Ken Glass Design Associate Pte Ltd v Wind-Power Construction Pte Ltd [2002] SGHC 237

Case Number : Suit No 1557 of 2001

Decision Date : 14 October 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Anand Thiagarajan and Anthony Netto (Anand T & Co) for the plaintiffs; Alan Shankar and Lim Poh Choo (Alan Shankar & Lim) for the defendants

Parties : —

Contract – Contractual terms – Fundamental breach – Refusal to complete at completion date – Disputes as to extension of contract

Contract – Illegality and public policy – Remedy to be awarded where deception is involved – Recovery of moneys paid to stakeholders

Judgment

GROUNDS OF DECISION

1 The Plaintiffs were at all material times the owners of the industrial premises known as Lot A18060 at 5 Woodlands Sector 1, Woodlands East Industrial Estate ("the Property"). They utilise the Property for their glass design and manufacturing business. The Defendants are building and general contractors and are also involved in processing and distributing glass and glass fixtures.

2 On 18 April 2001, in consideration of the sum of $17,000 (being 1% of the price), the Plaintiffs granted the Defendants an option ("the Option") to purchase the Property at the price of $1.7 million. On 2 May 2001 the Defendants accepted the offer contained in the Option by making a further payment of $153,000 (being 9% of the price) to Keppel TatLee Bank Ltd, the mortgagees of the Property, as stakeholders pending completion of the sale and purchase agreement ("the Agreement") that arose from the acceptance. The balance $1,530,000 was to be paid on completion. The Option provided, *inter alia*, for the following terms:

> (i) the Agreement was subject to *The Singapore Law Society's Conditions of Sale 1999* ("the Law Society Conditions") so far as they are applicable to a sale by private treaty and not varied by the terms in the Option;
>
> (ii) the Agreement was subject to the written approval of the Jurong Town Corporation ("JTC") for the sale of the Property to the Defendants; and
>
> (iii) completion was to within 12 weeks from the date of acceptance of the Option or within 4 weeks from the date of receipt of approval from JTC, whichever is later.

3 On 25 June 2001, in anticipation of completion on 25 July, the parties entered into a tenancy agreement wherein the Defendants agreed to let the Property to the Plaintiffs for the purposes of their glass designing and manufacturing business for a period of two years from 1 August 2001 at the rent of $15,000 per month. Upon entering into the tenancy agreement the Plaintiffs gave the Defendants two cheques, the first for $30,000 being two months' rent as deposit and the second for $15,000 being advance payment of rent for August 2001.

4 By letter dated 15 June 2001, JTC gave their in-principle approval for the sale and purchase of the Property subject to certain terms and conditions. Therefore pursuant to the Agreement, the completion of the sale and purchase of the Property would be 25 July 2001, being 12 weeks from 2 May 2001, the date of exercise of the Option.

5 One of the conditions imposed by JTC was that the Plaintiffs were to furnish the Certificate of Statutory Completion ("CSC") for a mezzanine floor extension prior to the completion. Construction of the mezzanine floor in the Property was undertaken in 1999 but no CSC had been obtained then. The Plaintiffs instructed their architects to set about obtaining it. However by mid-July it did not appear that the CSC could be obtained by the completion date of 25 July. The Plaintiffs therefore sought and obtained the approval of JTC for the completion to proceed with an undertaking given by the purchasers – the Defendants – to furnish the CSC after completion. With this, the Plaintiffs' solicitors wrote a letter on 20 July to the Defendants' solicitors to ask if the Defendants would be prepared to give such an undertaking upon the Plaintiffs giving the Defendants a corresponding undertaking. On 23 July the Defendants' solicitors replied to say that the Defendants were not prepared to furnish any undertaking to JTC. The letter ended with the following:

> Your clients are required to obtain the Certificate of Statutory Completion for the mezzanine floor extension prior to completion as this is one of the conditions for JTC's consent.
>
> In view of the above, please note that our clients will only complete with your clients when your clients have procured the Certificate of Statutory Completion. Please keep us informed at least three (3) days before completion.

6 In the event completion did not take place on the 25 July 2001. By letter dated 7 August 2001, the Defendants' solicitors asked the Plaintiffs' solicitors when the Plaintiffs expected to obtain the CSC. The letter also contained a 21-day notice to complete the sale and purchase of the Property under condition 29.10 of the Law Society Conditions. The Plaintiffs' solicitors replied on 15 August to say that the Defendants had agreed to extend the date for completion to end October. That letter states as follows:

> We refer to your telefax dated of 7 August 2001.
>
> We are instructed that the Certificate of Statutory Completion for the mezzanine floor extension is expected by end-October. Our clients have also applied to the Jurong Town Corporation for extension of time for completion. We are further informed that our clients have communicated with your clients in this regard and your clients has agreed to complete the sale and purchase in end-October 2001.
>
> Kindly confirm your clients' agreement to the above.

7 There was no reply from the Defendants or their solicitors until 11 September 2001. But that was only a holding letter which states as follows:

> We refer to your letter dated 15 August 2001.
>
> Please note that we are taking our clients' instructions and will revert to you in due course.
>
> All our clients' rights are reserved.

It is notable that the 21-day period given in the Defendants' notice to complete had expired on 28 August and there had been no letter after that date until this one. Between 3 September and 22 October there were transactions conducted between the parties which is the subject of considerable dispute and I shall pass over them for the time being.

8 On 22 October 2001 the Plaintiffs finally obtained the CSC. So on 23 October the Plaintiffs' solicitors wrote to the Defendants' solicitors to advise that they were ready to complete on 31 October. However the Defendants' solicitors replied on 25 October to say that the Defendants had never agreed to extend completion to end October and reserved their rights in respect of the failure to complete within the 21-day period given in the 7 August notice to complete. There followed an exchange of letters between the solicitors setting out the parties' respective positions in respect of the facts. This culminated in two letters, the first from the Plaintiffs' solicitors dated 26 October giving the

Defendants 21 days' notice to complete under Condition 29 of the Law Society Conditions. In their reply dated 29 October the Defendants' solicitors made a demand pursuant to Condition 29.10 of the Law Society Conditions for the return of the $170,000 paid by the Defendants.

Findings of fact

9 The main dispute of fact is whether the Defendants had agreed to grant an extension of time until end October 2001 for the completion. The persons who represented the parties throughout are the Plaintiffs' director Edmund Lim Cheng Kiat ("Lim") and the Defendants' director, Low Hang Teow ("Low"). There is also a third party and a most important actor in this little drama. He is John Tan ("Tan") who appears to be a freelance agent and wheeler-dealer *extraordinaire*. He was the person who brought together the parties on the sale and purchase and had also procured for both sides other unrelated financing opportunities. Unfortunately neither side saw fit to call him as a witness in this matter although he would have been able to throw much light on the case as he was the intermediary between the parties in several crucial transactions. He is the only one who can support or contradict the evidence of the protagonists in those matters.

10 It is the common position of the parties that the entire transaction was a sale and leaseback agreement. At the time the Plaintiffs were experiencing a severe cashflow problem and facing foreclosure by the mortgagee-bank as they had been unable to satisfactorily service their bank facilities. It was in these circumstances that Tan came into the picture and he was able to procure some bank financing for the Plaintiffs for a fee. But this was insufficient to tide the Plaintiffs over their difficult period and Tan suggested to Lim to sell the Property. Tan said that he had buyers who were interested to make such investments. Lim said that he would be prepared to do it provided the Defendants could lease the Property back as he wished to continue with the business and it was expensive to relocate to another location. In the negotiations leading up to the sale, the parties agreed that after the purchase the Property would be leased back to the Plaintiffs at a monthly rent of $15,000, a sum which the Defendants felt would give a satisfactory return on their investment.

11 However there was just one problem: JTC did not permit their factory premises to be rented out. Lim explained that JTC required the lessor to conduct operations on the leased premises. However this problem did not seem to be insurmountable as far as the parties were concerned. Lim said this in cross-examination:

> JTC does not allow a person to buy a JTC factory to merely rent out. To overcome this, we came up with this joint arrangement, whereby Defendant would purchase the property, machine remained there, we would transfer our technical know how to Defendant.

Lim explained that the Plaintiffs would in their application to JTC put up a bogus proposal which stated that the Plaintiffs and Defendants were entering into a joint venture and for that purpose required the transfer of the lease to the Defendants. Lim said that:

> … the joint arrangement was to fulfill JTC's requirements. I had earlier mentioned that JTC did not allow a purchaser to lease the property. That's why there is no $15,000 rental in [the application] document.

Lim admitted quite frankly that they were trying to "hoodwink" JTC in order to get their approval for the sale. It was in this context that the scheme fell flat arising from the delay in the CSC.

12 According to Lim, after the Defendants' solicitors served the 21-day notice to complete on 7 August, he telephoned Low about the delay in obtaining the CSC. Low told him to "carry on" with the application for it. Then on 10 August, Tan contacted Lim to say that Low would be prepared to extend the completion on condition that the Defendants agreed to pay compensation of $15,000 per month until completion. This figure corresponds to the agreed rental after completion. Lim agreed. Tan said that the $15,000 advance paid in June for the August 2001 rent would be utilised towards the compensation for the month of August, and the next payment due from the Plaintiffs would be in September 2001. To confirm this, the Plaintiffs sent a letter dated 10 August to the Defendants which states as follows:

> As regards the above matter, we sincerely apologize for the delay in completion.
>
> At present, the CSC is in process. The schedule of completing the whole process of

> CSC will be completed end of October. (Attached with letter from our architect).
>
> As to show we are sincerely to complete the sale, we will commence to pay our rent with effect from 1st August 2001 till the completion.

13 Lim said that the Plaintiffs made two further payments of $15,000 on 5 September and 5 October to the Defendants pursuant to this agreement to extend the completion date. The payment on 5 September was made by way of a cash cheque which the Plaintiffs handed to Tan. The Plaintiffs produced a copy of that cheque which appears to show on the reverse that it was encashed on 6 September and Low's signature is there. As for the payment of 5 October, Lim said that he made out a cheque and met Low at the Pasir Panjang Hawker Centre to hand it over. However Low told him to hand it to Tan. This was done by Jacky Tan ("Jacky"), the Plaintiff's other director, on 9 October at a coffee shop in Ang Mo Kio. However Tan informed Jacky that Low wanted it in cash. Jacky telephoned Lim and told him of this. Lim telephoned Tan and arranged to hand over the cash to him the following day. On 10 October Jacky handed $15,000 in cash to Tan at a coffee shop in Sembawang. Lim said that Low subsequently confirmed by telephone that Tan had handed this sum to him.

14 I now turn to Low's version. From the beginning until August 2001, it adheres to Lim's version very closely except for one crucial fact. That is the price. Although the Option states that the price is $1.7 million, Low maintained that it was actually $1.8 million and he had to pay the Plaintiffs $100,000 in cash. This came about at the negotiation stage when the Plaintiffs, through Tan, had asked for an additional $100,000 to be paid "under the table" to enable them to "roll" their business. Presumably this meant that the Plaintiffs did not wish to reflect this sum in the Option and they could have access to this sum for their business instead of it being paid to the bank to reduce the loan.

15 Low said that the "under the table" $100,000 was not recorded in any document. Neither did the parties talk about when it should be paid. However upon the grant of in-principle approval by JTC in June 2001, Tan informed him that the Plaintiffs wanted to be paid the $100,000. Low was reluctant to do this as there was no assurance that the sale and purchase would be completed. Tan then told him that the Plaintiffs were prepared to sign the Tenancy Agreement and pay him a deposit of two months' rent plus one month's rent in advance. Low said that it was then that he agreed to pay the $100,000 to the Plaintiffs, as he reckoned that his exposure would be reduced by the $45,000 he would receive from them in the form of three months' rent. Low gave Tan a cheque for $70,000. He said that the balance $30,000 was to come from Tan, who owed this sum to him. Low claimed that Tan had paid the $100,000 to the Plaintiffs although he admitted that he was not present when this was done. Indeed Low said that all communications with the Plaintiffs in respect of this payment of $100,000 was done through Tan. He said that he knew that the Plaintiffs had received the money because Tan had told him not to cash the two cheques for $45,000 until after Tan had handed the $100,000 to the Plaintiffs who could then place funds in their account for the $45,000 to be encashed.

16 Low said that at no time prior to 15 August did Lim propose to him to extend the completion to end October. Low pointed out that there was no need for a side agreement on compensation for late completion as there already was such a provision in the Law Society Conditions that would have yielded a similar amount.

17 Low deposed that after the 21-day period of the notice to complete given by his solicitors on 7 August, he told Tan that he was no longer interested in purchasing the Property. He requested for the return of the $100,000. Although Tan tried to persuade him to go through with it, he was not moved. Tan initially said the $100,000 would be paid in two instalments. However he later said that the Plaintiffs had changed their minds and Tan handed him three personal cheques drawn by Lim. Low said that none of these cheques were presented by the Defendants because the Plaintiffs eventually made the refunds in cash. Two of the cheques, which were for $22,000 and $23,000, were subsequently returned and Low exhibited the third one, a cash cheque for the sum of $30,000 and drawn on Lim's personal account. However at the reverse of the cheque are the words in Lim's handwriting: "RETURN FOR PERSONAL LOAN". Lim explained that he had given this cheque to Tan as repayment for a personal loan he had taken from him.

18 Low said that eventually the Plaintiffs refunded to him two sums, all in cash, totalling $40,000. The first refund was made on 3 September when Jacky gave him $25,000 in Tan's presence. The second was a few days after 5 October, when Lim gave him $15,000.

19 I must say that Low's version is as full of holes as Lim's version is corroborated and consistent. Firstly, the story of the $100,000 "under the table" payment is rather far fetched if one were to consider why the Plaintiffs would agree to it without any documentation. Once the Option is exercised, the Defendants would have a specifically enforceable contract to purchase the Property for $1.7 million (assuming no complications). In going about it in this manner the Plaintiffs would be taking the high risk that the Defendants would renege on the promise

to pay the $100,000.

20 Secondly, Low seemed to have a high degree of trust in Tan when he handed him the $70,000 to pass to the Plaintiffs. Not only did he not require a written acknowledgement of receipt from the Plaintiffs, he did not even get an oral acknowledgement. This must be seen in the light of the fact that it was the Defendants' case that Tan was the Plaintiffs' property agent.

21 Thirdly, Low had no explanation as to why the Plaintiffs' solicitors letter of 15 August, which alleged that Low had agreed to extend completion to end October, was not rebutted within a reasonable time if he had not made such a concession.

22 Fourthly, Low's story about Lim's cheque is rather incredible. Why Lim would give the Defendants his personal cheque for $30,000 to reduce a debt owed by the Plaintiffs is rather puzzling. It would have been a simple matter for Lim to pay this sum into the Plaintiffs' bank so that it can be reflected as a director's loan, and have the Plaintiffs give their cheque to the Defendants. Furthermore, Low had no cogent explanation as to why Lim would have written the words "return for personal loan" and the only plausible one is that given by Lim, i.e. that it was indeed a repayment of a personal loan from Tan.

23 Fifthly, Low admitted receiving the Plaintiffs' cheque dated 5 September 2001 for $15,000. The Plaintiffs had claimed that this was compensation for late completion in respect of September. Low said that the cheque was rejected by the bank when he presented it for payment and so he passed it to Tan. It was accepted that payment had been made on the cheque because there is a "PAID" stamp on its face. On the reverse there are the following machine printed words:

HOST SUP OVERRIDE BY SA35

Drawing agst todays deposit > 10000.00

KEN GLASS DESIGN ASSOCIATE PTE LTD

06/09/20012336X10271032 TT26

401/320/724 5 SGD $15,000

77189

Override By SA35

Counsel for the Defendants put it as their case that "HOST SUP OVERRIDE BY SA35" meant that the cheque was rejected due to insufficient funds in the account. However he did not produce any evidence to support this contention. The cheque in fact appears to be paid in that same transaction because the word "Paid" is stamped on the front of the cheque. The words and symbols at the reverse could well mean that an override was required by a person of higher authority in the bank because the sum in the cash cheque exceeded $10,000. But this is speculation. Whatever it is, the Defendants have not given any evidence to support a contention that appears to contradict the ordinary meaning of the words on the face of the cheque.

24 Sixthly, Low's evidence depends heavily on Tan because Low was not the one who paid the Plaintiffs the $100,000 nor the one who directly communicated with Lim in respect of many crucial aspects of his version of events. Even if Low were telling the truth, it would be from his point of view and in respect of many of the events he was relying on what Tan had told him. In particular Low was relying wholly on Tan for his claim that he had paid the Plaintiffs $100,000 "under the table". Therefore his failure to call Tan as a witness to support his version of events must affect the credibility of his evidence.

25 Finally those inconsistencies must be contrasted with the well corroborated versions of the Plaintiffs' witnesses which were fully supported by documents. In respect of demeanour, I found Lim to be earnest and truthful whereas Low was evasive and bare with the details.

26 I therefore made the finding that Low was not telling the truth and accepted Lim's version of events. Specifically I found that the Defendants had agreed to extend the time for completion to end October 2001. Therefore they were in breach of the Agreement in refusing to

complete on 31 October upon the Plaintiff's request. I also found that there was no agreement to pay the $100,000 "under the table" and consequently no such payment took place. I further found that the Plaintiffs had paid the Defendants $30,000 as two months' deposit and three further sums of $15,000 each.

27 In their Statement of Claim, the Plaintiffs had prayed for specific performance of the Agreement. However in the midst of submission on 23 August 2002 counsel for the Plaintiffs withdrew this prayer and advised that they would only ask for damages in law and under the Law Society Conditions.

28 I disallowed the recovery. The Agreement was conditional upon the approval of JTC. Such approval was obtained through a deceptive application by the Plaintiffs with the concurrence and co-operation of the Defendants. On the Plaintiffs' case, had the fact that the transaction was in reality a sale and leaseback arrangement been revealed to JTC, such approval would not have been given. This would have rendered the Agreement null and void according to its terms.

29 In *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 All ER 844, the plaintiffs sought to enforce an indemnity given by the defendants in consideration of the issue of a clean bill of lading by the carrier when it was not justified to do so. The headnote gives the following facts:

> The plaintiffs as agents for shipowners agreed with the defendants for the shipment of one hundred barrels of concentrated orange juice f.o.b. London to Hamburg, freight to be paid by the defendants. The defendants stipulated that they should have clean on board bills of lading. The barrels were in fact old and leaking, as the defendants knew and as the plaintiffs learnt when the barrels were brought to the dock. At the request of the defendants the plaintiffs agreed to issue and did issue bills of lading describing the goods as in "apparent good order and condition", the defendants agreeing to indemnify the shipowners against all losses or damage arising from the issue of clean bills of lading. Owing to the condition of the barrels a considerable quantity of the orange juice leaked away before they were delivered to the ultimate purchasers. The shipowners having paid the amount of the loss so arising assigned to the plaintiffs their rights under the agreement of indemnity. The plaintiffs, when they issued clean bills of lading, knew that bankers would not ordinarily advance money against bills of lading unless the bills were clean bills of lading, but the plaintiffs had not contemplated that anyone should be defrauded by the issue of these bills of lading and did not know what was intended to be done with the bills of lading by any purchasers of the goods from the defendants.

30 The clean bill was requested in order to induce the bank to advance money on the bill. The English Court of Appeal, by a majority, refused to enforce the defendants' promise to indemnify the shipowners on the basis that it arose out of a transaction which contained all the elements of the tort of deceit. Morris LJ said at p 853:

> The promise on which the plaintiffs rely is, in effect, this: If you will make a false representation which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain.

31 In *Suntoso Jacob v Kong Miao Ming* [1986] SLR 59 the plaintiff, an Indonesian, had transferred shares in a ship-owning company to the defendant, a Singaporean, to be held on trust by the latter for his benefit. The purpose of this was to get around the administrative requirement in force at the time that a ship would be considered foreign-owned if the majority of shares in the owner-company was not held by Singaporeans. The defendant had signed a blank transfer of the shares he held on trust but had refused to deliver the share certificates when requested to do so by the plaintiff. The suit was taken out for a declaration that the defendant was not entitled to the shares and that he held them as trustee for the plaintiff. The Court of Appeal upheld the decision of Lai Kew Chai J to refuse the plaintiff any remedy as he had practised a deception on the public administration.

32 *Suntoso's case* was applied in *Tan Soi v Pow Kwee Lan & Ors* [1998] 3 SLR 191 which concerns a Housing and Development Board ("HDB") shop. The plaintiff and one Phua had entered into a trust deed in 1976 by which the latter agreed to hold a tenancy for the shop on trust for the former. After Phua died the tenancy was registered in the name of his widow. In 1994, the HDB offered to sell the premises to the sitting tenant, namely the widow. She subsequently transferred this offer to her four children, the second to fifth defendants, who exercised the right accordingly and purchased an 82-year lease for the premises. The plaintiff claimed that the premises were held on trust for him. The defendants argued, *inter alia*, that the trust deed was unenforceable as it was made for the purpose of deceiving the HDB. The court found that the purpose of the trust deed was to facilitate a scheme by which Phua allowed the plaintiff to take advantage of the benefit of the reduced rental he was offered by virtue of his status as a resettled tenant and that this offended the policy behind the reduced rental. The trust deed was accordingly unenforceable as the plaintiff did not come to court with clean hands

33 In the present case the Plaintiffs also did not come to the Court with clean hands. That was probably the reason that they had withdrawn their prayer for specific performance and asked only for damages for breach of contract. But this prayer has two problems:

> (i) The first problem is the method of assessing the loss. Although the Agreement is for sale and purchase of the Property, the parties had intended that it existed alongside the Tenancy Agreement. The true intention of the parties was to enter into a sale and leaseback agreement. This would not have been permitted by JTC and therefore it would not have been possible for the Plaintiffs to secure a corresponding sale and leaseback agreement in relation to which their losses, if any, could be assessed.
>
> (ii) The second problem is this. Equity deems to be done what ought to have been done. Therefore had the parties revealed the fact of the sale and leaseback agreement to JTC, as they ought to, approval would not have been given and pursuant to the Agreement it becomes null and void.

34 Accordingly, I held that the Defendants were not liable for damages.

35 There remained the question of the $153,000 that the Defendants had paid to the stakeholders pending completion. Ordinarily losses would lie where they fall in such situations. However the stakeholders require an order of court to deal with the money in their hands. I was of the view that I have a discretion in the matter and proceeded to weigh the relative equities of the parties. In my opinion, the parties were *in pari delicto* in this matter and if an order was required, they should as far as possible be returned to their original positions, i.e. a reversal of all payments would be appropriate. Counsel for the parties agreed that, after accounting for all the payments made by the parties to each other, such reversal would be achieved by an order to the stakeholders to pay the sum of $58,000 to the Plaintiffs and the balance $95,000 to the Defendants, and I so ordered.

36 On the question of costs, I was of the view that it would be appropriate to make no order as to costs.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT