

Tentat Singapore Pte Ltd v Win Bo Pte Ltd
[2010] SGHC 283

Case Number : Suit No 464 of 2007
Decision Date : 23 September 2010
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Edwin Lee Peng Khoo, Sim Chee Siong and Chiam Xiu Michelle (M/s Rajah & Tann LLP) for the plaintiff; JB Jeyaretnam, Rajan s/o Sankaran Nair (M/s Rajan Nair & Partners) and Ramachandran Shiever Subramaniam (M/s Grays LLC) for the defendant.
Parties : Tentat Singapore Pte Ltd — Win Bo Pte Ltd

Contract

23 September 2010

Judgment reserved.

Kan Ting Chiu J:

Background

1 The plaintiff, Tentat Singapore Pte Ltd ("Tentat") provided financial support to the defendant, Win Bo Pte Ltd ("Win Bo") and is seeking to recover the payments it claimed to have made, but Win Bo denies the claim and makes a counterclaim against Tentat.

2 Win Bo had a lease from the Jurong Town Corporation over property at 14 Jalan Besut Singapore. Win Bo was constructing a factory building on the property with a loan from Oversea-Chinese Banking Corporation ("OCBC"). Win Bo had commenced with the construction, but the contractor stopped work and went into receivership without finishing the project. When the construction ceased, OCBC recalled the loan, and obtained an order for the possession of the property on 10 November 2004. However, Win Bo obtained the bank's agreement not to enforce the order, and to allow it to continue with the construction.

3 Win Bo needed financial assistance to continue with the project, and Tentat agreed to provide the support. With Tentat's involvement the project was revived and another contractor, Tat Ho Builder Pte Ltd ("Tat Ho"), was engaged. This endeavour also failed. Tat Ho left the site without completing the building in October 2006. OCBC took possession of the property on 22 January 2007, and subsequently sold the property on 27 June 2007. After paying off OCBC, there is a balance of \$1,447,680.21, which is held by stakeholders pending the determination of these proceedings.

The principal witnesses

4 The four principal witnesses in this action are:

- (i) Lee Teng Hong ("LTH"), director, shareholder and principal person in Tentat;
- (ii) Lau Bo Chu ("LBC", also known as Janet Lau), formerly shareholder, director and principal person in Win Bo, and

(iii) Ng Tze Lik (also known as Thomas Ng), director of Tat Ho.

and they gave evidence on behalf of their respective companies.

5 Another person, Sim Ah Hui @ Jack Sim, was involved in the project. Win Bo alleged that he was Tentat's representative and he exercised control over the project on behalf of Tentat. Tentat disputed this and referred to site meeting minutes and letters from Win Bo which identified Jack Sim with Tat Ho. Neither Tentat nor Win Bo called Jack Sim as a witness during the trial, and I do not find that the evidence adduced at the trial supported Win Bo's allegation.

The issues

6 An array of issues of varying materiality was raised at the hearing. Upon a review, they came under three primary heads, (i) the conditions of the financial arrangement between Tentat and Win Bo, (ii) the reason for the termination of the construction work, and (iii) the amount of financial assistance extended by Tentat.

The conditions of the financial arrangement

7 Tentat's case is that it agreed to be the financier of the project when it was informed that Tat Ho agreed to complete the building for \$3m. Tentat and Win Bo agreed that Tat Ho was to make claims to Tentat directly for payment for the construction work, and Tentat was to make payment to Tat Ho. Upon the completion of construction, Win Bo was to sell the building to a real estate investment trust ("REIT") and repay to Tentat the payments it had made, plus a commission. In the course of the construction, however, the \$3m amount was found to be insufficient, and Tentat made payments totalling to \$4,070,000 by the time OCBC took possession of the unfinished building. [\[note: 1\]](#)

8 Win Bo's case is that Tentat had a bigger role in the project. Tentat nominated Tat Ho, which was also undertaking other jobs for Tentat and LTH, to be the contractor. Tentat was responsible for completing the construction, and Tentat was to be repaid only when construction is completed and a Temporary Occupation Permit ("TOP") is obtained. [\[note: 2\]](#)

Tat Ho's appointment

9 When Tentat agreed to finance the construction, Win Bo issued a letter of award dated 30 June 2004 to Tentat to complete the factory for \$3m. [\[note: 3\]](#) As this was not in keeping with the financial assistance arrangement, the award was cancelled with effect from 13 July 2004. [\[note: 4\]](#) The significance of this cancelled award was that the \$3m was the contract sum.

10 Subsequently, Win Bo issued a letter of award dated 2 September 2004 to Tat Ho for the same job at the same price. [\[note: 5\]](#) LTH's evidence was that LBC informed him that Tat Ho was prepared to complete the construction of the factory for \$3m, and that a letter of award was shown to him.

11 That letter was not the only letter of award to Tat Ho. There was another award for the same job from Win Bo to Tat Ho, dated 1 September 2004 where the lump sum price was fixed at \$5,720,500. [\[note: 6\]](#) There was no reference to this letter of award in the letter of award of 2 September 2004. There was no indication that the later award replaced the earlier award. LTH's evidence was that he was not informed about this award, and he only came to know of it in the

course of these proceedings.

12 Win Bo and Tat Ho offered their explanations for the two awards. LBC stated that the first contract sum of \$5,720,500 was the sum in Tat Ho's tender submission of 30 July 2004 for the job, [\[note: 7\]](#) but the contract sum was reduced to \$3m at LTH's request. Tat Ho's position was explained by Thomas Ng who said that the \$5,720,500 did not originate from Tat Ho, but had come from Jack Sim, who he said represented LTH, but on the day after the award Jack Sim told him the figure was too high and it was reduced to \$3m. [\[note: 8\]](#)

13 When the different versions of the events are examined, the evidence of LBC and Thomas Ng on the change of the contract sums did not support Win Bo's contention that Tat Ho was Tentat's nominee for the contract. If indeed Tat Ho was Tentat's nominee, and Tat Ho was under the control of Tentat and LTH as Win Bo maintained, there was no reason for Tentat to fix the tender price for Tat Ho at \$5,720,500, have the job awarded to Tat Ho at that price, then have the award revised to \$3m.

14 The substantial reduction is more consistent with LTH's evidence that he was told that the contract price was \$3m and he did not know of the higher award. LTH's position was supported by the evidence of Mohamed Jufrie bin Mahmood and Andy Chong Yong, who were involved in the project on Win Bo's behalf, and were witnesses for Win Bo during the hearing. They both testified that LBC had informed LTH that the cost for completing the building was about \$3m. [\[note: 9\]](#)

15 Stronger evidence came from Win Bo itself. On 16 November 2004, it wrote a letter signed by LBC to Tat Ho [\[note: 10\]](#):

Please refer to the abovementioned **Letter of Award dated 1 September 2004**.

This is to re-confirm our mutual understanding that the contract for the above works does not follow the standard SIA contract.

As you are aware, this is a **private contract** under special terms and conditions that have been **agreed upon by us both**.

This is to reaffirm our understanding and agreement that the LD (Liquidated Damages) shall be \$1,000.00 (Singapore Dollars One Thousand Only) per day should you fail to complete the works by **31st August 2005**.

[emphasis added]

Several aspects of this letter are noteworthy. Win Bo referred to the Letter of Award of 1 September 2004 which was for the contract price of \$5,720,500, and it described it as a "private contract" agreed upon "by us both", *i.e.* Win Bo and Tat Ho. LBC attempted to explain that the reference to 1 September 2004 was a typing error. [\[note: 11\]](#) However, when it was pointed out to her that the reference to the letter of 1 September 2004 could not be a typographical error because the date of completion of 31 August 2005 [\[note: 12\]](#) was present only in the letter of 1 September 2004, and completion date in the letter of award of 2 September 2004 was 28 February 2005, [\[note: 13\]](#) LBC could offer no other explanation. [\[note: 14\]](#)

16 There were two other documents which showed that the true contract sum was \$5,720,500.

Tat Ho had obtained insurance coverage for the job. The interim cover note dated 20 September 2004 [\[note: 15\]](#) issued by its insurers The Asia Insurance Co Ltd recorded the contract value at \$5,720,000. In December 2005, a Man-Year Entitlement application for the project was made in December 2005. In the application form signed by Win Bo and Tat Ho, the contract value was also stated to be \$5,720,500.

17 The irresistible conclusion from all the evidence is that Win Bo and Tat Ho had agreed between themselves at the price of \$5,720,500 for completing the building. However, when LBC sought Tentat's financial assistance she represented to LTH that \$3m was needed to complete the construction, the letter of award of 2 September 2004 was shown to him, whereas the letter of award of 1 September 2004 continued to be the "private contract" between Win Bo and Tat Ho.

18 In the light of this evidence, Tat Ho was not a nominee or vehicle of Tentat. The situation cannot be that Tat Ho the nominee was expecting payment of \$5,720,500 from Tentat to complete the building, whereas Tentat the principal had made provision of \$3m for that purpose.

Tentat's alleged undertaking on the completion of the ground floor

19 Win Bo alleged that Tentat undertook that the ground floor of the building was to be completed by 1 December 2004. LBC testified that on 2 September 2004, she and LTH had a discussion which lead to LTH writing a note in Chinese, and giving her a copy of it. [\[note: 16\]](#) The English translation of the note [\[note: 17\]](#) reads:

A. Unsuccessful Sale

Total 3,300,000.00

Include 2 units industrial cargo lifts. Each unit 10 tons

1 unit passenger lift 1100kg

After TOP ready, OCBC must pay TENTAT \$2,000,000.00 within 14 days.

A 12/04 – WIN BO must pay TENTAT 100 thousand dollars exactly

B 1/05 " " " 100 thousand "

C 2/05 " " " 100 thousand "

D After TOP ready, WIN BO must pay TENTAT \$500 thousand dollars exactly within 6 months

E After TOP ready, WIN BO must pay TENTAT \$500 thousand dollars exactly within 9 months

B. Successful Sale

Total contract \$3,550,000.00

Buyer \$3,550,000.00 one-off issue to TENTAT

C

Ground floor must be completed before 1/12/04

1/12/04 not completed 1 month \$45,000/- LEE TENG HONG pay

LEE TENG HONG (Signed)

2/9/04

[emphasis added]

Win Bo regarded this note as evidence that Tentat undertook to complete the ground floor by 1 December 2004. [\[note: 18\]](#)

20 LTH denied that he or Tentat had undertaken that the ground floor of the building was to be completed before 1 December 2004 or that he had agreed to pay \$45,000 a month if it was not completed. His evidence was that the note was a record of the matters discussed, including LBC's request for assurance on the completion of the ground floor and for damages in the event of a delay, but he and Tentat did not agree to the request.

21 The two highlighted sentences in the note do not support Win Bo's contention. The first sentence did not name the party which was responsible to complete the ground floor before 1 December 2004. The second sentence stated that LTH was to pay damages in the event completion was delayed. If Tentat had undertaken to complete the ground floor by 1 December 2004, then Tentat, and not LTH, should pay if completion is delayed. There could be no mistake in the references to Tentat and LTH as they were mentioned by name in the note. If Win Bo regarded the note as Tentat's undertaking to ensure timely completion and LTH's agreement to pay damages for delayed completion, Win Bo could have claimed liquidated damages when completion was delayed, but Win Bo had not claimed damages from LTH or Tentat. Win Bo's inaction supports LTH's contention that those two sentences were not undertakings by Tentat or LTH.

The time for repayment

22 It was common ground that the parties had contemplated that Win Bo was to repay Tentat when a TOP of the building is obtained and the building is sold. Neither event was accomplished. The endeavour came to an end when OCBC took possession of the building, and prevented the completion of construction work (which had in fact stopped), or sale of the building by Win Bo.

23 Tentat's position was that Win Bo was not entitled to rely on the failure to obtain the TOP as a reason for not repaying to Tentat. There were no reasons disclosed for OCBC's decision to take possession in January 2007. Tentat's counsel suggested that LBC being made a bankrupt prompted the bank to take action. It is also likely that the bank acted because construction work had stopped.

24 Win Bo, however, contended that Tentat had caused the bank to take possession of the building because (i) Tentat had control of the construction and was responsible for the completion of the factory, [\[note: 19\]](#) and (ii) that Tat Ho stopped work because Tentat did not pay it. [\[note: 20\]](#)

25 On the first ground, there is no record of any agreement that Tentat was responsible for the

completion of the building. There is evidence to the contrary, that Tentat had not taken on the responsibility. This is in a letter from Win Bo to Tentat dated 14 September 2005 [\[note: 21\]](#) when Win Bo and Tentat were discussing the resumption of construction after Tat Ho had stopped work for the first time. In the letter, Tentat and Win Bo agreed that the limit of Tentat's financial assistance was increased from \$3m to \$3,358,000. This letter was drafted by Tentat's solicitors and was reproduced by Win Bo on its letterhead. In para 3 of the letter Win Bo stated "We confirm that we have no claim against Tentat in relation to the Project."

26 An even more significant part of the letter is an additional clause which Win Bo inserted, that:

We, Win Bo Pte Ltd agreed to pay an additional sum of \$500,000 (Five Hundred Thousand Dollars) on condition that the funder will guarantee that they will complete the whole project and obtain final T.O.P. latest by 17th July 2006.

but Tentat did not endorse its acceptance and agreement to this clause. This clause showed that Tentat had not agreed to complete the whole project and obtain the TOP, and that Tentat did not agree to assume these responsibilities even on Win Bo's offer of \$500,000.

The reason for the termination of the construction works

27 With regard to Win Bo's allegation that Tat Ho stopped work because it was not paid by Tentat, Win Bo called Thomas Ng as a witness. His evidence was that Tat Ho stopped work for the final time in October 2006 because there were unpaid bills from its suppliers and sub-contractors amounting to \$450,000 which Tentat had not paid, and Tat Ho was sued on some of them. Tentat denied that it had failed to pay bills forwarded by Tat Ho. When Thomas Ng was cross-examined, it emerged that Tat Ho had never written to Tentat to complain over the non-payment of the bills and invoices [\[note: 22\]](#) and that Thomas Ng did not produce any of the bills and invoices amounting to \$450,000. [\[note: 23\]](#)

28 Against the background of the agreement that Tat Ho was to forward the bills and invoices to Tentat for payment, it is difficult to understand why Tat Ho did not make any formal complaints or demands to Tentat to pay the bills and invoices even when it was already sued on them, and had to stop work on the project.

29 In the light of the evidence, I find that it is unlikely that Tat Ho stopped work because Tentat did not made payment on bills and invoices amounting to \$450,000 and more likely that Tat Ho stopped work when it realised that it cannot look to Tentat or Win Bo to pay the \$5,720,500 that was agreed to under the private agreement with Win Bo.

30 Tentat rejected Win Bo's contention that no payment was due to Tentat as it had been agreed that repayment was to be made after the TOP is obtained. Tentat countered that Win Bo cannot rely on the absence of the TOP because that was brought about by Win Bo's failure to repay OCBC.

31 As the construction financed by Tentat's assistance had come to an end before TOP could be obtained, Win Bo's position implied that it would not have to make any repayment to Tentat. If Tentat had prevented Win Bo from obtaining the TOP, Win Bo may have a case to argue that repayment is not due before the TOP is issued. But when the inability to obtain the TOP is not caused by Tentat but by Win Bo, the absence of the TOP cannot be a reason for not repaying Tentat. The proper and reasonable position in these circumstances is that when Win Bo's default prevented it from obtaining the TOP, Tentat is entitled to repayment without waiting for the TOP.

The amount of financial assistance given by Tentat

32 There was no clear agreement on the amount of financial assistance that Tentat was to give to Win Bo. The closest evidence on that was in a letter from Win Bo to Tentat dated 20 May 2006 in which Win Bo referred to "... the sum of \$3,358,000.00 which you have already paid to Tat Ho Pte Ltd on our behalf ..." (This letter originated from a draft put up by Tentat's solicitors which Win Bo accepted and reproduced.)

33 Tentat did not issue statements to Win Bo or Tat Ho of the payments it made towards the construction. It quantified its claim on the basis of 42 of its payment vouchers [\[note: 24\]](#) which recorded payments made for that purpose. In 37 of the payment vouchers, Thomas Ng acknowledged receipt of the payment. Jack Sim acknowledged receipt in five vouchers, one Chew Sing Kuew ("Chew") acknowledged receipt in one voucher [\[note: 25\]](#) and in another voucher [\[note: 26\]](#) there was no acknowledgment of receipt. The payment vouchers were disclosed by Tentat in discovery and Win Bo had not raised any objections to them. Pursuant to O 27 r 4 of the Rules of Court (Cap 322, R5, 2006 Rev Ed), Win Bo is deemed to admit the authenticity of the vouchers, but that does not mean that Win Bo admits that the recorded payments were made.

34 At the trial, Tentat produced the originals of 15 of the payment vouchers and photocopies of the other 27 vouchers. Thomas Ng voiced doubts over the veracity of the payment vouchers. He testified that seven payments were recorded in payment vouchers as loans to Tat Ho when he received them, but the payment vouchers relied on by Tentat referred to the same payments as payments to Tat Ho on behalf of Win Bo. Tentat gave an explanation for this. It explained that Tat Ho had in some instances asked Tentat for payment before it carried out work, *i.e.* before it can claim payment from Win Bo. In such situations, when Tentat made payment, it would record the payments as loans to Tat Ho, and when the work was completed and Tat Ho was entitled to claim payment from Win Bo for the work, the payments made were reclassified as payments to Tat Ho on behalf of Win Bo in keeping with the financing agreement between Tentat and Win Bo, and new vouchers were issued for that purpose. The explanation is borne out by the fact that Tentat is making a claim against Win Bo for the payments made, and is not claiming for the repayment of the loans from Tat Ho.

35 There was another area of query over the payment vouchers. In the 42 vouchers Tentat relied on, Thomas Ng was the recipient in the payments in 35 vouchers, Jack Sim and Chew were the recipients for the payments in six vouchers and one voucher did not record the recipient of the payment by anyone. The 35 vouchers for which Thomas Ng was the recipient are evidence of payments to Tat Ho as Thomas Ng was a director and representative of Tat Ho, but Jack Sim was not an employee of Tat Ho, and there was no evidence that he was authorised to receive payments on behalf of Tat Ho, and the same applies to Chew. The voucher without any recipient, *a fortiori*, is not evidence of payment to Tat Ho. The total sum in the 35 vouchers signed by Thomas Ng is \$3,680,000.

36 Tentat also made its claim on the alternate causes of action of misrepresentation and mistake. On misrepresentation, Tentat alleged that Win Bo had represented that it "had possession of the Property and could complete any sale of the same with real estate investment trust company ("REIT")". [\[note: 27\]](#) On mistake Tentat's case was that it was mistaken over Win Bo's "ability to delivery possession of the Property and complete any sale to the REIT". [\[note: 28\]](#) It can be seen that both causes of action were based on Win Bo's possession of the property and Win Bo's ability to sell the property to a REIT.

37 Win Bo was in possession of the property when it entered the financial assistance agreement

with Tentat. While there was an order of court for OCBC to take possession, Win Bo had made arrangements with OCBC for the latter to withhold enforcement, and Win Bo lost possession because of subsequent events. At the time Win Bo represented that it was in possession of the property, and that was not a misrepresentation. The representation that Win Bo could complete the sale of the property to a REIT should be construed against the prevailing facts. Win Bo did not represent that there was a binding agreement for the sale of a property to a REIT. The representation was that it could sell the factory to a REIT. There was nothing at that time which prevented Win Bo from selling the building to a REIT when construction was completed. Following from that, if Tentat believed that Win Bo was able to sell and deliver possession of the property to a REIT it was not a mistake as the ability was only lost subsequently.

The counterclaim

38 Win Bo counterclaimed against Tentat for damages under four heads, firstly \$8,100,000 being the difference between the auction price obtained and a "firm offer" from Mapletree Logistics Trust Management Ltd ("Mapletree") a REIT, to purchase the property for \$6.4m, secondly \$3,519,173.95 for loss of rental income and interest from the property, thirdly \$992,101.58 as interest paid to OCBC and fourthly \$26,556.37 for "interest lost as a result of [Tentat's] garnishing the balance of the sale proceeds".

39 It is fundamental that Win Bo's claims can succeed only if Tentat had caused the failure of the project. As the failure was not attributable to Tentat, Win Bo has no basis for the counterclaims.

40 Beyond that, the claims were not made out because:

- (i) The first head of claim was without merit. Only a Letter of Intent [\[note: 29\]](#) from Maplewood to Win Bo was adduced in evidence, and that was conditional to Win Bo obtaining from JTC a 25-year-extension of the lease. There was no evidence that the discussions between Win Bo and Mapletree had progressed to a further stage, or that JTC was prepared to grant the 25-year extension,
- (ii) For the second claim there was no evidence that the factory if completed could have yielded the rental income claimed. The claim was based on a Letter of Intent from a company to rent one floor of the building for use as a workers' dormitory for 2000 workers with cooking facilities. It was shown during the cross-examination of LBC that Win Bo could not have met these requirements. Furthermore, the claim was computed without deducting the rental that Win Bo would have to pay to the REIT for the one floor,
- (iii) For the third claim, Win Bo did not explain the basis for it to seek Tentat to reimburse for interest it paid to OCBC from the period 1 December 2004 to 1 December 2007. This claim presupposed that the bank interest would not have been payable by Win Bo if the project was completed, and
- (iv) The claim for \$26,556.37 was worked out on interest at the rate of 1% per month for the sum of \$1,447,680.21 which was garnished over the period 2 October 2007 to 26 November 2007 when the money was garnished. However as the terms on which the garnishment was discharged were not disclosed, there is no basis for this claim to be understood and determined.

Conclusion

41 Tentat shall have judgment in the sum of \$3,680,000, and costs, and Win Bo's counterclaim is dismissed with costs.

[\[note: 1\]](#) Plaintiff's Closing Submissions paras 4–7

[\[note: 2\]](#) Defence and Counterclaim para 5

[\[note: 3\]](#) AB53–55

[\[note: 4\]](#) AB57

[\[note: 5\]](#) AB361–362

[\[note: 6\]](#) AB356–357

[\[note: 7\]](#) Affidavit of Evidence-in-Chief of Lau Bo Chu para 23

[\[note: 8\]](#) Notes of Evidence 24 September 2009 page 30 lines 26–29 and page31 lines 15–16

[\[note: 9\]](#) Notes of Evidence 25 September 2009 page 68 lines 15–22 and Notes of Evidence 28 September 2009 page 58 lines 22–24

[\[note: 10\]](#) AB402

[\[note: 11\]](#) Notes of Evidence 16 September 2009 page 60 lines 15–25

[\[note: 12\]](#) See AB356

[\[note: 13\]](#) See AB361

[\[note: 14\]](#) Notes of Evidence 16 September 2009 page 62 lines 16–23

[\[note: 15\]](#) AB371

[\[note: 16\]](#) AB364–366

[\[note: 17\]](#) AB363

[\[note: 18\]](#) Defendant's Written Submissions para 6.1.2

[\[note: 19\]](#) Defendant's Written Submissions paras 2.2.2 and 2.2.3

[\[note: 20\]](#) Defendant's Written Submissions para 2.3.3

[\[note: 21\]](#) AB498

[\[note: 22\]](#) Notes of Evidence 24 September 2009 page 35 line 27 – page 36 line 1

[\[note: 23\]](#) Notes of Evidence 24 September 2009 page 46 line 32 – page 47 line 2

[\[note: 24\]](#) See Plaintiff's Closing Submissions Table 1 and Plaintiff's Bundle of Documents

[\[note: 25\]](#) PB28

[\[note: 26\]](#) PB18

[\[note: 27\]](#) Statement of Claim (Amendment No. 2) para 9

[\[note: 28\]](#) Statement of Claim (Amendment No. 2) para 14

[\[note: 29\]](#) AB513–526

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