed their valuations with disregard to Vietnam laws. In fact, the starting assumption unless proven otherwise must be that CBRE, as a professional entity operating in Vietnam had performed its valuation in accordance with Vietnam laws. The burden was on the defendants to prove on a balance of probabilities that CBRE had failed to comply with Vietnam laws in the CBRE Report. Even if CBRE had failed to take into account the relevant Vietnam laws in the two instances highlighted by the defendants, it did not follow that EY had departed from its instructions. The critical distinction between a departure from instructions and mistakes made by the expert as stated at [55] above must be emphasised again. This again relates to the fundamental principle that the court should only intervene to set aside an expert's determination in exceptional cases and must otherwise give full effect to the parties' agreement.

Whether the court should have invited CBRE to provide clarifications

58 At the hearing of OS 935/2018, the defendants submitted that the court should have exercised its discretion to invite CBRE to clarify the assumptions made in its valuation.[57] The defendants argued that CBRE had expressly stated in its report that "[i]f any of our assumptions are found to be inaccurate our valuation is void and all reliance is revoked".[58] Thus, CBRE should be invited to clarify whether or not its assumptions were still accurate.

59 The court is an adversarial process and the burden is on the parties to prove their respective cases. The court is entitled to rely on all the available information that is before it at the time of the hearing. If the defendants believed that CBRE had made inaccurate assumptions, then the burden was on *the*

---

57 FTR, 3:46:30pm.

58 PBOD, Tab 7, p 378.

Version No 1: 27 Oct 2020 (22:41 hrs)

defendants to produce an affidavit from CBRE. Based on what was before the court, it could not be said that CBRE had made any inaccurate assumptions. CBRE did not admit that it had made any errors. The defendants' assertions that CBRE had made inaccurate assumptions were robustly contested by the plaintiffs, as stated above at [42]–[51]. If CBRE refused to engage the defendants and the defendants were insistent that CBRE had made inaccurate assumptions, then it is for the defendants to initiate an action against CBRE for negligence in its valuation that resulted in the defendants paying more for the plaintiffs' 19% shareholding in the Company.

60 Moreover, pursuant to cl 1.6 of the Settlement Agreement, the defendants were required to make payments to the plaintiffs in two instalments in April 2018 and June 2018 respectively. I was not inclined to prolong the matter given that there was already a substantial delay.

Summary

61 In summary, for Issue 1, I found that the EY Report was not marred by manifest errors. The central plank of the defendants' case was premised on the Savills Report. It was undeniable that without the Savills Report and Mr Nyugen's expert opinion, almost all of the defendants' allegations of manifest errors would not have been identifiable and visible for the defendants to launch a series of attacks on the EY Report. The plaintiffs, on the other hand, disagreed with the Savills Report and its accompanying criticism of the EY Report. In other words, this was a case of a difference of opinions between the two pundits on the valuation of the plaintiffs' 19% shareholding in the Company.

Version No 1: 27 Oct 2020 (22:41 hrs)

62 The Savills Report was commissioned by the defendants after they had seen the EY Report and realised that they had to pay US$4,165,675 for the plaintiffs' 19% shareholding in the Company. The defendants must have felt that the Settlement Sum was too much and decided to seek a second opinion which they were not allowed to do under the Settlement Agreement. Nevertheless, the defendants went ahead and commissioned the Savills Report. If the Savills Report had valued the plaintiffs' 19% shareholding in the Company higher than the EY Report, the defendants would not have taken issue with the EY Report and this case would not have come before the court. However, from the Savills Report, the defendants alleged that the "Disputed Value would be reduced by approximately US$3.4 million (*ie*, 15.5%)"[59]. Since the defendants had agreed in the Settlement Agreement to be bound by the EY Report, they must abide and honour that agreement notwithstanding the findings of the Savills Report. If the defendants felt strongly that the EY Report was erroneous and unfair, then the appropriate recourse would be to commence an action against EY for professional negligence which resulted in the defendants paying more to the plaintiffs for their 19% shareholding in the Company.

63 EY had engaged CBRE to value the Company's assets in Vietnam. The plaintiffs' legal pundit in Vietnam laws, Dr Luu, confirmed that CBRE's valuation was in compliance with Vietnam laws. The defendants' legal pundit, Mr Nyugen, on the other hand, had a contrary legal opinion. Hence, this was a difference in legal interpretation and there were no manifest errors of law.

64 Therefore, regarding Issue 1, I found that there were no manifest errors of law and fact. EY also could not have been faulted for failing to consider the

---

[59] DWS, p 35 para 80.

Version No 1: 27 Oct 2020 (22:41 hrs)

Additional Documents which arose as a result of the defendants' repeated dilatory conduct.

65 As for Issue 2, I was satisfied that EY had not exceeded the scope of its contractual mandate and the valuation conducted by CBRE was done in accordance with Vietnam laws.

Conclusion

66 For the foregoing reasons, I found that there was no basis to set aside the EY Report. Accordingly, I allowed the plaintiffs' application in OS 935/2018. I ordered that the EY Report was final and binding upon the parties and the defendants were jointly and severally liable to pay the sum of US$4,165,675 (plus interest calculated at 5.33% per annum commencing from 1 August 2018 to the date of payment) to the plaintiffs. As for costs, I ordered the defendants to pay costs fixed at $8,000 (inclusive of disbursements).

Tan Siong Thye
Judge

Lee Ee Yang and Wong En Hui, Charis (Covenant Chambers LLC)
for the plaintiffs;
Hing Shan Shan Blossom, Tan Yi Yin, Amy and Chin Tian Hui,
Joshua (Drew & Napier LLC) for the defendants.

Version No 1: 27 Oct 2020 (22:41 hrs)